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Removing the Malice from Federal "Malicious Prosecution": What Cognitive Science Can Teach Lawyers About Reform

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Section 1983 ("§ 1983"), Title 42 of the U.S. Code empowers individuals suffering civil rights abuses at the hands of state actors to seek recourse in federal court. The statute was enacted in response to southern states' failure to control the Ku Klux Klan. Since 1961, it has increasingly become a vehicle for federal reform of unconstitutional state and local government practices. Nationwide, state criminal justice systems cry out for such ex post reform, as they continue to generate wrongful convictions at unacceptable rates with no notable preventative measures in place.

"Malicious prosecution" claims brought under § 1983 are a common mechanism for redressing state-driven wrongful convictions, but this Article asserts that they are not meeting their full reform potential. A plurality of federal courts erroneously requires plaintiffs to prove malice in support of such claims. While superficially the requirement comports with the "malicious" prosecution nomenclature, the nomenclature itself is misleading. Federal malicious prosecution claims are based on the Fourth Amendment, the purpose of which is to hold state defendants accountable for objectively unreasonable acts — not intentional, or malicious, ones.

In abandoning the Fourth Amendment's purpose, the offending courts have also ignored the real causes of wrongful convictions, and therefore have failed to further true reform. Research shows that the vast majority of wrongful convictions are driven not by malice but by cognitive biases — mental processes that filter information subjectively, causing inaccurate perceptions and objectively unreasonable decisionmaking. Although unintentional and often unconscious, cognitive biases may be ameliorated through education, exposure to divergent views, and reform of systemic factors that trigger and exacerbate bias. Reframing § 1983 relief for wrongful conviction as a question of objective unreasonableness rather than malice would tie liability more closely to: (1) nonmalicious cognitive errors that frequently taint state actors' decisions during criminal proceedings; and (2) states' failure to implement cognitive error-neutralizing practices. This change to the legal standard, accompanied by close consideration of cognitive science, has the potential to enhance plaintiffs' access to compensation and to require state reform of the true systemic causes of many wrongful convictions.

* Associate Professor of Law, CUNY School of Law. I am grateful to David Wong for inspiring this Article and teaching me invaluable lessons about effective lawyering, as well as to Mr. Wong's tireless advocates, including William Goodman, Jaykumar Menon, and Jonathan C. Moore. I thank Ann Shalleck of American University Washington College of Law for her early feedback and support of these ideas, and CUNY School of Law Library faculty Raquel J. Gabriel, Yasmin Sokkar Harker, and Jonathan Saxon for brilliant research support. Thank you also to the faculties of CUNY Law and Albany Law School for challenging comments on drafts. Finally, my sincere gratitude to the talented editors of the *Harvard Civil Rights–Civil Liberties Law Review*, particularly Zoë Brennan-Krohn, for ever so graciously providing insightful substantive suggestions and refining the details.

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Introduction

In 1980, when David Wong was just seventeen years old, he left behind his native China and settled unlawfully in the United States, where his mother hoped he could obtain an education.[1] Half a year into his new life in New York City, he was arrested for robbery and later convicted and incarcerated.[2] Wong publicly acknowledged his involvement in the robbery.[3] It was a subsequent *wrongful* conviction for the murder of a fellow inmate that would most dramatically alter Wong's life.

On March 12, 1986, while Wong was serving his sentence for robbery at the Clinton Correctional Facility in Dannemora, New York, another inmate was stabbed to death in the prison yard.[4] Correction Officer Richard F. LaPierre, who was located in a tower 400 feet from the incident as 700 similarly clad inmates circulated in the yard, identified Wong as the perpetrator.[5] The prison security leadership and state investigators fell in step, despite the implausibility of LaPierre's account and substantial exculpatory evidence. As a result, Wong was tried, convicted of murder, and ultimately sentenced to a term of twenty-five years to life in prison.[6]

Seventeen years and several appeals later, the New York State appellate court vacated Wong's conviction, based on, *inter alia*, the lack of credibility and consistency in LaPierre's account, the absence of physical evidence and motive, and uniform inmate testimony of Wong's innocence.[7] Shortly thereafter, the district attorney filed a motion, which the trial court granted, to dismiss the murder charges against Wong.[8] By that point, the wrongful conviction had kept Wong behind bars over a decade longer than he would have been incarcerated for the robbery alone.[9]

What cognitive science tells us about why such wrongful convictions occur — and how a logical reform to the prevailing § 1983 "malicious prosecution" standard could better address these causes and potentially help deter wrongful convictions — is the subject of this Article. As one of the litigators who pursued § 1983 relief on Wong's behalf, I am intimately famil-

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[1] Plaintiff's Opposition to Defendants' Summary Judgment Motion, Ex. 7 at 3–4, Wong v. LaPierre, No. 8:07-CV-1110 (N.D.N.Y. Mar. 23, 2011) (forensic psychological evaluation of Dr. Sanford L. Drob).

[2] *Id.* at 5.

[3] I-Ching Ng, *Freedom Elusive for Victim of Injustice*, S. China Morning Post, Dec. 31, 2004, at 9, *available at* http://www.scmp.com/article/483796/freedom-elusive-victim-injustice, *archived at* http://perma.cc/NNY6-2K6N.

[4] *See Wong*, No. 8:07-CV-1110, slip op. at 2–3 (order granting defendants' motion for summary judgment).

[5] *See id.* at 3–5.

[6] *See id.* at 15–16.

[7] *Id.* at 16, 18–19.

[8] *Id.* at 19.

[9] Plaintiff's Brief in Opposition to Defendants' Summary Judgment Motion at 9, *Wong*, No. 8:07-CV-1110 [hereinafter Plaintiff's Summary Judgment Opposition].

iar with his story and therefore use it to illustrate the promise of my proposed revision.[10]

Wrongful convictions like Wong's are prevalent — a sad truth made apparent in the last two decades.[11] Due to the advent of postconviction DNA testing, over 170 wrongfully convicted individuals have been exonerated since 1990.[12] "[H]undreds of additional exonerations . . . have been based on evidence other than DNA."[13] DNA exonerations may attract media attention, but the majority of wrongful convictions, like Wong's, lack biological evidence necessary for DNA testing.[14] Accordingly, these cases are "notoriously difficult to litigate,"[15] and "known exonerations almost surely reflect only the tip of a very large iceberg."[16]

The rush of exonerations has invited scholarship on the causes of wrongful convictions and potential reforms.[17] Such inquiries have revealed that errors in criminal investigations and prosecutions are commonly driven by flawed eyewitness identifications, false confessions, unreliable jailhouse informant testimony, police and prosecutorial misconduct, forensic scientific error or fraud, and inadequate defense counsel.[18] Professors Keith Findley and Michael Scott have argued that "[a] theme running through almost every case, that touches each of these individual causes, is the problem of tunnel vision."[19]

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[10] Although I represented Wong in his § 1983 action, I limit the information revealed in this Article to what is in the public record.

[11] *See* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 291–92 (2006); Daniel S. Medwed, *Anatomy of a Wrongful Conviction: Theoretical Implications and Practical Solutions*, 51 VILL. L. REV. 337, 337–38 & n.6 (2006).

[12] Findley & Scott, *supra* note 11, at 291.

[13] *Id.*

[14] Medwed, *supra* note 11, at 356; *see also Protecting the Innocent: Proposals to Reform the Death Penalty: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 917 (2002) (statement of Barry Scheck) ("The vast majority (probably 80%) of felony cases do not involve biological evidence that can be subjected to DNA testing."); Nina Martin, *Innocence Lost*, S.F. MAG., Nov. 2004, at 78, 105, *available at* http://deathpenalty.org/downloads/SFMag.pdf, *archived at* http://perma.cc/R29J-QCLM (noting that "only about 10 percent of criminal cases have any biological evidence — blood, semen, skin — to test").

[15] Medwed, *supra* note 11, at 356–57; *accord*, Hugo Adam Bedau et al., *Convicting the Innocent in Capital Cases: Criteria, Evidence, and Inference*, 52 DRAKE L. REV. 587, 602 (2004) ("Even when DNA evidence is at hand, however, it does not always lead in a steady path to the vindication of an innocent defendant. The evidence still has to be handled properly, and the testing has to be done by independent and appropriately trained scientists."); *see also* Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655, 656–61 (2005) (analyzing procedural obstacles involved in litigating postconviction non-DNA claims of innocence).

[16] Findley & Scott, *supra* note 11, at 291.

[17] *Id.* at 292.

[18] *Id.*; *see also* BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 246 (2000).

[19] Findley & Scott, *supra* note 11, at 292.

Tunnel vision refers to a "compendium of common heuristics and logical fallacies"[20] stemming from various "cognitive biases,"[21] including confirmation bias and hindsight bias.[22] These biases pervade criminal proceedings throughout, from case investigation to prosecution (plea-bargaining or trial), appeal, and postconviction phases.[23] Tunnel vision drives wrongful convictions by inducing investigators, prosecutors, judges, and defense lawyers to "focus on a suspect, select and filter the evidence that will 'build a case' for conviction, while ignoring or suppressing evidence that points away from guilt."[24]

For the purposes of this Article, most significant is that tunnel vision is thought to be an *unintentional* product of the human condition, rather than an affliction of the malicious state of mind.[25] This fact becomes critical in the context of civil relief for individuals whose convictions, like Wong's, have been vacated. Once Wong was finally released from prison, civil damages were his main recourse against the prison guards and state investigator who for years had perpetuated error upon error in investigating, prosecuting, and convicting Wong. Wong's central claim of "malicious prosecution," a common mechanism for securing postconviction federal relief, encompassed the crux of his injury — his unlawful seizure by the government from arraignment through the postconviction dismissal of charges. Such civil relief would hinge not on whether the state defendants acted erroneously (though unintentionally), but on whether they acted *maliciously* in pursuing Wong criminally.

Perpetuating a legal standard that is constitutionally and cognitively faulty, and which arguably hinders civil rights reform, the Second, Third, Ninth, Tenth, and Eleventh Circuits have held that malice is a necessary element of a § 1983 "malicious prosecution" claim.[26] Both the "malice" element, and the nomenclature of "malicious prosecution" that makes the element superficially logical, are misguided. Federal "malicious prosecution" claims are grounded in the Fourth Amendment, which demands an analysis of "objective reasonableness" rather than subjective intent.[27] Recognizing this, the Fourth and Sixth Circuits have excluded malice from the

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[20] Diane L. Martin, *Lessons About Justice from the "Laboratory" of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence*, 70 UMKC L. REV. 847, 848 (2002).

[21] Findley & Scott, *supra* note 11, at 308–09. This Article uses the terms "cognitive bias" and "cognitive distortion" interchangeably.

[22] These cognitive biases are defined *infra* Part III.

[23] *Id.* at 295; *see also* Martin, *supra* note 20, at 850 (describing tunnel vision during the police investigation stage).

[24] Martin, *supra* note 20, at 848.

[25] Findley & Scott, *supra* note 11, at 292.

[26] *See infra* note 68 and accompanying text. Wong filed his § 1983 action in the Northern District of New York, which sits in the Second Circuit.

[27] Graham v. Connor, 490 U.S. 386, 399 (1989).

analysis and have suggested renaming the "malicious prosecution" claim accordingly.[28]

That numerous federal courts require wrongfully convicted plaintiffs to prove malice is problematic in two fundamental and inextricably linked ways: (1) a malice requirement strips § 1983 of a core purpose and power — to hold accountable state actors who unintentionally, but unreasonably and wrongfully, deprive individuals of their right to liberty; and (2) a malice requirement simultaneously disregards the lessons of cognitive psychology — that unintentional yet unreasonable acts drive many wrongful convictions and must be addressed if we are to reform the criminal justice system. Moreover, as a consequence of the malice requirement, malicious prosecution claims are among the hardest causes of action to prove.[29]

While the courts rejecting a malice requirement recognize the first problem, they neglect the second one entirely. To fill this significant gap, this Article uses cognitive science to explain that the need for a change in the prevailing legal standard is not merely a theoretical one, because reality — how wrongful convictions occur in the world — requires it, if we are to have a chance at true criminal justice reform.

Neglecting cognitive science and the reformist origins of § 1983 comes at a high cost. Even after wrongly pursued criminal charges have been dismissed, the government typically does not acknowledge its culpability, let alone offer its wrongfully convicted victims resources for reentering society.[30] Thus, it is particularly critical that individuals like Wong have meaningful access to monetary reparations for lost years of liberty and emotional well-being. Section 1983 waits on the back end, after the criminal justice system and its operators have already failed most miserably, to provide plaintiffs with some compensation for their injuries.[31] Moreover, § 1983 ac-

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[28] *See infra* notes 72–83 and accompanying text.

[29] "Malicious prosecution is one of the most difficult causes of action to prove and many cases go down in flames by a directed verdict if not sooner by a summary judgment. The reason for this is the requirement that defendant's institution of either civil or criminal proceedings be dictated by *malice*." 1 LOUIS A. LEHR, JR., PREMISES LIABILITY 3D § 2:18 (2014 ed.) (emphasis added).

[30] *See, e.g.*, Alafair S. Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J.L. & LIBERTY 512, 518 (2007) ("In many of the recent exoneration cases, for example, prosecutors have continued to insist that the exonerated defendant is guilty, even when exculpatory DNA evidence undermines the government's initial case."); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 898–900 (2004) (noting that during the infamous Central Park Jogger case, even after DNA testing confirmed the true rapist's confession, former prosecutors and the police department criticized the district attorney's office for moving to vacate and set aside the wrongful convictions). The government's imperviousness to exoneration is yet another example of cognitive bias.

