BELIEF AND DOUBT IN MALICIOUS PROSECUTION AND LIBEL

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Like libel, malicious prosecution is a tort of ambivalence: to protect the plaintiff at all, we must run serious risk of harm to not only the defendant but public values as well. In libel we may vindicate the plaintiff's rights only at the risk of abdicating the defendant's right to speak and the public's right to hear. In malicious prosecution we may vindicate the plaintiff's right only at the risk of abdicating the defendant's right to report a crime and the public's right to expect a judicial determination about that supposed crime. Were courts omniscient and judges always wise, a protective balance might be struck that would maximize the plaintiffs' rights in these cases without risking public losses. As it is, both torts have proliferated rules in an expression of their ambivalence and in an effort to weigh the balances finely. Thus a pennyweight rule in malicious prosecution might shift the balance.

I believe one of the pennyweight rules about probable cause in the tort of malicious prosecution is wrong, and because even small rules here may have significant weight, a brief examination is warranted.

It is usually said that to establish a malicious prosecution the plaintiff must show that the defendant had earlier initiated a criminal prosecution[1] against the plaintiff,[2] that the prosecution was terminated favorably to the plaintiff,[3] and that the defendant was actuated by mal-

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1. *See* Dellums v. Powell, 566 F.2d 167, 191 n.65 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978). Analogous claims are possible in the case of wrongful civil proceedings. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 120, at 850 (4th ed. 1971). To some extent, abuse of process is also a distinct tort. *Id.* § 121, at 856.

2. *See* Dellums v. Powell, 566 F.2d 167, 191 n.65 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978); Lampos v. Bazar, Inc., 270 Or. 256, 278-79, 527 P.2d 376, 386 (1974) (continuing prosecution).

3. *See* Tucker v. Duncan, 499 F.2d 963, 965 (4th Cir. 1974); Cimino v. Rosen, 193 Neb. 162, 164-65, 225 N.W.2d 567, 569-70 (1975).

ice in prosecuting.[4] In addition, the defendant must be shown to have prosecuted without probable cause to do so.[5] This last element is clearly the most important single issue in the decided cases.

Everyone agrees that there is an objective test of probable cause.[6] The accuser who charges the plaintiff with possession of marijuana merely because he sees the accused with a drug dealer is too quick on the draw of an inference. Though the accuser may speak in good faith, he lacks probable cause in the objective sense: most reasonable people would not believe a finding of possession is warranted from this evidence.

Probable cause is established in the objective sense if the accuser obtains facts warranting the inference of possession, even though it is still an inference and not a matter of direct perception.[7] If the accuser sees Joe Doe pass money to a drug dealer and receive a package in exchange, the inference of possession becomes stronger. If the accuser then smells marijuana smoke as he passes Doe's room, an inference of possession is probably warranted in the objective sense.

Although many persons would draw the inference of possession in such a case, the accuser's own state of belief or doubt might be quite different. He might believe that Doe in fact possesses an illegal substance but that Doe would nevertheless be acquitted by local juries on this evidence. If the accuser holds this belief but initiates a prosecution anyway, he still has probable cause and can not be held liable for malicious prosecution.[8] The accuser might also believe that Doe is in possession of an illegal substance, but only by a bare weight of the evidence and not beyond a reasonable doubt. In this situation, too, he is protected: the objective test of probable cause shows that there is ground for prosecution, and the mere fact that the accuser does not himself accept guilt beyond a reasonable doubt does not make him lia-

4. *See* Martin v. City of Albany, 42 N.Y.2d 12, 16, 364 N.E.2d 1304, 1307-08, 396 N.Y.S.2d 612, 614 (1977); Lambert v. Sears, Roebuck & Co., 280 Or. 123, 134, 570 P.2d 357, 363-64 (1977).

5. *See* Rose v. Reinhart, 194 Neb. 478, 481, 233 N.W.2d 302, 304-05 (1975); Myer v. Ewald, 66 Wis. 2d 168, 173-74, 224 N.W.2d 419, 424-25 (1974).

6. Most courts have used some variation on the test set out by Chief Justice Shaw in Bacon v. Towne, 58 Mass. (4 Cush.) 217, 238-39 (1849): "Probable cause is such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe, or entertain an honest and strong suspicion, that the person arrested is guilty." Many courts have used some version of this, apparently first picking it up from texts. *See* Slade v. City of Phoenix, 112 Ariz. 298, 301, 541 P.2d 550, 553 (1975); Tweedy v. J.C. Penney Co., 216 Va. 596, 599, 221 S.E.2d 152, 155 (1976). Note that the belief or suspicion is not in the mind of the accuser but in the mind of a reasonable person. *Id.*

7. *See* Orser v. State, 582 P.2d 1227, 1233 (Mont. 1978) (snow machine tracks from illegally killed elk to accused's yard); Rose v. Reinhart, 194 Neb. 478, 482, 233 N.W.2d 302, 305 (1975) (inference of intent from repeated past conduct).

