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Article abstract

This article provides a justification for the often-criticized tort of malicious prosecution. It begins by discussing the Supreme Court of Canada's malicious prosecution caselaw and by reconstructing the Court's expressed policy-based account of the tort. This policy-based account raises three concerns: (1) it renders the malice standard arbitrary, (2) it fails to explain why malicious prosecutors should be held accountable as a matter of private rather than public law, and (3) it leaves the source of the plaintiff's private right mysterious. However, the Court's jurisprudence supports a more principled account, specifically one that focuses on the nature and limits of a prosecutor's public office. This office-based account responds to the above concerns while affirming the Court's view that malice is the correct standard of fault and, more generally, that malicious prosecution is a distinctly private wrong.

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The Tort of Malicious Prosecution: A Principled Account

*Michael Law-Smith**

This article provides a justification for the often-criticized tort of malicious prosecution. It begins by discussing the Supreme Court of Canada's malicious prosecution caselaw and by reconstructing the Court's expressed policy-based account of the tort. This policy-based account raises three concerns: (1) it renders the malice standard arbitrary, (2) it fails to explain why malicious prosecutors should be held accountable as a matter of private rather than public law, and (3) it leaves the source of the plaintiff's private right mysterious. However, the Court's jurisprudence supports a more principled account, specifically one that focuses on the nature and limits of a prosecutor's public office. This office-based account responds to the above concerns while affirming the Court's view that malice is the correct standard of fault and, more generally, that malicious prosecution is a distinctly private wrong.

Cet article développe une justification au délit de poursuite abusive, qui est souvent critiqué. Il débute par l'examen de la jurisprudence de la Cour suprême du Canada en matière de poursuites abusives et reconstitue l'explication du délit offerte par la Cour, laquelle se fonde sur les politiques publiques. Cette explication fondée sur les politiques publiques soulève trois préoccupations : (1) elle rend arbitraire le critère de l'intention malveillante, (2) elle n'explique pas pourquoi la responsabilité des procureurs malveillants devrait s'enraciner dans le droit privé plutôt que le droit public, et (3) elle laisse mystérieuse la source du droit privé du plaignant. Cela dit, la jurisprudence de la Cour appuie une approche fondée sur des principes plutôt que des politiques publiques, en particulier une approche qui se concentre sur la nature et les limites de la charge publique d'un procureur. Une telle approche répond aux préoccupations susmentionnées tout en confirmant le point de vue de la Cour selon lequel l'intention malveillante est la norme de faute applicable et, plus généralement, les poursuites abusives constituent un délit de droit privé distinct.

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Introduction

The common law tort of malicious prosecution provides that persons subject to groundless and maliciously motivated criminal proceedings may recover damages against the prosecutor. The tort was developed in the eighteenth century, when private litigants prosecuted criminal charges.[1] This history is often invoked to explain why plaintiffs were required to prove not merely that the prosecutor knew or should have known that the action was groundless, but, more demandingly, that the prosecutor was motivated by malice or an improper purpose. The malice standard was "justified historically on the need to encourage private citizens to assist in bringing criminals to justice."[2] Of course, today it is state prosecutors, not private individuals, that prosecute virtually all criminal actions. However, common law courts still recognize the tort. Moreover, they still apply the traditional malice standard.

Given this history, it is perhaps not surprising that some legal officials and scholars have questioned whether the tort of malicious prosecution should continue to exist (or, at least, exist in its traditional form) in a modern legal system where the state prosecutes almost all criminal proceedings. Lord Mance, dissenting in *Willers v. Joyce*, the Supreme Court of the United Kingdom's most recent malicious prosecution judgment, wrote that "the tort of malicious prosecution of criminal proceedings is virtually extinct" and developing it further would "come close to necromancy."[3] Others argue that the "reality of modern prosecutorial arrangements" requires a "fundamental reassessment" of the tort's constitutive

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1 Douglas C Hay, "Prosecution and Power: Malicious Prosecution in the English Courts, 1750-1850" in Douglas C Hay & Francis G Snyder, eds, *Policing and Prosecution in Britain, 1750-1850* (Oxford: Oxford University Press, 1989) 343 at 348–51.

2 Philip H Osborne, *The Law of Torts*, 6th ed (Toronto: Irwin Law, 2020) at 276. See also Erika Chamberlain, "Negligent Investigation: A New Remedy for the Wrongly Accused: *Hill v. Hamilton-Wentworth Regional Police Services Board*" (2008) 45:4 Alta L Rev 1089 [Chamberlain, "Negligent Investigation"] ("[m]any of the 'hedging devices' in the tort of malicious prosecution were initially established to protect citizens involved in private prosecution. At a time when the system relied on private citizens to prosecute alleged criminals, it was necessary to protect them from liability if the prosecution turned out to be unsuccessful" at 1094); *Abrath v North Eastern Railway Company* (1886), 11 App Cas 247 at 252, [1886] UKHL J0315-1 (HL Eng), Lord Bramwell ("[i]f ever there was a necessity for protecting persons it is in an action for malicious prosecution ... a prosecutor is a very useful person to the community. ... One may venture to quote Bentham even upon this matter. He said that laws would be of very little use if there were no informers, and that it is necessary for the benefit of the public that people when they prosecute, and prosecute duly, should be protected").

3 *Willers v Joyce*, [2016] UKSC 43 at para 131.

elements.[4] Some hold that the shift to public criminal prosecutions justifies a lower standard for liability. Erika Chamberlain, for example, writes that "with private prosecutions being all but obsolete, the need for such restrictions on liability is diminished."[5] The majority in *Willers*, for its part, extended the tort to include the malicious prosecution of civil proceedings. More generally, malicious prosecution is often considered to suffer from the same conceptual difficulties as the related tort of misfeasance in public office, which has been described as "peculiar" or a "misfit" in a sphere of civil liability grounded in individual private rights.[6] Indeed, one might question whether the wrongful conduct at the heart of malicious prosecution is best addressed through private law at all.[7]

Among these criticisms, two lines of objection against the traditional conception of malicious prosecution emerge. First, it is argued that the tort is a historical by-product and that in an era of public prosecutions it should be abandoned, or its malice element should be replaced with a lower standard, such as negligence. Second, it is argued that prosecutorial wrongdoing at the hands of state officials is an awkward conceptual fit within private law, which traditionally focuses on the rights and duties governing the interactions of private individuals, and thus that prosecutorial wrongdoing should be addressed through public law remedies, such as those available in administrative or criminal law.

Notwithstanding these criticisms, the Supreme Court of Canada, in a series of cases over the past thirty years, has upheld the tort of malicious prosecution and its traditional malice standard of fault. In justifying the enduring importance of this tort, the Court explained that "public confidence in the office of a public prosecutor suffers greatly" where prosecutors are not held accountable for abusing their power.[8] Furthermore, the Court held that the high threshold of malice provides "a careful balancing between the policy consequences of exposing prosecutors to liability, versus the need to safeguard and vindicate the rights of the accused."[9] However, this policy-based account is vulnerable to three concerns. While it

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4 Norm Maamary, "*A v. New South Wales*: Determining Where the Truth Lies: Institutional Prosecutors and the Tort of Malicious Prosecution", Case Comment (2008) 30:2 Sydney L Rev 357 at 369–70.

5 Chamberlain, "Negligent Investigation", *supra* note 2 at 1094.

6 Mark Aronson, "Misfeasance in Public Office: A Very Peculiar Tort" (2011) 35:1 Melbourne UL Rev 1; John Murphy, "Misfeasance in a Public Office: A Tort Law Misfit?" (2012) 32:1 Oxford J Leg Stud 51.

7 See Part II-B, *below*, for discussion of Justice Stratas's argument in *Paradis Honey Ltd v Canada (Minister of Agriculture and Agri-Food)*, 2015 FCA 89 [*Paradis Honey*].

8 *Nelles v Ontario*, [1989] 2 SCR 170 at 195, 1989 CanLII 77 (SCC) [*Nelles*].

9 *Ontario (Attorney General) v Clark*, 2021 SCC 18 at para 26 [*Clark*].

provides an intelligible explanation for the malice standard, the balancing rationale invites doubt as to whether the standard should not be higher or lower. More importantly, it fails to offer a robust explanation for why malicious prosecutors should be held liable in private law rather than accountable in public law. Finally, and relatedly, it leaves the nature and source of the plaintiff's underlying private right mysterious.

In this article, I argue that the Supreme Court's jurisprudence supports a more principled account, specifically one that focuses on the nature and scope of the prosecutor's public office. This principled reconstruction of the Court's position explains why the tort of malicious prosecution is required in a system of law in which criminal proceedings are brought by public prosecutors whose office is occupied by natural persons. The fact that private individuals occupy the office that exercises the state's prosecutorial powers entails that individuals ought to have rights against each other from abusing the powers attached to those offices to harm one another. Malicious prosecution is, then, the wrongful use of the state's prosecutorial powers by one individual against another. The malicious prosecutor wrongs the defendant to the criminal proceeding by using prosecutorial powers against them for a purpose inconsistent with the prosecutor's office. Unlike the policy-based account, the principled account is not vulnerable to the three concerns mentioned above. The principled account responds to these concerns while affirming the Supreme Court's view that malice is the correct standard of fault and the key element of the tort. More generally, it affirms that malicious prosecution is not only a distinct wrong—it is a distinctly private wrong.

This article proceeds in three parts. Part I traces the Supreme Court's jurisprudence on malicious prosecution. Part II discusses the policy-based account for the tort and identifies three concerns for this account. Part III develops the alternative, principled account and explains how it addresses these concerns.

