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Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis

The study of the tort of malicious prosecution is properly the study of systems to defend the law from misuse. The problem of frivolous suits bothered early legal systems just as it troubles modern jurisprudence, and though these older systems defined wrongful initiation of legal process more expansively than we and punished it more harshly, our present law is their descendant.

The tort of malicious prosecution, the centerpiece of the present American system for deterring groundless litigation, has recently received considerable scholarly attention. Courts generally recognize one of two forms of the tort. In about one-third of American jurisdictions, plaintiffs who have brought actions for malicious prosecution have found the remedy all but useless, because of the restrictions of the English Rule, which requires a showing of special damage. In a


3. In Rome, good or bad faith was irrelevant and, depending on the nature of their claims, losing complainants could be penalized up to a fifth of the amount for which they had sued. See THE INSTITUTES OF JUSTINIAN 328 note (J. Thomas ed. 1975). A losing Anglo-Saxon plaintiff lost his tongue or paid a heavy penalty. See p. 1221 infra.

4. This Note considers only civil malicious prosecution, also known as “wrongful civil proceedings,” W. PROSSER, HANDBOOK OF THE LAW OF TORTS 850 (4th ed. 1971) and “wrongful use of civil proceedings,” RESTATEMENT (SECOND) OF TORTS § 674 (1977).

5. See Henry v. First Nat'l Bank, 444 F.2d 1300, 1310-11 (5th Cir. 1971), cert. denied, 405 U.S. 1019 (1972). Although other tools exist, they are seldom employed and provide little deterrence. Courts could tax full costs, but have been extremely reluctant to do so. See p. 1233 infra. Criminal sanctions against groundless civil litigation are included in many conspiracy statutes. See, e.g., CAL. PENAL CODE § 182(3) (West Supp. 1979); N.J. STAT. ANN. § 2A:98-1(c) (West 1969). Attorneys who bring groundless suits may be taxed costs themselves, held in contempt, or disciplined through the bar, while various other tort actions besides malicious prosecution exist for specific types of misuse of legal process. See generally Note, Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process, 44 U. CHI. L. REV. 619 (1977).


8. Special damages are those that would not normally result from similar litigation. See O‘Toole v. Franklin, 279 Or. 513, 517, 569 P.2d 561, 563 (1977). Interference with the

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slightly larger number of jurisdictions,\(^9\) malicious prosecution plaintiffs have enjoyed the somewhat less restrictive Restatement Rule, which lacks a special damage requirement.\(^{10}\)

This Note analyzes the history of Anglo-American attempts to discourage malicious civil suits. The analysis begins in the seventh century with the laws of Kentish kings, and focuses on the historical bases for the modern system and the changing balance among the policies that the different rules have attempted to serve. The Note argues that both of the current rules share significant defects unrelated to the advisability of the special damages requirement, and that the American system for dealing with groundless suits is sensitive neither to the history in which it has its roots nor to the needs of the modern judiciary. It proposes adoption of a new remedial framework that incorporates historically proven solutions, and demonstrates that such a system would be functionally superior to and historically more justifiable than that which is currently employed.

I. The Present American Controversy

Both the English and Restatement Rules require pleading and proof of three basic elements: termination of the underlying suit in the original defendant's favor,\(^{11}\) lack of probable cause for the underlying suit,\(^{12}\) and malice on the part of the original plaintiff.\(^{13}\) To these the person is special damage, see, e.g., Woodley v. Coker, 119 Ga. 226, 228, 46 S.E. 89, 90 (1903) (arrest under civil process); Yelk v. Seefeldt, 35 Wis. 2d 271, 277-78, 151 N.W.2d 4, 7 (1967) (lunacy proceedings), as are proceedings that interfere with property, see, e.g., Mayflower Indus. v. Thor Corp., 15 N.J. Super. 139, 152, 83 A.2d 246, 252 (Ch. 1951), aff'd per curiam, 9 N.J. 605, 89 A.2d 242 (1952) (injunction preventing normal business is "special grievance"); dictum added that appointment of receiver, issuing writ of replevin, filing *lis pendens* also qualify); Alvarez v. Retail Credit Ass'n, 234 Or. 255, 259, 381 P.2d 499, 501 (1963) (attachment of wages).

9. See, e.g., Turner v. J. Blach & Sons, 242 Ala. 127, 128, 5 So. 2d 93, 94 (1941); Ackerman v. Kaufman, 41 Ariz. 110, 113-14, 15 P.2d 966, 967 (1932). Other jurisdictions have listed the requirements of the tort without including a special damages requirement, though without squarely confronting the issue. See, e.g., Williams v. Templet Shipyard, Inc., 278 So. 2d 895, 896 (La. Ct. App. 1973); Lindsay v. Larned, 17 Mass. 190, 194-97 (1821).

10. Restatement (Second) of Torts §§ 674, 677, Comments a & b (1977); see W. Prosser, *supra* note 4, at 853.


13. See, e.g., Crouter v. United Adjusters, Inc., 266 Or. 6, 10, 510 P.2d 1328, 1330 (1973); Johnson v. Mount Ogden Enterprises, 23 Utah 2d 169, 172, 460 P.2d 333, 335 (1969). Malice may be inferred from lack of probable cause. See Crouter v. United Adjusters, Inc., 266 Or. 6, 8-10, 510 P.2d 1328, 1329-30 (1973); W. Prosser, *supra* note 4, at 855 n.55. Malice is shown when one proves that a proceeding has been brought "primarily for a
English Rule adds a fourth element: the underlying suit must have caused some form of damage beyond that generally attendant upon similar forms of litigation. Compensatory damages under either rule include all expenses and damage incurred by reason of the wrongful litigation, and both rules permit punitive damages.

The debate about the two rules is informed by four competing policies. Those authorities that favor the English Rule stress both the need to encourage the honest litigant to seek judicial redress by protecting him from reprisal, and the value of resolving litigation quickly and with finality. Proponents of the Restatement Rule emphasize both the need to deter groundless suits and the fairness of making wronged defendants whole.

An ideal system for remedying purpose other than the adjudication of the claim in suit, id. at 855; Restatement (Second) of Torts § 676 (1977), but it has also been defined as reckless disregard of the rights of the defendant, see note 118 infra (citing authorities).

See notes 7 & 8 supra.

15. See, e.g., Connelly v. White, 122 Iowa 391, 395-96, 98 N.W. 144, 145-46 (1904) (English Rule); Restatement (Second) of Torts § 681 (1977). No case has held that the expense of the malicious prosecution action itself is recoverable. These expenses, like those of any lawsuit, are currently compensable only through costs statutes, which give inadequate compensation in most American jurisdictions. See pp. 1229, 1232-33 infra.


17. The English Rule is essentially the tort inherited from common law, and its proponents find support in history, see Wesko v. G.E.M., Inc., 272 Md. 192, 195 n.1, 321 A.2d 529, 531 n.1 (1974); Potts v. Imlay, 4 N.J.L. 330, 332-34 (Sup. Ct. 1816), though that history is false at worst and misleadingly incomplete at best, see pp. 1221-29 infra. Although English Rule jurisdictions may agree that the special damages requirement is ill-suited to the role in which they cast it, they argue that the Restatement Rule is no better, see Aals v. Aals, 246 Iowa 158, 163, 66 N.W.2d 121, 124 (1954), and that any change must come through the legislature, see O'Toole v. Franklin, 279 Or. 513, 521, 569 P.2d 561, 565-66 (1977); cf. Potts v. Imlay, 4 N.J.L. 330, 332-33, 338 (Sup. Ct. 1816) (only legislature can reestablish costs sanction).