8. Schwartz v. Boswell, 156 Ky. 103, 108-09, 160 S.W. 748, 751 (1913); *cf.* Connery v. Manning, 163 Mass. 44, 46-47, 39 N.E. 558, 559-60 (1895) (accuser believes in innocence but thinks that jury will convict).

ble for instituting a prosecution.[9]

It is also possible, however, for the accuser to lack a belief in the inference of possession or to hold a belief ranging in certainty from one percent to fifty percent, so that he is not persuaded that the accused actually possesses the substance but believes, in fact, that possession is unlikely. If the evidence is sufficient to induce a reasonable person to believe that Doe has possession of the substance, but the accuser lacks such a belief, can it reasonably be argued that the accuser lacks probable cause to initiate a prosecution?

The state of authority on the question is unsatisfactory. The *Restatement* flatly takes the view,[10] without any explanation for it, that no accuser can have proable cause for prosecution unless he subjectively believes the accused to be guilty of the crime charged.[11] There are cases that support this view in holdings,[12] and others that support it in dicta[13] or in holdings that may lie only in the eye of the beholder.[14] There are still other cases that have been cited as supporting the subjective belief rule but that do not in fact do so.[15] Though the rule is clear that subjective belief in guilt is not *sufficient* to show probable cause,[16] some of the decisions may have confused the question whether subjective belief is *sufficient* to justify prosecution with the question whether

9. RESTATEMENT (SECOND) OF TORTS § 662, Comment c (1977).

10. The rule may have originated in cases like Broad v. Ham, 132 Eng. Rep. 1278, 1279-80 (1839), but this was a case we would now call an abuse of process case, the criminal charge being used to coerce a collateral advantage.

11. RESTATEMENT (SECOND) OF TORTS § 662, Comment c (1977). The requirement is apparently that the accuser affirmatively believe in guilt. Doubt would presumably be permissible up to the 50% mark. But if doubt exceeded 50%, the "belief" would be in innocence. It is, of course, clear that subjective belief is not sufficient to show probable cause and that objective grounds are required. *See* note 15 *infra*.

12. Watson v. Cain, 171 Ala. 151, 155-56, 54 So. 610, 611 (1911); Harkrader v. Moore, 44 Cal. 144, 149-51 (1872).

13. *See, e.g.*, Carroll v. Kalar, 112 Ariz. 595, 599, 545 P.2d 411, 415 (1976) (apparently assuming subjective belief is required but finding for defendant); Hitson v. Simms, 69 Ark. 439, 440-41, 64 S.W. 219, 220 (1901) (stating subjective belief rule in general definition of probable cause, but holding for defendant); Keefe v. Johnson, 304 Mass. 572, 579, 24 N.E.2d 520, 524 (1939) (stating the subjective belief rule, but holding for defendants). The *Keefe* case was questioned in Seelig v. Harvard Coop. Soc'y, 1 Mass. App. Ct. 341, —, 296 N.E.2d 825, 828 n.3 (1973), discussed in note 17 *infra*.

14. Dunlap v. Chesapeake & O. Ry., 107 W. Va. 186, 148 S.E. 105 (1929). This court first seems to decide that the evidence was insufficient to warrant prosecution and that the defendant had admitted this by stating he did not believe that he was acting upon probable cause, or "we did not have any evidence against the boys." *Id.* at 188, 148 S.E. at 105. What follows, however, is much language in which the court speaks both of belief in the facts and belief in guilt. *Id.* at 191-92, 148 S.E. at 106.

15. Pessagno v. Keyes, 143 Md. 437, 122 A. 651 (1923), sometimes cited for the subjective doubt rule, is not about that rule at all. It simply holds that an irrational belief in guilt, no matter how honest, is not enough. *Id.* at 442, 122 A. at 652-53. It thus stands for the objective rule. Many cases so hold, specifically refusing to use a subjective test to *justify* the prosecution. *See* Coblyn v. Kennedy's, Inc., 359 Mass. 319, 323-26, 268 N.E.2d 860, 863-64 (1971) (false imprisonment case, noting analogies to the fourth amendment and malicious prosecution probable cause problems).