[31] "Malicious prosecution" claims pursuant to § 1983 are an essential source of compensation for the wrongfully convicted. The following twenty states do not have compensation statutes of their own: Alaska, Arizona, Arkansas, Delaware, Georgia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Michigan, Nevada, New Mexico, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, and Wyoming. *Compensating the Wrongly Convicted*, INNOCENCE PROJECT (Oct. 10, 2014, 9:20 AM), http://www.innocenceproject.org/free-

tions, including "malicious prosecution" claims, can lead to systemic reform — indirectly, by attaching a heavy fiscal price to wrongful convictions (through both damages and attorneys' fees[32]), as well as directly, through injunctive relief against institutions.

For § 1983 to achieve its full potential as a meaningful source of monetary compensation and systemic reform in the malicious prosecution context, it must tie liability to the types of nonmalicious cognitive errors that frequently taint the various phases of criminal proceedings. This Article proposes an objective "unreasonable prosecution" standard that would ask whether a state actor is engaged in conduct reasonably likely to lead to an accurate conviction. Such a standard would make relevant for individual liability purposes whether a defendant submitted to cognitive biases that led to unreasonable decisions in the criminal investigation and prosecution processes. In addition, attention to the cognitive psychology behind wrongful convictions would open a new avenue to plaintiffs for pursuing municipal liability. Though unintentional, tunnel vision is triggered and exacerbated by systemic practices that states establish and can influence, and tunnel vision can be mitigated through education and debiasing strategies. Accordingly, plaintiffs could challenge not only individual state actions stemming from cognitive bias, but also municipal policies that systemically generate wrongful convictions by fostering or failing to mitigate cognitive bias.

These changes would better reflect human behavior as we understand it today, would give plaintiffs an improved chance of securing some civil justice after years of wrongful incarceration, and would honor § 1983 by encouraging states to remedy patterns and practices that lead to wrongful convictions. Given the lack of uniformity in federal "malicious prosecution" jurisprudence, there is plenty of room to envision such an alternative.

This Article proceeds as follows: Part I sets out the prevailing legal standard for federal "malicious prosecution" claims, which requires a showing of "malice," and uses Fourth and Sixth Circuit jurisprudence to describe a preferable alternative — the "objective reasonableness" standard that derives from the Fourth Amendment. Accordingly, Part I proposes a shift in terminology from "malicious prosecution" to "unreasonable prosecution," while recognizing the need to shape an "objective reasonableness" standard that is less deferential to the government than current jurisprudence. Part II uses cognitive psychology as a tool to shape the "objective reasonableness" standard in the wrongful conviction context, describing the kinds of cogni-

innocent/improve-the-law/fact-sheets/compensating-the-wrongly-convicted, *archived at* http://perma.cc/PYH4-H63D. Moreover, existing compensation statutes fail to provide adequate compensation. *See id.*

[32] *See* 42 U.S.C. § 1988(b) (2012) (authorizing courts to award reasonable attorneys' fees to the prevailing party in a § 1983 action). Such fees have become an integral part of § 1983 remedies. *See* MARTIN A. SCHWARTZ & KATHRYN R. URBONYA, SECTION 1983 LITIGATION 3 (2d ed. 2008), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/sec19832.pdf/$file/sec19832.pdf, *archived at* http://perma.cc/WR3E-EHSU.

tive distortions that lead to wrongful convictions. Part III applies the concepts explained in Part II to the facts of the Wong case to illustrate how they operate and how they could be useful for obtaining civil relief pursuant to § 1983 against individual defendants. Part IV uses cognitive psychology to propose a new avenue of relief against municipal defendants.

I. Section 1983 "Malicious Prosecution" is a Fourth Amendment Claim, Requiring Proof of Objective Unreasonableness, Rather than Malicious Intent

A. Section 1983 is a Vehicle for Reform of State Practices

Congress passed the Civil Rights Act of 1871[33] in response to the failure of southern state police and state courts to control the Ku Klux Klan's rampant violence against African Americans.[34] Section 1 of that Act is now embodied in 42 U.S.C. § 1983, which authorizes private parties to enforce their federal constitutional rights, and some federal statutory rights, against defendants who act under color of state law.[35] Section 1983 does not itself establish any federally protected rights.[36] Rather, the statute provides plaintiffs with a cause of action for enforcing federal rights already established by the Constitution or by other federal statutes.[37]

Section 1983 makes a wide range of federal constitutional rights enforceable against state defendants. For example, under the Fourteenth Amendment, these rights include substantive and procedural due process, the equal protection of the laws, and rights incorporated from the Bill of Rights by the Due Process Clause.[38] "These incorporated rights include rights protected by the First Amendment free speech and religion clauses . . . , the Fourth Amendment protection against unreasonable searches and seizures, and the Eighth Amendment protection against cruel and unusual punishment."[39]

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[33] 17 Stat. 13 (1871).

[34] Erwin Chemerinsky, Federal Jurisdiction § 8.2 (6th ed. 2012); Martin A. Schwartz, Section 1983 Litigation Claims and Defenses § 1.03 (4th ed. 2003 & Supp. I 2015), *available at* Westlaw SNETLCD.

[35] *See* Schwartz, *supra* note 34, §§ 1.01, 1.04. Section 1983 reads as follows:

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

42 U.S.C. § 1983 (2012).

[36] Schwartz, *supra* note 34, § 1.05.

[37] *Id.*

[38] Schwartz & Urbonya, *supra* note 32, at 24.

[39] *Id.*

In *Monroe v. Pape*,[40] the United States Supreme Court articulated a critical purpose of § 1983:

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance, or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.[41]

Thus, Congress "interpose[d] the federal courts between the States and the people, as guardians of the people's federal rights."[42]

With the *Monroe* decision, § 1983 became the vehicle for constitutional litigation against state officials. At first, § 1983 plaintiffs sought monetary damages against individual state officials.[43] Over time, plaintiffs also began to sue state officials for prospective injunctive relief, and to name cities and counties as defendants.[44] Although the Eleventh Amendment precludes § 1983 suits against nonconsenting states, potential defendants include local and municipal entities violating the law through policies, custom or practice, inadequate training, or inadequate hiring.[45] "Ultimately, the federal court became the place to reform state and local governmental practices."[46]

B. Federal "Malicious Prosecution" is a Fourth Amendment Claim

In theory and purpose, § 1983 provides federal courts a valuable opportunity to reform state criminal justice systems that otherwise trample on criminal defendants' civil rights. Potential constitutionally based claims against state law enforcement include excessive force, abuse of civil process, false arrest, unreasonable search, and malicious prosecution.[47] Malicious prosecution is the subject of this Article.

In the United States, malicious prosecution emerged after the Revolutionary War from English law as a common law tort to remedy the misuse of

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[40] 365 U.S. 167 (1961), *rev'd on other grounds*, Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

[41] *Id.* at 180. The *Monroe* Court also articulated the purposes of § 1983 as follows: (1) to "override certain kinds of state laws," (2) to provide "a remedy where state law was inadequate," and (3) "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice." *Id.* at 173–74.

[42] Mitchum v. Foster, 407 U.S. 225, 242 (1972).

[43] SCHWARTZ & URBONYA, *supra* note 32, at 2. Qualified immunity doctrine has made it more difficult to prevail against government officials performing discretionary functions, generally shielding them from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[44] SCHWARTZ & URBONYA, *supra* note 32, at 2.

[45] 1 STEVEN H. STEINGLASS, SECTION 1983 LITIGATION IN STATE COURTS § 15:5 (2014).

[46] SCHWARTZ & URBONYA, *supra* note 32, at 2.

[47] SCHWARTZ, *supra* note 34, §§ 3.12, 3.15–.16, 3.18–.19, 3.21.

criminal process.[48] Because § 1983 does not create or establish any federal rights, but rather makes liable state actors who deprive others of rights secured by the United States Constitution,[49] a claim of malicious prosecution is only actionable under § 1983 if it encompasses a violation of a particular constitutional right.[50] Federal "malicious prosecution" jurisprudence has been far from coherent or uniform in addressing whether malicious prosecution triggers certain constitutional provisions and, if so, which ones.

In *Albright v. Oliver*,[51] the Supreme Court spoke disjointedly on the question of which constitutional principles govern § 1983 malicious prosecution claims, leaving the circuits without clear guidance.[52] The *Albright* plurality ruled that an arrested individual may base a claim of criminal prosecution without probable cause only on the Fourth Amendment, not on substantive due process.[53] Using a different rationale, Justice Souter came to the same conclusion.[54] Accordingly, most lower courts have required that a plaintiff base her § 1983 malicious prosecution claim on the Fourth Amendment, and prove that she suffered a significant deprivation of liberty between arraignment and dismissal of her criminal charges.[55] Confusion nonetheless prevails because the Supreme Court has "never explored the contours of a Fourth Amendment malicious-prosecution suit under § 1983."[56]

This Article assumes that the Fourth Amendment governs the full range of violations by state actors that lead to wrongful convictions — from arrest through the postconviction dismissal of charges.[57] In addition to joining the *Albright* plurality, Justice Ginsburg authored a concurrence interpreting the Fourth Amendment's reach in just this way.[58] Justice Ginsburg opined that "seizure" under the Fourth Amendment encompasses not only false arrest, but also other methods by which the state retains control over a defendant's person, including through criminal charges to which a defendant must an-

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[48] Jacques L. Schillaci, Note, *Unexamined Premises: Toward Doctrinal Purity in Section 1983 Malicious Prosecution Doctrine*, 97 NW. U. L. REV. 439, 443–46 (2002).

[49] SCHWARTZ, *supra* note 34, § 1.05; *see also* 42 U.S.C. § 1983 (2012).

[50] SCHWARTZ, *supra* note 34, § 3.18. Since there is no federal statute prohibiting malicious prosecution, the fact that § 1983 also provides a cause of action for enforcing federal statutory rights, *see supra* note 37 and accompanying text, is not relevant here.

[51] 510 U.S. 266 (1994).

[52] *See generally id.* (six separate, nonmajority opinions); *see also* MARTIN A. SCHWARTZ & GEORGE C. PRATT, SECTION 1983 LITIGATION JURY INSTRUCTIONS § 8.03[A] (2014) (describing post-*Albright* uncertainty across the circuits).

[53] *Albright*, 510 U.S. at 271–75 (plurality opinion).

[54] *See id.* at 286–89 (Souter, J., concurring in the judgment).

[55] *See* SCHWARTZ & PRATT, *supra* note 52, § 8.03[A].

[56] Wallace v. Kato, 549 U.S. 384, 390 n.2 (2007).

[57] The Supreme Court has concluded that "malicious prosecution" is "entirely distinct" from "false arrest" because malicious prosecution "remedies detention accompanied not by absence of legal process, but by *wrongful institution* of legal process." *Id.* at 390. Although this Article focuses on federal malicious prosecution claims because many courts use an improper standard to adjudicate them, other potential § 1983 claims following a wrongful conviction include false arrest and due process violations.

[58] *See generally Albright*, 510 U.S. at 276–81 (Ginsburg, J., concurring).

swer in court.[59] Thus, a defendant remains "effectively 'seized' for trial so long as the prosecution against him remain[s] pending."[60] By the same rationale, if an officer gives misleading testimony at a hearing, "that testimony serve[s] to maintain and reinforce the unlawful haling of [the defendant] into court, and so perpetuate[s] the Fourth Amendment violation."[61]

Justice Ginsburg emphasized that "this conception of a seizure and its course recognizes that the vitality of the Fourth Amendment depends upon its constant observance by police officers."[62] It is this broad conception of the Fourth Amendment's scope that animates the rest of the discussion in this Article. Since § 1983 "malicious prosecution" actions review state actors' conduct from arraignment to the postconviction dismissal of charges, it is critical to consider the factors that contribute to wrongful convictions at each of these stages.

C. Objective Reasonableness, Rather than Subjective Intent, is the Correct Test for Federal "Malicious Prosecution" Claims

Fending for themselves, lower federal courts frequently have used the elements of the common law tort of malicious prosecution to assess § 1983 "malicious prosecution" claims.[63] The Fifth Circuit has described two broad, but closely related, approaches in the circuit courts.[64] One approach requires proof of all common law elements of malicious prosecution, usually based on the law of the state where the offense occurred, as well as proof of a constitutional violation such as deprivation of liberty under the Fourth Amendment.[65] The second approach views common law malicious prosecution as unenforceable under § 1983, but looks to the common law elements of the tort as needed to assist the enforcement of analogous constitutional violations, such as seizures under the Fourth Amendment.[66]

The four common law elements required under the first approach vary across jurisdictions in terms of specific wording and analytical nuance, but generally can be summarized as follows: (1) the defendant instituted or supported a criminal proceeding against the plaintiff; (2) the proceeding terminated in the plaintiff's favor (for example, by a dismissal of charges or a finding of not guilty); (3) there was no probable cause to support the defen-

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[59] *Id.* at 277–79.
[60] *Id.* at 280.
[61] *Id.* at 279.
[62] *Id.*
[63] *See* SCHWARTZ & PRATT, *supra* note 52, § 8.03[A].
[64] *See* Castellano v. Fragozo, 352 F.3d 939, 949 (5th Cir. 2003).
[65] *Id.* at 949–50; *see, e.g.*, Grider v. City of Auburn, 618 F.3d 1240, 1256 (11th Cir. 2010); Manganiello v. City of New York, 612 F.3d 149, 160–61 (2d Cir. 2010); McKenna v. City of Philadelphia, 582 F.3d 447, 461 (3d Cir. 2009); Lassiter v. City of Bremerton, 556 F.3d 1049, 1054 (9th Cir. 2009); Wilkins v. DeReyes, 528 F.3d 790, 799 (10th Cir. 2008).
[66] *See, e.g.*, Sykes v. Anderson, 625 F.3d 294, 308–10 (6th Cir. 2010); Brooks v. City of Winston-Salem, 85 F.3d 178, 184 n.5 (4th Cir. 1996).

dant's charges; and (4) the defendant's actions were malicious or motivated by something other than bringing the guilty to justice.[67]

This Article challenges courts' incorporation of the fourth requirement into federal, Fourth Amendment-based "malicious prosecution" claims. As elaborated below, by focusing on a defendant's subjective state of mind, courts squander the opportunity instead to examine whether the defendant acted in a manner reasonably likely to lead to an accurate conviction — the inquiry most appropriate under the Fourth Amendment and most likely to reform state criminal justice systems that generate wrongful convictions in a haze of cognitive distortions.

