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This article examines the history of interference with contract and tortious interference with business relations. It distinguishes the two actions and separates them on the basis that one is grounded in tort law while the other is predicated on contract law. The article concludes by suggesting a limit on the interference actions.

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I. INTRODUCTION: THE OVER-BREADTH OF THE INTERFERENCE ACTIONS

The history of tort law in the twentieth century is one of expansion.[1] Historically, those who have argued against the spread of liability have often done so in vain.[2] One area which may escape this trend, however, is the interference torts—tortious interference with contract and tortious interference with business relations. The prima facie cases for these actions are no broader now than they were in the mid-nineteenth century.[3] Nevertheless, writers today, like writers then, consistently agree the causes of action are too broad.[4] The overriding apprehension, then as well as now, is that allowing someone who lost money on a business deal to sue a third party who caused the loss could lead to the destruction of modern business,[5] competition,[6] and contract law.[7]

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1. *See* W. KEETON, D. DOBBS, P. KEETON & D. OWEN, PROSSER & KEETON ON TORTS §§ 1-6, at 1-34 (5th ed. 1984) (describing the historical rise and expansion of tort liability and damages) [hereinafter cited as PROSSER & KEETON]; *see also* Palmer, *Why Privity Entered Tort—An Historical Re-examination of* Winterbottom v. Wright, 27 AM. J. LEGAL HIST. 85 (1983) (describing the nineteenth century rise of the negligence action).

2. *See, e.g.*, E. LEVI, AN INTRODUCTION TO LEGAL REASONING 7-19 (1948) (analyzing the breakdown of the inherently dangerous rule and the rise of modern products liability).

3. *Compare* Lumley v. Gye, 118 Eng. Rep. 749, 753 (Q.B. 1853) (defining the malice limit on interference with contract) *with infra* text accompanying notes 22-26 (discussing the modern malice standard).

4. For a detailed argument that social concerns require the drastic limitation of the interference torts, see Dobbs, *Tortious Interference with Contractual Relationships,* 34 ARK. L. REV. 335 (1980). *See also* Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine,* 49 U. CHI. L. REV. 61, 61-62 (1980) (arguing that the confusion of case law in the interference tort area requires restriction of the actions).

5. *See* Dobbs, *supra* note 4, at 367-68 (examining the effects of the interference actions relating to misuse of economic power). *See generally* Note, *Tortious Interference with Conduct of a Business,* 56 YALE L.J. 886 (1947) (examining the business effects of the interference actions).

6. *See* PROSSER & KEETON, *supra* note 1, § 130, at 1012-15 (discussing the privilege and effect of competition in the interference tort context); *see also infra* note 42.

7. *See generally* Perlman, *supra* note 4, at 65 (closely analyzing the effects of contract law on interference with contract and business relations).

A. *Comparison to Heart-Balm Legislation*

Not only are the policy arguments for restricting the interference torts strong, the historical precedent is also significant. What is probably the best modern example of restricting tort liability deals with an action closely related to the interference torts: criminal conversation.[8] Through heart-balm legislation, many states have limited or abolished actions for criminal conversation, alienation of affections, and breach of contract to marry.[9] These actions essentially allowed recovery for tortious interference with the marriage contract and for tortious interference with personal relations.

Although prevalent under common law, the family law torts proved too severe for modern American society.[10] Because the family law torts include added dangers of allowing extortion[11] and permitting possible constitutional violations,[12] the reasons for restricting the interference with contract and business relations torts, admittedly, do not seem as compelling as those behind the heart-balm statutes.[13] Otherwise, however, the analysis is similar. In one sense, liability for interference with contract is less justified than even the alienation of affections action. In the business realm the injured party may still sue under the contract, but under the heart-balm statutes the rejected lover has no remedy at all.[14]

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8. Criminal conversation, a tort based on sexual infidelity, in fact may have grown out of the intentional interference with business tort. *See* Dobbs, *supra* note 4, at 341; *see also* Sayre, *Inducing Breach of Contract*, 36 HARV. L. REV. 663, 667 n.12 (1923) (discussing criminal conversation in the context of the interference torts).

9. *See* W. WEYRAUCH & S. KATZ, AMERICAN FAMILY LAW IN TRANSITION 299-301 (1983). *See generally id.* at 301.

10. [T]he law clearly should not hold the inducer [of breach of contract to marry] liable; for the fiancee's interest in the protection of his promised advantages from interference by third persons is far outweighed by the strong social interest in general freedom to enter marriage contracts, combined with the individual interests of the inducer and the girl in freedom to enter into advantageous relations with others.

Sayre, *supra* note 8, at 687.

11. An argument exists that these family law torts conflict with principles in the due process clause. *See* W. WEYRAUCH & S. KATZ, *supra* note 9, at 300.

12. *See* RESTATEMENT (SECOND) OF TORTS §§ 766, 766A, 766B (1979). These sections define a prima face case for the interference torts and each section specifically excepts contracts to marry.

13. *See* W. WEYRAUCH & S. KATZ, *supra* note 9, at 299-300. In passing heart-balm statutes, "legislatures . . . acted out of concern that the danger of punitive and excessive jury verdicts might lead to extortion." *Id.* at 299. *See also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 129, at 933 (4th ed. 1971) (discussing family law tort policy in the context of the interference torts).