16. Among many authorities see those cited in note 15 *supra*.

subjective belief is *required* to justify it.[17] Besides these problems, the cases do not analyze what is meant by the term "belief in guilt." It could refer to a belief in the truth of testimony, a belief in the inference that might be drawn from known facts, or a belief that there is a criminal statute proscribing the conduct in question.[18] Posed against this nebulous authority for the *Restatement's* subjective doubt rule is the authority generally accepting the objective rule requiring that probable cause be judged by the guilt as it would appear to a reasonable person.[19] This test, with few exceptions,[20] is stated outside the context of the subjective belief problem, so it may be argued that the wide acceptance of the objective test does not preclude a subjective addendum like that supported by the *Restatement*.

It does not seem worthwhile to argue out this state of authorities in search of a settled rule. I doubt that there is one in any meaningful sense. It does seem worthwhile, however, to argue that the *Restatement* rule is wrong. I believe that if the facts would lead a reasonable person to prosecute, an accuser's subjective doubt about the guilt of the accused should not be taken to demonstrate a lack of probable cause for prosecution. The subjective assessment of the accuser is unimportant to the probable cause issue whether that assessment deals with credibility of evidence, the fairness of inferences, or the belief that there is a statute making the conduct criminal.

In the first instance, it is difficult to see why subjective doubt is thought to touch the issue of probable cause at all. One who doubts guilt might still think it his duty to initiate a prosecution. But even if he doubted the guilt and acted not out of public spirit but out of pure malevolence, such behavior would seem to show malice rather than a want of probable cause.[21] The malice issue is quite different for practical reasons. If the accuser's subjective doubt in guilt of the accused goes to establish malice but not a want of probable cause, the accuser will escape liability unless there is more evidence. This is true because both malice and a lack of probable cause, as well as some other ele-

17. Seelig v. Harvard Coop. Soc'y, 1 Mass. App. Ct. 341, 296 N.E.2d 825 (1973) may be such a case. The court noted earlier authority supporting the *Restatement's* rule that subjective belief was *required* to show probable cause; it then rejected this partly on the ground of authorities like Coblyn v. Kennedy's, Inc., 359 Mass. 319, 323-26, 268 N.E.2d 860, 863-64 (1971), which dealt with the question whether subjective belief was *sufficient*. 296 N.E.2d 825, 827-28. It was all dicta anyway, and that gives something of the aura of decisions in this area.

18. *See* text following note 41 *supra*.

19. See authorities cited at notes 6 & 17 *supra*.

20. Selig v. Harvard Coop. Soc'y, 1 Mass. App. Ct. 341, 296 N.E.2d 825 (1973), discussed the objective test as a rejection of the subjective doubt rule, 296 N.E.2d at 827-28, but as indicated in note 17 *supra*, that case demonstrates some problems of its own.

21. RESTATEMENT (SECOND OF TORTS) § 669 (1977) provides that lack of probable cause is evidence that there was malice when the lack of probable cause "tends to show that the accuser did not believe in the guilt of the accused." This seems a clear indication that the restaters regarded this point as one going to the issue of malice.

ments,[22] must be proven before the plaintiff can recover, and proof of malice does not prove a lack of probable cause.[23] But if the accuser's doubts about guilt are thought to speak to the issue of probable cause, the matter may be different under the well-settled rule that, under certain circumstances, proof that probable cause is lacking will permit an inference that malice was present.[24] In other words, a want of probable cause, once established by the accuser's subjective doubts, carries the malice issue piggyback; but it does not work the other way around. In addition, probable cause is to be decided by the judge, not the jury,[25] while malice is a jury question.[26] The allocation of the subjective doubt problem to the probable cause issue rather than to the malice issue is thus no merely theoretical matter. With this in mind, it bears repeating that the accuser's doubt about guilt, if bad at all, seems to go only to the malice issue.

There are more important reasons, however, for thinking it wrong to judge the subjective doubts of the accuser where there is an adequate objective ground for the prosecution. Even if he is personally malicious, the accuser serves a public purpose. It may be that the law itself is wrong or too severe, as many people have argued in the marijuana case. But it will hardly do to create a law of crimes and then penalize the citizen for utilizing the judicial processes to enforce that law. Even in the case of the unwelcome law, then, we must accept the accuser as serving a public purpose. That purpose, of course, is not vitiated by his malice, though he may wish to exclude the accuser from our dinner table. With this law enforcement purpose in mind, it seems difficult to say that one in possession of substantial evidence of a crime not only may but must conceal the evidence unless he is personally convinced of guilt, and that if he acts on the evidence he subjects himself to potential liability.