I. The Malicious Prosecution Trilogy: *Nelles*, *Proulx*, and *Miazga*

The Supreme Court of Canada's contemporary jurisprudence on malicious prosecution begins in 1989 with *Nelles v. Ontario*.[10] The plaintiff, a nurse at the Toronto Hospital for Sick Children, had been charged with murdering newborns. The nurse sued the Crown, the Crown Attorneys, and the Attorney General for malicious prosecution after her charge was dismissed for insufficient evidence at a preliminary hearing. The defendants moved to strike the claim, arguing that the Crown is immune from liability for its prosecutorial decisions.

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10 *Supra* note 8.

The Supreme Court rejected the Crown's argument, holding that the government and its prosecutors do not enjoy absolute immunity from civil liability for how they exercise their prosecutorial powers.[11] The Court further rejected the Crown's argument that even limited Crown liability would have a "chilling effect" on legitimate prosecutions or would diminish public trust and confidence in the integrity of prosecutors.[12] Public confidence in the impartiality of public prosecutors, the Court explained, requires that prosecutors be held accountable when they abuse their prosecutorial powers.[13]

The Court held that, to establish malicious prosecution, the plaintiff must prove on a balance of probabilities that the prosecution was: (1) initiated by the defendant, (2) terminated in favour of the plaintiff, (3) initiated without reasonable or probable cause, and (4) motivated by malice or a primary purpose other than carrying the law into effect.[14] The third element, the Court explained, requires that the prosecutor lacked a subjective belief in a probable conviction or that a reasonable person would have lacked such a belief.[15] The fourth element requires that the prosecutor was primarily motivated by an "improper purpose," which, the Court held, is broader than spite or ill will.[16] In conclusion, the Court dismissed the Crown defendants' motion to strike and ordered the matter back to trial.

A decade later, *Proulx v. Quebec (Attorney General)* provided the Court with another opportunity to outline the scope of liability for malicious prosecution and to apply the malice standard.[17] The police had investigated the plaintiff for a murder but did not press charges because there was insufficient identification evidence. Five years later, a retired police officer who was part of the initial investigation made public allegations linking the plaintiff to the murder. The plaintiff responded by filing a defamation suit against the officer. Shortly afterwards, the police officer accompanied a new eyewitness to a meeting with Crown prosecutors.[18] After what the Court described as an "extremely flawed and unusual" identifi-

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11 *Ibid* at 194–98.

12 *Ibid* at 197.

13 *Ibid* at 195.

14 *Ibid* at 192–93.

15 *Ibid* at 193.

16 *Ibid*.

17 2001 SCC 66 at paras 35–45 [*Proulx*].

18 *Ibid* at paras 1–12.

cation process, the Crown pressed charges against the plaintiff, resulting in a guilty verdict that was overturned on appeal.[19]

The majority in *Proulx* explained that although criminal justice depends on having prosecutors vested with "extensive discretion" and that courts should be "very slow indeed to second-guess a prosecutor's judgment," the Attorney General and Crown prosecutors "are not above the law and must be held accountable."[20] The Court held that these competing interests justify the high malice standard for malicious prosecution, which goes beyond recklessness or gross negligence and "requires evidence that reveals a willful and intentional effort on the Crown's part to abuse or distort its proper role within the criminal justice system."[21]

The Court found that this was one of those "exceptional circumstances" where the prosecutor acted without reasonable and probable cause and used the office deliberately for an improper purpose.[22] The Crown prosecutor lacked reasonable cause to initiate the prosecution because the charges "were based on fragments of tenuous, unreliable and likely inadmissible evidence."[23] The malice standard was satisfied because the prosecutor had effectively "lent his office to a defence strategy in the defamation suits."[24] The Court concluded that the Attorney General was liable for malicious prosecution.

Another decade later, the Supreme Court in *Miazga v. Kvello Estate* considered a malicious prosecution claim brought by two foster parents who had been charged with sexual abuse on the basis of allegations by their foster children which the trial judge described as "so unbelievable as to be patently absurd."[25] Before the children recanted their allegations, the prosecutor had proceeded with the charges because he accepted the children's evidence, perhaps in part due to a then widely-held view that children never lie about abuse.[26]

The Court in *Miazga* emphasized that while *Nelles* correctly held that prosecutors do not enjoy absolute immunity, the Crown's constitutional independence from the judiciary entails that courts must respect deci-

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19 *Ibid* at paras 6, 12.

20 *Ibid* at para 4.

21 *Ibid* at para 35.

22 *Ibid* at paras 4, 45.

23 *Ibid* at para 34.

24 *Ibid* at para 43.

25 2009 SCC 51 at paras 14–15, 31 [*Miazga*].

26 *Ibid* at paras 17, 94, 96.

sions made within the scope of the Crown's prosecutorial discretion.[27] And the decision whether to initiate or continue a criminal proceeding is at the "core" of prosecutorial discretion.[28] The Court explained that this discretionary independence is not aimed at protecting the personal interests of Crown attorneys, but rather at protecting the public interest in allowing prosecutors to make decisions on behalf of the public without fear of judicial interference.[29]

Finally, the Court in *Miazga* affirmed that the malice requirement raises the factual question of whether the prosecutor was motivated by a "primary purpose other than that of carrying the law into effect."[30] Applied to the facts, the Court held that malice was not established as the prosecutor appeared to have acted on an honest belief in the credibility of the children's testimony.[31]

II. The Policy-Based Account

A. Balancing Discretion and Accountability

The Supreme Court jurisprudence appears to affirm Justice Lamer's statement in *Nelles* that a "review of the authorities on the issue of prosecutorial immunity reveals that the matter ultimately boils down to a question of policy."[32] In particular, the Court's view seems to be that determining the appropriate scope of prosecutorial liability is a function of balancing two policy considerations: (1) the need to grant the Crown broad discretion over prosecutorial decisions, and (2) the need to hold Crown prosecutors accountable for wrongful prosecutions.[33] The Court expresses this view explicitly in *Proulx*, writing that "[g]iven the importance of [the prosecutor's] role to the administration of justice," there is a "public interest in setting the threshold for [their] liability very high," but that "the Ministry of the Attorney General and its prosecutors are not above the law and must be held accountable. Individuals caught up in the justice system must be protected from abuses of power. In part, this ac-

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27 *Ibid* at paras 45–51.

28 *Ibid* at para 45, citing *Krieger v Law Society of Alberta*, 2002 SCC 65 at paras 43, 46–47 [*Krieger*].

29 *Miazga*, *supra* note 25 at para 47, citing *R v Power*, [1994] 1 SCR 601 at 616, 1994 CanLII 126 (SCC).

30 *Supra* note 25 at para 56.

31 *Ibid* at paras 100–01.

32 *Supra* note 8 at 199.

33 *Miazga*, *supra* note 25 at para 81.

countability is achieved through the availability of a civil action for malicious prosecution."[34]

Understood in this way, the Court's approach to delineating liability for malicious prosecution was to choose within a spectrum of liability ranging from complete immunity to no immunity, where each fault standard (malice, negligence, recklessness, and so on) represents a different point along the spectrum and expresses a different balance between immunity and accountability. Within this range of options, the Court finds that malice strikes a "careful balancing ... between the right of individual citizens to be free from groundless criminal prosecutions and the public interest in the effective and uninhibited prosecution of criminal wrongdoing."[35]

The Court's discussion of malicious prosecution in two more recent decisions illustrates this understanding of the tort. In *Henry v. British Columbia (Attorney General)*, a 2015 decision concerning a Crown prosecutor's liability for damages caused by breaching the plaintiff's constitutional right to disclosure in a criminal proceeding, the Court affirmed that maintaining a high threshold for malicious prosecution is in the public interest. Otherwise, the public suffers if the fear of civil liability influences the Crown's prosecutorial decisions.[36] A low threshold would "force prosecutors to spend undue amounts of time and energy defending their conduct in court instead of performing their duties."[37] The malice threshold, therefore, was "deliberately chosen to insulate core prosecutorial functions from judicial scrutiny."[38] This language of design echoes the Court's comment in *Miazga* that the tort was "narrowly crafted, employing stringent tests, to ensure that liability will attach in only the most exceptional circumstances."[39]

In *Henry*, the Court further specified the nature of the prosecutorial discretion that deserves protection.[40] The Court affirmed their statement from *Krieger v. Law Society of Alberta* that, in the Canadian constitutional order, the sovereign alone holds the power to prosecute its subjects.[41] This discretionary power is to be exercised, as Crown policy in almost

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34 *Supra* note 17 at para 4.

35 *Miazga*, *supra* note 25 at para 52.

36 *Henry v British Columbia (Attorney General)*, 2015 SCC 24 at para 40 [*Henry*].

37 *Ibid*.

38 *Ibid* at para 62.

39 *Supra* note 25 at para 51.

40 *Supra* note 36 at paras 61–62.

41 *Supra* note 28 at paras 43, 45.

every Canadian province and territory mandates, on the basis of two factors: (1) where there is a reasonable prospect of conviction, and (2) where the prosecution is in the public interest.[42] Prosecutorial decisions made pursuant to these two factors fall squarely within the Crown's discretionary authority and therefore should not be interfered with by courts. However, a prosecutor's decision to withhold evidence is not protected by prosecutorial discretion, since disclosure is a constitutional obligation under sections 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*. Liability for withholding disclosure thus did not warrant the high standard of malice.[43]

Most recently, in *Ontario (Attorney General) v. Clark*, the Supreme Court affirmed the *Nelles*, *Miazga,* and *Proulx* approach to malicious prosecution.[44] At issue in *Clark* was whether prosecutors are liable to police officers when exercising their prosecutorial discretion. In this case, the officers claimed they were wronged by a prosecutor who did not challenge the accused's statements that the officers assaulted him. The Court found that the prosecutor was not liable, distinguishing a prosecutor's liability to the accused for malicious prosecution and their liability to third parties, including police officers involved in the investigation. Justice Abella noted that the Court's approach to malicious prosecution has long involved "balancing" the threat that prosecutorial liability poses for prosecutorial independence and "the public interest in making prosecutors accountable" for violating the "the rights of the accused, who is uniquely vulnerable to the misuse of prosecutorial power."[45]

B. Three Challenges to the Policy-Based Account

The policy-based account of the tort of malicious prosecution raises three concerns. The first is that viewing the fault standard as a tool for balancing competing public interest considerations invites doubt from both sides. Critics may always argue that the threshold should be a little higher or lower on the spectrum. At best, the malice standard seems to be a reasonable choice among the available options. At worst, the standard appears arbitrary. The Court's account is unable to provide a principled justification for the malice standard, because it views the standard as a proxy for balancing two independent concerns, rather than itself reflecting an underlying concern.