A plurality of circuits has erred on this score. Transposing common law into § 1983 liability, the Second, Third, Ninth, Tenth, and Eleventh Circuits have specifically ruled that malice is an element of a § 1983 malicious prosecution claim.[68] Under common law:

> [Malice] has been variously defined as: the intent, without justification or excuse, to commit a wrongful act; ill will, evil motive, gross indifference, or reckless disregard of the rights of others; ill will in the sense of spite, lack of belief by the actor himself in the propriety of the prosecution, or its use for an extraneous improper purpose; and making a charge with knowledge that it is false or with reckless disregard for the truth.[69]

Malice extends to proceedings "instituted primarily for an improper purpose," even in the absence of "actual hostility, ill will, or a grudge or desire for revenge toward the plaintiff."[70] Malice may be inferred from "mere wantonness or carelessness if the actor, when doing the act, knows it to be wrong or unlawful."[71] This attention to the subjective state of mind of the state actor — albeit on a definitional spectrum from evil motive to reckless,

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[67] *See* SCHWARTZ, *supra* note 34, § 3.18; Schillaci, *supra* note 48, at 445.

[68] *See Grider*, 618 F.3d at 1256 n.24; *Manganiello*, 612 F.3d at 160–61; *McKenna*, 582 F.3d at 461; *Lassiter*, 556 F.3d at 1054; *Wilkins*, 528 F.3d at 799; *see also* Kingsland v. City of Miami, 382 F.3d 1220, 1234–35 (11th Cir. 2004); Awabdy v. City of Adelanto, 368 F.3d 1062, 1067 (9th Cir. 2004).

[69] 4 HOWARD FRIEDMAN & CHARLES J. DIMARE, LITIGATING TORT CASES § 50:37 (2013) (footnotes omitted); *see also Manganiello*, 612 F.3d at 163 (holding that "malice may be shown by proving that the prosecution at issue was undertaken from improper or wrongful motives, or in reckless disregard of the rights of the plaintiff"); *Wilkins*, 528 F.3d at 801 (holding that the malice element can be met if it is proven that officers knowingly relied on false evidence).

[70] FRIEDMAN & DIMARE, supra note 69.

[71] *Id.* Malice may also be inferred from an obvious lack of probable cause. *Id.* Professor Dan Dobbs, however, has warned against conflating probable cause and malice issues, reasoning that "if malice or improper purpose can be inferred anytime probable cause is lacking, then malice does not look like an independent element of the plaintiff's case at all. The Restatement has accordingly attempted to limit the inference to cases in which the lack of probable cause shows the accuser did not believe the charges he brought." DAN B. DOBBS ET AL., THE LAW OF TORTS § 589 (2d ed. 2014). That some courts nonetheless conflate probable cause and malice issues does not quiet this Author's concerns. Whether courts employ the malice standard directly or indirectly, by failing to assess the reasonableness of state actors' conduct

or conscious, disregard — is in friction with this Article's contention that even unconscious processes leading to the objectively unreasonable actions of state actors should factor into what has traditionally been termed a "malicious prosecution."

While requiring "malice" to prove "malicious prosecution" may seem logical as a matter of linguistics, at least two circuits have recognized that the surface appeal of this approach is misguided. Indeed, the Fourth and Sixth Circuits have explicitly rejected the malice element, reasoning that federal claims traditionally labeled "malicious prosecution" require a showing of an *unreasonable* seizure under the Fourth Amendment,[72] which is not concerned with a defendant's subjective state of mind.[73] These circuits follow Supreme Court precedent holding that "[t]he Fourth Amendment inquiry is one of 'objective reasonableness' under the circumstances, and subjective concepts like 'malice' and 'sadism' have no proper place in that inquiry."[74]

In *Sykes v. Anderson*,[75] the Sixth Circuit articulated with specificity for the first time the elements of a Fourth Amendment malicious prosecution claim under 42 U.S.C. § 1983.[76] In doing so, the court excluded the common law malice element, critiquing circuits that require malice for failing to recognize an independent constitutional tort actionable under § 1983:

> This circuit has never required that a plaintiff demonstrate "malice" in order to prevail on a Fourth Amendment claim for malicious prosecution, and we join the Fourth Circuit in declining to impose that requirement. The circuits that require malice have imported elements from the common law without reflecting on their consistency with the overriding *constitutional* nature of § 1983 claims. Common-law and § 1983 claims have different foundations. As the Supreme Court explained in *Albright v. Oliver*, "the constitutional tort 42 U.S.C. § 1983 authorizes stands on its own, influenced by the substance, but not tied to the formal categories and procedures, of the common law."[77]

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through a cognitive science lens, they miss a critical opportunity to address the true causes of wrongful convictions.

[72] *See* U.S. CONST. amend. IV. A "seizure" triggering the Fourth Amendment's protections occurs only when government actors have, "by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen." Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968); *see also* Brower v. Cnty. of Inyo, 489 U.S. 593, 596 (1989) ("A seizure occurs even when an unintended person or thing is the object of the detention or taking, but the detention or taking itself must be willful." (citations omitted)).

[73] *See* Sykes v. Anderson, 625 F.3d 294, 309–10 (6th Cir. 2010); Brooks v. City of Winston-Salem, 85 F.3d 178, 184 n.5 (4th Cir. 1996).

[74] *See* Graham v. Connor, 490 U.S. 386, 399 (1989).

[75] 625 F.3d 294 (6th Cir. 2010).

[76] *Id.* at 308–09.

[77] *Id.* at 309 (citations omitted) (quoting Albright v. Oliver, 510 U.S. 266, 277 n.1 (1994) (Ginsburg, J., concurring)); *see also* Frantz v. Village of Bradford, 245 F.3d 869, 874–75 (6th Cir. 2001) (holding that "*Albright* precludes reliance on state law to define § 1983 federal

The Fourth and Sixth Circuits have emphasized that, for a malicious prosecution claim to be actionable under § 1983, it must support a violation of the Fourth Amendment without probing a defendant's mental state. Specifically, the Sixth Circuit said, "the Fourth Amendment violation that generates a § 1983 cause of action obviates the need for demonstrating malice . . . [because] Fourth Amendment jurisprudence makes clear that we should not delve into the defendants' intent."[78] Relying on the Supreme Court, the Fourth Circuit in *Brooks v. City of Winston-Salem*[79] similarly concluded that "the reasonableness of a seizure under the Fourth Amendment should be analyzed from an objective perspective," such that "the subjective state of mind of the defendant, whether good faith or ill will, is irrelevant."[80]

That circuit courts overwhelmingly continue to conflate the common law and constitutional torts reinforces what the Sixth Circuit recognized — that "designating the constitutional claim one for '*malicious* prosecution' is both unfortunate and confusing."[81] Instead, the Sixth Circuit proposed that "unreasonable prosecutorial seizure" might better "grasp the essence of this cause of action under applicable Fourth Amendment principles."[82] The court had also previously described malicious prosecution claims under the Fourth Amendment as "encompass[ing] *wrongful* investigation, prosecution, conviction, and incarceration."[83]

The Fourth and Sixth Circuits' focus on the objective wrongs generated by our criminal justice system, whether those wrongs are malicious or not, circles back to the original purpose of § 1983 — to protect individuals from civil rights abuses perpetuated by entrenched state practices.[84] The malice requirement is a byproduct of the rich common law history of the malicious prosecution tort, which evolved largely to hold accountable private citizens who lay baseless charges, without punishing the "honest but ignorant accuser."[85] This history does not apply to claims based on § 1983, which "aimed not only at state officials who intentionally deprived citizens of their

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cause of action" and rejecting "the reasoning of courts which have relied on the state law elements of malicious prosecution"); Darrah v. City of Oak Park, 255 F.3d at 301, 311–12 (6th Cir. 2001) (confirming that the above-quoted language in *Frantz* survived abrogation).

[78] *Sykes*, 625 F.3d at 309.

[79] 85 F.3d 178 (4th Cir. 1996).

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

[81] *Sykes*, 625 F.3d at 310 (emphasis added) (quoting *Frantz*, 245 F.3d at 881 (Gilman, J., dissenting)); *see also* Newsome v. McCabe, 256 F.3d 747, 751 (7th Cir. 2001) ("[I]f a plaintiff can establish a violation of the fourth (or any other) amendment there is nothing but confusion to be gained by calling the legal theory 'malicious prosecution.'").

[82] *Sykes*, 625 F.3d at 310 (quoting *Frantz*, 245 F.3d at 881 (Gilman, J., dissenting)).

[83] Barnes v. Wright, 449 F.3d 709, 716 (6th Cir. 2006) (emphasis added).

[84] As acknowledged *infra* section I.D, the "objective reasonableness" standard is far from a panacea as currently applied by courts. Indeed, for it to be more than another mechanism for insulating all but the most obviously incompetent state actors from liability, it must be significantly reconceived.

[85] Schillaci, *supra* note 48, at 468.

rights, but also at state actors who simply failed to protect such rights."[86] The state officials targeted by § 1983 are "repeat players" whose actions, whether stemming from malignant intent or negligence, have a tremendous impact that must be curtailed by states through improved training of its law enforcement personnel and other measures designed to reduce the likelihood of wrongful convictions.[87] Reliance on the intent element of the malicious prosecution tort allows state actors to escape consequence even as they continuously generate inaccurate convictions that epitomize the wrongs § 1983 called on federal courts to correct.[88]

D. The Correct Standard Should Examine State Conduct in Terms of Its Reasonable Likelihood to Lead to Accurate Investigations and Prosecutions, Regardless of Typicality

This Article embraces the reasonableness standard cautiously, and with a number of caveats, due to significant flaws in the standard's application. Other commentators have concluded that reasonableness review in the Fourth Amendment context is highly deferential to the government, with courts finding state conduct reasonable as long as they "can identify any plausible goal or reason that promotes law enforcement."[89] Such deference contradicts the goal of § 1983[90] and the Fourth Amendment[91] to hold state power in check, and is antithetical to the reformist aspirations of this Article.

Moreover, the reasonableness standard remains ill-defined, generally leaving courts unbridled discretion to balance the interests of the government against those of the individual.[92] Courts are thus free to issue inconsistent rulings and to defer to the state, considering and disregarding particular circumstances as they see fit.[93] Courts are also free, as feminist and critical race theorists have warned, to turn the purportedly *objective* reasonableness

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[86] *Id.* at 470 (citing the Civil Rights Act of 1871 and contemporary congressional hearings).

[87] *Id.*

[88] *See id.* at 442, 465–66 (citing RONALD JAY ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE 413 (2001) ("Fourth Amendment law is generally structured so as to make police motive irrelevant . . . .")), 468–71.

[89] Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 200 (1993); see also Cynthia Lee, *Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis*, 81 MISS. L.J. 1133, 1147–48 (2012).

[90] *See supra* section I.A.

[91] Lee, *supra* note 89, at 1148.

[92] *Id.* at 1149.

[93] *See id.*; Thomas Y. Davies, *Can You Handle the Truth? The Framers Preserved Common-Law Criminal Arrest and Search Rules in "Due Process of Law" — "Fourth Amendment Reasonableness" Is Only a Modern, Destructive, Judicial Myth*, 43 TEX. TECH. L. REV. 51, 55 (2010) ("The beauty of 'Fourth Amendment reasonableness' — at least from the [J]ustices' points of view — is that it can carry whatever content the [J]ustices choose to give it."); Gerald S. Reamey, *When "Special Needs" Meet Probable Cause: Denying the Devil Benefit of Law*, 19 TEX. HASTINGS CONST. L.Q. 295, 299–300, 327 (1992) (arguing the reasonableness standard results in "ad-hoc and unprincipled" decisionmaking).

standard into a vehicle of judges' own biases, as they view what is reasonable myopically — generally through white, male, wealthy eyes.[94]

While I share these significant concerns about the fairness of the reasonableness standard, I take a pragmatic approach. The Supreme Court is not likely to discard the reasonableness test anytime soon, so developing guidelines for reasonableness assessment may be a more practical reform to the "malicious prosecution" claim. For instance, Professor Cynthia Lee has advanced a "reasonableness with teeth" standard in the search and seizure context, arguing that factors for assessing reasonableness should be set out in advance to ensure that courts subject government claims of reasonableness to rigorous scrutiny.[95]

To assess whether the government acted reasonably in investigating and prosecuting what ultimately proves a wrongful conviction, this Article proposes that courts objectively consider whether government actors made choices reasonably likely to lead to an accurate determination of guilt. As illustrated below, cognitive science can help identify and explain unreasonable state action and thereby aid courts in conducting rigorous scrutiny.