20. Restatement Rule proponents dispute the relevance of the more recent English precedent. They argue that in England costs provide a remedy for virtually all injury outside the scope of the special damage rule. See Peerson v. Ashcraft Cotton Mills, 201 Ala. 348, 348, 78 So. 204, 204 (1917); Lipscomb v. Shofner, 96 Tenn. 112, 114, 33 S.W. 818, 818 (1896). In addition, they rely on the malice requirement to protect honest litigants, see Kolka v. Jones, 6 N.D. 461, 469, 71 N.W. 558, 561 (1897); W. PROSSER, supra note 4, at 851; cf. Jones v. Gwynn, 10 Mod. 214, 218, 88 Eng. Rep. 699, 701 (1714) (malice requirement prevents action on case from discouraging just prosecutions), and that adoption of the broader rule has not produced an avalanche of malicious prosecution suits, see Peerson v. Ashcraft Cotton Mills, 201 Ala. 348, 349, 78 So. 204, 205 (1917). They also find support in mythical precedent. See note 59 infra.


22. See, e.g., Whipple v. Fuller, 11 Conn. 582, 585 (1856); Closston v. Staples, 42 Vt. 209, 215-22 (1869).
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groundless litigation would promote each of these four policies rather than compelling courts to choose among them. The quest for such a system began centuries ago. Yet among the world’s legal systems only the American places a subsequent tort action at the core of its machinery for dealing with groundless litigation.

Historical analysis shows that the common law never expected the tort of malicious prosecution to resolve the competing policies that surround the problem of groundless litigation; rather, the tort has inherited that function by default. In fact, the American system represents a significant departure from the preferred solution of the common law, which from pre-Norman times to the present has placed primary reliance on controls available within groundless suits. Historically, subsequent actions have been only a supplement to internal sanctions.

II. The Evolution of the Current Systems

A. Early Developments

Anglo-Saxon courts employed a simple system for guarding against false suits: the complainant unfortunate enough to lose his cause also lost his tongue, or, if that option proved distasteful, was compelled to pay his opponent compensation, called *wer*, which was fixed according to the complainant’s status. Each complainant was required to provide sureties—*borh*—who were subjected to the same penalties if the complainant could not be found.

These simple though harsh sanctions, imposed in the action itself, were prompt and probably effective. They served a dual function.

23. At some level, any system that deters groundless suits will also discourage some suits that are legitimate. The object is therefore to minimize the conflict while striving for optimal deterrence. See notes 94, 125 infra.


25. Other systems permit the costs of litigation to be recovered within each suit. See Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 Calif. L. Rev. 792 (1966); Gold, *supra* note 2, at 57.


27. *Wer* (also *wergild*) was the status-based blood price placed on each man that could be paid to his family to atone for his murder, and that he himself was compelled to pay for certain crimes. See 2 B. THORPE, *supra* note 26 (glossary). The amount was significant, see 2 POLLOCK & MAITLAND, *supra* note 1, at 515 n.4 (*wer* for citizen of London during Henry I’s reign (1100-35) was 100 shillings, then large sum).

28. The *borh* was required as a guarantee of the plaintiff’s good faith and willingness to submit to the court’s decision. See Hlothære & Eadric 8 & 9 (673-87 A.D.), reprinted in 1 B. THORPE, *supra* note 26, at 31.
First, they punished and deterred false suits, thus protecting individuals from abuse and protecting the judicial machinery from misuse. Second, they sometimes produced compensation (wer) for wronged defendants.

The system, however, was designed for a medieval trial in which God was the judge, and hence it equated an unsuccessful with a false suit. In such a system there could be no place for the honest but mistaken litigant, whose access to the courts today’s authorities guard jealously. Further, it provided rather random recompense to defendants, because any payment varied with the complainant’s status and not with the extent of the wrong done.

The system of taxing fixed wer in response to false suits did not long survive the Norman conquest. It gave way to a new and more flexible system that evolved from the Norman traditions—amercement. The amercement system did not exact a previously fixed penalty from the losing plaintiff and in strict theory was not automatically applied to every case. In practice, however, immediately following the determination of the underlying suit, judges found virtually all losing plaintiffs to be in the King’s mercy for a false claim. Liability then attached for some monetary penalty, which was assessed or “affeeded” by honest men of the neighborhood. Once the penalty had been ascertained, the losing plaintiff or his pledges would pay it to the court.

29. This abuse could be significant, because of the rigors of what passed for a trial in the Middle Ages. Common methods of proof were by oath or by ordeal. Guilt was settled by successful—or unsuccessful—recital of the oath, or by failure in the ordeal: if a red-hot iron burned when grasped or if the waters refused to accept a litigant (that is, he floated), guilt was established. See 2 Pollock & Maitland, supra note 1, at 598-602.

30. The punitive aspect was apparently central, since the sanction only incidentally produced appropriate compensation, if it produced any at all. See id. at 519.

31. See 2 Pollock & Maitland, supra note 1, at 539, 598-602.

32. The amercement system applied not only to false suits, but also to other infractions, including unsuccessful defense of suit. See id. at 513.

Maitland traces the roots of amercement to the Frankish practice of forfeiture of goods for infidelitas. See id. at 515 n.4. Amercement was thus related to outlawry, id. at 513, and could lead to forfeiture of all one’s chattels, id. at 513, 514.

33. P. Winfield, supra note 24, at 15.

34. Id.

35. Amercement was not limited to the royal courts. See 2 Pollock & Maitland, supra note 1, at 513.

36. The form was “in misericordia pro false clamore.” See, e.g., Ralph de Bylesfield v. William of Oakham, Cor. Reg. Roll 150, m.26 (Hil. 1297), reprinted in 58 Selden Society 49, 50 (Sayles ed. 1939) [hereinafter cited as Sayles].

37. 2 Pollock & Maitland, supra note 1, at 513.


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Though the system shared functional similarities with its predecessor, the courts had a more flexible sanction in amercement than in the penalties of wer and loss of tongue. Because penalties were assessed according to the extent of the wrong done, they could in theory range from all one's possessions to only pennies. Amercement thus allowed more selective deterrence than the older system had provided, and left room for honest though unsuccessful suits.

The system had its shortcomings as well, two of which were central. First, wronged defendants received no compensation; rather, the amercement was paid to the king, lord, or sheriff in whose court the wrongful suit had been brought. Second, since amercements could penalize only those before the court, the law found itself unable to deal effectively with groundless suits brought through straw parties. At the same time, the new process of indictment allowed the unscrupulous to subject a victim to legal proceedings and possible punishment for breach of the king's laws without submitting even a straw plaintiff to the jurisdiction of the court.

40. In both systems, liability for the sanction was established simultaneously with the determination of the underlying suit, though the extent of the sanction was determined at a later stage in the process. See pp. 1221, 1222 supra. Sureties were required in both systems. See notes 28, 39 supra (citing authorities). Finally, both systems were more concerned with penalizing wrongdoing than with making victims whole. See p. 1222 supra; 4 W. Holdsworth, supra note 39, at 536, 537. Actual injury was not a measure of either punishment or compensation. Thus amercement was ascribed not according to the harm done, but "according to the gravity of the offense, according as it is great or small," 2 H. Bracton, supra note 38, at 329-30, and wer was also independent of the damage actually caused, cf. Statute of Marleberge, 52 Hen. 3, c. 6, § 2 (1267) (grants costs to victorious defendants in actions under writ of right of ward; provides also that losing plaintiffs be amerced).

41. Maitland credits amercement's flexibility with its ultimate success. See 2 Pollock & Maitland, supra note 1, at 514. That flexibility also led to burdensome abuse. Id.

42. See Magna Charta, 9 Hen. 3, c. 14 (1225); 2 H. Bracton, supra note 38, at 329-30.

43. See 2 Pollock & Maitland, supra note 1, at 513, 515.

44. Though virtually every losing plaintiff was amerced, see note 34 supra (citing authorities), amercements were proportional to the plaintiff's wrong in bringing the action rather than to the status of the wrongdoer, and hence could be nominal in a legitimate, though losing, suit. See note 43 supra (citing authorities).