14. *See generally* W. PROSSER, *supra* note 13, § 129, at 933 (discussing the family law cause of action in this context). *But see* Perlman, *supra* note 4, at 73 (arguing that the family

B. *Prima Facie Elements of the Interference Actions*

The prima facie cases for interference with contract and interference with business relations are quite similar to each other.[15] In both, the plaintiff must first prove that a valid contract or business relationship[16] existed. Second, he must prove that the defendant, a third party, knew or should have known[17] of the contract or relationship. Lastly, the plaintiff must prove that the defendant acted to disrupt the contract or relationship, and that this act was in fact disruptive, causing damages.[18] Because the two interference torts are so similar, many courts have essentially combined them.[19] Because the plaintiff

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relationship acts as a limit on the family law torts, thus the business interference actions are potentially more dangerous, because the class of possible plaintiff's is much broader).

15. According to Dean Prosser, "[e]ssentially, no different principle [between the interference tort] is involved, and it is chiefly as a matter of convenience that the case of inducing breach of contract are considered as a [separate] group." W. PROSSER, *supra* note 13, § 129, at 931. *Compare* ABA MODEL JURY INSTRUCTIONS FOR BUSINESS TORT LITIGATION § 1.03 (1980) *with id.* § 2.20 (giving the prima facie case of the interference with contract and interference with "prospective advantage" actions) [hereinafter cited as MODEL JURY INSTRUCTIONS]. For recent overviews of the prima facie elements of these actions, see Bradford, *Protection Against Intentional Breach of Contract Remedies in Tort,* 44 ALA. LAW. 320 (1984); Watson, *Business Torts—A Brief Survey*, FLA. B. TRIAL LAW. SEC. NEWSLETTER, June 1984, at 17.

16. That is, a business relationship "with the probability of future economic benefit," MODEL JURY INSTRUCTIONS § 2.20 (1980), or a business relationship which rises to the level of a "prospective contractual relation," RESTATEMENT (SECOND) OF TORTS § 766 (1979). The Restatement takes an approach different from the one discussed here, but this difference is beyond the scope of this discussion. For an analysis of the Restatement approach, see Perlman, *supra* note 4, at 67-69.

17. For a thorough discussion of the knowledge element, see Dryden v. Tri-Valley Growers, 65 Cal. App. 3d 990, 135 Cal. Rptr. 720 (Ct. App. 1977); *see also* PROSSER & KEETON, *supra* note 1, § 129, at 982. Some decisions seem to treat the *third party* element as a threshold *standing* analysis, but it is clearer as an element of the *prima facie* case. *See, e.g.*, Battista v. Lebanon Trotting Ass'n, 538 F.2d 111, 116 (6th Cir. 1976) (the interference tort *arises when* the defendant is *a third person who is not a party to the contract*); Anderson v. Minter, 32 Ohio St. 2d 207, 291 N.E.2d 457, 461 (1972) (plaintiff alleging interference with an employment contract does not state a claim a supervisor acting as an agent of the employer, who is a party to the contract).

18. For statements of the interference torts' prima facie cases which embody these elements, see MODEL JURY INSTRUCTIONS, *supra* note 15, §§ 1.03, 2.30 (1980); RESTATEMENT (SECOND) OF TORTS §§ 766, 766A, 766B (1979). Many cases contain similar lists of elements. *See, e.g.*, Seven D. Enters. Ltd. v. Fonzi, 438 F. Supp. 161, 163 (E.D. Mich. 1977); Richardson v. La Rancherita of La Jolla, Inc., 98 Cal. App. 3d 73, 80, 159 Cal. Rptr. 285, 288 (Ct. App. 1979); Livoti v. Elston, 52 A.D.2d 444, 446, 384 N.Y.S.2d 484, 485 (App. Div. 1976). For a detailed discussion of each of the prima facie case elements, see Comment, *Contractual Relations: When Are They Also A Tort?* 28 BAYLOR L. REV. 687, 689-98 (1976).

19. The classic statement of this point is in Zimmerman v. Bank of Am. Nat'l Trust & Sav. Ass'n, 191 Cal. App. 2d 55, 12 Cal. Rptr. 319 (Ct. App. 1961) (Tobriner, J.). In *Zimmerman*, the court reasoned "[t]he nature of the [interference with business relations] tort does not vary with the legal strength, or enforceability, of the relation disrupted. The actionable wrong lies in the inducement to break the contract or sever the relationship, not in the kind of contract or relationship so disrupted. . . ." *Id.* at 57, 12 Cal. Rptr. at 320-21. *See infra* note 20; *see also*

could just as likely recover under the business relations action, even if a contract technically does not exist under current law, courts tend not to inquire into the existence or validity of any alleged contract.[20] Therefore the defendant, a third party to the alleged contract, would usually not bother to raise a contract law defense such as lack of consideration or the statute of frauds.[21]

Except in those situations in which the defendant can argue that the plaintiff's alleged relations were too tenuous to merit legal protection, interference cases rarely turn on the element of existence of a contract or business relation in a prima facie case. The element of the prima facie case most often in dispute is the one requiring that the defendant intentionally acted to destroy a contract or business relation which he knew existed.[22] Traditionally courts have imposed a "malice standard" requiring that the plaintiff prove the defendant acted not only intentionally but also with malice.[23] Because, however, in almost all interference cases the alleged interference appears to benefit the defendant, thus allowing a court to label the defendant's intent as malice and find liability, the malice standard is virtually inoperable.[24] Therefore, most theories which limit the scope of the interference torts attempt to replace malice with a less manipulable limit.[25] Still, the element of the prima facie case dealing with the nature of the

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Dryden v. Tri-Valley Growers, 65 Cal. App. 3d 990, 994, 135 Cal. Rptr. 720, 723 (Ct. App. 1977) ("[i]t is likewise settled that the tort of interference with contract is merely a species of the broader tort of interference with prospective economic advantage; and while the elements of the two actions are similar, the existence of a legally binding agreement is not a *sine qua non* to the maintenance of a suit based on the more inclusive wrong").