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22. *See* text & notes 1-5 *supra*.

23. RESTATEMENT (SECOND) OF TORTS § 669A (1977).

24. *Id.* § 669. Though the *Restatement* takes the view that malice may be inferred from a lack of probable cause and not the other way around, it would permit the same evidence, lack of subjective belief, to work for the plaintiff on both issues. In spite of the provisions in § 669A, then, it seems possible that the jury will infer malice from a lack of subjective belief and that the judge, compelled by the lack of such belief, will find a want of probable cause. Judge Linde attacked this point in his concurring opinion in Lambert v. Sears, Roebuck & Co., 280 Or. 123, 136-38, 570 P.2d 357, 364-65 (1977). *Cf.* Hawkins v. Hawkins, 32 N.C. App. 158, 161, 231 S.E.2d 174, 175 (1977) (proof that the primary aim of the defendant was to advance a collateral purpose or private interest is admissible to show the absence of probable cause).

25. *See* Slade v. City of Phoenix, 112 Ariz. 298, 301, 541 P.2d 550, 553 (1975); Allen v. Osco Drug, Inc., 265 N.W.2d 639, 642 (Minn. 1978). Although many courts have said that where the facts are in dispute the question is for the jury, this appears to be shorthand meaning that the jury resolves the factual dispute, but the decision whether the facts, as found by the jury, constitute probable cause remains for the judge. This division of responsibility between judge and jury is set out well in *Allen*.

26. Exxon Corp. v. Kelly, 281 Md. 689, 699-700, 381 A.2d 1146, 1152-53 (1978); Huntley v. Harberts, 264 N.W.2d 497, 501 (S.D. 1978).

There are many situations in which we evidently feel that a person in possession of information is not to act as the sole judge of its importance. The lawyer who finds a secretary apparently sharing the firm's files with a lawyer from another firm might, in spite of the evidence, believe the secretary's exculpatory explanation. If the lawyer does not reveal the known facts to his partners, however, they will almost certainly feel betrayed, no matter how strong the subjective belief that the secretary was innocent. Similarly, the citizen who has evidence of another's crime has not been constituted the final judge and jury of the evidence. If it is evidence that reasonable people would find convincing, his subjective doubts do not justify him in withholding the evidence from the public representatives; by the same token, his subjective doubts should form no basis for liability.

The subjective belief issue has arisen in the sister tort of libel. If a public official levels a defamatory accusation at another person, it is news and newspapers will publish it. May a newspaper be held in damages for publishing such news merely because the editor disbelieves the accuser and thinks there is no truth in him? Only recently has the issue been raised explicitly. In *Edwards v. National Audubon Society*,[27] an editor for Audubon made some angry and unjustified accusations that scientists supporting the use of pesticides were being paid by the industry to lie. The *New York Times* recognized this accusation, which had been published in the Society's magazine, as news. It therefore interviewed the editorial writer, obtained the names of scientists he had in mind, interviewed as many of these as possible, and ran the story, reporting both the accusation and responses of the scientists it had been able to interview. Some of the accused scientists sued the *Times*, as well as the Audubon society and its editor. Asserting authorities that support a freedom to report accurately on public proceedings,[28] the Second Circuit held that the *Times* was protected by the first amendment so long as it printed newsworthy accusations.[29] The fact that the *Times* did not actually believe the accusations did not furnish any ground for liability so long as the accusations were genuine news. In other words, subjective doubt did not affect the *Time's* otherwise good cause to publish the news.[30]

27. 556 F.2d 113 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977).

28. There is a common law privilege to make an accurate report of public proceedings. *See* RESTATEMENT (SECOND) OF TORTS § 611 (1977). As to accusations leveled against public officials in public documents or proceedings, the privilege is more or less constitutionalized in Time, Inc. v. Pape, 401 U.S. 279, 291-92, *rehearing denied*, 401 U.S. 1015 (1971) on which the *Audubon* court relied, 556 F.2d at 120. As to a possibly inaccurate report of judicial proceedings involving a private person, see Time, Inc. v. Firestone, 424 U.S. 448, 455-60 (1976).

29. 556 F.2d at 120.