45. See note 39 supra (citing authorities).

46. Courts could punish the straw party, but status-based limitations on amercement, see note 42 supra (citing authorities); 2 Pollock & Maitland, supra note 1, at 514-15, made such punishment an ineffective way to punish the guilty procurer, who might be a lord, maintaining a propertyless freeman to bring suits. Furthermore, certain classes of people could not be amerced at all—notably infants. See E. Coke, First Institutes *127a. Infants, therefore, were not required to have pledges. Id.; cf. 3 H. Bracton, On the Laws and Customs of England 250 (S. Thorne trans. 1977) (1st ed. n.p. 13th Cent.) (alternate form of writs for infants does not require security).

47. The process is generally traced to 1166 and the Assize of Clarendon. See 2 Pollock & Maitland, supra note 1, at 641-42.

48. Through indictments, the early juries of presentment, the forerunners of today's grand juries, were responsible for bringing reputed criminals to the royal attention. Id. The jurors themselves could be punished through amercement. P. Winfield, supra note
The absence of compensation to wronged defendants left amercement’s ability to deter false suits unaffected, and sparked only sporadic and limited legislation until the sixteenth century.50 But amercement’s failure to control falsely instigated indictments and straw-party suits presented a threat to the integrity of the legal system itself,51 and demanded a remedy. The English legal system responded with the writ of conspiracy in 1293.52

Unlike its modern descendants, conspiracy took aim not at all malicious suits, nor even at those causing special hardships, but solely at straw-party actions.54 The writ granted wronged defendants limited

24, at 14. But if one merely suggested the existence of a crime to the jury, one could escape personal responsibility and possible amercement if the accusation proved false. Prior to the development of indictment, all accusations were handled through a process that appears civil: even serious felonies were brought before the court through the wronged party’s accusation, called an “appeal,” 2 POLLOCK & MAITLAND, supra note 1, at 572, and were provable through oath, ordeal, or battle, id. at 598-606.

49. Only one statute prior to 1500 gave victorious defendants their costs: The Statute of Marleberge, 52 Hen. 3, c. 6, § 2 (1267) (limited to writ of right of ward). See J. HULLOCK, THE LAW OF COSTS 124 (Dublin 1795). One other statute gave costs to successful defendants in a writ of error, but only if they had been plaintiffs below: Costs, &c. awarded to the plaintiff, where the defendant such a writ of error, 3 Hen. 7, c. 10 (1486).

50. See note 64 infra.

51. See SAYLES, supra note 36, at liv (quoting Yorkshire eyre roll of 1294) (“[T]here are so many and so influential maintainers of false plaints and champertors and conspirators leagued together to maintain any business whatsoever etc. that justice and truth are completely choked . . . .”)

52. See Statute of Champerty, 33 Edw. 1, Stat. 3 (1305). But see note 53 infra (citing authority that correct date is 21 Edw. 1 or 1298). The first part of the statute provided for imprisonment or fine, the second for the new writ. Vagueness in the meaning of conspiracy, see P. WINFIELD, supra note 24, at 3, was cleared up by the Definition of Conspirators, 33 Edw. 1, Stat. 2 (1304):

Conspirators be they that do confer or bind themselves by Oath, Covenant, or other Alliance, that every of them shall aid and bear the other falsly and maliciously to indite, or cause to indite, (2) or falsly to move or maintain Pleas; (3) and also such as cause Children within Age to appeal Men of Felony, . . . (4) and such as retain Men in the Country with Liveries or Fees for to maintain their malicious Enterprises; . . . (5) And Stewards and Bailiffs of great Lords, which . . . undertake to bear or maintain Quarrels, Pleas, or Debates, that concern other Parties than such as touch the Estate of their Lords or themselves.

53. The statute creating the writ has erroneously been recorded as 33 Edw. 1, or 1305. See SAYLES, supra note 36, at lix; P. WINFIELD, supra note 24, at 26-28.

There has been some confusion over conspiracy’s antecedents. Modern historians agree that no general right of action for false suit existed at common law. See 2 POLLOCK & MAITLAND, supra note 1, at 539 & n.7; SAYLES, supra note 36, at lvii-lx; P. WINFIELD, supra note 24, at 29-37, 142. Coke disagreed, see E. COKE, SECOND INSTITUTES *562 (statutory writ merely affirmed common law) [hereinafter cited as SECOND INSTITUTES], but Coke’s statement is unreliable, see 2 POLLOCK & MAITLAND, supra note 1, at 539 n.7; P. WINFIELD, supra note 24, at 29. The modern belief is supported by the early cases, see Richard of Hagbourne v. Geoffrey de Chilcheyth, Cor. Reg. Roll 138, m.35 (Mich. 1293), reprinted in 57 Selden Society 160 (1938) (plea of conspiracy from new ordinance; plaintiff does not know meaning of term); Goldington v. Bassingburn, Y.B. Trin., 3 Edw. 2, pl. 27B (1310), reprinted in 20 Selden Society 194, 196 (1905) (possibly ambiguous) (writ not founded on common law).

54. See note 52 supra.

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rights to sue those who procured third parties to instigate groundless actions, but granted no remedy against an individual plaintiff who sued without ground.\textsuperscript{55} Moreover, the writ required not only a showing that false claims had been made in court but also a further showing of malice:\textsuperscript{56} the subsequent sanction was limited to the most egregious of groundless actions, and did not extend, as did amercement, to simple false suits.\textsuperscript{57}

The writ of conspiracy was, in a sense, a commission for defendants to act as private attorneys general in protecting the system on its vulnerable flank.\textsuperscript{58} The writ marked the first time the English legal system recognized a general right of action for wrongful initiation of legal process,\textsuperscript{59} and represented a change in the already ancient pattern of internal sanctions against false suits. Yet the new remedy remained generally limited to a penalty for straw-party actions.\textsuperscript{60} Thus the break with tradition was relatively minor; the law assessed penalties for groundless suits\textsuperscript{61} through the procedure of a suit for damages only when the wrongdoer had not placed himself before the court.

\textsuperscript{55} See id.
\textsuperscript{56} See P. Winfield, supra note 24, at 66-81. Other essentials for liability on the mature writ were procurement, id. at 81-83, combination, id. at 59-65, and a determination of the underlying suit in the now-plaintiff's favor, id. at 83-87.
\textsuperscript{57} See p. 1222 supra.
\textsuperscript{58} Sayles suggests that the essence of conspiracy was damages. Sayles, supra note 36, at lxii. This is true, but only from the point of view of the wronged defendant, whom the law enticed into an enforcement role by the promise of a remedy. From a systemic point of view, the writ was in essence a procedure for sanction. The tension between the two functions that the tort has been called on to serve—remedy and sanction—contributed significantly to confusion throughout its development. See Savile v. Roberts, 1 Ld. Raym. 374, 378-79, 91 Eng. Rep. 1147, 1150 (1698) (debate over whether “conspiracy” or “damages” formed basis of ancient writ; Lord Holt decides damages in argument that applies equally well, \textit{mutatis mutandis}, to opposite outcome).
\textsuperscript{59} Many American courts and commentators have been misled on the point. Restatement and English Rule jurisdictions alike refer to and rely on a mythical right of action for false suit said to exist before the Statute of Marlborough. See, e.g., Smith v. Michigan Buggy Co., 175 Ill. 619, 626-27, 51 N.E. 569, 571 (1898) (English Rule); Kolka v. Jones, 6 N.D. 461, 465-66, 71 N.W. 558, 559-60 (1897) (Restatement Rule); Note, \textit{Malicious Prosecution—Its Scope and Purpose}, 22 Geo. L.J. 343, 344 (1934); 28 S. Cal. L. Rev. 427, 427-28 (1955). The myth of a common law ancestor can be traced to Lord Coke. See \textit{Second Institutes}, supra note 53, at *561, *562 (discussing writ of conspiracy); note 53 supra.
\textsuperscript{60} The writ expanded somewhat, Sayles, supra note 36, at lxii, but the twin requirements of procurement and conspiracy generally filtered out actions not brought through straw parties, see Note, Y.B. Eyre of London, 14 Edw. 2, f.10v (1212), \textit{reprinted in} 86 Selden Society 357 (1909) (Stanton, J.) (combination essential); Goldington v. Bassington, Y.B. Trin., 3 Edw. 2, pl. 27B (1310), \textit{reprinted in} 20 Selden Society 194, 197 (1906) (procurement essential).
\textsuperscript{61} Although conspiracy was created primarily to deal with the new process of indictment, see 2 Pollock & Maitland, supra note 1, at 559; P. Winfield, supra note 24, at 14, it also applied to civil suits, see Sayles, supra note 36, at lxv; P. Winfield, supra note 24, at 55-59. The restrictive nature of the modern tort is thus derived not from its origins in wrongful criminal proceedings, as Prosser suggests, W. Prosser, supra note 4, at 850-51, but rather from the fact that it was originally limited to straw-party actions.
The effectiveness of the amercement-conspiracy system depended primarily on the continuing vitality of the internal sanction. But amercement, which had once formed a branch of the royal revenue, was in a long but steady process of decline. As one consequence, the law was threatened with the loss of effective internal sanctions against false suits. The situation grew intolerable, and evoked simultaneous responses from Parliament and from the courts.