This paradigm consciously distinguishes typical behavior from reasonable behavior. That is, while cognitive bias is typical of the human condition, it may nonetheless amount to unreasonable state conduct in the prosecution context when it systematically leads to conviction of the innocent. Professor Jody Armour draws a similar line between typicality and reasonableness in the context of racism.[96] Professor Armour rejects arguments of the "Reasonable Racist," who considers her victim's race before using force because she believes African Americans are prone to violence, but claims she should be excused for acting with prejudice because most similarly situated Americans would do the same.[97] While Professor Armour grudgingly admits that "it is unrealistic to dispute the depressing conclusion that, for many Americans, crime has a black face,"[98] she condemns the "Reasonable Racist's" self-defense claim for assuming that the sole objective of criminal law is to punish those who deviate from statistically defined norms.[99] She concludes that "not all 'typical' beliefs are per se reasonable" because the reasonableness inquiry considers social interests, including accuracy and moral justification, that typical beliefs may not advance.[100]

Just as typical racist beliefs may be unreasonable because they are inaccurate and morally blameworthy, cognitive biases are unreasonable when they systematically lead to conviction of the innocent — the essence of

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[94] *See* Lee, *supra* note 89, at 1150; Dana Raigrodski, *Reasonableness and Objectivity: A Feminist Discourse of the Fourth Amendment*, 17 TEX. J. WOMEN & L. 153, 187 (2008).

[95] Lee, *supra* note 89, at 1160.

[96] Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 787–90 (1994).

[97] *Id.* at 787–88.

[98] *Id.* at 787.

[99] *Id.* at 787–88.

[100] *Id.* at 788.

profound inaccuracy and moral reprehensibility. While the "Reasonable Racist" might argue that blame should be reserved for the statistically deviant, Professor George Fletcher has noted that the actual moral norm implicit in the analogous "reasonable man test" is that blame applies to those who fail to overcome character flaws that they fairly can be expected to surmount for the sake of important social interests.[101] State actors who accept the highly consequential role of shaping a criminal defendant's fate, and who operate in a system long plagued by errors leading to wrongful convictions, must be expected to acknowledge and surmount the influence of cognitive biases for the sake of important social interests in fairness and liberty.

E. Application of the "Malice" Requirement in David Wong's § 1983 Action Improperly Shifted the Focus Away from Cognitive Bias, the Likeliest Cause of Wrongful Conviction

On October 18, 2007, Wong filed a federal action in the Northern District of New York pursuant to 42 U.S.C. § 1983, alleging, *inter alia*, malicious prosecution against prison personnel Richard LaPierre, Roger Nelson, Joseph Wood, and John D. Carey, as well as state investigator Thomas Hickey.[102] The court evaluated the record on the defendants' motion for summary judgment for evidence of every element of a common law malicious prosecution tort, including "malice."[103] To find malice, the court looked for inferential proof of the defendants' overtly intentional conduct — fabrication of evidence, falsification of inculpatory testimony and statements, and concealment of exculpatory evidence.[104]

The malice standard, and the attending focus on questions of intentionality, obscured the forces more likely at play in Wong's conviction — systemic cognitive biases that scientists tell us commonly drive wrongful convictions.[105] As the defendants denied intentional wrongdoing, they escaped confronting the institutional problems sure to cause future wrongful convictions.

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[101] George P. Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269, 1291 (1974). While Professors Armour and Fletcher rest their analyses on the subjective "reasonable person test" applicable to tort and criminal law, Armour, *supra* note 96, at 789, the same concepts would seem applicable to the ill-defined Fourth Amendment objective reasonableness test. In the Fourth Amendment objective reasonableness context — as in the reasonable person context — the consideration of important social interests naturally enters the balancing test. Actions and decisions leading to wrongful conviction have such a high social cost that they arguably tip the scales toward a sort of strict liability.

[102] Wong v. LaPierre, No. 8:07-CV-1110, slip op. at. 2 (N.D.N.Y. Mar. 23, 2011) (order granting defendants' motion for summary judgment). The ability to assert a § 1983 claim against officers who furnish information to prosecutors is particularly important, given that prosecutors are likely to have absolute prosecutorial immunity.

[103] *Id.* at 33.

[104] *Id.* at 32–33.

[105] Specific cognitive biases are identified and defined *infra* Part II, and applied directly to the Wong case *infra* Part III.

The Fourth Amendment's "objective reasonableness" test imposes a different, more appropriate, burden for federal "malicious prosecution" actions. An objective standard is also, as it turns out, a more accurate way to hold state actors accountable for the unintentional or unconscious, yet still unreasonable, conduct that often drives wrongful convictions in our criminal justice system. Below, this Article uses concepts from cognitive science to explain why unintentional, wrongful conduct so commonly propels criminal prosecutions, and then uses the Wong case to demonstrate how courts might employ these concepts to assess whether the state actors behind wrongful convictions acted reasonably.

II. Systemically Driven Cognitive Biases Lead to "Unreasonable Prosecutions"

The Fourth Amendment's "objective reasonableness" standard has the potential to target inaccurate and unreliable prosecutions, rather than just badly motivated ones. In electing to require malice and fixate on such markers as intentional fabrication or falsification, a majority of courts has turned a blind eye to the more common, systemic causes of wrongful convictions and therefore perpetuated those causes. Reform requires judges and juries to examine evidence of "malicious prosecution" in terms of state actors' failures to exercise reason in pursuing a prosecution. Cognitive psychologists provide a vocabulary and explanations for unintentional, faulty thought processes that, by definition, lead to objectively unreasonable conduct by state actors. In identifying these processes, we can create some parameters for the reasonableness standard.

A. Cognitive Distortions Pervade All Phases of the Criminal Process (From Investigation to Postconviction)

Professors Findley and Scott argue that cognitive distortions taint the criminal justice process from the start — during the police investigation of a criminal case — and continue to infect all phases of criminal proceedings through postconviction.[106] They contend that these distortions, including confirmation bias and hindsight bias, result in "tunnel vision,"[107] which they describe as follows:

> Tunnel vision is a natural human tendency that has particularly pernicious effects in the criminal justice system. . . . This process leads investigators, prosecutors, judges, and defense lawyers alike to focus on a particular conclusion and then filter all evidence in a case through the lens provided by that conclusion. Through that filter, all information supporting the adopted conclu-

[106] Findley & Scott, *supra* note 11, at 295.
[107] *Id.* at 307–08.

> sion is elevated in significance, viewed as consistent with the other evidence, and deemed relevant and probative. Evidence inconsistent with the chosen theory is easily overlooked or dismissed as irrelevant, incredible, or unreliable. Properly understood, *tunnel vision is more often the product of the human condition as well as institutional and cultural pressures, than of maliciousness or indifference*.[108]

Other scholars, as well as most official inquiries into specific wrongful convictions, have also attributed wrongful convictions, in major part, to tunnel vision.[109]

Significantly, that tunnel vision is often unintentional does not mean state actors lack culpability or are doomed to convict the innocent. As explained above, under the Fourth Amendment, culpability does not depend on intentionality.[110] Moreover, to the extent holding individual state actors financially responsible for unconscious wrongdoing is objectionable on policy grounds, government indemnification practices have an answer. Individual state actors who are found liable for "malicious prosecution" are unlikely to pay damages to plaintiffs out of their own pockets, particularly if, as this Article urges, the malice requirement is eliminated.

Indeed, in a recent empirical study of the indemnification practices in forty-four of the largest law enforcement agencies across the country, and in thirty-seven small and midsized agencies, Professor Joanna Schwartz found that *governments* paid approximately 99.98% of the dollars plaintiffs recovered in § 1983 (and related tort-based) lawsuits alleging civil rights violations by law enforcement.[111] The law enforcement officers in Professor Schwartz's study "almost never contributed anything to settlements or judgments — even when indemnification was prohibited by law or policy, and even when officers were disciplined, terminated, or prosecuted for their conduct."[112] Indemnification would seem an even greater certainty where law enforcement officers are adjudged to have acted objectively unreasonably due to unintentional cognitive bias:

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[108] *Id.* at 292 (emphasis added) (footnotes omitted).

[109] *See, e.g.*, BILL KURTIS, THE DEATH PENALTY ON TRIAL: CRISIS IN AMERICAN JUSTICE 33 (2004) ("Perhaps the most common fault with criminal investigations is their failure to explore all the possible suspects. When attention begins to focus on a single individual, too often the detectives are called off the general hunt to go after the single target. Tunnel vision sets in."); Martin, *supra* note 20, at 848; James McCloskey, Commentary, *Convicting the Innocent*, 8 CRIM. JUST. ETHICS 2, 56 (1989). As early as 1958, before wrongful convictions were widely recognized, the American Bar Association and the Association of American Law Schools recognized that "what starts as a preliminary diagnosis designed to direct the inquiry tends, quickly and imperceptibly, to become a fixed conclusion, as all that confirms the diagnosis makes a strong imprint on the mind, while all that runs counter to it is received with diverted attention." ABA Joint Conference on Professional Responsibility, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1160 (1958).

[110] See *supra* notes 72–88 and accompanying text.

[111] Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 936–37 (2014).

[112] *Id.* at 885, 890.

> Though the language in [indemnification] statutes varies from state to state, they "commonly require that to be entitled to indemnification, the employee must (1) have acted within the scope of employment, and (2) not have engaged in intentional, reckless, or malicious wrongdoing." As a result, "the state or local government officer who is acting within the scope of his or her employment in something other than extreme bad faith can count on government defense and indemnification."[113]

Thus, those convinced that true culpability for wrongful convictions caused by cognitive bias lies with the state should rest assured that the state will also bear the loss in virtually all federal malicious prosecution actions won by plaintiffs.[114]

Finally, as discussed below,[115] systemic factors over which state officials have control exacerbate and encourage cognitive distortions. There is serious culpability in the perpetuation of systems known to lead to inaccuracies so profound that the innocent are convicted. The hope is that a legal standard linking the true sources of these inaccuracies to liability — through individual and municipal liability — would encourage and require states to make the kinds of systemic changes necessary to improve the accuracy of criminal investigations, prosecutions, and convictions.

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[113] John P. Taddei, *Beyond Absolute Immunity: Alternative Protections for Prosecutors Against Ultimate Liability for § 1983 Suits*, 106 Nw. U. L. Rev. 1883, 1914 (2012) (footnotes omitted) (quoting, respectively, Martin A. Schwartz, *Should Juries Be Informed that Municipality Will Indemnify Officer's § 1983 Liability for Constitutional Wrongdoing?*, 86 Iowa L. Rev. 1209, 1217 (2001), and John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 Va. L. Rev. 47, 50 (1998)). Although removing the intentionality component from malicious prosecution claims theoretically could lead governments to raise the indemnification threshold correspondingly, as a practical matter, indemnification is virtually universal regardless of black-letter standards.

[114] Plaintiffs' lawyers are likely to be concerned with a more preliminary issue — whether a Fourth Amendment claim anchored in cognitive bias theory could survive the qualified immunity argument that defendants' conduct did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known," because cognitive bias is largely *unconscious*. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The response to this concern is twofold. First, it has been established that a prolonged detention is unconstitutional where it is caused by significant investigative errors (like those in the Wong case), including "law enforcement officials' mishandling or suppression of exculpatory evidence in a manner which 'shocks the conscience.'" Russo v. City of Bridgeport, 479 F.3d 196, 211 (2d Cir. 2007) (quoting Baker v. McCollan, 443 U.S. 137, 144 (1979)). That cognitive bias is the reason for such objectively unreasonable conduct, and that defendants may not understand this, is important to address for the sake of achieving reform of the criminal justice system but seems beside the point for a qualified immunity analysis. Second, this Article argues that municipalities should be held liable for failing to educate their employees about the dangers of cognitive bias. *See infra* Part IV. Perhaps ironically, the more educated state employees become about cognitive bias, the less they will be able to argue that the cause of their investigative errors should absolve them of liability.

[115] *See infra* section II.A.3.

Some of the specific cognitive processes leading to tunnel vision in the criminal justice system, and their perpetuation and exacerbation through systemic state practices, are described below.

1. Confirmation Bias.

According to Dr. Raymond Nickerson, an internationally recognized cognitive psychologist, "if one were to attempt to identify a single problematic aspect of human reasoning that deserves attention above all others, the confirmation bias would have to be among the candidates for consideration."[116] Psychologists use the term "confirmation bias" to describe the human tendency to seek and interpret evidence to support preferred hypotheses or existing expectations and beliefs at the exclusion of alternative possibilities.[117] This filtering process involves the converse as well — disregarding or avoiding information that could undermine preferred hypotheses and beliefs or that supports alternative possibilities.[118] There is substantial empirical evidence that confirmation bias is "extensive and strong and . . . appears in many guises."[119] Integral to the concept is the notion that "people can and do engage in case-building unwittingly, without intending to treat evidence in a biased way or even being aware of doing so."[120] Thus, it is a cognitive process that is by definition free of intent, malicious or otherwise.