20. "[T]ortious interference with a contract and tortious interference with a business relationship are basically the same cause of action. The only material difference appears to be that in one there is a contract and in the other there is only a business relationship." Smith v. Ocean State Bank, 335 So. 2d 641, 642 (Fla. lst DCA 1976).

21. The classic examination of this issue is in *Zimmerman*, 191 Cal. App. 2d 55, 12 Cal. Rptr. 319 (Ct. App. 1961) (Torbiner, J.). The defendant argued the statute of frauds protected him, as well as the second party to the contract. *Id.* at 57, 12 Cal. Rptr. at 320. The court rejected this defense on the ground that the defendant's status was different from that of the other contracting party. *Id.* at 60-61, 12 Cal. Rptr. at 322-23. *See also* W. PROSSER, *supra* note 12, § 129, at 932 ("[t]he agreement need not, however, be enforceable by the plaintiff as a contract").

22. *See infra* note 26 and accompanying text.

23. The malice standard seems to have begun with dictum in Lumley v. Gye, 118 Eng. Rep. 749, 753 (Q.B. 1853) (discussed *infra* Part II). *See generally* PROSSER & KEETON, *supra* note 1, § 129, at 980-82; W. PROSSER, *supra* note 13, § 129, at 927, 928, 930, 931, 938 (discussing the historical rise and the ideological inadequacy of the malice standard).

24. *See* Note, *Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort,* 93 HARV. L. REV. 1510, 1527 (1980) (expressing a general disfavor with the malice standard on the ground that it is imprecise and manipulable).

25. The leading example is the suggestion of an "unlawful means test" in Perlman, *supra* note 4, at 62 (discussed *infra* in Part IV). *See also* Dobbs, *supra* note 4, at 365 (proposing a

defendant's intent remains a primary aspect of the interference torts. This is the most crucial issue in most interference litigation. It is at the heart of the ideological debate concerning the interference actions.[26]

C. *Scope of the Present Discussion*

The question of the defendant's intent, then, defines the general scope of the present inquiry. The following three sections of this discussion support the thesis that to determine a workable limit on the interference torts, that is, to find a substitute for the malice standard, the torts must be considered separately.[27] The existence of an enforceable contract in an interference with contract action should legally distinguish that action from interference with business relations, in which an injured party has no alternate remedy at all. Therefore, the second section of this discussion examines the rise of the interference torts in the English common law and suggests that, notwithstanding the modern idea that interference with contract is more justified than the business relations action,[28] the earliest forms of this tort did not involve binding contracts.[29] The section also describes the current confusion in interference law, which may have arisen because of the conflict between the historical and modern concepts of the interference torts.

The third section of this discussion outlines an economic argument for analytically separating the two torts on the basis of the differences between the contract and tort law inherent in each of the interference actions. This section proposes that the initial inquiry in any interference case should be the same as the primary inquiry in a contract case: is there a valid contract?

The fourth section encompasses these preceding arguments and suggests a specific workable limit for the interference actions. This limit modifies a recent proposal[30] that an "unlawful means test" limit the interference torts.[31] This final section summarizes the economic rationale for the unlawful means test, and proposes a modification

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limit on the interference actions similar to the unlawful means test); Note, *supra* note 24, at 1529-39 (theorizing that a loose balancing test came to replace the malice standard).

26. *See supra* note 25.

27. This thesis opposes the modern concept that these torts are essentially the same and the only difference is that one requires proof of a contract and the other requires proof of a business relationship. *See supra* notes 15 and 20.

28. *See supra* notes 15, 20 and 27.

29. *See infra* Part II.

30. Perlman, *supra* note 4, at 78. *See generally supra* note 25, and *infra* Part IV, (examining Professor Perlman's "unlawful means test").

31. *See supra* note 30.

based on the theory that the two interference torts are conceptually distinct because interference with contract more directly conflicts with the policies supporting contract law.

II. HISTORICAL DEVELOPMENT OF THE INTERFERENCE ACTIONS

A. *The* Lumley *Theory of Tortious Interference*

The history of the two interference torts provides the basis for the notion that the contract action is analytically separate from the business relations tort. Recent discussions of the torts presuppose that *Lumley v. Gye*,[32] an important interference case, first established the interference with contract action and that post-*Lumley* courts extended the tort to protect contracts-at-will and even prospective relations.[33] This view relies on the theory that the business relation action is looser and less justified than the interference with contract tort.[34] After all, the requirement of a contract would seem to eliminate spurious claims, wherein the parties to the alleged relationship have only minimal contact with each other.[35] Notwithstanding this reasoning, during the twentieth century the business and contract torts ultimately merged. Given the validity of tortious interference with a business relationship, the *Lumley* requirement of a contract effectively disappeared.[36]

The prevailing explanation[37] for the historical rise of this situation might be called the *Lumley* theory of tortious interference. Only a few preliminary judicial inquiries into the interference area existed in the English common law before the *Lumley v. Gye* decision of

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32. 118 Eng. Rep. 749 (Q.B. 1853).