Parliament responded by shoring up the internal sanctions through a series of costs statutes enacted over several centuries, each of which

62. See E. Coke, First Institutes *161a n.4 (F. Hargrave & C. Butler eds. 1817).
63. Holdsworth suggests that the practice was naturally superseded by the process of "making fine." See 3 W. Holdsworth, A History of English Law 391 (5th ed. 1942). His sources, however, do not suggest that fines took the place of amercements. It is more likely that ever-stricter limitations on the size of amercement resulted from changing attitudes toward the "wrongs" amercement punished. Since both plaintiffs and defendants could suffer amercement for losing a suit, see note 32 supra, limitations on its size, like limitations on the costs statutes, see note 106 infra, might well have been viewed as protecting the honest litigant.

The resulting decline can be traced from amercement's origins as a penalty of all one's chattels, see note 32 supra; through Henry I's promise to limit the sanction to no more than 100 shillings, 2 Pollock & Maitland, supra note 1, at 515 n.4; Becket's belief that the law of Kent limited amercements to 40 shillings, id. at 514; Bracton's procedural constraints, 2 H. Bracton, supra note 38, at 329-30; Fitzherbert's expectation that amercements would typically run four to six shillings, A. Fitzherbert, Natwra Brevium *76a; to Lord Holt's statement that amercement had become a matter of form, Savile v. Roberts, 1 Ld. Raym. 574, 580, 91 Eng. Rep. 1147, 1151 (1698). One hundred shillings was a heavy penalty in 1100. 2 Pollock & Maitland, supra note 1, at 515 n.4. Six shillings, however, was just enough for a meal in 1600: Shakespeare has Falstaff spend about ten shillings on a meal, five shillings eightpence on two gallons of sack alone. Henry IV, Part I, Act scene iv.

64. The most important defendants' costs statutes were: An act that the plaintiff, being nonsuited, shall yield damages to the defendants in actions personal, by the discretion of the justices, 23 Hen. 8, c. 15, § 1 (1531) (costs allowed to prevailing defendants in actions of trespass, debt or covenant, detinue, account, case, or on contract or statute); An act to give costs to the defendant upon a nonsuit of the plaintiff, or verdict against him, 4 Jac. 1, c. 3 (1606) (extending defendants' costs to all cases in which prevailing plaintiff might have costs).

That costs were a direct response to mounting groundless suits—and an indirect response to the failure of amercement—is explicitly recognized in the statutes themselves, see, e.g., Costs, &c., awarded to the plaintiff, where the defendant sueth a writ of error, 3 Hen. 7, c. 10 (1486) (to discourage groundless appeals for delay only); An act for the avoiding of wrongful vexation touching the writ of Latitat, 8 Eliz. 1, c. 2 (1565) (to punish vexatious use of summary process), and in the cases construing them, see, e.g., Franck v. Burt, Style 149, 82 Eng. Rep. 602 (1648); Ladd v. Wright, Moore 625, 72 Eng. Rep. 800 (1601) (both state costs given for wrongful vexation).

The costs system was a synthesis of the internal sanctions it succeeded. Like amercements, it was flexible, though the flexibility was in the discretion of the court. See, e.g., An act to give costs to the defendant upon a nonsuit of the plaintiff, or verdict against him, 4 Jac. 1, c. 3 (1606); An act that the plaintiff, being nonsuited, shall yield damages to the defendants in actions personal, by the discretion of the justices, 23 Hen. 8, c. 15, § 1 (1531). Like both previous systems, the sanction was limited, this time to necessary costs of suit, including attorneys' fees. See Goodhart, Costs, 38 Yale L.J. 849, 856-59 (1929). Like wer, it provided compensation. Like amercement, it punished groundless litigation.
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left the costs sanction broader and more useful than the one before. The costs statutes also reestablished the ancient policy of providing some measure of compensation to wronged defendants. Taxable costs, however, were limited to the direct expenses of the litigation, and did not extend to many forms of consequential damages, such as those arising from arrest of the person or attachment of property. Costs thus fell short of being either a comprehensive internal sanction or a complete remedy and, in the areas of possible damage beyond the perimeter of a costs award, the action on the case in the nature of conspiracy evolved into the English Rule for malicious prosecution.

B. Emergence of the Modern Rule

The action on the case presented courts with the opportunity to fashion, by analogy to writs of conspiracy, a cause of action that would fit those forms of malicious prosecution that had become unreachable through the internal sanctions. Case, it was said, would lie against more severely than it punished merely unsuccessful suits. See, e.g., An act for the better preventing frivolous and vexatious suits, 8 & 9 Will. 3, c. 11, § 1 (1697) (no costs assessed if probable cause found in multiple-defendant suits).

65. In the most egregious cases, when the plaintiffs caused arrest or attachment and then delayed prosecution of the underlying claim or were nonsuited, a narrowly drawn statute allowed judges to tax both costs and damages. See An act for the avoiding of wrongful vexation touching the writ of Latitat, 8 Eliz. 1, c. 2 (1565).

66. The older writs against misuse of procedure simply could not cover the wrongs that costs did not encompass. Conspiracy was hampered by its limitation to straw-party suits, as were champerty and maintenance. See P. Winfield, supra note 24, at 131-38. Properly applied, deceit was limited to fraud on the court, 2 Pollock & Maitland, supra note 1, at 535, though it had grown in uncertain fashion into the area of false and malicious suits, see A. Fitzherbert, supra note 63, at *98N. Even when the old forms technically applied, they were frequently rendered useless by the complexities of their own procedure. See 2 W. Holdsworth, A History of English Law 459 (4th ed. 1936).

67. The Statute of Westminster 2, 13 Edw. 1, stat. 1, c. 24, § 2(3) (1285), authorized clerks of chancery to create a new writ whenever a case was outside the technical scope of the older writs, but still analogous to the situation an older writ contemplated. The writ of conspiracy came closest to filling the need, and hence formed the basis of the analogy. See Savile v. Roberts, 1 Ld. Raym. 374, 378-79, 91 Eng. Rep. 1147, 1150 (1698). Yet the new action was something of a hybrid. Scholars trace it in name no further back than Fitzherbert, writing in 1554, who first characterized actions of conspiracy against one individual as properly actions "upon the case upon the falsity and deceit done," A. Fitzherbert, supra note 63, at *116L; P. Winfield, supra note 24, at 119, though actions on the case for false indictments could be brought after 1429, J. Bryan, The Development of the English Law of Conspiracy 28-29 (1909). The maturing action was nourished as well by related precedent in writs of trespass and deceit, which overlapped conspiracy's field. P. Winfield, Present Law of Abuse of Legal Procedure 202 (1921) ("It is precisely the organic growth of these three actions [trespass, deceit, and conspiracy] together that made it possible for the Courts to extend the law without perceptible effort . . . .")