Confirmation bias has various manifestations, the most common of which is the focus on a favored hypothesis resulting in failure to interpret data as evidence of alternative hypotheses.[121] Even when treatment of evidence is evenhanded initially, once one takes a position on an issue, the primary purpose becomes to defend or justify that position.[122] Simply forming a hypothesis — such as by naming a suspect in a criminal case — worsens bias, even absent confidence in the hypothesis.[123]

Related to the first manifestation of confirmation bias is the process of giving greater weight to information that supports existing beliefs or opinions than to information that undermines those beliefs or opinions, and seeking to discredit or explain away the undermining information.[124] "A good

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[116] Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 1998 Rev. of Gen. Psychol. 175, 175 (1998).

[117] *Id.* at 175, 177.

[118] *Id.* at 177.

[119] *Id.* Confirmation bias has been found in numerous contexts, including the criminal justice system, the policy world, medicine, the judiciary, and science. *See id.* at 190–96; *see also* Jerome Groopman, How Doctors Think 65 (2008).

[120] Nickerson, *supra* note 116, at 176.

[121] *Id.* at 177–78.

[122] *Id.* at 177.

[123] Barbara O'Brien, *Prime Suspect: An Examination of Factors that Aggravate and Counteract Confirmation Bias in Criminal Investigations*, 15 Psychol. Pub. Pol'y & L. 315, 328 (2009).

[124] *Id.*

deal of empirical research demonstrates that people are incapable of evaluating the strength of evidence independent of their prior beliefs."[125] Indeed, people are motivated to defend their beliefs by working hard internally to refute disconfirming evidence while accepting confirming evidence without much scrutiny.[126] Selectively favoring evidence that supports a named suspect over that which exculpates the suspect or implicates someone else is a recipe for disaster in a criminal investigation.

In a well-known study demonstrating this bias against disconfirmation, researchers knew that half their subjects supported the death penalty and believed in its deterrent effect, while the other half opposed the death penalty and questioned its deterrent effect.[127] They asked all of the subjects to evaluate two studies — one that supported the deterrence efficacy of the death penalty and one that did not.[128] Even though both studies described the same experimental procedures (only with differing results), the subjects supporting the death penalty justified in detail their conclusion that the prodeterrence study was more convincing than the nondeterrence study, while the death penalty opponents did the opposite.[129] Moreover, each group became more entrenched in its original view based on this biased assessment of the death penalty studies.[130]

Reinforcing the unintentional nature of these processes, "people . . . appear to seek confirmatory information even for hypotheses in whose truth value they have no vested interest."[131] For example, in one classic study of confirmation bias in hypothesis-testing, Professor Peter Wason gave subjects four cards and told them that each one contained a letter on one side and a number on the other.[132] Wason revealed four sides to subjects — one vowel, one consonant, one even number, and one odd number.[133] He then asked subjects which cards they needed to turn over to test the following rule: If a card has a vowel on one side, then it has an even number on the other side.[134] Subjects overwhelmingly checked just the vowel card or the vowel and even number cards, demonstrating their pursuit of information that would confirm the rule.[135] Meanwhile, they failed to check the other

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[125] Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 Wm. & Mary L. Rev. 1587, 1596 (2006).

[126] *Id.* at 1598.

[127] Charles G. Lord, Lee Ross & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. Personality & Soc. Psychol. 2098, 2098, 2100 (1979).

[128] *Id.* at 2100.

[129] *Id.* at 2101–03.

[130] *Id.* at 2103–04.

[131] Nickerson, *supra* note 116, at 178.

[132] P.C. Wason, *Reasoning About a Rule*, 20 Q. J. Experimental Psychol. 273, 273 (1968).

[133] *Id.* at 273.

[134] *Id.* at 273–75.

[135] *Id.* at 273–77.

side of the odd number card, which might have revealed a vowel that disproved the rule.[136]

Unlike Professor Wason's disinterested subjects, police officers and prosecutors are likely to be invested in their hypotheses about a criminal case — for various reasons, including publicity, professional role, and empathy with the victim — and therefore are presumably at even greater risk of overvaluing confirmatory information.[137] This would explain, for instance, the tendency of police and prosecutors in wrongful conviction cases to search for incriminating evidence against their suspects, without looking at viable alternative perpetrators.[138]

Confirmation bias even has the power to influence what we see. "[W]hat one sees — actually or metaphorically — depends, to no small extent, on what one looks for and what one expects."[139] Indeed, one may deduce patterns that aren't actually present.[140] For instance, in one early study, students' perceptions of the social qualities (e.g., relative sociability, friendliness) of a guest lecturer were influenced by what they expected based on a prior description of the individual.[141] In another study, two groups of people viewed the same videotape of a child taking an academic test; one group was led to believe the child's socioeconomic background was advantaged and the other that it was disadvantaged.[142] Forming a hypothesis about the child's abilities based on assumptions about the relationship between socioeconomic status and academic ability and then interpreting the video accordingly, the former group rated the child's academic abilities as above grade level, while the latter group rated the same performance as below grade level.[143]

In the context of a criminal investigation, confirmation bias can similarly manifest itself in suspect identification on the basis of expected racial, ethnic, and socioeconomic qualities, which are likely to disfavor minority and poor individuals. Drawing on data from four major studies on race and innocence, one author concluded that a disproportionate percentage of wrongful convictions involve racial minorities and postulated that this disparity is driven by individual cognitive error and structural power imbalances in society.[144] Once potentially false assumptions drive hypotheses, problematic hypotheses may further drive major investigative flaws.

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[136] *Id.* at 276–77.

[137] *See infra* section II.A.3.(a).

[138] *See* Findley & Scott, *supra* note 11, at 316.

[139] Nickerson, *supra* note 116, at 182; *see also* D. Michael Risinger et al., *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 CALIF. L. REV. 1, 12–16 (2002).

[140] Nickerson, *supra* note 116, at 181.

[141] *Id.*

[142] *Id.* at 182.

[143] *Id.*

[144] Karen F. Parker, Mari A. Dewees & Michael L. Radelet, *Racial Bias and the Conviction of the Innocent*, *reprinted in* WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE 114, 127–28 (Saundra D. Westervelt & John A. Humphrey eds., 2001).

Numerous additional studies have revealed that people not only see, but also remember, in biased ways. They tend to recall information that confirms expectations stemming from stereotypes, including those based on ethnicity, education, socioeconomic status, and lifestyle.[145] Similarly, they prefer to retrieve from memory information that confirms a presented hypothesis or belief.[146] For instance, participants in one study heard a story about a woman who exhibited introverted and extroverted behaviors.[147] Researchers later asked half the participants to evaluate whether the woman was suited for a job requiring extroversion and the other half to assess whether she was suited for a job requiring introversion.[148] The former group recalled more examples of the woman's extroversion, while the latter group recalled more instances of her introversion.[149] A focus on one hypothesis (the woman's suitability for one job versus the other) biased the participants, causing them to search their memories for confirming evidence.[150]

Memory bias may distort not only how police and prosecutors recall their investigative findings, but also the accounts of eyewitnesses on whom investigators rely. In the world of confirmation bias, distortion begets distortion. Once expectations, among other factors, have led us to conclude we perceived one thing rather than another, it becomes more difficult to perceive details that contradict the original perception.[151] Our misconceptions can be reinforced as we establish the initial interpretation of what we perceived, and later when we try to remember what we perceived.[152]

Of course, people do not always and inevitably see what they want to see, or what they are told to see. Confirmation bias is produced by the "cyclical interplay between pre-existing schemata and the uptake of new information."[153] Just as schemata, or mental categories constructed from experience and belief, organize perception and inference so that we are able to process new information, they also limit meaningful perception through the selective processing of this new information.[154] The human cognitive system engages in this selective attention to information "so automatically and seamlessly that we rarely realize we are doing it."[155]

Researchers have specifically found that police investigators are "prone to confirmation bias."[156] In one study, experienced investigators considered witnesses who exonerated a favored suspect less credible than those who

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[145] *See generally id.*
[146] Findley & Scott, *supra* note 11, at 312.
[147] THOMAS GILOVICH, HOW WE KNOW WHAT ISN'T SO: THE FALLIBILITY OF HUMAN REASON IN EVERYDAY LIFE 33, 36 (1991).
[148] *Id.* at 36.
[149] *Id.*
[150] *See id.*
[151] Risinger et al., *supra* note 139, at 15.
[152] *Id.*
[153] *Id.* at 13.
[154] *Id.* at 13–15.
[155] *Id.* at 15.
[156] O'Brien, *supra* note 123, at 318.

incriminated that suspect.[157] Similarly, in another study, police trainees considered evidence in a mock homicide case less reliable if it invalidated their initial hypotheses.[158]

Professors Findley and Scott argue that confirmation bias helps explain how state actors have failed in many wrongful conviction cases. They describe the process as follows:

> Convinced by an early — although plainly flawed — eyewitness identification, police and prosecutors . . . sought evidence that would confirm guilt, not disconfirm it. They searched for incriminating evidence against their suspects, but never looked at viable alternative perpetrators. When confronted with ambiguous or inherently weak evidence . . .[,] police and prosecutors interpreted it as powerfully incriminating. When confronted with contrary evidence . . .[,] they sought to discredit or minimize that evidence.[159]

The "stubborn assessment of guilt in these cases persisted on appeal and through postconviction proceedings," giving state actors a skewed sense of the strength of their case and motivating them to persist against the wrongfully convicted defendant.[160] Thus, that moment in every case when the "investigation shifts from figuring out what happened to proving" a favored theory is when the truth-finding process becomes profoundly compromised.[161]

2. Hindsight Bias.

Tunnel vision is further reinforced by cognitive distortions in the form of hindsight bias. According to cognitive researchers, hindsight bias is the tendency to reanalyze an event until one's memory of it makes the ultimate conclusion about the event seem inevitable, more likely, or more predictable than originally expected. This cognitive distortion reflects the nature of memory as a dynamic process of reconstruction, according to which little pieces of information about an event or situation are constantly updated and replaced in our brains by new information. "During this process, evidence consistent with the reported outcome is elaborated, and evidence inconsistent with the outcome is minimized or discounted. The result of this rejudgment process is that the given outcome seems inevitable or, at least, more plausible than alternative outcomes."[162]

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[157] *Id.*
[158] *Id.*
[159] Findley & Scott, *supra* note 11, at 316.
[160] *Id.*
[161] O'Brien, *supra* note 123, at 316.
[162] Erin M. Harley, Keri A. Carlsen & Geoffrey R. Loftus, *The "Saw-It-All-Along" Effect: Demonstrations of Visual Hindsight Bias*, 30 J. Experimental Psychol.: Learning, Memory & Cognition 960, 960 (2004).

Professors Findley and Scott have identified three potential dangers of hindsight bias in the wrongful conviction context. First, it could reinforce unwarranted focus on an innocent suspect. Once police or prosecutors determine who they believe is guilty, as a result of hindsight bias, "not only might they overestimate the degree to which that suspect appeared guilty from the beginning, but they will likely best remember those facts that are incriminating (thereby reinforcing their commitment to focus on that person as the culprit)."[163]

Second, hindsight bias may contribute to eyewitness identification errors, which are the most common cause of wrongful convictions.[164] Eyewitness confidence is widely recognized to be quite malleable.[165] Accordingly, an eyewitness who receives "confirming feedback" after making an identification can develop inflated "confidence in the ultimate identification . . . [and in her] assessment of the conditions surrounding the identification."[166] For instance, in hindsight, an eyewitness who had a poor view of the perpetrator or paid little attention to the incident can start to believe the opposite and reconstruct memories of the incident as clear.[167]

Third, hindsight bias has been associated with a "reiteration effect" that exacerbates errors in criminal investigation and prosecution.[168] Research has shown that confidence in the truth of an assertion increases if the assertion is repeated, even if the assertion is untrue. Accordingly, the longer police, prosecutors, and witnesses live with a conclusion of guilt and repeat that conclusion and its bases, the more obvious it appears that all evidence pointed to that conclusion from the start. "[T]he reiteration effect makes it increasingly difficult for police and prosecutors to consider alternative perpetrators or theories of a crime."[169]

3. Systemic Factors Trigger and Exacerbate Cognitive Distortions.

Professors Findley and Scott argue that multiple external forces, including institutional pressures and training (or lack thereof), exacerbate law enforcement's natural cognitive biases and cause tunnel vision.[170] In addition

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[163] Findley & Scott, *supra* note 11, at 318.

[164] Barry Scheck, Peter Neufeld, and Jim Dwyer determined that eyewitness misidentifications contributed to the initial convictions in over 80% of documented DNA exonerations. SCHECK ET AL., *supra* note 18, at 246; *see also* Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 542 (2005) (finding eyewitness error in 64% of the 340 wrongful conviction cases studied).

[165] Amy L. Bradfield, Gary L. Wells & Elizabeth A. Olson, *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. APPLIED PSYCHOL. 112, 113 (2002).

[166] Findley & Scott, *supra* note 11, at 318.

[167] *Id.* at 318–19.

[168] Ralph Hertwig, Gerd Gigerenzer & Ulrich Hoffrage, *The Reiteration Effect in Hindsight Bias*, 104 PSYCHOL. REV. 194, 194 (1997).

[169] Findley & Scott, *supra* note 11, at 319.

[170] *Id.* at 323, 327.

to raising awareness of the occurrence and dangers of cognitive biases among state employees, state officials have an obligation to address the systemic factors that encourage these biases.

(a) Institutional Pressures Cause Cognitive Bias.