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42 *Henry*, *supra* note 36 at para 61.

43 *Ibid* at paras 56–62.

44 *Supra* note 9 at paras 26–39.

45 *Clark*, *supra* note 9 at paras 26–29, 57.

The second concern is that the policy-based account is unable to justify malicious prosecution as a private cause of action. The importance of holding prosecutors accountable does not explain why they should be held accountable through tort law liability. The legal system has several avenues for holding individuals (and the state) accountable. Specifically, following Justice Stratas in *Paradis Honey Ltd v. Canada (Minister of Agriculture and Agri-Food)*, prosecutorial wrongdoing may be argued to fall within the category of "public law problems" that would be more appropriately addressed through the public law principles governing administrative judicial review.[46] In *Paradis Honey*, Justice Stratas suggested that administrative review is generally the appropriate legal avenue for holding government agents accountable for faulty decisions. Although *Paradis Honey* concerned government liability in a different context, the argument applies equally to malicious prosecution. Justice Stratas held that Canadian tort law has gone astray by trying to solve "public law problems" with "private law tools."[47] Observing that the relationship between government agents and private individuals is entirely unlike that between private individuals themselves, he concludes that "liability for public authorities should be governed by principles on the public law side of the divide, not the private law side."[48] In particular, he urged that the public law principles governing administrative judicial review are the appropriate tools for addressing the liability of public officials.[49]

Criminal law provides yet another potential public law means for holding prosecutors accountable while also protecting the integrity of the prosecutor's office. If the normative concerns underpinning the tort are the policy objectives of preventing prosecutorial misconduct and holding prosecutors accountable when they do wrong, then criminal law appears to be uniquely well-suited for achieving such public aims. Criminal law is commonly understood as the realm for addressing *public* wrongs; that is, according to one popular characterization, wrongs that are a matter of public concern and that the state, acting on behalf of all citizens, ought to address.[50] If the integrity of the prosecutor's office is a matter of public concern, then perhaps criminal accountability is the appropriate remedy for prosecutorial wrongdoing.

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46 *Supra* note 7 at paras 127–32.

47 *Ibid* at para 127.

48 *Ibid* at para 130.

49 *Ibid*.

50 See RA Duff & SE Marshall, "Public and Private Wrongs" in James Chalmers, Fiona Leverick & Lindsay Farmer, eds, *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh: Edinburgh University Press, 2010) 70 at 71–72.

Anticipating this second objection, the Supreme Court in *Nelles* wrote that public law remedies fail to "adequately redress the wrong done to the plaintiff."[51] Justice Lamer explained that "the use of professional disciplinary proceedings, while serving to some extent as punishment and deterrence, do not address the central issue of making the victim whole again."[52] Public law remedies provide "vindication of a public wrong not the affirmation of a private right of action."[53] Justice Lamer's explanation helps clarify the Court's later comments in *Clark* that liability for malicious prosecution works to "safeguard and vindicate the rights of the accused"[54] and uphold "the right of individual citizens to be free from groundless criminal prosecutions."[55] Considered in isolation, these references to the accused's rights are ambiguous between public law rights against the state, such as those protected by the constitution, and private law rights that, at least ordinarily, govern interactions between private persons. Justice Lamer's explanation suggests that these statements should be understood as referring to private rights.

This response, however, invites the third challenge: the policy-based account leaves the nature and source of the plaintiff's private right unclear. In a private law action, the plaintiff claims not merely that the defendant has done something wrong, but that the defendant has done something wrong the plaintiff.[56] Stated differently, the plaintiff claims that the defendant's conduct infringed one of their private rights.[57] Thus,

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51 *Supra* note 8 at 198.

52 *Ibid*.

53 *Ibid*.

54 *Supra* note 9 at para 26.

55 *Ibid* at para 37, citing *Miazga*, *supra* note 25 at para 52.

56 See Arthur Ripstein, *Private Wrongs* (Cambridge, Mass: Harvard University Press, 2016) at 1 [Ripstein, *Private Wrongs*].

57 See Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007) ("[b]efore a defendant can be characterized as a tortfeasor the anterior question of whether the claimant had a right against him must be answered" at 2); Ernest J Weinrib, "Two Conceptions of Remedies" in Charles EF Rickett, ed, *Justifying Private Law Remedies* (Portland: Hart Publishing, 2008) 3 ("[a]s a determinant of liability, the appropriately relational normative category is that of a right; a right is inherently relational because its existence immediately implies that another is under a duty not to infringe it" at 11); Allan Beever, *Rediscovering the Law of Negligence* (Portland: Hart Publishing, 2007) ("[t]o establish that the defendant committed a wrong, the claimant must show that the defendant damaged something over which she had a right. The law is not interested in loss per se, but only in losses that flow from a violation of the claimant's primary legal rights" at 218). The Supreme Court appears to embrace such a "rights-based" approach to tort law in *1688782 Ontario Inc. v Maple Leaf Foods Inc.*, 2020 SCC 35 at paras 18–19 [*Maple Leaf*].

for any action in tort, it should be possible to identify the precise right that the plaintiff is claiming was infringed.

The Supreme Court does not elaborate on the nature of the plaintiff's right against malicious prosecution in any of the malicious prosecution cases. More troublingly, if the scope of the defendant's liability is determined by the competing policy concerns of prosecutorial discretion and accountability—concerns that reflect the interests of the public at large—what right of the defendant is at issue or how this liability could be explained as a relationship between the parties as private individuals is mysterious. An explanation of a tort right (or corresponding duty) in terms of the parties' relationship is required not only by a range of leading tort theories but also by the Supreme Court's own jurisprudence.[58] The correlative right and duty at play in a private suit should reciprocally constrain both parties in a "horizontal" relationship.[59] It is not clear how such reciprocal rights could exist in the context of the "vertical" relationship between the state and a private individual. While the Supreme Court's malicious prosecution jurisprudence establishes such a right and gestures towards its importance, it does not explain how such a right is consistent with the basic conceptual structure of private law or why this right is required by the normative foundations of such law.

III. The Principled Account

A. Public Offices and Relational Equality

The Supreme Court's jurisprudence supports an alternative, more principled explanation for the tort of malicious prosecution that addresses these three concerns.[60] The principled account begins with the observation

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[58] See Ernest J Weinrib, *The Idea of Private Law* (Cambridge, Mass: Harvard University Press, 1995) at 19; Ripstein, *Private Wrongs*, *supra* note 56 at 5–7; John CP Goldberg & Benjamin C Zipursky, *Recognizing Wrongs* (Cambridge, Mass: Harvard University Press, 2020) at 4; John Oberdiek, "Structure and Justification in Contractualist Tort Theory" in John Oberdiek, ed, *Philosophical Foundations of The Law of Torts* (Oxford: Oxford University Press, 2014) 103 at 115; Allan Beever, *A Theory of Tort Liability* (Oxford: Hart Publishing, 2016) at 188–189 [Beever, *Tort Liability*]; John Gardner, *From Personal Law to Private Life* (Oxford: Oxford University Press, 2018) at 52–57; Nick Sage, "Relational Wrongs and Agency in Tort Theory" (2021) 41:4 Oxford J Leg Stud 1012 at 1012–17, 1029–33; *Maple Leaf*, *supra* note 57 at paras 62–65; *Deloitte & Touche v Livent Inc. (Receiver of)*, 2017 SCC 63 at paras 25–31.

[59] See *Maple Leaf*, *supra* note 57 at paras 21–22, 41. See generally Ripstein, *Private Wrongs*, *supra* note 56 at 11–12.

[60] By "principled," I mean an explanation flowing from the basic normative principles of private law. As mentioned above, those principles are concerned with the relationship of rights and duties between private persons and not, or at least not in the first in-

that in a system of public law, the state must act through natural persons occupying public offices.[61] Public offices are the locus of state action. As the Court suggests in *Nelles*,[62] a Crown prosecutor should not be thought of as a private individual who is afforded special powers, but rather as a public office that carries rights, privileges, and powers that must be exercised through natural persons.[63] This conception of public prosecutors is captured by Justice L'Heureux-Dubé's statement in *Proulx* that the "role of the Attorney General and of Crown attorneys when they lay criminal charges ... is a public law role. They represent the Crown and the public interest, and not their private interest or the interest of a private citizen."[64] The nature of this role is not unique to prosecutors. As others have explained, the structure of all public offices "consists of a set of normative powers, rights, privileges, and immunities that may be exercised by its

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stance, with broader societal considerations. In the context of malicious prosecution, a principled account should explain the malice standard as reflecting an underlying relational principle rather than as balancing multiple policy considerations. The Supreme Court distinguishes between relational and policy considerations in roughly these terms, writing that policy considerations "are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally" (*Cooper v Hobart*, 2001 SCC 79 at para 37). This is not to deny, of course, that policy-based accounts are based on principles too. Indeed, all accounts that purport to provide justifications are based on principles of one kind or another. Nor is it to deny that policy considerations may be relevant at a later stage of analysis in adjudicating private law liability. It is rather to distinguish between principles that are traditionally understood as internal versus external (or, if you prefer, primary versus secondary) to the fundamental normative structure of private law. See Christopher Essert, "Thinking Like a Private Lawyer" (2018) 68:1 UTLJ 166 at 182 [Essert, "Thinking Like a Private Lawyer"].