33. *See* Note, *Tortious Interference with Contract: A Reassertion of Society's Interest in Commercial Stability and Contractual Integrity,* 81 COLUM. L. REV. 1491, 1491-92 (1981) (arguing that "tortious interference with contract [is] the historical precursor of such liability" as liability for "intentional interference with prospective or unformalized relations"); *see also* Note, *supra* note 24, at 1529 (the interference tort "had been *extended* to protect at will contracts and even prospective relations") (emphasis added).

34. This concept—that a contract is more worthy of judicial protection than is a business relation—seems to have originated in Temperton v. Russell, 1 Q.B. 715 (1893). The *Temperton* plaintiff sued under both interference with contract and interference with business relations. *Id.* at 719-20. The court held the interference with contract claim was insufficient on the basis of the trial evidence. *Id.* at 720. The court also refused to recognize an action for interference with business relations. *Id.* at 722.

35. Case law shows, however, that the strength of the alleged relationship between the two parties does not always correspond to the strength of the plaintiff's claim. In Studley, Inc. v. Gulf Oil Corp., the plaintiff made out a strong interference with business relations claim, although the second party to the relationship never knew of the plaintiff's existence. 386 F.2d 161 (2d Cir. 1967).

36. *See supra* notes 19 and 20.

37. *See supra* note 33.

1853.[38] Certainly, no American case before *Lumley* unequivocally allowed tortious interference with contract.[39] After *Lumley*, the interference action eventually became a part of the English common law. It spread to the United States[40] and the requirement of a contract gradually disintegrated, allowing a mere business relationship to sustain a cause of action.[41]

As the tort began to function in twentieth century America, it quickly conflicted with the capitalist tenet of competition.[42] To protect free enterprise, American courts allowed "lawful competition"[43] as a defense privilege; the tort as stated in the *Lumley* opinions proved too broad to exist unchecked in a free enterprise economy.[44] Possibly as a result of this danger, lawyers came only rarely to invoke the interference actions. Recently such actions, however, have become "fashionable"[45] causes of action. Nonetheless, the history of the torts is

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38. "Traditional teaching about the development of the tort of interference with contractual relations maintains that it emerged in 1853 with the landmark case of Lumley v. Gye." Note, *supra* note 24, at 1510. *See also id.* at n.1 (listing citations that recognize *Lumley* as the leading case in the area of tortious interference with contract). *See generally* W. PROSSER, *supra* note 13, § 129, at 927 (Professor Prosser's misstatement of history, that "the recognition that economic relations are entitled to protection against unreasonable interference is on the whole a comparatively recent development.").

39. According to Professor Sayre, the interference doctrine arose with *Lumley* and "from England has emigrated to the United States." Sayre, *supra* note 8, at 671. At least one American court, however, fully recognized interference with contract 25 years before *Lumley*. *See infra* text accompanying notes 74-86 (discussing Aldridge v. Stuyvesant, 1 Hall 210 (N.Y. Sup. Ct. 1828)).

40. *See supra* note 39.

41. *See* Perlman, *supra* note 4, at 64 (arguing that post-*Lumley* courts "extended" interference with contract "to prospective relationships not yet formalized into contract").

42. "It is startling that a doctrine of this sort [liability for tortious interference] is superimposed on an economic order committed to competition." Perlman, *supra* note 4, at 78. *See also id.* at 62 ("offering someone a better deal may interfere with an existing contract, but it is also the essence of a free market"). *See generally supra* note 6.

43. Much has been written on the lawful competition defense privilege, and the content of these treatments is beyond the scope of the present discussion. For a detailed examination of this area, see generally Ahern v. Boeing Co., 701 F.2d 142, 143 (11th Cir. 1983); DeVoto v. Pacific Fidelity Life Ins. Co., 618 F.2d 1340, 1347 (9th Cir. 1980); Insurance Field Servs., Inc. v. White & White Inspection & Audit Serv., Inc., 384 So. 2d 303, 306-07 (Fla. 5th DCA 1980); Supreme Sav. & Loan Ass'n v. Lewis, 130 Ill. App. 2d 16, 21, 265 N.E.2d 857, 860 (App. Ct. 1970); Rudolf v. Huntington Symphony Orchestra, Inc., 91 Misc. 2d 264, 265-66, 397 N.Y.S.2d 863, 864-65 (App. Term 1977); RESTATEMENT (SECOND) OF TORTS §§ 767-769 (1979); PROSSER & KEETON, *supra* note 1, § 130, at 1012-15; W. PROSSER, *supra* note 13, § 129, at 932, 946; Carpenter, *Interference with Contract Relations*, 41 HARV. L. REV. 728, 745-62 (1928).

44. *See* Note, *supra* note 24, at 1527-28 (arguing the malice standard over-expands the interference torts); *see also* Dobbs, *supra* note 4, at 357 (arguing that "courts have been in an expansive mood for a long time," and that in the context of interference actions this mood does "more harm than good").

45. Wackenhut Corp. v. Maimone, 389 So. 2d 656, 657 (Fla. 4th DCA 1980) ("[t]he tort of intentional interference with a contractual or business relationship has of late emerged from

actually quite different from this *Lumley* theory, and this difference might provide a solution to the generally acknowledged problem that the scope of the torts is too broad.