68. It is difficult to pinpoint exactly when amercement ceased to be effective, though by 1478 it was no longer serious enough to require pledges, which had become a formality even before that time. See Haver v. Gibbons, 3 Bulls. 61, 81 Eng. Rep. 52 (1613) (citing Y.B. 18 Edw. 4, pl. 9 (1478)). See generally note 63 supra (discussing decline of amercement).
one when conspiracy would lie against two or more. But in practice, case lay against any number, even against types of wrongful initiation of legal process never within the scope of the old writ. Yet the function was consistent with that of the older action. Case did not reach false suits per se; it punished "manifest vexation," caused in the course of such a suit, that could not be reached by internal sanctions. The seventeenth-century decisions that gave content to "manifest vexation" demonstrate that the term essentially encompassed damages in excess of those curable through costs. In Savile v. Roberts, Lord Holt organized the kinds of damages previously recognized in actions on the case in the nature of conspiracy into two categories, one of particular or "special" damage, the other of straw-party suits. In so


70. See 3 W. BLACKSTONE, supra note 39, at *126.

71. See, e.g., Skinner v. Gunton, Raym. Sir T. 176, 83 Eng. Rep. 93 (1681) (case lay on allegation of false arrest though no final determination had been reached in action following arrest); Dowse v. Swaine, 1 Lev. 275, 83 Eng. Rep. 404 (1680) (exaggeration of claim sufficient if effect is hindering of bail). This expansion was partially a result of uncertainty over what limits case had inherited from its various antecedents. See note 67 supra. It was still possible to argue in Skinner v. Gunton that the action lay against two or more only, while the extent to which the costs statutes preempted the remedy was debated strenuously in Webster v. Haigh, 3 Lev. 210, 211, 83 Eng. Rep. 654, 655 (1685). For another expression of judicial uncertainty, see Jones v. Gwynn, 10 Mod. 214, 219, 88 Eng. Rep. 699, 701 (1714) (Parker, C.J.) ("Actions of conspiracy are the worst sort of actions in the world to be argued from; for there is more contrariety and repugnancy of opinions in them than in any other species of actions whatever.")


73. See Waterer & Freeman, Hob. 266, 266-67, 80 Eng. Rep. 412, 412-13 (1619). It was important to develop a theory under which the action lay for something other than bringing suit, for the common law had refused to permit subsequent sanctions—tort actions—against resort to the courts, even if vexatious. See Parker v. Langley, Gilb. 163, 167, 93 Eng. Rep. 295, 294 (1714). The law had good reason to prefer the internal sanctions, since the tort, even though limited, had historically been abused. See SAYLES, supra note 36, at lxxi. It is within the context of an expressed preference for internal sanctions that the judges first expressed disfavor with malicious prosecution. See Parker v. Langley, Gilb. 163, 167, 93 Eng. Rep. 293, 294 (1714).

74. See, e.g., Waterer & Freeman, Hob. 266, 267, 80 Eng. Rep. 412, 413 (1619): [I]f his suit be utterly without ground of truth, and that certainly known to himself, I may have an action of the case against him for the undue vexation . . . he puttheth me unto by his ill practice . . . . [But] the new action must not be brought before the first be determined . . . [and] there must be not only a thing done amiss, but also a damage either already fallen upon the party, or else inevitable.

Thus only damage that continued after costs had been granted could ground the action. 75. 1 Ld. Raym. 374, 91 Eng. Rep. 1147 (1698), also reported as Savill v. Roberts, 1 Salk. 13, 91 Eng. Rep. 14, and Savill v. Roberts, 12 Mod. 208, 88 Eng. Rep. 1257. The discussion of the tort in the civil context is dictum, because the case involved a suit for false indictment for riot.

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doing, he established the guidelines that have become the modern English Rule.\textsuperscript{77}

Thus the tort of malicious prosecution in England is part of a comprehensive system for dealing with wrongful litigation, a system that has not changed its essential outline in over a millennium. The central feature has always been some form of internal sanction—\textit{wer} or corporal punishment, amercement, or costs. Subsequent actions of conspiracy or case were never designed to carry the primary burden of deterring false suits; that function had always been reserved for internal sanctions. Subsequent suits were developed for and limited to the extraordinary case for which the internal sanctions provided neither deterrent nor remedy.

That system continues today in England and in other common law jurisdictions.\textsuperscript{78} In the United States, however, the core of the structure withered.\textsuperscript{79} Costs lost their deterrent effect as they proved less of a burden to the wrongdoer,\textsuperscript{80} provided less of a remedy as they met less of the victim’s expenses,\textsuperscript{81} and could no longer be fashioned to meet the wrong as judicial discretion was curtailed.\textsuperscript{82} By the beginning of the nineteenth century, costs had ceased to perform the function for which they had been designed—deterring false suits—\textsuperscript{83} and the inherited system collapsed.


\textsuperscript{78} \textit{See} Gold, \textit{supra} note 2, at 46, 52; Goodhart, \textit{supra} note 64, at 849-51.

\textsuperscript{79} The standard explanation has cited the mythology of the American frontier, where “fair play meant no advantage given and where lawyers were thought a hindrance to justice. \textit{See Goodhart, supra note 64, at 872-74; Comment, Court Awarded Attorney’s Fees and Equal Access to the Courts,} 122 U. Pa. L. Rev. 636, 640-43 (1974). Such factors may have given rise to the early statutes enacting detailed schedules of costs, such as 1801 N.Y. Laws c. 190, but these statutes governed fees between attorney and client, as well as fees taxable by the courts, \textit{id.} at 571 (penalty for overcharge). Thereafter whatever influence the factors had manifested itself only in a lack of legislative reconsideration that combined with inflation and an expanding economy to render the old costs statutes an anachronism. \textit{See Goodhart, supra note 64, at 873-74; McCormick, Counsel Fees and Other Expenses of Litigation as an Element of Damages,} 15 Minn. L. Rev. 619, 620-21 (1931). In fact, the American Rule on costs has recently been described as a historical accident, unworthy of the policy imperatives read into it by the courts. \textit{See Ehrenzweig, supra note 25, at 798-800; Comment, supra, at 642. But see Alyeska Pipeline Serv. Co. v. Wilderness Soc’y,} 421 U.S. 240, 251-57 (1975) (finding deliberate limitation in history).

\textsuperscript{80} \textit{See, e.g.,} Potts v. Imlay, 4 N.J.L. 330, 335, 338 (Sup. Ct. 1816) (dictum); Pangburn v. Bull, 1 Wend. 345, 349 (N.Y. 1828) (argument for defendant-in-error).

\textsuperscript{81} In Allgor v. Stillwell, 6 N.J.L. 166 (Sup. Ct. 1822), the jury in a malicious prosecution action had awarded $15 as compensation to a person who had twice been called 18 miles to court on groundless charges. The court held that court costs were the complete measure of compensation since damages were not special. These costs amounted to six cents. \textit{Id.}

\textsuperscript{82} \textit{Cf.} 1801 N.Y. Laws c. 190 (establishing precise fees chargeable by attorneys and other officers of court for every action).

\textsuperscript{83} \textit{See} Potts v. Imlay, 4 N.J.L. 330, 334, 335, 338 (Sup. Ct. 1816).
Litigants responded to the collapse in two ways. One way was to attempt to establish judicial power to tax costs without legislative authority.\footnote{84} This course was rejected, largely because the costs sanction traditionally had been closely controlled by statutes.\footnote{85} The other way was to seek redress through malicious prosecution actions, but here resources were limited, for the inherited English Rule was encrusted with constraints resulting from centuries of coexistence with and judicial preference for internal sanctions.

A majority of the American jurisdictions that have confronted the limited tort have been willing to overcome the traditional "special damages" constraint in order to provide a deterrent\footnote{86} and a remedy\footnote{87} not otherwise available. Yet a substantial minority has rejected that solution,\footnote{88} both because its members feel that the action gives a remedy the legislature has chosen not to provide\footnote{89} and because they are unwilling to impose the inefficiency and improper deterrence inherent in the broader rule on themselves and on honest litigants before them.\footnote{90} The result is the split in American jurisdictions discussed in Part I. But the debate over which of these rules should prevail obscures the underlying problem that both rules share: a remedial system for controlling groundless litigation that relies exclusively on subsequent suits does not effectively serve the purposes for which courts attempt to use it.