61 See Arthur Ripstein, *Kant and the Law of War* (New York: Oxford University Press, 2021) [Ripstein, *Kant and the Law of War*] ("officials are entitled to do these things [that ordinary private persons are not entitled to do] because the legal order is entitled to do them, and, as an artificial person, a legal order can only act through others, through natural persons in particular" at 116–17). See also Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, Mass: Harvard University Press, 2009) at 190–98 [Ripstein, *Force and Freedom*].

62 *Supra* note 8 at 191–92, citing *R v Boucher*, [1955] SCR 16 at 23–24, 1954 CanLII 3 (SCC) [*Boucher*].

63 While the defendant in almost every malicious prosecution suit is a criminal prosecutor, some courts have also applied the tort to other kinds of prosecutors. See e.g. *Stoffman v Ontario Veterinary Association*, 1990 CanLII 6925 (ON Div Ct) (finding that a veterinary association's disciplinary board could be liable for malicious prosecution). The office-based account developed in this article seems suitable to explaining such non-criminal malicious prosecution too because these prosecutors also exercise powers attached to offices created by legislation.

64 Justice L'Heureux-Dubé dissented, but not on this point (see *supra* note 17 at para 114).

occupant in service of its defining purpose."[65] The idea that prosecutors occupy public offices aligns with the Court's statement in *R v. Boucher*, cited with approval in *Nelles*, that a prosecutor's purpose is not to "win" the trial, nor even to obtain a conviction; rather, "his function is a matter of public duty" to bring the evidence before a jury or judge to determine whether the accused committed the crime they are charged with.[66] In *R v. Stinchcombe*, the Court goes so far as to say that evidence possessed by the Crown prosecutor's office is "the property of the public" rather than the property of the Crown counsel.[67] Stepping into the office of prosecutor, individuals must leave behind their private interests and act on behalf of the public to further the public purposes that define the prosecutor's role.[68]

Understood in this way, when a criminal prosecutor acts as a "minister of justice" within the scope of their office,[69] the prosecutor is not acting in their private name, and therefore cannot be personally subject to private law liability.[70] In such situations, the public (that is, all of us) is acting through a public office.[71] Because the public acts through public offices, public officials can do things that no private person can lawfully do. For example, many of the state's policing powers, including the powers to

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65 Malcolm Thorburn, "Policing and Public Office" (2020) 70:2 UTLJ 248 at 250 [Thorburn, "Policing and Public Office"].

66 *Boucher*, *supra* note 62 at 23–24.

67 [1991] 3 SCR 326 at 333, 1991 CanLII 45 (SCC).

68 See Christopher Essert, "The Office of Ownership Revisited" (2020) 70:2 UTLJ 287 ("[an] important characteristic of an office is the fact that offices have purposes and that the powers of office-holders are constrained by reference to those purposes" at 292) [Essert, "The Office of Ownership Revisited"]. As Ripstein notes, an office's public purposes limit its holder's capacity not only to act on their private interests, but also on their "all-things-considered judgment" (*Kant and the Law of War*, *supra* note 61 at 164).

69 *Nelles*, *supra* note 8 at 196–97; *Miazga*, *supra* note 25 at para 89.

70 As Thorburn explains, one reason we should characterize the person as entering an office and leaving their private personality behind "is that there is a permanence and self-standing structure to offices. The rights, powers, liberties, and duties of office are not organized by relation to a particular human being who bears them; instead, they are structured around the defining *purposes* of the office, which exist prior to any particular occupant and will endure after any given occupant has left the office" (Malcolm Thorburn, "Kant and the Criminal Law of War" in Ester Herlin-Karnell & Enzo Rossi, eds, *The Public Uses of Coercion and Force: From Constitutionalism to War* (New York: Oxford University Press, 2021) 171 at 181–82 [Thorburn, "Kant and the Criminal Law of War"]).

71 The same point can be made in terms of state action rather than public action. See Avihay Dorfman & Alon Harel, "The Case Against Privatization" (2013) 41:1 Philosophy & Pub Affairs 67 ("for a task to be done 'in the name of the state,' it must be executed by public officials" at 79–80).

detain, search, and arrest individuals, can only be justified with reference to this feature of public offices. That is because "[t]he idea of office allows us to imagine one person making decisions with respect to another person without putting one person above another."[72] However, because individuals occupy the public prosecutor's office, the use of powers attached to that office for purposes that fall outside of those permitted by the enabling statute remains possible.[73] There is always the risk, as the Court observed in *Miazga*, that the individual acting as prosecutor "steps out of his or her role" while exercising their prosecutorial powers.[74]

In such cases, where a prosecutor acts to "abuse or distort its proper role within the criminal justice system,"[75] the individual acting as prosecutor wrongs the defendant in the criminal proceeding. The malicious prosecutor exercises public powers from a position beyond the scope of their office to privately interfere with another individual.[76] The House of Lords was therefore correct to note that a "distinctive feature of the tort is that the defendant has abused the coercive powers of the state."[77] However, this description is incomplete. To provide a principled justification of the tort as a private law action, the office-based account must explain how this abuse of coercive state power constitutes a private wrong against the maliciously prosecuted. It does so by focusing on how the prosecutor's abuse of state power affects the relationship between the parties, rather than how the prosecutor's conduct was independently wrong.

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72 Thorburn, "Policing and Public Office", *supra* note 65 at 265. See also Ripstein, *Kant and the Law of War*, *supra* note 61 ("[t]he only way that [public authority can exist] consistently with the freedom of everyone is if the officials who comprise the legal order adopt an exclusively public standpoint, both empowering officials to do things that no private person is entitled to do and restricting the means that those officials can use in carrying out their mandates" at 49).

73 Thorburn refers to those occupying public offices who act on "their own whim" rather than the purposes that define their office as "mere tyrants" rather than "genuine legal authorities" (Thorburn, "Kant and the Criminal Law of War", *supra* note 70 at 175).

74 *Supra* note 25 at para 7 [emphasis removed].

75 *Proulx*, *supra* note 17 at para 35.

76 See Malcolm Thorburn, "Two Conceptions of Equality before the (Criminal) Law" in François Tanguay-Renaud & James Stribopoulos, eds, *Rethinking Criminal Law Theory: New Canadian Perspectives in the Philosophy of Domestic, Transnational, and International Criminal Law* (London: Bloomsbury Publishing, 2012) 3 ("the mere fact that an individual holds a particular public office should not insulate him from liability in tort or criminal law. If his conduct was not in accordance with the principles of public law, then it must be attributed to him as a private party—and he must be held accountable as a private party for that conduct according to the same standards as all other private citizens" at 11–12 [footnotes omitted]).

77 *Gregory v Portsmouth City Council*, [2000] 1 AC 419 at 426, [2000] UKHL 3.

The Supreme Court's jurisprudence entails that malicious prosecution constitutes a wrongful private interaction between the individual acting as prosecutor and the criminal defendant subject to that power. The underlying basis for private liability can be understood in terms of what is legally required for two private individuals to interact and relate as equals. The idea that a just system of private relations requires that individuals relate on terms of legal equality is foundational to a range of theories that understand tort liability as premised on relational wrongdoing.[78] For example, under Ernest Weinrib's corrective justice theory, tort law identifies when an interaction between two parties constitutes an injustice in their relationship and "corrects this injustice when it reestablishes the initial equality by depriving one party of the gain and restoring it to the other party."[79] Private rights and duties aim to ensure that parties interact on terms of equality and private liability upholds their relational equality in the face of its violation.

The idea that prosecutors occupy a public office reveals how the malicious prosecutor acts in a way that is inconsistent with the parties' relationship of private legal equality. A prosecutor's public powers are only consistent with relational equality among individuals if the prosecutor excludes certain reasons for action, namely those outside of their office's justifying purposes.[80] Where individuals acting as prosecutors fail to do so, they use a public power to structure their private relation with another individual. Interacting on terms of unequal private legal power constitutes an unjust interaction between the parties. That is, the private use of public powers by one individual to harm another undermines their relationship as legal equals. By stepping outside of their office, the prosecutor moves beyond the type of justified vertical relationship with the plaintiff that Justice Stratas described as unsuitable for private liability.[81] Rather, the malicious prosecutor uses a vertical power to structure a horizontal relationship.

Private liability for malicious prosecution provides a mechanism for undoing this relational injustice and reaffirms the parties' equal status under private law. A private remedy requiring the defendant to compensate the plaintiff for their losses is necessary to restore the original legal equality between the parties by undoing the effect of the malicious prose-

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78 See *supra* note 58.

79 Ernest J Weinrib, "Corrective Justice in a Nutshell" (2002) 52:4 UTLJ 349 at 349 [Weinrib, "Corrective Justice in a Nutshell"].

80 For the argument that relational equality can require limiting one's reasons for action in a different institutional context, see Daniel Viehoff, "Democratic Equality and Political Authority" (2014) 42:4 Philosophy & Pub Affairs 337 at 351.