B. *Early Common Law Roots of the Interference Actions*

1. THE LANDLORD/TENANT AND MASTER/SERVANT ACTIONS

The roots of the interference torts go back well before *Lumley* into the English Year Books,[46] which established two separate but analytically similar interference causes of action.[47] One rule[48] dates from the eighth year of Henry VII's reign and allowed a landlord to sue anyone who enticed his tenants to move away.[49] This rule applied to tenancies-at-will, which either party could legally terminate at any time.[50] In a tenancy-at-will the tenant was free to leave and the landlord had no recourse against him. Consequently, the law allowed the landlord to sue any third party who had enticed the tenant away.[51] In modern terms, the law allowed actions for intentional interference with a business relationship; because the tenancy agreement was terminable-at-will, it was a mere relationship, not a binding contract.[52] Although contemporary hornbook contract law did not exist at this early date,[53] because the landlord had no recourse against his tenant, the law provided a remedy against a third party who was at fault.

A second interference rule dating from this same period arose from the English Ordinance of Labourers[54] in 1349. At that time, a plague had created a labor shortage which was so severe that Parlia-

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relative obscurity to provide a quite *fashionable* basis for contemporary law suits") (emphasis added). As late as 1978 a California court, however, allowed the interference torts to be described as "infrequently invoked." Worldwide Commerce, Inc. v. Fruehalf Corp., 84 Cal. App. 3d 803, 809, 149 Cal. Rptr. 42, 45 (Ct. App. 1978).

46. *See infra* text accompanying notes 47-58.

47. Professor Sayre traces the interference action even farther, to ancient Rome. Sayre, *supra* note 8, at 663-64.

48. For a brief discussion of the landlord/tenant action for enticement and its origins, see Aldridge v. Stuyvesant, 1 Hall 210, 215-16 (N.Y. Sup. Ct. 1828).

49. Y.B. 9 Hen. 8 pl. 8.

50. *Id. See* Aldridge v. Stuyvesant, 1 Hall 210, 212 (N.Y. Sup. Ct. 1828).

51. *See supra* note 50.

52. *See id.*; *see also* W. PROSSER, supra note 13, § 129, at 929 (the "family tree [of interference with contract] goes back to very ancient times, when it was not the existence of a contract which was important, but the status, or relation recognized by the law, in which the parties stood toward one another, and with which the defendant interfered").

53. *See generally* G. GILMORE, THE DEATH OF CONTRACT 11-15 (1974) (arguing contract law as it is currently perceived did not develop until the nineteenth century).

54. 23 Edw. III (1349). The common law before 1349 has provided a similar enticement remedy, but only where the defendant had used actual violence. Sayre, *supra* note 8, at 665. For another discussion of this very early development, see generally Comment, *Interference with Contractual and Business Relations in Alabama*, 34 ALA. L. REV. 599, 599-601 (1983).

ment passed a statute making liable an employer who enticed a servant away from another employer.[55] This "enticement" tort then merged with the existing body of English common labor law.[56] It applied, however, to employment situations which were terminable-at-will, not to contractual employment relationships.[57] Like the landlord/tenant-at-will cause of action, in modern terms this was an action for tortious interference with business relations. The proof requirement for the existence of the relationship was similar to the modern requirement, but stricter.[58]

2. ROOTS OF THE INTERFERENCE ACTION IN THE COMMERCIAL SECTOR

The early common and statutory law did not allow a cause of action for interference with enforceable contracts.[59] Yet early law did allow a plaintiff to sue for interference with business relations which arose out of either a landlord/tenant or a master/servant relationship, the two dominant business relationships of the era.[60] As business began to develop in the nineteenth century,[61] pressure on the courts may have increased to expand the tort. Even earlier, in 1793, an English court had quietly extended the business relations action to the

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55. Sayre, *supra* note 8, at 665-66; Note, *supra* note 24, at 1515 n.22.

56. *See supra* note 55; *see also* Pingrey, *Interference of Third Parties in the Contracts of Others*, 48 CENT. L.J. 112 (1899) (summarizing the post-*Lumley* development of the master/servant enticement action).

57. "[T]here was no requirement that the master, as plaintiff, prove the existence of a contract between himself and his servant. Instead, the master had merely to show that a 'subsisting' relation of service existed." Note, *supra* note 24, at 1515. A modern case reaffirms that employment-at-will situations come under the interference with business relations action. Unistar Corp. v. Child, 415 So. 2d 733, 734 (Fla. 3d DCA 1982). *See generally infra* note 112. The law in this area is changing, however, as states abrogate or modify their employment-at-will doctrines and recognize a *public policy* exception or a *wrongful discharge* tort. As one state supreme court recently explained, "[w]hile we believe that considerations of public policy do not demand total abandonment of the employment-at-will doctrine, . . . there are occasions when exceptions to the general rule are recognized in the interests of justice." Mers v. Dispatch Printing Co., 19 Ohio St. 3d 100, 103, 483 N.E.2d 150, 153-54 (1985). The present analysis, however, considers only the traditional employment-at-will doctrine.

58. To establish the relation under the "enticement" tort, the master had to show that the servant had begun the work relationship. *See* Note, *supra* note 24, at 1515. This requirement did not exist in actions for interference with contract. Failure to meet this requirement was an obstacle to the *Lumley* majority because the second party to the contract, an opera singer, had not sung at his theater and, thus, had never begun her employment with the plaintiff. The court, nevertheless, held for the plaintiff. *See infra* note 96.