Under either variation of the present system, many factors intervene to prevent the threat of subsequent suit and ultimate liability from presenting an effective deterrent to groundless suits. A truly malicious litigant might expect that his victim will settle a suit rather than incur

\footnote{84} See Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796) (disallowing circuit court attempt to tax costs).
\footnote{85} See generally J. HULLOCK, supra note 49 (discussing statutes grounding right to costs). The reaction of American courts is typified by Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306, 306 (1796) (disallowing counsel fees) ("[E]ven if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute.") Only courts of equity have claimed an inherent right to tax costs, and that claim is of doubtful historical validity, since even the equitable costs power seems to have its roots in statute. See 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 403 (7th ed. 1956).
\footnote{86} See, e.g., Kolka v. Jones, 6 N.D. 461, 468, 71 N.W. 558, 560 (1897) (no policy requires law to encourage unfounded claims; adopts Restatement Rule); Closson v. Staples, 42 Vt. 209, 219 (1869) (English Rule would encourage groundless suits; adopts Restatement Rule).
\footnote{87} See p. 1220 & note 22 supra (citing authorities). For an examination of the spurious history relied upon by many of these courts, see notes 53 & 59 supra.
\footnote{88} See p. 1218 supra.
\footnote{89} E.g., Smith v. Michigan Buggy Co., 175 Ill. 619, 627-28, 51 N.E. 569, 571 (1898); Carnation Lumber Co. v. McKenney, 224 Or. 541, 546, 356 P.2d 992, 994 (1960).
\footnote{90} E.g., Mitchell v. Silver Lake Lodge, 29 Or. 294, 297, 45 P. 798, 798 (1896); Luby v. Bennett, 111 Wis. 613, 624-25, 87 N.W. 804, 808 (1901). The same policies that led these courts to rely on the English Rule have been relied on to foreclose suit by victorious plaintiffs against those who defended without ground. See Ritter v. Ritter, 391 Ill. 549, 555, 46 N.E.2d 41, 44 (1943).
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the prohibitive cost of two trials—one on the merits and one on the issue of probable cause.\(^9\) Even if the victim could finance the necessary litigation, a malicious plaintiff might well undergo the slim risk of ultimate adverse judgment on probable cause to gain the tactical advantage that tying up an opponent in litigation can provide.\(^2\) In some cases that risk may be lessened still further by practical obstacles to the subsequent suit.\(^3\)

At the same time, plaintiffs with honest cases may feel a deterrent effect that is only remotely related to the question of whether their suit is one the legal system desires to encourage.\(^4\) The plaintiff who has lost a close case may be subjected to the same subsequent suit as the plaintiff whose case lacked all merit, and the costs of that subsequent suit are inescapable regardless of the outcome on the issue of probable cause.\(^5\)

91. See Kirkham, Complex Civil Litigation—Have Good Intentions Gone Awry? 70 F.R.D. 199, 207 (1976) (expense in complex cases threatens almost all defendants with bankruptcy, and leaves little alternative to settlement, regardless of merits).

92. See Levi, supra note 2, at 212-15 (tactical advantage of imposing expense and delay on opponent is primary reason some plaintiffs file suit).

93. Some litigants and commentators have raised the possibility of jurisdictional barriers to a subsequent suit. See Alexander v. Petty, 35 Del. Ch. 5, 8, 108 A.2d 575, 577 (1954); Note, Counterclaim for Malicious Prosecution in the Action Alleged to be Malicious, 58 Yale L.J. 490, 491 n.3 (1949). Yet bringing a suit seems to present sufficient involvement with a state to satisfy the minimum-contacts requirement for personal jurisdiction for the subsequent suit, under Shaffer v. Heitner, 433 U.S. 186 (1977), and International Shoe Co. v. Washington, 326 U.S. 310 (1945). Nonetheless, collection problems would remain if the plaintiff had no property in the United States or was no longer available when the subsequent suit was brought. See Two Policemen Win Damages in Lawsuit on Brutality Charge, N.Y. Times, Apr. 20, 1978, § B, at 3, col. 1 (default judgment in malicious prosecution action suspected uncollectible due to disappearance of defendant).

94. The lack of correlation between absence of probable cause and deterrent effect can be expressed analytically. Let \(P_1=\) the probability that the original suit will end in a judgment against the plaintiff, \(P_2=\) the probability that the original defendant will bring a malicious prosecution action, \(P_3=\) the probability that liability for malicious prosecution will result. Let \(C_r=\) the cost of the subsequent suit to the original plaintiff, \(C_A=\) the cost of the original suit to the original defendant, and \(E=\) the exemplary damages that may be assessed in the malicious prosecution action. The deterrent available in the current system, eliminating minor factors, is:

\[
P_1 \times P_2 \times (C_r + P_3(C_A + E)).
\]

Any factor that increases the probability of subsequent suit will increase the deterrent effect even if the plaintiff is sure that neither malice nor lack of probable cause can be found; therefore even honest plaintiffs are deterred because they will have to bear the costs of the subsequent action whether they had cause or not. Courts have generally adjusted the deterrent effect by tinkering with the likelihood of ultimate liability on the subsequent suit, \(P_3\), which can indirectly affect the likelihood that suit will be brought, \(P_2\). Thus, courts justify requirements other than lack of probable cause because they "protect the honest litigant." See p. 1220 supra (special damages); note 108 infra (malice). Ideally, the deterrent should only vary with the unjustifiability of the suit. See note 125 infra.

95. See note 94 supra. Although the elements of the Restatement Rule—termination for defendant, malice, and lack of probable cause—all must be alleged, only favorable prior termination is susceptible of simple disproof. The other requisites offer small disincentive to one who wishes to use the subsequent action to harass an opponent, though they may protect an honest plaintiff from ultimate liability. Thus, subsequent suits as a remedy present another problem for the law: the harassment of honest litigants.
Even under the English Rule, litigation to determine the applicability of the special-damages requirement remains a real possibility.

In addition, victims of groundless litigation under either rule are not likely to be made whole. Even if they can afford the gamble of a malicious prosecution action and are ultimately successful, the expenses of the subsequent proceeding will not be an item of recoverable damages. A wronged defendant must rely on the uncertain possibility of punitive damages for full compensation.

Finally, a system of subsequent suits requires a second trial of essentially identical factual material in order to determine whether the first action should ever have been brought. Such spawned litigation is undesirable when judicial institutions are already overloaded.

Thus the present American system fails to serve effectively the policies that a remedial framework for deterring groundless litigation should be designed to implement. Both the Restatement and English Rules, taken as primary systems for handling groundless suits, ignore the teaching of the common law: the tort of malicious prosecution was designed to function as a secondary defense within a general system of internal controls. The problems surrounding the two rules are the result of exclusive reliance on subsequent sanctions, and can only be solved by reintegrating the advantages offered by internal sanctions.

III. A Common Law Proposal

An internal sanction could be reestablished through costs assessed in the discretion of the court. Though revival of that sanction may be

96. See Gold, supra note 2, at 48 (discussing bleak prospect of yet another suit from perspective of original defendant).
97. See note 15 supra.
98. See p. 120 supra.
99. See Smith v. Michigan Buggy Co., 175 Ill. 619, 629-30, 51 N.E. 569, 572 (1898) (material facts repeated); Wright, Estoppel by Rule: The Compulsory Counterclaim Under Modern Pleading, 38 MINN. L. REV. 423, 444 (1954) ("second trial of what are likely to be the very same facts").
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attractive, legislatures have shown little interest in such a system\textsuperscript{103} despite 200 years of judicial and scholarly urgings.\textsuperscript{104} Courts are also unlikely to develop the costs sanction independently; judges have been extraordinarily reluctant to assert an inherent power to tax costs,\textsuperscript{105} in part because that power has historically been closely controlled by the legislature.\textsuperscript{106}

A second possibility is to permit defendants to plead malicious prosecution as a counterclaim.\textsuperscript{107} Yet the traditional tort carries constraints appropriate to a subsequent action that would hinder its usefulness as an internal sanction.\textsuperscript{108}

103. Alaska is the only state now following a comprehensive costs policy, encompassing attorneys’ fees, as a general rule. See ALASKA STAT. § 09.60.010 (1973); ALASKA R. CIV. P. 82a. See generally Comment, supra note 79, at 799-800. Federal courts have power to grant attorneys’ fees in a growing number of still separately specified cases. See Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 415-16 nn.5-7 (1978) (enumerating statutes); Alyeska Pipeline Serv. Co. v. Wilderness Soc’y, 421 U.S. 240, 257-62 (1975) (detailing limited judicial and legislative exceptions to general rule).