81 *Paradis Honey*, *supra* note 7 at paras 127–32.

cution on the parties' standing vis-à-vis one another. If individuals who occupy the prosecutor's office have access to public powers without others having a right to undo harms arising from the abuse of those powers, then those individuals occupying the prosecutor's office would effectively have unequal legal statuses. Without such a remedy, the idea that a public office exists independently from its occupant begins to disintegrate.[82] The justification of public offices, as establishing public authority without compromising individual equality, would be undermined.[83] A system in which some private individuals have legal powers that others do not is inconsistent with private law's commitment to relational equality. The tort of malicious prosecution allows for interactions between prosecutors and criminal defendants to be "structured in order to preserve the basic equality" of both parties.[84]

While private law's commitment to relational equality between persons provides the normative foundation for the principled account of malicious prosecution, the tort gains additional justificatory support from its contribution to the broader commitments of contemporary legal systems to the ideal of democracy and the rule of law. As Elizabeth Anderson, Niko Kolodny, and Seana Shiffrin argue, a concern for citizens relating on terms of equality—including equal legal power—is at the heart of the ideal of democracy.[85] The tort of malicious prosecution, though not historically grounded in democratic values, helps to guard against "asymmetries in power" between state prosecutors and private citizens that result in relations of "superiority and inferiority."[86] A private remedy to undo instances

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82 See Essert, "The Office of Ownership Revisited", *supra* note 68 ("an office is something that has a kind of existence independent of any particular holder, that is 'picked up' or 'held' by an officeholder, and thus that individual holders are separate from the office and that they act, in some way, for or on behalf of the office, such that the acts of previous, present, and subsequent holders are all comprehensible as the acts of the office itself" at 288).

83 Thorburn, "Policing and Public Office", *supra* note 65 ("[t]he idea of public office is what makes possible a necessary and acceptable kind of inequality—that between individual private persons, on the one hand, and the collective person of the state, on the other—while maintaining the kind of equality that really matters, which is the equality of all persons *vis-à-vis* one another" at 249–50). See also Thomas Sinclair, "The Power of Public Positions: Official Roles in Kantian Legitimacy" in David Sobel, Peter Vallentyne & Steven Wall, eds, *Oxford Studies in Political Philosophy*, vol 4 (Oxford: Oxford University Press, 2018) 28 at 30; Ripstein, *Force and Freedom*, *supra* note 61 at 190–98.

84 Essert, "Thinking Like a Private Lawyer", *supra* note 60 at 167.

85 Elizabeth S Anderson, "What Is the Point of Equality?" (1999) 109:2 Ethics 287 at 289; Niko Kolodny, "Rule Over None II: Social Equality and the Justification of Democracy" (2014) 42:4 Philosophy & Pub Affairs 287 at 289; Seana Valentine Shiffrin, *Democratic Law*, ed by Hannah Ginsborg (New York: Oxford University Press, 2021).

86 Kolodny, *supra* note 85 at 300.

of interpersonal subordination by prosecutors who exploit this potential for asymmetrical power supports the ideal of democratic equality. The tort also supports the ideal of the rule of law insofar as it affirms that public officials are not above the law.[87] In *Roncarelli v. Duplessis*, the Supreme Court expressed its willingness to hold state actors liable in private law for using their powers arbitrarily.[88] Since then, the legal system has developed other ways to prevent and respond to arbitrary uses of public power. The tort of malicious prosecution continues to reflect the concern for the rule of law in the private law context: when a public official uses their power beyond their office's scope, they must be liable to others as a private person.[89]

As a slogan, we might say that malicious prosecution is the privatization of the prosecutor's public office.[90] It is using a public means for a private purpose. You cannot build your house in the middle of a public park. Nor can a public prosecutor use their access to prosecutorial powers to get even with their childhood bully. This characterization aligns with the Court's description of malicious prosecution in *Proulx* as an "improper mixing of public and private business."[91] The tort of malicious prosecution provides individuals with a remedy in instances where others privately abuse public powers to their detriment.

However, the privatization slogan is partly misleading. As we have seen, the question in a malicious prosecution suit is not whether the prosecutor sought to achieve a distinctly private end, but whether they sought to achieve an end outside the scope of the purposes that define the prosecutor's office. The malice standard should thus be satisfied in cases analogous to *Roncarelli*, where the Court held that it was no defence that the Quebec premier's abuse of the liquor licensing power was, in the premier's

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87 See Frank Scott's two-principle characterization of the rule of law, cited in WS Tarnopolsky, "Frank Scott – Civil Libertarian" (1981) 27:1 McGill LJ 14 ("[t]he first is that the individual may do anything he pleases, in any circumstances anywhere, unless there is some provision of law prohibiting him. Freedom is thus presumed, and is the general rule. All restrictions are exceptions. The second rule defines the authority of the state, and places the public official (including the policemen) in exactly the opposite situation from the private individual: a public officer can do nothing in his public capacity unless the law permits it. His incapacity is presumed, and authority to act is an exception" at 25).

88 1959 CanLII 50 (SCC) [*Roncarelli*].

89 See Dennis Klimchuk, "State Estoppel" (2020) 39:3 Law & Phil 297 ("power is exercised arbitrarily when it is unauthorized by law in a particular way: here, when the occupant of an office uses the means that office provides to an end other than that (or those) for which sake it was constituted" at 321).

90 See Ripstein, *Private Wrongs*, *supra* note 56 at 182, characterizing the tort of misfeasance in public office in these terms.

91 *Supra* note 17 at para 38.

view, aimed at the public purpose of preserving Quebec culture.[92] The question in a malicious prosecution suit is not whether the defendant initiated criminal proceedings for some conceivable public purpose, but whether they acted "pursuant to an improper purpose inconsistent with the [prosecutor's] office."[93] That is, whether they initiated proceedings for a purpose other than the "traditional prosecutorial function" of carrying the criminal law into effect where there is a reasonable prospect of a conviction and a conviction is in the public interest.[94]

One might worry that this explanation of malicious prosecution undercuts the historical application of the tort against private litigants bringing criminal claims. Similarly, one might worry that this explanation is inapplicable to the rare cases where private litigants still initiate criminal proceedings and the even rarer cases where they prosecute those proceedings.[95] The application of the tort to so-called "private prosecutions" is perhaps best explained by a different framework that does not appeal to public offices.[96] The aim of this article is, after all, to develop an account that responds to the special problems of this tort when applied to state prosecutors. However, the office-based account of the tort is consistent with its application to non-governmental prosecutors if we understand all prosecutions to be invoking a public power. And this idea may well be justified. Recall that in *Krieger*, the Supreme Court held that under Canadian law, "it is the sovereign who holds the power to prosecute his or her subjects."[97] This view is also supported by the broad powers that the Crown and Attorney General maintain over private prosecutions, including the power to withdraw charges or take over prosecutions at any moment once the criminal prosecution has begun.[98] Moreover, the fact that there was no tort of malicious initiation of civil proceedings available in the eighteenth and nineteenth centuries suggests that the law already

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92 *Supra* note 88.

93 *Miazga*, *supra* note 25 at para 79.

94 *Nelles*, *supra* note 8 at 193, 196–97.

95 See *Criminal Code*, RSC 1985, c C-46, s 504.

96 For an example of such a different framework, see Beever, *Tort Liability*, *supra* note 58 at 175.

97 *Supra* note 28 at paras 45–47.

98 See *R v McHale*, 2010 ONCA 361 at paras 59–62, 71–77; *Director of Public Prosecutions Act*, SC 2006, c 9, s 3(3)(f). The Crown's prosecution manual even stipulates that Crown prosecutors have a duty to supervise private prosecutions ("Crown Prosecution Manual" (14 November 2017) Part D 30: Private Prosecutions, online: <ontario.ca/document/crown-prosecution-manual/d-30-private-prosecutions> [perma.cc/4EKU-A3UD]). Moreover, the Crown prosecutor's office must be informed of any privately laid information (*Criminal Code*, *supra* note 95, s 507.1(3)), and private prosecutions must generally follow the same standards of evidence and procedure as public prosecutions.

considered there to be a public element to criminal prosecutions, even when initiated by private parties. Indeed, John Fleming refers to the early malicious prosecution cases as focusing on "private citizens who discharge their *public* duty of prosecuting those reasonably suspected of crime."[99] If we accept that ordinary citizens can momentarily exercise powers that are usually justified only at the hands of the police, such as in a citizen's arrest,[100] we have reason to also accept that ordinary citizens can momentarily occupy the public office of prosecutor.[101]

B. The State's Liability for Office-Based Wrongs

The principled account is largely consistent, then, with the Supreme Court's characterization of the wrong of malicious prosecution as a "perversion of the powers of the office of the Crown" through the "malicious use of the office for ends that are improper and inconsistent with the traditional prosecutorial function."[102] In the next section, I explain how the four elements of the tort support this account. I then explain how this account shows that malicious prosecution is the violation of a private right.

I should first address the worry that this account is in tension with another aspect of the Court's malicious prosecution jurisprudence. While the office-based account suggests that it is the private individual occupying the prosecutor's office who commits the wrong of malicious prosecution, the jurisprudence suggests that the state, in addition to the individual prosecutor, can be liable. The principled account thus might appear at odds with cases that name the Attorney General or the Crown as defendants.[103] Not only is there a linguistic discrepancy with these styles of cause, but also a substantive discrepancy with the assumption in these cases that the state itself can be liable and thus ordered to pay the plaintiff damages. The question for the principled account is whether an analysis that focuses on whether an individual acted beyond the legitimate

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99 John G Fleming, *The Law of Torts*, 5th ed (Sydney: The Law Book Company, 1977) at 606 [emphasis added].

100 See Malcolm Thorburn, "Justifications, Powers, and Authority" (2008) 117:6 Yale LJ 1070 at 1125–29.

101 The responses offered here also address the worry that an office-based account is unable to explain unusual cases where courts have applied the tort of malicious prosecution to citizens who did not themselves decide to initiate a criminal prosecution but who were instrumental to its initiation (such as by filing the initial complaint to the police). See e.g. *Drainville v Vilchez,* 2014 ONSC 4060; *Patinios v Cammalleri*, 2016 ONSC 6743; *HA v SM*, 2021 ONSC 3170.

102 *Miazga*, *supra* note 25 at para 84; *Nelles*, *supra* note 8 at 196–97.

103 See e.g. *Nelles*, *supra* note 8; *Proulx*, *supra* note 17.

scope of their public office can yield the conclusion that the state may be liable when its agents do so.