Researchers have found that calling upon a person to adopt a particular function or perspective (i.e., a "role") has cognitive effects. In one study, participants who assumed the role of homebuyer recalled the details of a story about a house differently than those who assumed the role of burglar.[171] Accordingly, "investigators whose role is to solve a problem may become convinced of the truth of a proposed solution more easily than investigators whose role is to describe a situation, or to describe the likelihood of various options."[172]

Police officers face pressures from various sources, including supervisors, victims, the community, and the media, to solve crimes quickly.[173] Media and the public subject the police to unrealistic expectations about their capacity to solve crimes.[174] Large caseloads place the police under constant pressure to complete assigned cases and move on.[175] The clearance rate, or rate at which cases reported to the police are closed, is the most common measure of investigator performance.[176] Police administrators have been known to pressure investigators to make sure the case clearance rates ultimately reported to the Federal Bureau of Investigation ("FBI") and the public do not diminish public confidence in the police.[177] Thus, "investigators' thought processes may become distorted by the desire to alleviate the pressure that comes from not being able to assure the public that the offender has been caught and the community is safe."[178] Moreover, according to FBI rules, arresting an offender and turning over the case file to prosecutors is enough to clear a case, potentially leading investigators to conclude that their responsibility begins and ends with arresting a "plausible offender."[179]

Prosecutors also face tunnel-vision-inducing pressures to ensure conviction of the suspects apprehended by police. Role effects are distorting for prosecutors much like they are for the police:

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[171] Risinger et al., *supra* note 139, at 18.
[172] *Id.* at 19.
[173] Findley & Scott, *supra* note 11, at 323; *see also* Nat'l Research Council, Fairness & Effectiveness in Policing: The Evidence 227–28 (Wesley Skogan & Kathleen Frydl eds., 2004).
[174] *See* Kenneth Dowler, *Media Consumption and Public Attitudes Toward Crime and Justice: The Relationship Between Fear of Crime, Punitive Attitudes, and Perceived Police Effectiveness*, 10 J. Crim. Just. & Popular Culture 109, 111 (2003).
[175] Findley & Scott, *supra* note 11, at 325.
[176] *Id.*
[177] *Id.* at 324.
[178] *Id.* at 323.
[179] *Id.* at 325–26.

> In those rare cases where a defendant is acquitted, the conclusion that ethical prosecutors, convinced that they would only prosecute a guilty person, must reach is not that the defendant was truly innocent, but that the system failed, that the truth did not prevail, that justice miscarried.[180]

Prosecutors' offices often emphasize conviction rates in evaluating job performance and justifying their work.[181] In combination with public pressure, this focus on conviction rates fosters a "conviction psychology," which diminishes the value of doing justice.[182] Even those prosecutors most committed to justice — the "ethical and honorable" prosecutors — need to believe their role is "righteous[ ]," rather than harmful to blameless defendants.[183] Empirical data showing that greater prosecutorial experience correlates with a stronger conviction-oriented mentality reflects the psychological power of such institutional and cultural pressures in prosecutors' offices.[184]

Cognitively biased police investigations further distort prosecutorial assessments. While prosecutors see the evidence generated by the police investigation, often they "do not see the evidence about alternative suspects who were rejected too quickly, about eyewitnesses who failed to identify the defendant, or about other disconfirming evidence that police dismissed as insignificant."[185] Moreover, prosecutors rarely receive feedback challenging these assessments of guilt because most criminal defendants plead guilty and most trials result in convictions.[186]

Finally, research has revealed "conformity effects," or the human tendency to rely on others' views to develop our own conclusions.[187] People may rely on others to gain additional information, or "merely to be in step with their peers."[188] Difference in rank can exacerbate these effects, as research reveals that individuals of lower rank are more influenced by those of perceived higher rank than the reverse.[189] Thus, as police investigators and prosecutors collaborate on a case, the cognitive biases of one team member may unduly distort the thinking of another.

Entrenched role assignments, hierarchies, and group dynamics within police departments and prosecutors' offices are inarguably challenging to

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[180] Burke, *supra* note 30, at 519–20.

[181] Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. Rev. 125, 134–35 (2004); George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 Sw. U. L. Rev. 98, 99, 114 (1975).

[182] *See* Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 Am. J. Crim. L. 197, 198 (1988); Felkenes, *supra* note 181, at 108–12.

[183] Findley & Scott, *supra* note 11, at 329; Randolph N. Jonakait, *The Ethical Prosecutor's Misconduct*, 23 Crim. L. Bull. 550, 551 (1997).

[184] Felkenes, *supra* note 181, at 111.

[185] Findley & Scott, *supra* note 11, at 330.

[186] *See* Burke, *supra* note 30, at 519.

[187] Risinger et al., *supra* note 139, at 19.

[188] *Id.*

[189] *See id.*

transform. However, as discussed below,[190] this Article proposes that criminal justice systems can go a long way in developing awareness of the dangers of cognitive bias and encouraging state actors to challenge their own, as well as their colleagues', initial views of a criminal case.

(b) Traditional Law Enforcement Training Promotes Techniques That Foster Cognitive Bias.

Making matters worse, "[t]o a surprisingly large extent, tunnel vision in the criminal justice system exists not despite our best efforts to overcome these cognitive biases and institutional pressures, but because of our deliberate systemic choices."[191] Traditional law enforcement training lacks instruction on recognizing and overcoming tunnel vision, and also "affirmatively teaches" investigators to use techniques that result in "encouraged tunnel vision."[192]

For instance, most police officers in the United States are taught that "interrogations" should elicit confessions rather than information, and therefore to use interrogations to prejudge guilt rather than to consider alternatives.[193] The most commonly taught interrogation technique, the "Reid Technique," generally includes the following: (1) isolating the suspect; (2) confronting her with assertions of guilt; (3) interrupting any denials of guilt; (4) convincing the suspect police have evidence of her guilt; and (5) offering sympathy and minimizing the moral seriousness of the act to make the suspect believe confessing is her best option.[194] Police typically engage in such interrogations when they lack sufficient other evidence of guilt.[195] However, instead of encouraging police to maintain an open mind at this stage, law enforcement training openly encourages cognitive biases, "expressly embrac[ing] the foundational problems with tunnel vision — a premature conclusion of guilt, and an unwillingness to consider alternatives."[196]

Police manuals also encourage ineffective methods of identifying deception during an interrogation, including reliance on indicators such as gaze aversion, unnatural posture, physical self-manipulation, and the covering of mouth or eyes.[197] Research shows that most police officers rely on such

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[190] *See infra* section II.B.

[191] Findley & Scott, *supra* note 11, at 333.

[192] *Id.*

[193] *Id.* at 334.

[194] *See* Richard A. Leo, *The Third Degree and the Origins of Psychological Interrogation in the United States*, *in* INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 37, 72–73 (G. Daniel Lassiter ed., 2004); Saul M. Kassin, *On the Psychology of Confessions*, 60 AM. PSYCHOL. 215, 220 (2005); Saul M. Kassin, Christine C. Goldstein & Kenneth Savitsky, *Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt*, 27 LAW & HUM. BEHAV. 187, 188 (2003).

[195] Findley & Scott, *supra* note 11, at 335–36.

[196] *Id.* at 335.

[197] FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 143–53 (2001); Samantha Mann, Aldert Vrij & Ray Bull, *Detecting True Lies: Police Officers' Ability to Detect Suspects' Lies*, 89 J. APPLIED PSYCHOL. 137, 144 (2004).

cues,[198] even though the cues do not actually prove fabrication.[199] Accordingly, trained investigators tend to be overconfident in their ability to identify deception[200] and err by accepting false confessions.[201]

B. Neutralizing Cognitive Bias

Empirical evidence has shown that cognitive bias can be neutralized, offering governments a tremendous opportunity to reduce the likelihood of wrongful convictions and making it incumbent upon them to implement practices in an effort to do so. Acknowledging the science and attendant state duties opens the door to framing malicious prosecution claims not just against state actors relatively low on the totem pole, like investigators, but also against municipalities and key policymakers who fail to implement reasonable practices that neutralize cognitive bias. Such claims could result in injunctive relief, including systemic reforms to neutralize cognitive bias.

Cognitive scientists have found that educating individuals about the cognitive processes leading to bias can mitigate bias, though likely not eliminate it entirely.[202] In a recent Canadian study simulating the investigation of an industrial incident, researchers educated study participants — students and professional investigators — about tunnel vision, informing them how it can bias information collection, interpretation, and decisionmaking, providing concrete examples of confirmation bias, encouraging them to consider alternative hypotheses when investigating, and providing an example of poor decisionmaking because of failure to consider alternative hypotheses.[203] The researchers found that education had some debiasing effect on their study participants, and caused participants to seek a greater amount of information about what caused the industrial incident than those in the control condition.[204]

Ensuring that police and prosecutors consider a range of views can further protect against tunnel vision. Researchers have found that "induced counter-argument" — requiring people to articulate arguments that contra-

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[198] *See* Mann et al., *supra* note 197, at 142, 144.

[199] *See id.* at 144; AMINA MEMON, ALDERT VRIJ & RAY BULL, PSYCHOLOGY AND LAW: TRUTHFULNESS, ACCURACY AND CREDIBILITY 30–31 (2d ed. 2003) (describing a review of over 100 studies revealing that "a typical nonverbal response during deception does not exist"); *see generally* Bella M. DePaulo et al., *Cues to Deception*, 129 PSYCHOL. BULL. 74 (2003).

[200] *See* Kassin et al., *supra* note 194, at 189; Christian A. Meissner & Saul M. Kassin, *"He's Guilty!": Investigator Bias in Judgments of Truth and Deception*, 26 LAW & HUM. BEHAV. 469, 478 (2002).

[201] *See* Saul M. Kassin, Christian A. Meissner & Rebecca J. Norwick, *"I'd Know a False Confession if I Saw One": A Comparative Study of College Students and Police Investigators*, 29 LAW & HUM. BEHAV. 211, 222 (2005).

[202] *See* Burke, *supra* note 30, at 522–23; *see also* Findley & Scott, *supra* note 11, at 370–71.

[203] Carla L. MacLean, C.A. Elizabeth Brimacombe & D. Stephen Lindsay, *Investigating Industrial Investigation: Examining the Impact of A Priori Knowledge and Tunnel Vision Education*, 37 LAW AND HUM. BEHAV. 441, 442–43 (2013).

[204] *See id.* at 448.

dict their existing beliefs — and "exposure to opposing views can reverse the effects of cognitive bias."[205] "Considering alternatives breaks the inertia that comes from focusing on data consistent with an initial hypothesis. . . . [and] may activate a mind-set that reduces bias in later, unrelated judgment tasks."[206] Accordingly, in one study, participants who were asked to select a suspect and then to discuss evidence both for and against that hypothesis showed no more bias than people who stated no hypothesis at all.[207] Yet considering several suspects, instead of just one, left participants as biased as those considering only evidence favoring one suspect.[208] Thus, while "[i]nvestigators cannot always delay focusing on a suspect, [ ] taking the extra step of actively considering evidence that points away from that suspect shows promise as a simple way to counteract bias."[209]

Professor Alafair Burke argues in the prosecutorial context that systemic reform of law enforcement practices should couple education with training on such debiasing strategies.[210] She proposes that prosecutors serve as their own devil's advocates, establish internal review processes at their offices, and expose prosecutorial decisionmaking to external review.[211] Similar techniques have been used by intelligence agencies to "address problems of narrow analysis"[212] and could assist police departments as well.

More specifically, Professor Burke suggests that, to neutralize their own biases, prosecutors should regularly review cases from the perspective of defense counsel in search of reasonable doubt.[213] Instead of "accept[ing] evidence that appears inculpatory[, they] should force [themselves] to articulate any basis for skepticism."[214] "Similarly, rather than assuming that seemingly exculpatory evidence is flawed, they should probe the value of that evidence to the defense."[215] Professor Burke believes disciplined counterargument is particularly useful for counteracting prosecutors' persistent belief in a defendant's guilt even after exoneration.[216] Indeed, this simple technique, which has the virtue of advancing good, basic lawyering skills, also has the potential to mitigate the reiteration effect that threatens pending criminal investigations and prosecutions.[217]

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[205] Burke, *supra* note 30, at 523.
[206] O'Brien, *supra* note 123, at 317.
[207] *Id.* at 329.
[208] *Id.*
[209] *Id.*
[210] *See* Burke, *supra* note 30, at 523–28.
[211] *Id.*
[212] Colin Wastell et al., *Identifying Hypothesis Confirmation Behaviors in a Simulated Murder Investigation: Implications for Practice*, 9 J. Investigative Psychol. & Offender Profiling 184, 196 (2012).
[213] *See id.*; Burke, *supra* note 30, at 524.
[214] Burke, *supra* note 30, at 524–25.
[215] *Id.* at 525.
[216] *Id.*
[217] *See supra* notes 168–169 and accompanying text regarding the "reiteration effect."

Taking Professor Burke's proposal to its logical (albeit more revolutionary) conclusion, prosecutors and defense attorneys might acknowledge their common goal to prevent wrongful convictions and communicate to that end.

An internal review process could provide an additional debiasing mechanism. Professor Burke proposes tasking more neutral prosecutors (unassociated with initial charging decisions) with taking a "fresh look" at cases, particularly where the government's original evidence against a defendant has been undermined.[218] Offices with adequate resources could formalize such reviews, while less resourced offices could encourage informal debate to mitigate cognitive bias.[219] Such practices would send a strong message that the ideal prosecutorial role transcends securing convictions and that conformity is not desirable among colleagues working to secure justice.