59. PROSSER & KEETON, *supra* note 1, § 130, at 1005. *See generally* Note, *supra* note 24.

60. *See generally* PROSSER & KEETON, *supra* note 1, § 130, at 1005-06. This discussion goes further, stating that other common business relations in this period may also have been protected. *Id.*

61. *See* Note, *supra* note 24, at 1511-21 (describing the historical and social factors which gave rise to *Lumley*).

commercial sector.[62]

The plaintiff in *Tarleton v. M'Gawley*[63] owned a ship which he sent to Africa to trade with the "natives."[64] Once at the African coast, the ship captain sent a boat ashore to trade.[65] A group of Africans who wanted to trade paddled a canoe out to meet the ship's boat.[66] Before the two groups could meet, the defendant, the captain of another English ship, fired a cannon at the canoe, killing one of the Africans and succeeding in disrupting the plaintiff's trading.[67] Apparently, the court found the defendant's motives were malicious.[68] According to the case report,[69] the defendant's attorney relied on one main defense: the plaintiff had violated African law in attempting to trade without acquiring from the local African king the required trading license.[70] The defense attorney compared the defendant's disruptive cannon shot with the act of "alarming the owner of a house which the plaintiff was about to break into."[71] Probably because the attorney did not argue lack of common law precedent for this kind of action, the court issued a short opinion which dismissed the defense as irrelevant and found for the plaintiff, holding the licensing requirement was "a foreign law; the act of trading is not itself immoral."[72]

Although the *Tarleton* opinion does not address the legal issue of interference,[73] its only innovation would seem to be an expansion of the scope of then existing interference tort law. Because the plaintiff had not yet met the group of Africans, and hence there was no contract, the defendant's interference was with business relations and not with a contract. Without saying so, *Tarleton* extended the landlord/tenant and master/servant interference causes of action into the commercial sector. *Tarleton* did not address, however, interference with a valid contract.

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62. Tarleton v. M'Gawley, 170 Eng. Rep. 153 (K.B. 1793).

63. *Id.* For a discussion of *Tarleton* in its socio-legal context, see Lever, *Means, Motives, and Interests in the Law of Torts,* in OXFORD ESSAYS IN JURISPRUDENCE 52 (A. Guest ed. 1961).

64. 170 Eng. Rep. at 153.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* According to the case report, the defendant fired "maliciously intending to hinder and deter the natives from trading."

69. *Id.* at 154.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Tarleton,* 170 Eng. Rep. 153 (K.B. 1793).

C. *The Rise of the Action for Interference with an Enforceable Contract*

1. *Aldridge v. Stuyvesant*

Thirty-five years later an American court did allow an action for interference with contract. *Aldridge v. Stuyvesant*[74] presented a landlord/tenant problem, but unlike the tenancies in the earlier cases, the *Aldridge* lease was a binding contract for one year, rather than a tenancy-at-will.[75] Under the facts of *Aldridge*, *A*, the landlord, rented a house to *B*.[76] During the first month of the tenancy, *C*, a third party, "wrongfull[y] and malicious[ly] threat[ened]"[77] the tenants, saying "that he would levy and seize their goods"[78] unless they moved out. *C*'s threat worked and the tenants broke the lease and moved. Unable to mitigate his damages by finding another tenant, *A* sued *C* for intentionally interfering with the lease contract. The defense carefully distinguished the tenancy-at-will rule and argued that absolutely no precedent existed to support an action for interference with an enforceable contract.[79] The defense reasoned that the tenancy continued throughout the year,[80] so "the conduct of the defendant would have formed no defense to an action brought against the tenants by the plaintiff to recover the rent."[81]

This argument depended on the premise that by freely entering a contract with the tenant, the landlord had established an enforceable basis of liability against the tenant and therefore he should be precluded from shopping for another defendant.[82] Under this reasoning, a contract is not a property right which a party creates in isolation of his business dealings. Instead, it is a planned course of action which a party agrees to take if an event occurs—such as the breaching of the lease in *Aldridge*. The cause of the event was irrelevant to the defense. The tenant could have broken the lease for any reason whatsoever—that a third party happened to advise him to do so should not have been legally relevant.[83]

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74. 1 Hall 210 (N.Y. Sup. Ct. 1828).

75. *Id.* at 210.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 212. "Upon referring to the Year Book, . . . it will be found that the tenants spoken of were tenants *at will* . . . . [B]ecause the tenants here [are] tenants for years . . . they remain bound by their contract with the landlord, and he has a perfect remedy to enforce a performance of the contract." *Id.*

80. *Id.*

81. *Id.* at 211.

82. *Id.* at 211-12. *See supra* note 79.

83. The court, in Ashley v. Harrison, adopted this rationale in denying a cause of action

In rejecting this defense, the *Aldridge* court held the lease contract to be a property interest belonging to the landlord. The defendant had interfered with this property and was therefore liable, just as a defendant could be liable for violating a property right in trespass. This is the same reasoning that an English court used twenty-five years later in *Lumley v. Gye*.[84] The *Lumley* court was almost certainly not aware of the *Aldridge* holding,[85] and so apparently reached its conclusion independently.