104. See Smith v. Michigan Buggy Co., 175 Ill. 619, 628-29, 51 N.E. 569, 572 (1898); Potts v. Imlay, 4 N.J.L. 330, 332, 338 (Sup. Ct. 1816); Ehrenzweig, supra note 25, at 799-800; Goodhart, supra note 64, at 872-78; Comment, supra note 79, at 692-55.


106. Courts refusing to expand the judicial power to tax costs have explicitly noted the tradition of exclusive legislative control. See, e.g., Alyeska Pipeline Serv. Co. v. Wilderness Soc’y, 421 U.S. 240, 262 (1975); Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306, 306 (1796). Although the deference is justified as to costs per se, its transference to the malicious prosecution debate is based on an excess of judicial caution caused by simple misinformation. The legislature’s role with respect to internal sanctions generally has been vastly exaggerated. See note 59 supra; Kolka v. Jones, 6 N.D. 461, 466, 71 N.W. 558, 560 (1897) (viewing costs as first internal sanction and erroneously reporting broad effect for early costs statutes). Prior to the creation of the costs sanction, two different regimes of internal sanctions had come and gone, neither of which depended on explicit legislative grants. See pp. 1221-28 supra. To the extent that reasons should be inferred from the legislative failure to update the costs statutes, but see note 79 supra, those reasons are that it is not desirable to deter honest litigants, see Gold, supra note 2, at 55, or to penalize losing litigants in close cases, see Comment, supra note 79, at 649-50, 652. Such a view does not justify a radical alteration in the structure of the common law system for combatting groundless suits. If a system of internal sanctions that avoids excessive deterrence and unfair penalty can be developed from existing judicial powers, no legislative prerogative or policy will have been invaded and the preferred policy of the common law will have been served.

107. The tactic has been proposed, see Wright, supra note 99, at 444; Note, supra note 6, at 664, 684, and some courts have experimented with the approach, e.g., Eiteljorg v. Bogner, 502 F.2d 970, 971 (Colo. App. 1972); Sonnichsen v. Streeter, 4 Conn. Cir. Ct. 659, 666-67, 239 A.2d 63, 68 (1967). Others suggest they would look favorably on such a course. E.g., Mayflower Indus. v. Thor Corp., 15 N.J. Super. 139, 150, 83 A.2d 246, 251 (Ch. 1951), aff’d per curiam, 9 N.J. 605, 89 A.2d 242 (1952). Most, however, have rejected it. E.g., Schwab v. Doelz, 229 F.2d 749, 753 (7th Cir. 1956); The Savage is Loose Co. v. United Artists, 413 F. Supp. 555, 562 (S.D.N.Y. 1976); see Note, supra note 93, at 494-95.

108. For example, the special damages requirement of English Rule jurisdictions, which
A better option is a new tort action: a compulsory counterclaim for "groundless suit." Through such a counterclaim, courts could integrate the advantages of the ancient, internal remedies into their dispute-resolution function.

The counterclaim would involve three stages. The first would coincide with the case on the merits, and encompass only proof on the issue of lack of probable cause. The original defendant's proof of developed to avoid duplication of the remedy already available through costs, would usually render a malicious prosecution counterclaim a waste of time. The element of malice, which has survived since the writ of conspiracy precisely because it protects honest litigants, see Jones v. Gwynn, 10 Mod. 214, 218, 88 Eng. Rep. 699, 701 (1714); W. Prosser, supra note 4, at 851, would introduce issues irrelevant to the merits of the original claim. If the defense of advice of counsel, which protects good-faith litigants from liability in a subsequent action, were raised in the context of a counterclaim in the original suit, the plaintiff might be forced to change counsel, thus increasing the expense of his lawsuit as well as disrupting the speedy resolution of his claims. See note 124 infra. Finally, the confusion involved in attempting to reshape the action into one useful as an internal sanction would hinder its success, for the elements of the old tort are deeply ingrained in the law. See, e.g., Babb v. Superior Court, 3 Cal. 3d 841, 845, 479 P.2d 379, 381, 92 Cal. Rptr. 179, 181 (1971) (rejects malicious prosecution counterclaim, argues that "hornbook law" requires termination of prior proceeding before action will lie); Note, supra note 98, at 490-95.

109. Grainger v. Hill, 4 Bing. (N.C.) 212, 221, 132 Eng. Rep. 769, 773 (1838) (court creating tort of abuse of process to fit new need). 110. "Compulsory" here is used in the same sense as in FED. R. CIV. P. 13(a): the defendant may choose not to bring the counterclaim, but a subsequent suit will not be available as an option. 111. The analogue created would combine the more useful features of the prior forms of internal sanctions. Thus, the root issue—probable cause—would be decided simultaneously with the determination of the merits of the underlying claim, thereby maximizing judicial efficiency, as in all previous systems. The system for determining appropriate sanctions would not interfere with the trial of the original claim, just as in all previous systems. See notes 26 & 27 supra (wer sanction set by custom); p. 1222 supra (amercement sanction determined by specially appointed panel); Goodhart, supra note 64, at 855 (sanction determined subsequently by special taxing master). The defendant would be reimbursed, as with wer and costs, and the sanction would be flexible, as with amercement and costs. Finally, like amercement, the system would minimize the threat to honest litigants. 112. The cause of action thus "matures" as of the moment a claim the defendant believes to be groundless is filed. Cf. 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1428, at 148 (1971) (possible theoretical justification for malicious prosecution counterclaim).

113. The meaning of "probable cause" will undoubtedly vary slightly from jurisdiction to jurisdiction, though it is generally expressed in terms of the reasonable or cautious person. See, e.g., Ray v. City Bank & Trust Co., 358 F. Supp. 630, 638 (S.D. Ohio 1973) (cautious man's reasonable belief in cause of action in light of facts known or available on reasonable inquiry); Carnegie v. Gage Furniture, Inc., 217 Kan. 564, 568, 538 P.2d 659, 663 (1975) (reasonably or ordinarily prudent man on reasonable grounds). It is not necessary that the law be clear before a belief that facts support a claim is reasonable; when there is ambiguity, a plaintiff may rely on any reasonably supportable interpretation. Bill Dreiling Motor Co. v. Herlein, 543 P.2d 1283, 1285 (Colo. App. 1975). Probable cause is measured by an objective standard; plaintiff's motivation is not relevant. The only inquiry would be whether, with facts known to plaintiff or facts ascertainable by plaintiff on reasonable inquiry, a "reasonable" person would have thought he or she had a valid claim.
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that narrow issue would present largely the same factual questions as would the defense to the underlying action, but the standard of proof would be more difficult to sustain than that required by a simple defense. In this stage, the original defendant would have to demonstrate such an insufficiency of reasonably reliable evidence that no reasonable person confronted with such evidence could have believed that the action brought might succeed.

The second stage would be the judge's decision on the issue of probable cause, which would follow immediately the decision on the merits by the finder of fact, whether judge or jury. Unless a lack of probable cause were found, the counterclaim would terminate with the end of the trial on the merits.

The third stage would involve a determination of damages. Central to this stage would be proof of purely compensatory damages, but the defendant would also be entitled to demonstrate any aggravating circumstance that might call for punitive damages, such as willful misuse of the courts or reckless disregard of the rights of the defendant. Compensatory damages would be assessed according to the amount of damage actually caused, while punitive damages would depend on the extent of the wrong committed. Hence, wronged defendants would be fully compensated.