Finally, an external review process might be more effective than internal review in overcoming conformity effects. External review may be accomplished by making prosecutorial decisions more transparent, or by designating outside reviewers.[220] Professors Angela Davis and Daniel Medwed have suggested increasing transparency with the creation of prosecutorial public information offices that would disclose prosecutorial policies.[221] Although prosecutors are likely to resist formal outside review that would impose on their broad discretion, Professor Burke suggests review committees that would serve in only an advisory fashion over limited factual questions.[222]

Even training law enforcement personnel on proper interviewing skills could reduce the impact of confirmation bias. Research has clearly established the relationship between poor interviewing and confirmation bias.[223] As bias manifests through questions that include or presume details not mentioned by the interviewee, the risk of false witness testimony escalates.[224] A recent Australian study concluded that "even if confirmation bias occurs automatically when interviewers receive knowledge about a case, they are able to overcome this bias if they had been previously trained to adhere to best practice guidelines and ask open questions."[225]

Because set conclusions about guilt are so difficult to overcome, Professors Findley and Scott argue that the focus must be on "helping police, prosecutors, defense lawyers, and judges understand why it is important

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[218] Burke, *supra* note 30, at 525–26.

[219] *Id.* at 526.

[220] *Id.* at 527.

[221] *See* Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 461–62 (2001); Medwed, *supra* note 181, at 177–78.

[222] Burke, *supra* note 30, at 527.

[223] Martine B. Powell et al., *Skill in Interviewing Reduces Confirmation Bias*, 9 J. INVESTIGATIVE PSYCHOL. & OFFENDER PROFILING 126, 126 (2012).

[224] *Id.*

[225] *Id.* at 131.

to suspend judgment as long as possible, and to resist the impulse to develop conclusions about a case too soon."[226]

As elaborated below, governments should be held accountable for failing to mitigate cognitive bias by training employees to suspend judgment and challenge their own hypotheses, and by implementing review processes that help employees generate alternative viewpoints.

III. Objectively Unreasonable Cognitive Distortions in the Wong Case

Tunnel vision, created and compounded by systemic forces, kept Wong behind bars long after he should have been given his freedom. And tunnel vision also helps explain why so many state actors clung to the objectively unreasonable position that Wong was guilty. The following analysis models applying the reasonableness standard through a cognitive bias lens to the individual state defendants in Wong's case.

A. Prison Yard Tower Guard Richard F. LaPierre

Correction Officer Richard F. LaPierre was posted to a tower in the prison yard of Clinton Correctional Facility when someone fatally stabbed inmate Tyrone Julius there.[227] LaPierre identified Wong as the perpetrator, causing other prison officers to detain and strip-search Wong immediately upon his exit from the prison yard.[228] LaPierre's identification set in motion a process that led directly to Wong's prosecution and conviction.[229]

Meanwhile, a number of factors made LaPierre's identification of Wong, and the reliance on and perpetuation of that identification, *objectively unreasonable*. First, prison yard conditions prevented LaPierre from seeing the perpetrator. Not only was LaPierre posted to a yard tower about 400 feet away from the crime scene,[230] but also the incident was obstructed by nearly 700 similarly clad inmates forming lines to exit the yard.[231] Making matters worse, from his faraway perch, LaPierre multitasked and, at times, used the naked eye. In fact, LaPierre allegedly witnessed the incident with the naked eye, before picking up his binoculars to follow the perpetrator along a convoluted route, as the perpetrator crossed the yard and communicated with other inmates.[232] Reinforcing the objective unreasonableness of his identification and other state actors' reliance on it, LaPierre was the only correction

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[226] Findley & Scott, *supra* note 11, at 372.

[227] Wong v. LaPierre, No. 8:07-CV-1110, slip op. at 3 (N.D.N.Y. Mar. 23, 2011) (order granting defendants' motion for summary judgment).

[228] *Id.* at 4–5; Plaintiff's Summary Judgment Opposition, *supra* note 9, at 2.

[229] *Wong*, No. 8:07-CV-1110, slip op. at 5–14; Plaintiff's Summary Judgment Opposition, *supra* note 9, at 4.

[230] *Wong*, No. 8:07-CV-1110, slip op. at 3–4.

[231] *See id.* at 3; Plaintiff's Summary Judgment Opposition, *supra* note 9, at 4.

[232] *See Wong*, No. 8:07-CV-1110, slip op. at 4–5.

officer to report witnessing the stabbing, even though there were guards posted in substantially closer proximity to the incident.[233]

Second, there was no physical evidence connecting Wong to the murder.[234] Although Wong was strip-searched immediately upon exiting the yard at LaPierre's prompting, prison officers found no weapon on him or anywhere else.[235] Wong was carrying only an "Oriental newspaper," which LaPierre later admitted he did not see on the assailant.[236] Moreover, officers found no trace of blood anywhere on Wong, even though Julius's stab wound "spurted" blood and "created a sufficient amount of blood to have splattered over the perpetrator."[237]

Despite the profound flaws of LaPierre's identification, he became the complaining witness against Wong. He provided his identification to the New York State Bureau of Criminal Investigation and incriminated Wong in direct conversations with the District Attorney's Office and through his testimony at the grand jury and criminal trial proceedings.[238]

Under the highly fact-specific objective reasonableness analysis, a jury could easily conclude that LaPierre was culpable for Wong's wrongful conviction based on direct evidence. In contrast, a finding of liability under the erroneous malicious intent standard would require inferential reasoning. That is, because direct evidence of LaPierre's mental state (or, for that matter, mental state generally) does not exist, a finder of fact would have to infer LaPierre's mental state from circumstantial evidence.

Notwithstanding the benefit of direct evidence, a challenge for a lawyer trying this case under the objective reasonableness standard would be to help the jury understand LaPierre's unreasonable conduct without resorting to motive. Cognitive psychology offers an explanation that lawyers can employ with the assistance of experts.

A cognitive psychologist evaluating the evidence in the Wong case and employing the concepts described above could conclude that, at some point while LaPierre attempted to follow the perpetrator with his binoculars, Wong may have entered LaPierre's line of vision. Falling victim to confirmation and hindsight bias, LaPierre then unwittingly began to reconstruct his memory of what he had done and seen beforehand as consistent with keeping his eyes on Wong the entire time (from the time of the assault until fellow guards apprehended Wong on the other side of the prison yard, at LaPierre's prompting). In the process, LaPierre would have ignored or undervalued highly inconsistent information, including: (1) that the perpetrator was not carrying a newspaper, but Wong was; (2) that LaPierre was not using binoc-

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[233] *Id.* at 5.
[234] *Id.* at 16.
[235] Plaintiff's Summary Judgment Opposition, *supra* note 9, at 2.
[236] *Id.*
[237] *Id.* (citing New York v. Wong, 11 A.D.3d 724, 726 (N.Y. App. Div. 2004) (reversing Wong's conviction)).
[238] *Wong*, No. 8:07-CV-1110, slip op. at 15.

ulars the entire time and so the actual perpetrator likely escaped his view; (3) that LaPierre's view was obstructed by nearly 700 similarly clad inmates in motion; and (4) that LaPierre's view of the stabbing itself was compromised by 400 feet (more than the length of a football field) of distance. Moreover, in the months following the incident and leading up to the criminal trial, LaPierre would have had to ignore or undervalue substantial exculpatory evidence — including the complete absence of blood on Wong even though the victim's wound would have splattered, and the eyewitness testimony of other inmates described below.

LaPierre's role as prison yard tower guard may have encouraged tunnel vision in the face of uncertainty, making the parameters of his role and the institutional pressures on him important sources of explanation for his objectively unreasonable conduct. Presumably, the institution depended on LaPierre to prevent security breaches in the prison yard, to identify culprits when breaches occurred, and generally to help maintain the impression that prison administrators were in control. Indeed, it is highly unlikely that LaPierre was called upon to keep an open mind. A lawyer trying this case would do well to gather evidence about LaPierre's job description, his supervisors' expectations, bases for his performance evaluations, the training he received, and other sources of systemic influences.

Further, cognitive psychology teaches that once LaPierre concluded that Wong was the perpetrator and reconstructed his memory accordingly, it became even more difficult for him to perceive details that contradicted that conclusion. As a result, he continued to hold fast to the identification — to testify against Wong time and again — and to encourage his colleagues to promote and reinforce the false identification. At the same time, his colleagues' reinforcement of the identification may have given him inflated confidence in the identification and in his poor assessment of the surrounding conditions. Using cognitive psychology, an expert could explain to a jury LaPierre's perpetual denial of wrongdoing.[239]

B. Prison Guard Joseph Wood

On the day of the stabbing, Lieutenant Joseph Wood was the Watch Commander, responsible for all security staff and facility operations at Clinton.[240] While still receiving reports about the incident on a rolling basis from sergeants and correction officers, including LaPierre, Wood reported to the Department of Corrections Central Office that Wong was "involved" in the

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[239] In addition to confirmation bias and hindsight bias, stereotyping may have influenced LaPierre's false identification. Wong was one of only two Chinese inmates at Clinton Correctional Facility, and therefore may have met LaPierre's stereotyped expectations of who the perpetrator would be. Whether this is a question of unconscious racism or perhaps Wong's greater visibility as "other," it would be another avenue to explore for explaining LaPierre's behavior from a cognitive perspective.

[240] *Wong*, No. 8:07-CV-1110, slip op. at 3.

crime.[241] Indeed, within just hours of the stabbing, and well before the Bureau of Criminal Investigation had a chance to complete its month-long investigation, Wood put an end to the in-house prison investigation he directed by completing a report formally accusing Wong of the crime.[242]

Wood was quick to endorse LaPierre's identification of Wong, despite an abundance of information that objectively should have given him pause. Through reports and his general knowledge as Watch Commander, Wood should have known that the conditions of the prison yard, as well as LaPierre's sporadic use of binoculars, made it virtually impossible for LaPierre to see the incident and accurately follow the perpetrator all the way across the yard.

Besides disregarding evidence that undermined LaPierre's identification, Wood failed to conduct an investigation thorough enough to uncover exculpatory information from inmates who witnessed the incident.[243] Rather, without much vetting, Wood accepted inmate Peter Dellfava's claim that Wong committed the crime.[244] There was, in fact, good reason to question Dellfava's statement, including that it was inconsistent with the exculpatory statements of numerous other inmates who identified a Latino perpetrator, and that Dellfava provided the statement in exchange for a transfer to a prison near his home.[245] Indeed, years later, Dellfava recanted and attributed his false, inculpatory statement to coercion by Sergeant Roger Nelson.[246] On the day of the incident, Nelson reported to Wood, and notified Wood about interviewing Dellfava.[247] By all accounts, however, neither Wood nor the Bureau of Criminal Investigation ever interviewed, or obtained a report from, Nelson about his interactions with Dellfava.[248]

From a cognitive psychology perspective, arguably, Wood also fell victim to confirmation bias. By adhering to one hypothesis — LaPierre's identification of Wong as the perpetrator — Wood closed himself off to alternatives and therefore disregarded information supportive of those alternatives. He did so by undervaluing or ignoring evidence that weakened LaPierre's identification and by conducting an investigation so limited that exculpatory evidence could not surface. Accordingly, he had no need to assess carefully inmate Dellfava's inculpatory statement because it was consistent with the expectation set by LaPierre's identification.

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[241] *Id.* at 5–6.
[242] Plaintiff's Summary Judgment Opposition, *supra* note 9, at 6.
[243] *Id.* at 7.
[244] *See id.* at 5–6.
[245] *Id.* at 7.
[246] *Wong*, No. 8:07-CV-1110, slip op. at 10 n.4, 17–18.
[247] Plaintiff's Summary Judgment Opposition, *supra* note 9, at 6.
[248] *See id.* ("[Nelson] also claims he prepared a report of the interview [with Dellfava] and submitted it through the standard channels, but defendants concede no such report has surfaced in discovery . . . . [Moreover,] Nelson is not mentioned in the BCI investigation report . . . .")

The pressures Wood faced in his role as the prison security leader at the time of Julius's murder may have prompted him to jump to a conclusion rather than to spend time assessing various options. Accordingly, a lawyer litigating this case might pursue evidence of such pressures, including additional information about Wood's position, the frequency of prison yard assaults on his watch (solved and unsolved), the bases of his job evaluations, and the training he received.

Wood's serious and objectively unreasonable oversights were made more egregious by the exculpatory evidence unearthed during the investigation that the New York State Bureau of Criminal Investigation ("BCI") conducted.

C. BCI Investigator Thomas Hickey

Thomas Hickey, a lead BCI investigator, arrived at Clinton about an hour after the incident, and immediately conferred with Wood.[249] Hickey and other BCI investigators proceeded to interview numerous correction officers and inmates and to generate a report.[250] The report began with an uncritical account of LaPierre's identification of Wong as the assailant.[251] This is, perhaps, no surprise, as the first thing Hickey must have learned upon arriving at the prison is that officials had already identified Wong as the perpetrator. That Wood, as head of prison security, endorsed this conclusion may well have had a conformity effect on Hickey. Accordingly, by all indications, Hickey's investigation became the pursuit of evidence to confirm Wong's guilt.

Hickey included in his investigation report various inmate statements. One was the inculpatory statement of inmate Dellfava, who had allegedly come forward to Sergeant Roger Nelson as a witness.[252] Even though the circumstances of this inmate's disclosure were highly suspect, particularly with respect to Nelson's role, Hickey never questioned Nelson.[253] From a cognitive psychology perspective, Hickey's commitment to the premise that Wong killed Julius led him to filter all evidence accordingly, such that he did not question confirming evidence like Dellfava's statement.