The principled account has at least three responses to this apparent tension. The first affirms the tension and holds that the private person acting as public prosecutor is the proper defendant in a claim for malicious prosecution. The other responses attempt to dissolve the tension by providing explanations for why the state (in addition to the private individual acting as prosecutor) can be liable for malicious prosecution. Before considering these responses, however, it is worth noting that the tension just raised not only exists between the principled account and certain malicious prosecution cases. It also exists within those cases whenever courts are ambiguous as to whether they are referring to the "prosecutor" qua state office or the "prosecutor" qua individual occupying that office. The need to address this tension thus further emphasizes the central point of this article: a compelling account of malicious prosecution must properly appreciate the relationship between a public office and its individual holder.

The first response to the objection that this account is inconsistent with the state's liability for malicious prosecution is to argue that courts have occasionally been mistaken as to who is fundamentally liable for malicious prosecution. According to this response, the object of courts' remedial orders should be changed. This response concedes the tension and suggests that courts resolve it going forward by limiting liability to the private person occupying the prosecutor's office. The jurisprudence supports this response insofar as courts have held individual prosecutors personally liable for malicious prosecution. In *Nelles*, the Supreme Court's first malicious prosecution case, the individual prosecutors were co-defendants.[104] And in *Miazga*, the Court's most recent malicious prosecution case, the individual prosecutor was the defendant.[105] Moreover, the two landmark decisions concerning public officials' private liability in Canada and the United Kingdom, *Roncarelli v. Duplessis*[106] and *Ashby v. White*,[107] both assess the official's liability under their private name. Nonetheless, two of the three cases in the Supreme Court trilogy and most lower court malicious prosecution decisions identify the state as a defendant. The first response therefore concludes that the basic assump-

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104 *Supra* note 8.

105 *Supra* note 25.

106 *Supra* note 88; Frank Scott suggested Duplessis was personally liable because he acted outside the scope of his public office: see Tarnopolsky, *supra* note 87 ("Duplessis ... could not find any legal authority to justify his order to cancel Roncarelli's liquor licence: so he paid personally" at 25).

107 (1703) 92 ER 126, 2 LD Raym 938 (HL Eng).

tion in these cases—that the government can be liable for malicious prosecution—is wrong.

The second response is more conciliatory. It holds that while the individual occupying the office is the tortfeasor in the first instance, the state may also be liable on the basis of vicarious liability. This response dissolves the tension by explaining why courts are correct to assume that the government can be liable for malicious prosecution, albeit for reasons not explicit in their decisions. The paradigmatic instance of vicarious liability arises in an employment relationship: if an employee commits a tort in the course and scope of their employment, their employer may be held liable for the tort.[108] The government can be an employer for the purposes of vicariously liability,[109] and the person occupying the office of the prosecutor is a government employee. It appears the only question is whether a malicious prosecutor acts in the course and scope of their employment.

One might think that because malicious prosecution requires the defendant to have acted beyond the scope of their prosecutorial role, then vicarious liability is inapplicable because a tortfeasor has always acted beyond the course and scope of their employment. However, in *Bazley v. Curry*, Canada's leading vicarious liability case, the Supreme Court characterizes acting in the course and scope of one's employment more broadly:

> The fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom.[110]

Malicious prosecution appears to fit this description.[111] The impugned conduct is directly related to conduct authorized by the employer: the power to prosecute criminal charges. Moreover, such authorization necessarily entails creating a risk of the wrong in question: an improper and groundless use of those powers.

However, while malicious prosecution seems consistent with a vicarious liability analysis at a general level, it appears unlike ordinary vicarious liability on closer examination. In typical vicarious liability cases, like *Bazley*, the nature and wrongfulness of the underlying tort can be explained without any reference to the notion that the wrongdoer stepped

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[108] Allen M Linden et al, *Canadian Tort Law*, 12th ed (Toronto: LexisNexis Canada, 2022) at 634.

[109] *Blackwater v Plint,* 2005 SCC 58 at paras 38, 97.

[110] 1999 CanLII 692 at para 41 (SCC) [*Bazley*] [emphasis omitted].

[111] More specifically, malicious prosecution appears to fit within the "situation of friction" category of vicarious liability cases (see *ibid* at para 19).

outside the scope of an office. Although the defendant's employment gave them the opportunity to commit the tort, the wrong would be fully cognizable if they committed it in a non-employment context. In *Bazley*, the defendant's employment at a children's care facility gave him the opportunity to abuse children, but the explanation for how such abuse is a private wrong does not depend on the context of his employment. By contrast, the nature and wrongfulness of a malicious public prosecution cannot be characterized without reference to the prosecutor's public office. Abusing prosecutorial powers to another's detriment requires a context that allows for the exercise of those powers. Consider the difference between a Crown prosecutor who negligently trips somebody while rushing into the courthouse and one who maliciously prosecutes somebody. Attaching liability to the Crown's office in the first case appears consistent with ordinary instances of vicarious liability: the employee's wrong of negligent bodily injury can be characterized without reference to the prosecutor's office or its powers. However, in the case of malicious prosecution, even though the employee acted beyond their office's purpose, we can only explain the wrong—a "perversion of the powers of the office of the Crown"[112]—with reference to their office.

What should we make of this difference? Perhaps not much. The state's liability for malicious prosecution might merely be a special type of vicarious liability. After all, malicious prosecution fits the basic structure of vicarious liability: an employer is held liable for their employee's wrongdoing. But a distinct and arguably more compelling view emerges when focusing on how the office-based nature of the wrong relates to the state's liability. This focus leads to a third response to the tension, which explains the state's liability for malicious prosecution as an extension of vicarious liability, but ultimately different in nature. The difference is that the state did not merely provide an opportunity for the individual occupying the prosecutor's office to commit a wrong, but was also the necessary instrument of that wrong. Even the instrument metaphor underplays the state's role in the commission of the tort. An off-duty police officer who uses his police weapon to commit a wrong uses a tool of his office, but not the office itself. A malicious prosecutor, like a patrolling police officer who performs a maliciously motivated and unjustified arrest, uses the office itself. Recall the Court's statement that only the state has the power to prosecute its subjects.[113] Although individuals acting as Crown prosecutors can abuse this power, such conduct remains the abuse of a state power. Therefore, when a person steps outside the Crown prosecutor's office but uses their official powers, the state itself is still acting.

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[112] *Miazga*, *supra* note 25 at para 84.

[113] *Henry*, *supra* note 36 at para 62, citing *Krieger*, *supra* note 28 at paras 43, 45.

The state's liability for malicious prosecution might therefore be simply explained by reference to this sense in which it conducted the wrongful prosecution.

Two other arguments support the state's liability for malicious prosecution. First, if we reject that the state acts through malicious prosecutors, we are left with the unsatisfying view that malicious prosecutors are akin to ordinary citizens who falsely impersonate Crown prosecutors. For, according to this view, whenever an individual occupying the Crown prosecutor's office acts beyond the scope of their office, the Crown is not acting and so cannot be directly liable. The Crown would not be liable for malicious prosecutions, then, for the same reason that a police department is not liable if somebody dresses up as one of their officers and commits a tort under the pretense of exercising a police power, because the police department had nothing to do with the wrong in question. Yet there is a clear difference between falsely claiming to exercise a power and the wrongful exercise of a power. To reject the second and third responses commits us to the odd conclusion that the initial criminal proceedings giving rise to a successful malicious prosecution suit were actually false look-a-like prosecutions.

Finally, and more troublingly from both a normative and doctrinal perspective, if the state was not liable in cases where public officials step outside their mandate, and instead only the person acting as the official was privately liable, the resulting legal structure would be one in which the state could do no wrong. The idea of using a state power for an improper purpose would be rendered unintelligible, since, under such a framework, purporting to use a power for an improper purpose would not constitute the use of that power at all. There would be no room for the distinction between the legitimate use of a public power and the fact of its use. Until the nineteenth century, the Crown's immunity from private liability was justified on these terms.[114] We must understand the Crown to be acting, and thus potentially liable for that action, in situations where the public prosecutor's powers are used for improper purposes to avoid

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[114] See Joshua Getzler, "Personality and Capacity: Lessons from Legal History" in Tim Bonyhady, ed, *Finn's Law: An Australian Justice* (Sydney: The Federation Press, 2016) 147 ("[f]or a long time, the English courts held that torts could not be sheeted home to the Crown and the public fisc for two reasons: first, because the Crown as head of state could not be analogised to a master or employer with control over servants employed by an array of public boards, departments, commissions and so on; and secondly because at the theoretical level it was inconceivable that the Crown could itself commit or command a wrong. The two theories could be entwined: a Crown servant causing negligent harms in pursuit of official duties by the very act of doing what the Crown could not itself have done or ordered must have been acting without authority; and that individual was therefore presumptively personally liable without engaging the Crown as principal in any liability" at 170).

this doctrinally outdated and normatively unsatisfying position. The Court clearly views the Crown as acting even when individuals abuse the Crown's powers, given its statements such as: "the defendant Crown was acting pursuant to an improper purpose inconsistent with the office of the Crown attorney."[115]

To summarize, there are three ways the principled account might respond to the objection that an account focusing on whether an individual stepped beyond their office cannot explain why courts have found the state itself, in addition to the individual prosecutor, liable for malicious prosecution. To avoid conceding the challenge and holding that the tort should only apply to prosecutors as private persons, the principled account can explain the state's liability either as an instance of vicarious liability or as a closely related form of liability focusing on the idea that the state acts when individuals abuse the state's powers. This last response seems to best capture the state's involvement and corresponding responsibility for malicious prosecutions.