114. See Wright, supra note 99, at 444.
115. The precise formulation of the burden that the defendant must meet will vary with each jurisdiction's definition of probable cause. See note 113 supra. If a case arose in which proof of lack of probable cause included a large number of facts irrelevant to a determination of the underlying suit and was therefore potentially confusing to a finder of fact, or a hindrance to swift judgment on the original claim, the judge would be free to order a separate hearing on that material under Fed. R. Civ. P. 42(b), or the equivalent state provision. Note, however, that the defendant would need to show only that the claim alleged was groundless; thus, an action for fraud could be groundless though the facts supported an action for breach of warranty.
116. Almost all jurisdictions require that probable cause be decided by the judge even in a trial for malicious prosecution alone, in which problems of jury confusion over multiple burdens of proof present even less difficulty than they would here. See generally 4 Mo. L. REV. 80 (1939); 32 YALE L.J. 198 (1922).
119. Although "actually caused" need not be defined as narrowly as it once was, see Savile v. Roberts, 1 Ld. Raym. 376, 381, 91 Eng. Rep. 1147, 1151 (1698) (necessary costs do not include those expended in defense to indictment alleging nonexistent crime), a reasonable basis must be demonstrated for damages claimed. Even plaintiffs advancing groundless claims should not be required to pay exorbitant legal fees simply because such fees are alleged.
120. Punitive damages reward those who serve as common law private attorneys general in searching out maliciously instituted groundless litigation, and also compensate them for intangible suffering that could not realistically be computed as an item of compensatory damages. See C. McCormick, supra note 105, at 276-77; H. Oleck, Damages to Persons and Property 541 (rev. ed. 1961).
The proposed counterclaim would further each of the goals involved in the debate over systems for controlling groundless litigation. Groundless suits would be deterred because the counterclaim is a prompt and unavoidable procedure for determining appropriate sanctions. Honest litigants would have the benefit of a system in which the extent to which they are deterred is directly related to their perception of the merit of their claim; if they were satisfied that they had probable cause, deterrence would be minimal. Since the proposed system would not require bringing an expensive separate action just to obtain relief, it provides victims of groundless litigation with a complete judicial remedy for the injury they have suffered. Finally, the system would promote judicial efficiency both by deterring malicious

121. See p. 1220 supra.

122. The sanction's promptness, coupled with the prospect of a complete remedy, would help maliciously prosecuted defendants to avoid unfavorable settlements and would thus provide a deterrent even in complex and expensive cases. Attorneys might even be willing to undertake the defense of a maliciously prosecuted action on a contingent fee.

123. No jurisdictional problems would arise, for even when issues were separated for trial the court would retain jurisdiction over the counterclaim. See Fed. R. Civ. P. 13(i); cf. Adam v. Saenger, 303 U.S. 59 (1938) (counterclaim allowed).

124. The objective nature of the proposed definition of probable cause means that a few plaintiffs who have retained negligent counsel and sued in good faith on the strength of counsel's advice may be subject to ultimate liability. Although these plaintiffs would have probable cause as that concept has traditionally been understood, see W. Prosser, supra note 4, at 854, the suit itself would still be without probable cause. Such suits have been punished under all prior systems of internal sanctions. The real wrongdoer in such a case is the plaintiff's attorney, but the defendant could not recover from him in a subsequent suit for simple negligence due to current law. See Norton v. Hines, 49 Cal. App. 3d 917, 922-23, 123 Cal. Rptr. 237, 240-41 (1975). Thus, a plaintiff's defense of good faith based on attorney advice might leave the defendant uncompensated. It would also interfere with plaintiff's case on the merits by requiring his attorney to testify and therefore to be replaced as counsel. A better system would allow innocent plaintiffs who are misled by their attorneys into filing wrongful suits to recover from their lawyers in subsequent malpractice actions on proof of simple negligence. See Ward v. Arnold, 52 Wash. 2d 581, 584, 328 P.2d 164, 166 (1958). For similar reasons, the law should not permit a defendant to implead plaintiff's counsel in the counterclaim.

A defense of advice of counsel might be appropriate in the hearing on damages to rebut an inference of malice. At this stage, when the plaintiff has already been judicially determined to have sued without probable cause, the danger of disrupting the original claim on the merits is nil.

125. The proposed system should be analyzed using the same model used in note 94 supra. Here $P_2$ approaches 1 and may be safely ignored, because plaintiffs would assume that a counterclaim will be brought. The additional cost imposed on the plaintiff by the probable-cause inquiry during the trial on the merits would be nominal, and may likewise be safely ignored. Here the formula for deterrence is significantly different:

$$P_1 \times P_2 \times (C_{d} + C_{A} + E).$$

The critical fact is the difference in the structure of the expression: the entire amount of the deterrence is proportional to the probability that lack of probable cause will be found, and hence to the justifiability of the original suit. In addition, the cost of the damages proceeding, $C_{d}$, will be significantly less than the cost of a full subsequent trial, so that the "substantive" damages, $C_{A} + E$, play a larger role in the damages portion of the formula. Though the total deterrent effect of the two systems may occasionally be the same, the deterrence provided by the subsequent-suit system would only be appropriate accidentally. Thus the proposed system is qualitatively superior to the present system.
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litigation that would otherwise arise, and by minimizing the judicial resources necessary to deal with any groundless litigation that may still be brought.

Even with the suggested counterclaim operating as an internal sanction, the present tort of malicious prosecution would continue, though curtailed in scope. The tort would still be used in its traditional role, limited to groundless litigation unreachable through the internal sanction—including wrongful nonjudicial or quasi-judicial proceedings, specialized judicial proceedings in which the counterclaim cannot be brought, or straw-party actions. Thus limited, the tort of malicious prosecution would once again serve its proper function as a supplement to internal sanctions.

Conclusion

The proposed remedial system represents not just a resolution of the policy debate between the two present American rules, but a logical evolution of the common law. It places the subsequent suit for malicious prosecution back in its proper context as a necessary but carefully limited adjunct to a comprehensive system of internal sanctions against groundless litigation. In so doing it vindicates the common law's long-standing policy against spawned litigation, while reinvigorating the still older policy against allowing misuse of the courts to go unrecompensed and unpunished. The proposal establishes a workable modern analogue of the historically proven systems for striking a proper balance between discouraging false suits and encouraging resort to law.

127. See Kaufman v. A.H. Robins Co., 223 Tenn. 515, 448 S.W.2d 400 (1969) (action against a company whose false allegations caused pharmacy board to initiate proceedings).
128. E.g., quasi-criminal proceedings, such as mental-competency or juvenile-delinquency proceedings.
129. E.g., ordinary civil or administrative proceedings in which a person can be required to participate in an investigation of his or her own actions based on information provided by a third party as in unemployment compensation. This category could also encompass actions against an opposing counsel when he has been the motivating force behind groundless litigation, as may occur in some class actions. Three controls could insure that subsequent suits against malicious straw-party actions were not misused: first, a counterclaim for groundless suit would lie within an action for malicious prosecution; second, a requirement of prior judicial determination of lack of probable cause could be imposed; third, courts could demand pleading and proof that a judgment for groundless suit was uncollectable from the nominal plaintiff in the underlying suit.
130. This Note has concentrated on a defendant's remedies and sanctions. But, as Professor Ehrenzweig notes, the problem of the plaintiff who has a claim that both he and defendant know is good, but who will have to expend more than the amount of the claim to demonstrate that which is already known to the parties, is no less acute. Ehrenzweig, supra note 25, at 792; cf. Ritter v. Ritter, 381 Ill. 549, 553-54, 46 N.E.2d 41, 43-44 (1943) (attempted claim for malicious defense). History and logic appear to suggest, as a remedy for this problem, the creation of a plaintiff's cause of action for "groundless defense" similar to that proposed for defendants in this Note.