Hickey's report also included the exculpatory statements of numerous inmates, who collectively explained why Wong could not have committed the stabbing and described the perpetrator as Latino.[254] One inmate specifically identified Nelson Gutierrez as the assailant, but it took Hickey over a month to interview Gutierrez, and at no point did Hickey treat Gutierrez like

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[249] *Wong*, No. 8:07-CV-1110, slip op. at 6.
[250] *Id.*
[251] *Id.* at 7.
[252] *Id.* at 9–10.
[253] *Id.* at 10 n.4.
[254] *Id.* at 8–9, 11–13.

a suspect.[255] This provides yet another example of Hickey discounting or disregarding evidence inconsistent with his driving hypothesis. Hickey persisted in this manner, even though he could find no physical evidence or motive linking Wong to the crime.[256] And as he promoted Wong's guilt, the reiteration effect made it more difficult for him to see other perpetrators and crime theories as real possibilities.

Using Hickey's report and ongoing assistance, as well as the testimony of LaPierre, Dellfava, and other correction officers, the Clinton County District Attorney proceeded to prosecute Wong for first-degree murder — even as additional exculpatory evidence surfaced.[257] Hickey helped prepare the government's case and sat at counsel's table during the trial. [258] On August 24, 1987, Wong was sentenced to a term of twenty-five years to life in prison for the murder of Tyrone Julius.[259] It appears prosecutors fell under the spell of cognitive bias as well.

As Wong's case illustrates, wrongful conviction can be caused by a series of objectively unreasonable actions, none of which necessarily reflects malice or produces evidence of malice. Wong's story is replete with evidence of unintentional tunnel vision, including LaPierre's zealous commitment to his identification of Wong, despite compelling evidence that he could not have seen Wong stab Julius, let alone follow Wong with his eyes through the prison yard; Wood's immediate adoption of LaPierre's identification and resulting failure to complete his internal investigation; and Hickey's active role in prosecuting Wong, despite continually emerging exculpatory evidence. Making objectively unreasonable cognitive biases a basis for § 1983 claims of unreasonable prosecution can motivate law enforcement to compensate for, and thus deter, these biases. And to accomplish such an outcome, the doctrinal approach of the Fourth and Sixth Circuits must prevail.

IV. Claims Against Local Governments, Informed By Cognitive Science, Can Propel Reform of Municipal Policies and Practices that Cause Wrongful Convictions

Wong did not bring any § 1983 claims against the local government for his wrongful conviction. However, a shift in the law — away from malice and toward objective reasonableness through a cognitive bias lens — would open the door to § 1983 claims against municipalities for failing to train and supervise their police officers and prosecutors to recognize and neutralize cognitive bias. Claims against municipalities can lead to systemic reform through individual actions for damages, as well as class actions for injunc-

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[255] *Id.* at 9, 11.
[256] *Id.* at 19.
[257] *See id.* at 12–16.
[258] *Id.* at 15.
[259] *See id.* at 15–16.

tive relief. Municipalities make particularly attractive targets for damages relief because, unlike individual state defendants, they are barred from raising a qualified immunity defense.[260] Moreover, municipalities' capacity to provide injunctive relief arguably offers civil rights plaintiffs a less tenuous avenue for attacking cognitive bias in the criminal justice system than damages actions alone.[261]

In the landmark decision of *Monell v. Department of Social Services*,[262] the Supreme Court determined that, although municipalities and other local governments cannot be sued under § 1983 for the acts of their employees, they may be sued for official policies or customs that cause constitutional torts.[263] The existence of a policy sufficient to impose § 1983 liability on a government can be established through: (1) decisions of municipal lawmakers; (2) actions of policymaking officials; and (3) "practices so persistent and widespread as practically to have the force of law."[264]

The Supreme Court held in *City of Canton, Ohio v. Harris*[265] that "the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact."[266] A municipality is de-

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[260] Owens v. Independence, 445 U.S. 622, 650 (1980) (holding that a municipality sued under *Monell* for violations committed by its officials does not have a qualified immunity from damages liability under § 1983, even if it could show that the officials would be entitled to such an immunity in a suit against them in their individual capacities).

[261] Individual damages actions are essential to compensating injured plaintiffs and, arguably, to educating judges about government misconduct so that they might be more effective in addressing structural reform through future cases. James J. Park, *The Constitutional Tort Action as Individual Remedy*, 38 HARV. C.R.-C.L. L. REV. 393, 451–52 (2003). Further, the Supreme Court considers it "almost axiomatic" that civil rights damages actions deter government employees and policymakers. *See* Carlson v. Green, 446 U.S. 14, 21 (1980). Various distinguished scholars have concurred. *See generally, e.g.*, Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991); Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845 (2001); Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 FORDHAM L. REV. 1913 (2007).

However, other distinguished scholars have offered theories about why civil rights damages actions will not effectively deter police department officials from engaging in future unconstitutional behavior. *See generally, e.g.*, PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS (1983); Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453 (2004); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000). Early empirical work suggests that the deterrence effect of damages suits depends on the quality of law enforcement agencies' systems for gathering and analyzing data about lawsuits. Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1028–29 (2010) (finding that few police departments gather and analyze lawsuits brought against them and their officers, and contrasting department practices with theories of deterrence). Thus, injunctive relief must play a critical role in achieving structural reform.

[262] 436 U.S. 658 (1978).

[263] *Id.* at 690–91, 694.

[264] Connick v. Thompson, 131 S.Ct. 1350, 1359 (2011); *see also* CHEMERINSKY, *supra* note 34, § 8.5.2.

[265] 489 U.S. 378 (1989).

[266] *Id.* at 388.

liberately indifferent when it fails to provide adequate training although the need for training is obvious and the inadequacy likely to result in the violation of constitutional rights.[267] Under such circumstances, "the failure to provide proper training may fairly be said to represent a policy for which the city is responsible."[268]

Failing to train police officers in the use of firearms provides one example of an unconstitutional municipal policy.[269] The Supreme Court has said that the need to train officers in the constitutional limitations on use of deadly force is obvious because city policymakers "know to a moral certainty" that their police officers will be required to arrest fleeing felons and cities provide their officers with firearms to facilitate this very task.[270] Additionally, the police so often violate constitutional rights in exercising their discretion in the use of firearms that the need for further training must be obvious to city policymakers.[271]

Since *Canton*, numerous lower courts have found "deliberate indifference" on similar grounds, including for failure to train police officers how to deal with armed, suicidal, emotionally distressed persons, failure to train police officers in handling police dogs, failure to formulate a policy against sexual harassment, and failure to protect a first-time offender placed in a cell with a known violent rapist.[272] Other lower courts have found deliberate indifference where a municipality is on constructive notice of a pattern of constitutional violations, such as when the city has received but failed to respond to complaints of police abuse.[273]

Floyd v. City of New York,[274] a recent high profile § 1983 class action against the City of New York, showcases the promise of failure to train/supervise claims for injunctive relief. The plaintiffs, African Americans and Latinos who were stopped by the New York Police Department ("NYPD"), argued for reform of a City policy or custom of unconstitutional stops and frisks.[275] Judge Scheindlin of the Southern District of New York found that NYPD supervisors routinely reviewed the productivity of officers without considering the facts of a stop to determine whether it was legally warranted or ensuring that officers were keeping records that would make such review possible.[276] The NYPD "repeatedly turned a blind eye to clear evidence of unconstitutional stops and frisks" by hindering the collection of accurate

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[267] *Id.* at 390; *see also* CHEMERINSKY, *supra* note 34, § 8.5.2; Karen M. Blum, *Making Out the* Monell *Claim under Section 1983*, 25 TOURO L. REV. 829, 843 (2009).
[268] *Canton*, 489 U.S. at 390.
[269] *Id.* at 390 n.10.
[270] *Id.*
[271] *Id.*
[272] CHEMERINSKY, *supra* note 34, § 8.5.2.
[273] *Id.*; *see also* Blum, *supra* note 267, at 843.
[274] 959 F. Supp. 2d 540 (S.D.N.Y. 2013).
[275] *Id.* at 556.
[276] *Id.* at 561.

data and making no effective use of the limited available data.[277] Furthermore, despite mounting evidence of unconstitutional stops, officer training remained deficient.[278]

Judge Scheindlin concluded that although the NYPD had been placed on actual and constructive notice of the need for better supervision, monitoring, training, and discipline to protect against constitutional violations, the NYPD "fail[ed] to make meaningful efforts to address the risk of harm to plaintiffs."[279] Additionally, the judge found sufficient evidence of unconstitutional stops to warrant municipal liability based on "practices so persistent and widespread as to practically have the force of law."[280] Following these rulings against the City of New York, the *Floyd* lawsuit resulted in a transformation of the NYPD's stop-and-frisk practices.[281]

Given the cognitive science discussed above, similar theories should allow civil rights plaintiffs to sue municipalities and other local governments for their deliberate indifference in addressing the tunnel vision that causes wrongful convictions. Just as the City of New York in *Floyd* failed to train its officers on proper stops and frisks, municipalities have failed to provide police officers and prosecutors adequate training on recognizing and neutralizing cognitive bias despite the foreseeable serious consequences of objectively unreasonable conduct resulting from cognitive bias. The government's deliberate indifference could also be framed as a failure to respond to voluminous complaints of wrongful convictions over the years, particularly in light of significant research attributing those convictions to cognitive bias. The *Floyd* court found liability based on such willful blindness, implying that municipalities have an obligation actively to educate themselves on the dangers of their employees' practices. Accordingly, a civil rights plaintiff could argue that the government failed to supervise its prosecutors and officers properly by neglecting to review investigations and prosecution decisions, failing to encourage consideration of alternative theories, and perpetuating and failing to address various institutional pressures that trigger and exacerbate cognitive bias, including problematic performance measures and interrogation techniques.

Numerous individual actions seeking damages from municipalities for failing to train and supervise their employees provide similar support for a claim based on failure to address the impact of cognitive bias on criminal investigation and prosecution.[282] Indeed, in a § 1983 case alleging municipal

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[277] *Id.* at 659.

[278] *Id.*

[279] *Id.* at 658–59 (alteration in original) (quoting Cash v. Cnty. of Erie, 654 F.3d 324, 334 (2d Cir. 2011)).

[280] *Id.* at 659–60 (quoting Connick v. Thompson, 131 S. Ct. 1350, 1359 (2011)).

[281] Mark Hamblett, *Settlement Reached in NYC Stop-and-Frisk Civil Suit*, N.Y. L.J. (Jan. 9, 2015), http://www.newyorklawjournal.com/id=1202714435284/Settlement-Reached-in-NYC-StopandFrisk-Civil-Suit, *archived at* http://perma.cc/2X5U-Z6JS.

[282] *See, e.g.*, Walker v. City of New York, 974 F.2d 293, 300 (2d Cir. 1992) (reversing district court's dismissal of claims alleging municipality's failure to train and supervise officers

liability based on inadequate training of police officers in the use of force, the Tenth Circuit denied the city summary judgment:

> [A] showing of specific incidents which establish a pattern of constitutional violations is not necessary to put the City on notice that its training program is inadequate. Rather, evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, is sufficient to trigger municipal liability.[283]

Thus, a plaintiff should not be required to prove the impact of cognitive bias on wrongful convictions beyond her own, as long as she can also demonstrate that the municipality has failed to train its employees in handling their own cognitive biases. Perhaps unfortunately, the latter should not pose an obstacle to plaintiffs.

Such municipal claims would have entitled Wong to discovery about the training and supervision received by prison guards and state investigators, the other wrongful convictions caused by the same municipality, and institutional pressures such as performance measures that might have influenced the defendants' unreasonable decisionmaking. With the aid of experts in cognitive science, litigation could be used to assess whether a municipality took the steps necessary to address tunnel vision as a matter of policy. Where municipal policies are flawed, a lawsuit so framed could result in injunctive relief forcing the municipality to institute policies that would address tunnel vision in criminal proceedings and potentially reduce the frequency of wrongful convictions.

Conclusion

State and local governments have not done enough to stop wrongful convictions. Therefore, it is high time federal courts intervene in the manner intended by § 1983. Unfortunately, § 1983 "malicious prosecution" claims are not having the reform effect they might if the "malice" requirement applied by many courts were replaced by an "objective reasonableness" standard appropriate for such Fourth Amendment claims. A shift to an "unreasonable prosecution" framework would enable courts to scrutinize the

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not to commit perjury, and permitting plaintiffs to conduct discovery to determine whether there was a pattern of perjury by police officers that notified city policymakers of the need for training and supervision); Oviatt v. Pearce, 954 F.2d 1470, 1479 (9th Cir. 1992) (holding that "a reasonable jury could conclude that the likelihood of unjustified incarceration was so obvious that defendant's" failure to take action evidenced deliberate indifference); Reynolds v. Borough of Avalon, 799 F. Supp. 442, 447 (D.N.J. 1992) (holding that "a reasonable jury could find that the risk of sexual harassment in the workplace is so obvious that an employer's failure to take action to prevent or stop it from occurring — even in the absence of actual knowledge of its occurrence — constitutes deliberate indifference").

[283] Allen v. Muskogee, 119 F.3d 837, 842 (10th Cir. 1997).

actions of law enforcement personnel and local governments through a cognitive science lens, and, hopefully, increase the likelihood that injured plaintiffs are compensated and that states implement education and training programs to mitigate the cognitive biases most frequently driving wrongful convictions. This change to the legal standard would give true criminal justice reform a fighting chance.