The exploration of these responses provides further evidence that understanding malicious prosecution requires an appreciation of the complex relationship between an office and its holder. We can now also see that the third response explains the courts' ambiguous language when describing which party (whether the Crown office or the individual occupying it) commits the wrong in malicious prosecution cases. In an important sense, they both do. More generally, the office-based account shows why this kind of ambiguity is not unique to prosecutors. The ambiguity is borne from the nature of state action as the interplay between an institutional role and a private person. It manifests when describing the actions of every public official, from judges to the Prime Minister.

C. The Doctrinal Structure of Malicious Prosecution

The principled account of malicious prosecution also substantially aligns with the tort's doctrinal structure, including the element of malice. Recall that the first concern with the policy-based account is that it cannot provide a secure foundation for the malice standard. According to the principled account, however, the malice standard does not merely establish a balance between prosecutorial discretion and accountability. If the tort's other elements are satisfied, the malice standard marks the difference between acting pursuant to the public prosecutor's office and acting as a private person who is using the powers attached to that office. The malice standard is fundamentally tied to the purposes for which the prosecutor acted. When the individual acting as prosecutor acts for a purpose

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[115] *Miazga*, *supra* note 25 at para 79.

beyond carrying the law into effect (and the tort's other elements are satisfied), the impugned conduct is not the legitimate act of a public official. It is the conduct of someone who has "perverted or abused his office."[116] As the Court characterizes the wrong in *Proulx*, it is to use the criminal process "as a vehicle to serve other ends."[117] The malice standard is critical because whether an individual has "*deliberately intended* to subvert or abuse the office of the Attorney General" is essential for determining whether they have "exceeded the boundaries of the office of the Attorney General."[118] Unlike the policy-based account, this account provides a principled explanation for the tort's intentional fault standard: the office holder's motives matter for assessing whether they acted beyond the legitimate scope of the office. A mere external description of a prosecutorial decision, such as the nature of its consequences, including the harm or risk of harm it created, does not determine whether that exercise of the office's powers was consistent with the purposes and scope of the office. This understanding of malice aligns with its characterization elsewhere in private law, such as in defamation law, where the defence of qualified privilege is defeated by malice if the defendant stepped outside the scope of their privilege by acting on an improper purpose.[119]

This explanation of the role of malice allows the principled account to avoid the objection that malicious prosecution is an unusual tort since it appears to make the plaintiff's liability depend on their subjective purpose. The malice standard should not be deemed appropriate because, as the policy-based account suggests, it functions as a useful threshold by limiting liability to the most culpable exercises of the prosecutor's powers. Rather, the malice standard is appropriate because it reflects a change in the legal nature of the act from a public prosecution to the private use of the prosecutor's public powers.[120] Beyond the scope of the prosecutor's office, the use of its powers to shape a private interaction wrongs the other party to that interaction. Thus, the prosecutor's subjective purpose is relevant here, unlike for most other torts, because the office of prosecutor is defined by a particular public purpose. Nonetheless, the nature of the

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116 *Nelles*, *supra* note 8 at 194.

117 *Supra* note 17 at para 43.

118 *Miazga*, *supra* note 25 at para 89 [emphasis added].

119 Osborne, *supra* note 2 at 440–41.

120 See Ripstein, *Private Wrongs*, *supra* note 56 for a discussion of the tort of misfeasance in public office ("[a]lthough misfeasance in a public office cannot be committed unless the defendant acts for what public law must regard as an improper end, the private law significance of so doing is not in the specific end that is pursued instead, but in the use of the power to pursue some other end by injuring the plaintiff" at 182–83).

wrong is consistent with the view that torts ordinarily concern the use of wrongful means rather than the pursuit of wrongful ends.[121]

Other torts that appear closely related to malicious prosecution but have lower fault standards might seem to provide counterexamples to this explanation. For example, the torts of negligent investigation and breach of constitutional rights are sometimes advanced alongside actions for malicious prosecution. Yet neither carries the malice standard. However, this difference is consistent with an office-based approach; that is, one that asks whether the impugned conduct is related to a power attached to a public office and, if so, what is the scope of that office.

Negligent investigation might be understood as connected to a public office with a different scope. But the Canadian jurisprudence supports a stronger explanation for the lower threshold for liability: unlike criminal prosecution, investigation by itself is not a public power. Although the order of the two leading negligent investigation decisions, *Hill v. Hamilton-Wentworth Regional Police Services Board*[122] followed by *Correia v. Canac Kitchens*,[123] might suggest that the tort ordinarily applies to police investigations, but that in special circumstances it can apply to private investigators, the courts' analytical approach in these cases suggests otherwise. The courts' application of a standard negligence analysis in each case suggests that negligent investigation is not concerned with a public power or office. Therefore, the question of whether the defendant acted pursuant to an office's purposes is irrelevant.

However, liability for breaching an accused person's constitutional rights appears to depend on whether the defendant occupied a public office. In Canada, the constitution confers strict, non-discretionary obligations on state officials.[124] However, the scope of these officials' constitutional obligations for the purposes of the Crown's liability is not determined by the purpose of their action. For example, in *Henry*, where the Crown was held liable for violating the accused's right to disclosure before trial, the Supreme Court's rejection of the malice standard makes sense,

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[121] While this article focuses on the role of malice in the context of public authority liability, one might ask whether malice plays a similar role in other motive-focused torts, such as malicious falsehood. For arguments that malice works similarly in these torts to transform a rightful means into a wrongful means of private interaction, see generally Beever, *Tort Liability*, *supra* note 58 at 171–76; Ripstein, *Private Wrongs*, *supra* note 56 at 159–84.

[122] 2007 SCC 41.

[123] 2008 ONCA 506.

[124] The *Charter* only applies to the federal and provincial government and its agents. See *Canadian Charter of Rights and Freedoms*, s 32, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

given that providing disclosure is not within the Crown's discretion.[125] Although the Court has cautioned that constitutional damages are a "distinct" public law remedy that cannot be equated with private law damages,[126] the rejection of the malice standard in *Henry* is consistent with an office-based approach because the question of whether the prosecutor breached their public duty of disclosure is not determined by the purpose of their non-disclosure.

In addition to explaining the malice standard, the principled account illuminates the significance of the three other elements of the tort of malicious prosecution. Each provides further conditions for determining whether the defendant wronged the plaintiff by abusing the office's powers against the plaintiff.

The first element—that the criminal proceeding was initiated by the defendant—ensures that the parties were involved in a direct interaction. Paired with the second element, which includes the requirement that the plaintiff was the criminal defendant in the proceeding, the first element focuses the inquiry on relational wrongdoing from the outset. It ensures that the question when assessing private liability is not whether the prosecutor acted wrongfully in general, but whether they wronged the plaintiff. It makes certain that "the two are connected as doer and sufferer of the same injustice."[127]

The second element also requires that the criminal proceeding terminated in the plaintiff's favour. This condition does not receive much judicial attention, yet its significance is not immediately obvious. The Court says that "the wrongdoing targeted by this tort is the decision to initiate or continue an improperly motivated prosecution."[128] But if the wrong of malicious prosecution is simply an improperly motivated prosecution, then why would it matter whether the plaintiff was convicted or acquitted? The common law's historical answer is that without this element, "almost every case would have to be tried over again upon its merits."[129] However, the conviction would not have to be retried if the wrong at issue in the civil suit was the decision to prosecute. That decision could be litigated in isolation from the conclusion of the criminal proceeding.

Insofar as the principled account must provide a principled explanation for each of the tort's elements, it must explain how this second condi-

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125 *Supra* note 36 at para 31.

126 *Vancouver (City) v Ward*, 2010 SCC 27 at para 22.

127 Weinrib, "Corrective Justice in a Nutshell", *supra* note 79 at 350.

128 *Henry*, *supra* note 36 at para 58.

129 *Basebé v Matthews*, (1867) LR 2 CP 684 at 687, 31 JP 391 (UK).

tion helps determine whether the prosecutor used their powers beyond the scope of their office. This framework directs our focus to what a conviction entails about whether the prosecutor acted within the limits of their office. To begin, a criminal conviction entails that a court viewed the state, and so the state prosecutor, as having established the accused's guilt beyond a reasonable doubt. A conviction thus seems to mean that from the court's perspective, the prosecutor stayed true to the purpose of their role "to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime."[130] In delivering a conviction, the court must assume that there was an objectively reasonable prospect of conviction at the outset of the proceedings. This is not to say that the court's assumption here is always correct—wrongful convictions resulting from improper prosecutorial conduct happen—but rather that until a conviction is overturned, the court seems committed to holding that the prosecutor acted (at least minimally) within the scope of their office. This explanation aligns with Allan Beever's claim that a "conviction indicates that the defendant was performing his legal duty."[131] Framing the element in these terms might raise doubts about whether a prosecutor who acts with malice and without subjective belief in a reasonable prospect of conviction but somehow obtains a conviction is really performing their legal duty. Perhaps this element is ultimately an external policy consideration that is necessary, as the Court writes, to "[avoid] conflict between civil and criminal justice."[132] Nonetheless, the office-based account offers a plausible interpretation of the nature of such a conflict: the court cannot coherently hold that the prosecutor both did and did not act within the scope of their office.

The third element—that the proceeding was initiated without reasonable or probable cause—is necessary under the principled account, because acting on an improper purpose alone is not sufficient to show that the defendant acted beyond the scope of the prosecutor's role. Consider, for example, a prosecutor whose primary motivation in pursuing a conviction was not to bring the law into effect, but rather the prospect of a career promotion should the proceedings go favourably. Such a prosecution may satisfy the malice standard but is not beyond the prosecutor's office if the prosecutor believes on reasonable grounds that a conviction will succeed. While this individual's motives may merit scrutiny—including liability to disciplinary, or as discussed below, public law remedies—their conduct qua prosecutor is not beyond their office's scope. It is in this sense that whether an official performs their office's mandate is not determined

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130 *Boucher*, *supra* note 62 at 23–24.