30. *Cf.* ATI, Inc. v. Ruder & Finn, Inc., 42 N.Y.2d 454, 460, 368 N.E.2d 1230, 1233, 398

The comparison to libel is a good one. Every malicious prosecution is based upon an accusation that the plaintiff was guilty of a crime. Sometimes the accusation is official, as where it is lodged by a police officer; sometimes the accusation is private, as where a citizen reports a crime and "swears out a warrant." In either event, the accusation of crime that lies at the core of the case is, of course, defamatory. It is true that the accused suffers a very particular kind of damage, in that when his reputation is attacked in this manner he must defend himself in court. It is also true that an abuse of the judicial system may be thought to warrant some special consideration. But these matters go to damages only: they do not remove libel from the core of malicious prosecution or identify an "interest" in the accused that stands wholly apart from his reputation.[31] Indeed, the point of recognizing a separate tort for malicious prosecution is that the old preconstitutional law of libel was too undiscriminating to deal with this situation. The old law of libel was strict liability law,[32] and clearly enough it would not do to hold the accuser strictly liable for invoking judicial redress. The alternative—which was actually followed—was to give a privilege to anyone who reported a crime, so that there was no responsibility for the defamation involved in such a report if the accuser acted without malice.[33] The preconstitutional law of libel, however, made privilege turn not on the reasonableness of the accusation but on the "malice" or state of mind of the accuser; this was the case for all privileges in defamation, not merely the privilege to report a crime.[34] Yet the privilege offered too little protection. An accusation supported by probable cause would not be protected if the accuser were found to have "malice." There was no room in the libel privilege to investigate probable cause.

This situation could have been altered by formulating different rules in libel for this particular privilege.[35] As history had it, however, the courts simply recognized a separate tort of malicious prosecution

N.Y.S.2d 864, 867 (1977) (prima facie tort action based claim of malicious motive, but public interest speech was protected).

31. Prosser took the view that the "interests protected are not altogether identical," pointing to the possible confinement that may follow this particular loss of reputation. W. PROSSER, *supra* note 1, § 119, at 834-35. But this distinction seems to go only to damages caused by this kind of libel. His point seems well taken, however, in the case of malicious civil suits.

32. *See id.* § 113, at 772-74.

33. RESTATEMENT (SECOND) OF TORTS § 598 (1977).

34. This analysis is now complicated by the constitutional decisions, which may well work to shift this emphasis. *See* Note, *The Constitutional Fault Test of Gertz v. Robert Welch, Inc., and the Continued Viability of the Common Law Privileges in the Law of Defamation*, 20 ARIZ. L. REV. 799 (1979). The common law rule, however, is in line with the text. *See* W. PROSSER, *supra* note 1, § 115, at 794.

35. Privilege is lost by abuse of the occasion, and it could have been held that lack of probable cause would be such an abuse. Such a rule would have enabled the plaintiff to defeat the privilege upon a showing either of "malice" or want of probable cause. By conceiving malicious prosecution as a separate tort, however, we can require that both malice and want of probable cause be shown as a prerequisite to liability.

for the same purpose. The probable cause requirement of malicious prosecution deals with the reasonableness of the charge and the malice requirement deals with the bad faith or improper purpose of the accuser. Thus in this special form of libel, there must be not only bad faith or malice, but also fault in the sense that a reasonable person would not draw an inference of "guilt" from the known evidence. From all this we may see that the fault requirement in libel cases under the *Gertz* standard was anticipated by almost 300 years in the basic rules for the kind of libel we call "malicious prosecution."[36]

Gertz, of course, holds that, under the first amendment, the private libel-action plaintiff must show both fault in his accuser and actual damages before he can recover.[37] The public figure who sues for libel must meet an even more stringent requirement for the proof of fault under the rule in *New York Times v. Sullivan*.[38] Though malicious prosecution cases do seem to involve libel, the courts have so far not applied the *Gertz* fault requirement to malicious prosecution cases.[39] I do not wish to argue that all the *Gertz* requirements must be applied in malicious prosecution actions,[40] but I do wish to say that malicious prosecution involves a special case of reputational interests, and that it involves the exercise of speech rights that, generally, have a socially useful purpose. We are called upon to take the fault requirement in malicious prosecution—the probable cause issue—seriously, even if it turns out that *Gertz* does not require us to do so.

The *Audubon* case may thus offer something more than analogy. If I am correct in thinking that malicious prosecution is a special case of libel—and certainly it is a special case of "speech"—then the same protection that is given to one who carries "news" to the public ought to be given to one who carries "news" of crime to the police. Even if

36. *See* Savile v. Roberts, 91 Eng. Rep. 1147, 1150-51 (1698). In the Lord Raymond report, Chief Justice Holt requires the plaintiff to prove malice and inequity in the prosecution and says the defendant will not be required to show probable cause—thus, in effect, leaving it to the plaintiff to prove the absence of probable cause.

37. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347, 349 (1974). There are some doubts as to the exact limits of the holding, for instance, whether the rules apply only to the media publications or to any "publication" in the common law sense of communication.

38. 376 U.S. 254, 279-80 (1964) (requiring either a knowing misstatement or a reckless one).

39. Allard v. Church of Scientology, 58 Cal. App. 3d 439, 450 & n.5, 129 Cal. Rptr. 797, 805 & n.5 (1976) held damages could be presumed. In Allen v. Osco Drug, Inc., 265 N.W.2d 639 (Minn. 1978) the argument apparently was that *Gertz* required "actual malice," and this argument was rejected on the broad ground that first amendment concerns were not present in a malicious prosecution action, which was thought not to "involve protected speech but rather . . . the action of having a complaint issue." 265 N.W.2d at 646. It may be noted, however, that it is the probable cause issue that serves the functions of fault required in *Gertz*, and that the malice issue is entirely different.

40. *See* Allard v. Church of Scientology, 58 Cal. App. 3d 439, 450 & n.5, 129 Cal. Rptr. 797, 805 & n.5. It seems more likely that the *Gertz* requirement that actual damage be proved is satisfied than that it has no application. A jury can reasonably infer damage in the expenditure of time in going to court, if nothing else.

personal doubt could be construed to demonstrate "malice," it is highly unlikely that personal doubt of the accuser could in either case constitute the fault envisioned in *Gertz*. I say this because it seems reasonably clear from the whole line of constitutional decisions beginning with *New York Times v. Sullivan*[41] that the "fault" has to do with the truth and accuracy of the statement on the facts known to the publisher. The spite with which the statement is made is not relevant to the fault required in these cases. If this is correct, then the fault element in malicious prosecution cases must be found in proof that the accuser acted without probable cause, not in proof of malice. It would be constitutionally doubtful as well as bad policy to hold the accuser liable for asserting something that is objectively justified. And it would certainly be anomalous if the states were to hold an accuser liable for reporting good evidence to the police merely because he did not believe its ultimate implications when a publisher or broadcaster could report the same evidence to the public at large without liability.

There are problems, too, of the meaning and application of the subjective doubt rule. The *Restatement* and many cases required the accuser to hold an affirmative belief in "guilt" of the accused.[42] "Guilt" is not defined or analyzed in the *Restatement*, though some of the earlier authorities drew a distinction between "knowing" facts and "believing" those facts constituted the offense charged.[43] The *Restatement* takes the view, in accord with most cases,[44] that one can have probable cause in making an accusation even if he acts under a mistake of law,[45] provided it is a reasonable one. Presumably the requirement that he have an affirmative belief in "guilt," however, is a requirement that he believe he knows the law and believe that the set of facts shows its violation. But if the accuser is wise enough to doubt that he knows the law or its application, he may find himself at the jury's mercy in a malicious prosecution action. If misplaced certitude is any part of the *Restatement* requirement, it seems undesirable, if not actually absurd. Very few accusers actually know the law in the lawyer's sense, but there seems to be no reason at all to prevent an accuser from giving facts to the police and letting the police decide whether any law has been violated. It might be objected that, under this view, the accuser receives the benefit of the "advice of counsel" rule[46] when in fact he has ob-

41. 376 U.S. 254 (1964).

42. See authorities cited in notes 11, 12 *supra*.

43. Harkrader v. Moore, 44 Cal. 144, 150 (1872) (deriving this distinction from an unspecified edition of *Greenleaf on Evidence*).

44. I am including those cases that do not mention the issue but hold that defendant had probable cause in spite of a reasonable mistake of law. *See* West v. Baumgartner, 228 Ga. 671, 680, 187 S.E.2d 665, 671 (1972); Lincoln v. Shea, 361 Mass. 1, 5-6, 277 N.E.2d 699, 702 (1972).

45. RESTATEMENT (SECOND) OF TORTS § 662, Comment i (1977).

46. The accuser who, after full and fair disclosure of the facts, obtains advice of counsel

tained only the "advice of police." I am not sure that this is the effect of saying that the citizen-accuser is entitled to doubt that he knows the law as applied to the case, but if it is, let us make the most of it: there is no reason to put the burden of legal doubt on the untrained citizen rather than on the police or public prosecutor.