2. *Lumley v. Gye*

While *Aldridge* expanded the early common law cause of action for interference with a tenancy-at-will,[86] *Lumley* addressed the other early common law action, enticement of a servant employed at will.[87] Although *Lumley* does not extend the law materially farther than *Aldridge* did, one reason *Lumley* quickly became the landmark case in this area[88] may be that it expressly overruled two prior cases with almost identical facts.[89]

All three of these cases dealt with a theater manager who had hired an opera singer. The singers' contracts in all three situations were for specified periods and were therefore legally enforceable, unlike contracts terminable-at-will.[90] In each case a third person's act prevented performance of the contract, causing a breach. In each case the theater owner sued the third party for interference with the singer's contract.[91] The earlier two opinions refused to allow the cause of action because the defendants' alleged interference was too

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for interference with a valid contract. 170 Eng. Rep. 276 (K.B. 1793). The court reasoned the breach of contract "might have proceeded from another cause, or perhaps from caprice or insolence." *Id.* at 276.

84. 118 Eng. Rep. 749 (Q.B. 1853).

85. *Lumley* does not mention *Aldridge*, and the dissent in *Lumley* states that "we have no decisions upon" the interference with contract action. *Id.* at 762. *See supra* note 102. Surprisingly, *Aldridge* did not seem to make an impact on its own state's law. A 1924 article about the potential effects of *Lumley* on New York law does not mention *Aldridge*. Note, *Torts: Inducement to Breach of Contract: Doctrine of* Lumley v. Gye, 9 CORNELL L. REV. 352 (1924).

86. *See supra* text accompanying notes 46-53 and 74-83.

87. *See supra* text accompanying notes 52-58.

88. *Lumley* became a topic for intellectual debate among nineteenth century legal scholars. *See, e.g., Letter from Sir Frederick Pollock to Justice Holmes* (Sept. 17, 1897), 1 HOLMES-POLLOCK LETTERS 78, 80 (M. Howe ed. 1944).

89. Taylor v. Neri, 170 Eng. Rep. 393 (C.P. 1795); Ashley v. Harrison, 170 Eng. Rep. 276 (K.B. 1793). Note that both cases are earlier than *Aldridge*, so the *Lumley* court could have cited *Aldridge* as an American trend away from the *Taylor* and *Ashley* holdings.

90. 118 Eng. Rep. at 750; 170 Eng. Rep. at 393; 170 Eng. Rep. at 276.

91. *See supra* note 90.

remote.[92] To allow the action could open the proverbial[93] floodgates, and could conceivably allow a lawsuit every time a "servant, whether domestic or not, was kept away a day from his master's business."[94] These first two opera singer cases barred the plaintiffs' action, then, because the judges adopted the "status" concept of contract over the "contract-as-property" notion.[95]

Lumley, however, changed this.[96] *Lumley* did to the worker interference cases what *Aldridge* had done to the landlord/tenant rule; it allowed an action when the plaintiff had entered a valid contract. The language of the opinions in *Lumley* indicates, however, that the judges saw their holding not only as allowing an action for interference with a valid contract, but also as extending the old master/servant enticement action into the area of nonmenial labor.[97] A major hurdle for the *Lumley* court was characterizing a "dramatic artiste"[98] as a "servant."[99]

The lengthy *Lumley* dissent by Justice Coleridge,[100] foresaw the implications the majority's holding could have on contract law. Justice Coleridge accepted the common law action for interference with an employment relation, but he was unwilling to extend it to enforceable contracts, under the theory "that in respect to breach of contract the general rule of our law is to confine [contractual] remedies by

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92. 170 Eng. Rep. at 394; 170 Eng. Rep. at 276.

93. *See* Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 351, 162 N.E. 99, 103 (1928) (Andrews, J., dissenting) (comparing the potential reach of a defendant's liability in negligence to the potential damage of downstream property after a dam breaks).

94. 170 Eng. Rep. at 394.

95. The *Ashley* court implicitly adopted the "status" theory in its dictum that the opera singer could have breached the contract for any reason; that a third party happened to breach should not be determinative. *See supra* note 83.

96. 118 Eng. Rep. at 753. Much of the *Lumley* opinion addresses a rule from the master/servant enticement cases requiring that the servant have begun work before the plaintiff can maintain an action. *See supra* note 57. This requirement seems merely to have had an evidentiary function providing assurance that some actual master/servant relationship existed. Because the action was on an unenforceable, at-will agreement, the law needed some noncontractual requirement for a relationship, just as the modern interference with business relations action requires some definite standard. *See infra* Part IV.

97. 118 Eng. Rep. at 752.

98. *Id.*

99. *Id.* The court dealt at some length with the issue of whether "the engagement of a theatrical performer . . . is not of such a nature as to make the performer a servant, within the rule of law which gives an action to the master for the wrongful enticing away of his servant." *Id.* *See generally* Sayre, *supra* note 8, at 667-68 (discussing the "dramatic artiste is not a servant" defense in *Lumley*).

100. 118 Eng. Rep. at 759. According to Professor Sayre, "[o]f the four opinions rendered in the case, the dissenting opinion of Justice Coleridge far outshines the other three for its ability and scholarship." Sayre, *supra* note 8, at 668.

action to the contracting parties."[101] Justice Coleridge was so frustrated that he resorted to the argument that if the majority was correct, then why did no "treatise on the law of contract [have] . . . a chapter on this" action?[102]

D. *Examples of the Modern Applications of the Interference Actions*

1. REAL ESTATE BROKERS AND ATTORNEYS

Justice Coleridge's arguments did not catch hold, however, and after *Lumley* an amorphous body of law grew up around the tortious interference concept.[103] Even Justice Coleridge's argument concerning the dearth of relevant scholarly literature soon became obsolete; and by the early twentieth century courts upholding the interference tort could find support in the contracts treatises of the day.[104] The interference torts soon expanded into a myriad of business situations. For example, they proved especially useful to real estate brokers and lawyers trying to collect contingent fees.