131 See Beever, *Tort Liability*, *supra* note 58 at 174.

132 *Miazga*, *supra* note 25 at para 54.

by their attitude alone.[133] In other words, the legal nature of a prosecutor's action for the purposes of private law cannot be reducible to their subjective motivation. It is also in this sense that even a spiteful prosecutor whose prosecution attempt fails, that is, the prosecutor whose conduct is as close to privately wrongful as possible, was still minimally carrying out the public function of their role if there were reasonable and probable grounds for conviction.

The elements of malice and the absence of reasonable and probable cause thus work together to help reveal when the defendant has stepped beyond their role as prosecutor. Satisfying the third element is necessary but not sufficient. If reasonable and probable grounds for conviction are absent but the prosecutor does not act with malice, they are simply doing their job poorly. As *Miazga* illustrates, a mistaken or unreasonable prosecutorial decision is insufficient. A prosecutor working based on an incorrect assumption may not be the best prosecutor, but they are not perverting their role by using the powers of the office for an improper purpose.

The elements of malicious prosecution might be understood, in the context of state prosecutions, as providing the unique requirements for a specific type of misfeasance in public office. The broader tort of misfeasance in public office captures a range of ways that state officials can "use their powers for improper purposes, even if the conduct in question is otherwise lawful."[134] This broader tort, which focuses on deliberately unlawful conduct by a public officer,[135] is applicable to any public office, from a liquor licensing office, to livestock inspectors, to public coroner offices.[136] Malicious prosecution can be understood, then, as the outcome of sufficient jurisprudence to work out a robust understanding of a public office's boundaries with respect to the specific decision of whether to initiate or continue a criminal prosecution.[137]

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[133] Ripstein, *Force and Freedom*, *supra* note 61 at 193–94. This interpretation renders Ripstein's point here consistent with his argument, cited in footnotes 120 and 121, that an office-holder's improper purpose can transform a legitimate means of interaction into a wrongful means.

[134] Erika Chamberlain, *Misfeasance in a Public Office* (Toronto: Thomson Reuters, 2016) at 213.

[135] *Odhavji Estate v Woodhouse*, 2003 SCC 69 at paras 23–24.

[136] *Roncarelli*, *supra* note 88; *Northern Territory v Mengel*, [1995] HCA 65, 185 CLR 307; *Reynolds v Kingston (City) Police Services Board*, 2007 ONCA 166.

[137] Indeed, as a broader category of tort, misfeasance in public office can capture state prosecutors engaging in wrongful interaction distinct from their core prosecutorial decision. See e.g. *Cool Spring Dairy Farms Ltd. v Alberta (AG)*, 2000 ABQB 724 at paras 5, 14–20 (applying misfeasance in public office to a prosecutor's sentencing application).

D. Malicious Prosecution as the Violation of a Private Right

In addition to providing a secure foundation for the malice standard, the office-based account also addresses the second and third objections to the policy-based account. That is, it explains both why public law accountability for prosecutorial wrongdoing is insufficient and the normative underpinnings of the private right against malicious prosecution.

The principled account's explanation of the plaintiff's private right reveals the inadequacy of public law remedies for responding to the wrong of malicious prosecution. Under the principled account, the right protected by the tort of malicious prosecution is not mysterious or fundamentally different from other private law rights. We need not accept, as Lord Hobhouse says of the tort of misfeasance in public office, that the tort of malicious prosecution is an exceptional instance where the law provides a private remedy despite there being no underlying private right.[138] Rather, like other private rights, the right infringed by malicious prosecution is a right that individuals hold against one another prohibiting specified conduct. We each have a right that others do not abuse the powers attached to the office of prosecutor (if and when they happen to occupy that office) to interfere with us. Such a right protects every individual's basic interest in interacting with others on terms of legal equality under a system of public offices. This might be understood as a species of the general tort right, as Robert Stevens puts it, that "we have against others that they refrain from abusing a court's process."[139] Although the possibility of the defendant infringing this right depends on their circumstances vis-à-vis occupying a particular office, this is no different than how the possibility of one person infringing another's tort rights at any given time depends on their circumstances. I may in a specific moment be incapable, for geographic or other reasons, of negligently injuring you, but that does not mean you lack a right against me doing so. The wrongfulness of malicious prosecution is thus explicable by reference to how the impugned conduct affects the relationship of reciprocal rights and corresponding duties between two private persons. The tort is essential, therefore, not merely to deter a certain kind of harm or to maintain the integrity of the prosecutor's office, but also to vindicate the plaintiff's private right.

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[138] *Three Rivers District Council v The Bank of England*, [2000] UKHL 33 (BAILII) at 34 [*Three Rivers*]. Robert Stevens appears to accept Lord Hob's conclusion, writing that "[m]isfeasance in a public office ... is a genuinely public wrong, quite different from other torts" (Stevens, *supra* note 57 at 242).

[139] *Supra* note 57 at 16. The office-based account, however, goes beyond Stevens' description by explaining the normative basis for such a right in the context of a court process that is in the hands of the state.

Public law remedies cannot vindicate private law rights. Judicial review of an administrative decision focuses on whether a state official exercising a statutory power acted beyond the lawful "boundaries of what they are legally empowered to do."[140] If the official's decision is found to be unlawful, it is deemed invalid and thus of no legal force or effect.[141] Judicial review concerns the legal validity of the official's decision, not their liability. A malicious prosecution lawsuit, on the other hand, focuses on whether the prosecutor wronged the plaintiff by violating their right. It concerns how the interaction between the parties affected their rights and duties, not the lawfulness of one party's actions in terms of the principles of public law. A court that finds a party liable for malicious prosecution does not render the defendant's decision to initiate criminal proceedings invalid, but rather affirms and enforces the plaintiff's right by ordering the defendant to pay damages. Prosecutorial wrongdoing is, therefore, more than a public law problem.[142] In the case of malicious prosecution, it is also a private law problem.

Criminal liability for prosecutorial wrongdoing is equally incapable of vindicating private rights. The point is not that it is inappropriate to hold prosecutors who abuse their office's powers criminally liable, but that doing so does not achieve the same thing as a private remedy. Criminal actions are brought by the state and in the name of the state. The victim of the offence may or may not participate. The very existence of torts and crimes that overlap in the sense of prohibiting the same conduct reveals that the law recognizes that private and public law remedies achieve different ends. Criminal liability does not, as the Supreme Court put it in *Nelles*, "redress the wrong done to the plaintiff."[143] From the perspective of private law, the malicious prosecutor did not do something wrong that happened to harm the plaintiff. The private wrong is what the malicious prosecutor did to the plaintiff. While public law remedies can serve important purposes, such as invalidating a malicious prosecutor's decision and condemning individuals who intentionally misuse the prosecutor's office, such remedies do not establish a private right against malicious prosecution and cannot (without importing a quasi-private remedy into public law)[144] achieve the purpose of such a right.

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[140] Colleen Flood & Lorne Sossin, eds, *Administrative Law in Context*, 3rd ed (Toronto: Emond Montgomery Publications, 2018) at 6.

[141] See The Honourable Justice Malcolm Rowe & Manish Oza, "Tort Liability for Public Authorities" (2022) 60:1 Alta L Rev 1 at 29.

[142] *Paradis Honey*, *supra* note 7 at para 127.

[143] *Supra* note 8 at 198.

[144] Indeed, Justice Stratas's reassurance that damages can be awarded in exceptional administrative decisions reveals, contrary to his implied point, that justice requires a pri-

Accordingly, the Supreme Court's following statement in *Miazga* is partly misleading:

> [T]he public law doctrine of abuse of process and the tort of malicious prosecution may be seen as two sides of the same coin: both provide remedies when a Crown prosecutor's actions are so egregious that they take the prosecutor outside his or her proper role as minister of justice, such that the general rule of judicial non-intervention with Crown discretion is no longer justified.[145]

Abuse of process, as a public law remedy, allows courts to stay a proceeding on the basis that it is unfair or undermines the integrity of the judicial system.[146] Abuse of process and malicious prosecution are only the same in one sense: both provide legal mechanisms for responding to improper prosecutorial conduct. But, as we have seen, the principled view of malicious prosecution holds that the tort does much more than that: it offers the plaintiff a means of making a private claim of right to remedy their injury.

Conclusion

This article developed a principled, office-based account of the tort of malicious prosecution. I have argued that this account is supported by the Supreme Court of Canada's jurisprudence and that it offers a more compelling justification of the tort than that jurisprudence's more explicit policy-based account. First, it offers a non-arbitrary explanation for the liability standard of malice by connecting it to the scope of a criminal prosecutor's public office. Second, it explains the conceptual significance of the tort's other elements. Third, it clarifies the nature of the private right underlying malicious prosecution. Fourth, it responds to the objection that prosecutorial wrongdoing should be addressed through public law remedies. Fifth, it explains the difference between malicious prosecution and other torts, such as negligent investigation, breach of constitutional rights, and misfeasance in public office.

An important question remains: how far does this account go as a general theory of private liability for public officials? The concerns raised at the outset of this article, and surely others as well, can be asked of every form of such liability. While I have argued that at least one tort can be justified in the face of these concerns, it is doubtful that the office-based account can explain every species of public authority liability. For exam-

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vate right of action against certain forms of official wrongdoing (*Paradis Honey*, *supra* note 7 at para 87).

145 *Supra* note 25 at para 51.

146 *R v Regan*, 2002 SCC 12 at paras 49–56.

ple, this account is unlikely to explain public authority torts with lower standards of fault, such as those with a negligence standard. Nonetheless, I hope that this account is useful with respect to understanding these other torts insofar as it provides one possible framework for analysis and, if that framework proves incomplete, helps reveal where the difficulties lie for a general theory of public authority liability in tort law.