The other components of an affirmative belief in "guilt" work different difficulties. If we try to apply the subjective doubt rule to direct perceptions the rule becomes meaningless or, at best, superfluous. The accuser who sees a robber fleeing the scene might believe he resembled John Doe. If he reports that John Doe was the robber and that he has identified him, he has clearly misrepresented the facts. The "fact" of concern here is the identification and its strength. Had this fact been truly reported—"there is some resemblance,"—no reasonable person would convict Doe or even charge him. In such a case the objective test does the work of showing that there was no probable cause, and the best that can be said of the subjective doubt rule is that it means nothing or that it accomplishes the same result that the objective test accomplishes.

Though presumably still a part of finding "guilt," factual inferences are more complicated. It is possible to imagine that an accuser perceives facts accurately but refuses to draw the inferences from them that others would draw. He sees a furtive transfer of a package from a known dealer in marijuana; later he smells marijuana smoke as he passes the room of the person who appeared to make the purchase. Many persons would draw the inference that the occupant of the room has just purchased marijuana or, if not, that he is at least in possession of that substance. If the accuser refuses to draw the inference and reports only the directly perceived facts, would the *Restatement* hold that probable cause is absent? In such a case, the accuser lacks affirmative belief in guilt. Perhaps in such a case he could always escape liability for malicious prosecution on the ground that the public prosecutor necessarily made an independent judgment and drew the inferences for himself.[47] If this is always to be the answer, then the subjective doubt rule adds nothing. If it is not always the answer, the subjective doubt

supporting prosecution has probable cause if he, in fact, relies on that advice. *See* Napier v. Sheridan, 24 Or. App. 761, 772-73, 547 P.2d 1399, 1405-06 (1976); Jackson v. Train, 495 S.W.2d 36, 39 (Tex. Civ. App. 1972).

47. *See* Dellums v. Powell, 566 F.2d 167, 192-93 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978) (using the independent judgment test). The *Restatement* puts the matter differently: merely giving information is not enough. He must either knowingly give false information or express a desire for prosecution. RESTATEMENT (SECOND) OF TORTS § 653, Comment g (1977). It is difficult to see why one's desire for prosecution shows an initiation of proceedings if the prosecutor made an independent judgment and was given all the correct facts. The independent judgment test in *Dellums*, 566 F.2d at 192-93, seems to emphasize the right question. And under that test, this issue seems, on these facts, to become identical to the advise of counsel issue, with the prosecutor as "counsel" in the case.

rule imposes a potential for liability upon a citizen who has done exactly what we want him to do—accurately report facts that most of us would think reveal a crime. If anyone has difficulty in accepting this idea where the only crime involves marijuana, I suggest that the same reasoning be employed where the accused is believed to possess a cache of machine guns.

Perhaps the only arguable case for the subjective doubt rule is the one in which, for some unlikely reason, the accuser does not believe in the inference of possession, but nevertheless speaks to the authorities in terms of that inference, instead of confining himself to a report of directly perceived facts. The accuser who has smelled the marijuana smoke but has somehow rejected the inference that John Doe possesses marijuana, nevertheless reports to the police, "Doe possesses marijuana." As trial lawyers know, witnesses often have a difficult time confining themselves to neat reports of direct factual perception and often speak, instead, in terms of conclusory inferences. Even an accuser who does not believe in Doe's "guilt" might conceivably find it difficult to speak in more precisely factual terms, especially if the officer who drafts an affidavit for a warrant does not do so. Such an accuser might, in spite of his belief in Doe's innocence, still feel impelled to report the "crime" and find it difficult to express himself in purely factual terms. But even if he is guilty of malice and is wilfully and spitefully accusing an innocent person, we ought not make a rule that merely works against the verbally unsophisticated accuser who does not know how to confine himself to purely historical facts. The form of his words ought not condemn him if the facts would convince a reasonable person that guilt was likely.

All of the cases put forward and arguments made so far raise serious questions about the respective roles and responsibilities for the citizen-accuser and the public authorities. The private accuser has every reason to expect that if he reports directly perceived facts to the prosecutor, the prosecutor will not prosecute unless there are legally valid inferences to be drawn. And when, in fact, the accuser has the fortune to deal directly with the official prosecutor himself—one who is a lawyer—the accuser gets the benefit of the advice of counsel rule, which is to say, he has probable cause to prosecute so far as he fully reports to the prosecutor and relies on his expertise.[48]

The problem seems to arise, then, when the accuser deals with a police officer or other nonlawyer in the criminal justice system. Yet the accuser probably believes that the police officer knows his business

