

The Supreme Court's Surprisingly Great Decision Against Lying Cops and Prosecutors

Justice Brett Kavanaugh's stunning ruling establishes a constitutional bar against malicious prosecution.

[Mark Joseph Stern](#) April 04, 2022 6:12 PM



Brett Kavanaugh pictured during Senate Judiciary Committee hearing on his nomination to be an associate justice of the Supreme Court of the United States in 2018. Michael Reynolds/Pool via Reuters

The Supreme Court has spent years debating whether the Fourth Amendment prohibits "malicious prosecutions," or the filing of bogus

criminal charges, without arriving at an answer. On Monday, Kavanaugh finally broke this impasse with an unexpectedly great decision that underscores his talent for dressing up major decisions in the guise of minor ones. His opinion in [Thompson v. Clark](#) declared that the court has *already* recognized a Fourth Amendment right against malicious prosecutions, which he defined as the “wrongful initiation of charges without probable cause.” Kavanaugh’s assertion is not actually true, but it doesn’t matter: The Supreme Court has now willed this protection into existence, establishing a federal shield against falsified charges.

Any parent would shudder at the injustice that gave rise to the lawsuit at the heart of *Thompson*. (Indeed, Kavanaugh’s own recitation of [the facts](#) evinces an empathy that’s lacking in much of his jurisprudence.) Larry Thompson and his wife, Talleta, lived in Brooklyn with their newborn baby, Nala, and Talleta’s sister, Camille Watson, who has cognitive impairments. The Thompsons took care of Watson because of her developmental disabilities. When Nala was just one week old, Watson covertly called the police and accused Larry Thompson of sexually abusing his baby.

After EMTs arrived, Thompson told them they must have the wrong address; no one in the apartment, he said, had dialed 911. The EMTs then returned with four NYPD officers. Thompson refused to let them enter the apartment, insisting that they first obtain a warrant. The officers tackled Thompson, handcuffed him on the floor, and conducted a warrantless search of his apartment and child. They found no evidence of abuse. The EMTs took the baby to the hospital, where doctors found no evidence of abuse—only diaper rash.

To [justify their own violence](#), NYPD officers filed a criminal complaint against Thompson. They accused him of violently resisting arrest and obstructing government administration, holding him in jail for two days. (It’s [no secret](#)

that many cops who violate people's rights later falsely accuse their victims of crimes to shield themselves from liability—the quintessential malicious prosecution.) These charges were clear retaliation against Thompson for asserting his Fourth Amendment right against a warrantless search, and prosecutors later dropped them without explanation. Thompson then sued the officers for malicious prosecution in violation of his constitutional rights.

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For centuries, most states have recognized malicious prosecution as a tort, or a civil violation that incurs damages. Yet the Supreme Court has long refused to say whether it's forbidden by the Fourth Amendment, too. The justices have previously passed up the opportunity to answer this question in [two notoriously muddled decisions](#). In the intervening years, lower courts have [divided hopelessly](#) over what, exactly, qualifies as an unconstitutional malicious prosecution—if it exists at all. For instance, in this case, the appeals court [held](#) that Thompson could not claim malicious prosecution. Why? Because his case ended with dropped charges rather than some “affirmative indications of innocence,” like an acquittal or a statement from the judge.

In his opinion for the court on Monday, Kavanaugh rejected this reasoning. For support, he turned to the judicial consensus in 1871, when Congress passed the civil rights law that lets individuals sue local law enforcement. At that time, courts authorized claims against malicious prosecution if the charges were filed without probable cause, “for a purpose other than bringing the defendant to justice,” and “ended without a conviction.” If a prosecutor abandoned the case or a court dismissed it without explanation,

an individual could still file suit. This formulation of malicious prosecution, Kavanaugh concluded, is also “housed in the Fourth Amendment.” As a result, prosecutors’ decision to drop charges against Thompson does not prevent him from suing the police.

Kavanaugh’s decision is both excellent and confusing. Excellent because it allows victims of police misconduct to sue in federal court even if prosecutors scuttle all charges; confusing because it begs the question at the heart of the case. Rather than explain why the Fourth Amendment bars malicious prosecutions, Kavanaugh simply asserted: “This court’s precedents recognize such a claim.” He then cited two precedents that did no such thing. Then he cited a heap of lower court decisions recognizing a Fourth Amendment right against malicious prosecutions, none of which binds SCOTUS.

In dissent, Justice Sam Alito, joined by Justices Clarence Thomas and Neil Gorsuch, fumed that “this court has never held that the Fourth Amendment houses a malicious-prosecution claim.” But just because the court hasn’t doesn’t mean that it shouldn’t. In a 2020 [decision](#) that Kavanaugh praised as “comprehensive,” Judge William Pryor—usually a law-and-order conservative—found ample historical evidence that the Constitution allows such claims. After all, bogus charges typically lead to wrongful arrest and imprisonment, the kind of “seizure” forbidden by the Fourth Amendment. The term “malicious prosecution,” Pryor explained, is just “shorthand” for a “seizure pursuant to legal process” that is tainted by “false statements or omitted information.” An arrest (or “seizure”) is unconstitutional when it is the product of cops’ lies.

Kavanaugh—along with Chief Justice John Roberts, Justice Amy Coney Barrett, and the three liberals—grasped this fact. Alito, Thomas, and Gorsuch did not. What accounts for this rift? One possibility is that Kavanaugh,

Roberts, and Barrett understood the troubling, real-world implications of Alito's position. It's no coincidence that this case involves a baby: Law enforcement routinely accuses parents of harming their children on the basis of dubious or nonexistent evidence. A [brief](#) filed on behalf of the conservative Home School Legal Defense Association elucidated this problem with alarming detail. (The brief was authored by the anti-LGBTQ Alliance Defending Freedom, which rarely finds itself on the same side as [the ACLU](#).) Countless parents, including evangelical home-schoolers, have been subjected to baseless "child-welfare investigations" that spiral into criminal probes. Zealous police and prosecutors may bring charges against parents with nothing more than a hunch. Perhaps this brief forced several conservative justices to confront the reality that no one—not even their own storybook family—is safe from malicious prosecution.

Whatever the reason for the conservative bloc's fissure, it's a good result for justice. The Constitution cannot possibly condone the horror that Thompson suffered at the hands of the NYPD. Fraudulent charges are a betrayal of an officer's most basic duties. It's long past time that the Supreme Court recognize them as a betrayal of the Constitution, as well.