48. *See* Page v. Rose, 546 P.2d 617, 620-31 (Okla. 1976); Meyer v. Ewald, 66 Wis. 2d 168, 181, 224 N.W.2d 419, 425-26 (1974).

and can be relied upon to get the matter right. This belief may seem foolish to some lawyers and judges, but it will not seem so to many members of the public. Even if we have formal objections to the notion that the accuser can rely on the officer for "legal advice" about the prosecution, it is still possible to respect the citizen's expectations of protection. If the facts are reported accurately to the officer—and the officer surely has some duty to get facts, not merely inferences[49]—then it is possible to see the decision to prosecute as one made by the officer, not by the accuser. In such a case, the original accuser is not the instigator of any prosecution.

So far as analysis of the subjective doubt rule forces us to question the role and responsibility of citizen and officer, it may have served a good purpose. Though liability of police officers or public entities or both is now possible in many jurisdictions,[50] I have no desire to hold either liable in any wholesale fashion in these matters. I do believe, however, that we should focus on their professional responsibility to the accuser as well as to the accused. If the facts are honestly reported, we should put responsibility upon the officers for a mis-decision to prosecute and leave the state of the accuser's mind to the consideration of mind-readers and divines.

One other matter must be mentioned briefly. It seems unlikely that there will be actual evidence about subjective doubt or affirmative belief in most instances. The insistence on formulating probable cause rules with reference to a subjective belief in "guilt" becomes a way of inducing the trier of fact to consider a matter about which there is no evidence. The net effect of this, I suspect, is to reverse the burden of proof. If the jury is told that the defendant in malicious prosecution—the erstwhile accuser—has probable cause only if he actually believed in guilt, and there is no actual evidence about the accuser's state of mind, the jury is invited to leap to the assumption that the accuser must justify his state of mind or that they are permitted to infer his state of mind from their dislike of his person. Though the issue of probable

49. The courts so hold in requiring "factual" affidavits for warrants. Spinelli v. United States, 393 U.S. 410, 418 (1969).

50. Police officers have been held liable in a number of cases. *See* Dellums v. Powell, 566 F.2d 167, 193 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1977) (police chief); Palermo v. Cottom, 525 S.W.2d 758, 765 (Mo. App. 1975). Where governmental immunity has been partly or largely set aside, the public entity, may be held for the officer's malicious prosecution. *See* Orser v. State, 582 P.2d 1227, 1231 (Mont. 1978); Martin v. City of Albany, 42 N.Y.2d 13, 14, 364 N.E.2d 1304, 1305, 396 N.Y.S.2d 612, 613 (1977). Prosecutors acting as such, however, are immune. Imbler v. Pachtman, 424 U.S. 409, 411-19 (1976); Watts v. Gerkins, 111 Or. 641, 647-51, 228 P. 135, 139-40 (1924). In a malicious prosecution case this immunity works out in a peculiar way: the accuser is permitted to rely on the prosecutor, and thus escapes liability, and the prosecutor is immune and thus escapes. The accuser, however, is not permitted to rely on the policeman or lay magistrate, and may be liable. So may the policeman himself.

cause is for the judge to decide, not the jury,[51] courts and lawyers forget this quite regularly.[52] Some cases actually involve jury instructions requiring a subjective belief in guilt.[53] Even when the judge decides the probable cause issue, the focus on the accuser's subjective state of mind invites the same erroneous inference, though the judge may be less likely to commit it than the jury.

Though it seems plainly wrong to me, the subjective doubt rule is, no doubt, a pennyweight rule, worth little discussion in itself. Yet the rule intersects with matters of considerable practical and theoretical importance. The rule works a covert shift in the burden of proof on probable cause, and analysis of the rules forces us to reconsider the appropriate role of the public authorities in taking responsibility for prosecutions and even the role of the Constitution in malicious prosecution cases. On those matters with which the subjective doubt rule intersects, such as the constitutional impact, there is room for argument and more discussion. But perhaps the fact that the subjective doubt rule touches so many important matters justifies this comment on the rule.

51. *See* note 25 *supra*.

52. *See* Allen v. Osco Drug, Inc., 265 N.W.2d 639, 642 & n.2 (Minn. 1978); Gustafson v. Payless Drug Stores Northwest, 269 Or. 354, 357-58, 525 P.2d 118, 120 (1974).

53. *See* Torian v. Ashford, 216 Ala. 85, 88-89, 112 So. 418, 420 (1927); Hitson v. Simms, 69 Ark. 439, 440-41, 64 S.W. 219, 219-20 (1901).