The real estate broker cases typically involve an agent who arranges a sale between a buyer and a seller, but where the parties consummate the sale independently, preventing the broker from collecting his commission.[105] These cases often involve a conflict between contract and tortious interference law, because the broker

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101. 118 Eng. Rep. at 760.

102. *Id.* at 761-62 ("[n]one of this reasoning applies to the case of breach of contract: if it does, I should be glad to know how any treatise on the law of contract could be complete without a chapter on this head, or how it happens we have no decisions on it").

103. Professor Sayre refers to the post-*Lumley* interference law as in a state of "constant uncertainty." Sayre, *supra* note 8, at 669. For cases establishing the early growth of the post-*Lumley* interference actions, see Note, *Torts—Interference with Contract—Effect of Motive*, 12 MINN. L. REV. 147 (1927).

104. *See, e.g.*, Dade Enters. v. Wometco Theatres, Inc., 119 Fla. 70, 73, 160 So. 209, 210 (1935) (citing 4 W.H. PAGE, THE LAW OF CONTRACTS § 2426 (1920) for the proposition that the victim of a breach of contract "may also maintain an action against the wrongdoer who induced such breach"). According to the 1920 Page treatise, "[t]he weight of modern authority holds that interference with any contract amounts to a tort." 4 W.H. Page, THE LAW OF CONTRACTS § 2426, at 4298 (1920).

105. *See, e.g.*, R.C. Hilton Assoc. v. Stan Musial & Biggies, Inc., 702 F.2d 907 (11th Cir. 1983) (broker not entitled to collect commission when he had neither a contract nor a business relationship with the seller); Studley, Inc. v. Gulf Oil Corp., 386 F.2d 161 (2d Cir. 1967) (facts create a jury question concerning defendant's tortious interference with broker's commission arrangement); Allen v. Powell, 248 Cal. App. 2d 502, 56 Cal. Rptr. 715 (Ct. App. 1967) (holding a broker may recover for tortious interference if the defendants conspired to circumvent the commission agreement); Katz v. Thompson, 19 Misc. 2d 848, 189 N.Y.S.2d 982 (Co. Ct. 1959) (broker may collect from buyer notwithstanding that the broker did not attempt to recover on his contract with seller).

will frequently sue the seller in contract and the buyer in tort.[106] At least one case has explicitly held that interference is a wrong independent of the breach; therefore, the plaintiff may sue both parties, and the buyer cannot defend on the theory that the plaintiff must first proceed in contract against the seller.[107]

Similarly, the cases involving attorney contingent fees [108] often involve a lawyer proceeding against a defendant who allegedly settled a pending law suit directly with a client. The lawyer alleges either the settlement prevented him from collecting his fee, or it prevented him from pursuing the case to its full value.[109] A variation of this fact pattern is where one law firm alleges that another takes its client.[110] The defendant firm can be liable for tortious interference if the evidence shows the defendant firm knowingly enticed the client.[111]

2. CONTRACTS TERMINABLE-AT-WILL

A more analytically complex pattern among current tortious interference cases is the contracts terminable-at-will issue, which has remained a subject of litigation since the Ordinance of Labourers in 1349.[112] Although the older view states that a plaintiff may not recover under an interference action alleging a terminable-at-will relationship,[113] in tort actions most modern courts treat contracts termi-

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106. *See supra* note 105.

107. *See* Katz v. Thompson, 19 Misc. 2d 848, 189 N.Y.S.2d 982 (Co. Ct. 1959).

108. *See* Dombey, Tyler, Richards & Greiser v. Detroit, Toledo & Ironton R.R. Co., 351 F.2d 121 (6th Cir. 1965) (law firm alleging defendant settled directly with client and therefore prevented firm from collecting contingent fee not permitted to recover because proof of attorney-client relationship was insufficient); Frazier v. Boccardo, 70 Cal. App. 3d 331, 138 Cal. Rptr. 670 (Ct. App. 1977) (facts present sufficient evidence for one law firm to proceed against second firm which allegedly tortiously interfered with a contingent fee client contract); Herman v. Prudence Mutual Casualty Co., 41 Ill. 2d 468, 244 N.E.2d 809 (1969) (a group of 93 attorneys may not maintain a class action against an insurance company for interference with contractual relations involving 88 clients); Krause v. Hartford Accident & Indem. Co., 331 Mich. Rep. 19, 49 N.W.2d 41 (1951) (insurance company did not interfere with attorney's client contract because the company was lawfully asserting a privilege); *see also Herman*, 41 Ill. 2d at 473, 244 N.E.2d at 811-12 (citing additional attorney fee cases).

109. *See supra* note 108 (citing *Dombey, Herman,* and *Krause*).

110. *See* Frazier v. Boccardo, 70 Cal. App. 3d 331, 138 Cal. Rptr. 670 (Ct. App. 1977).

111. *Id. Frazier* holds this situation creates a jury question concerning the existence of a prima facie interference action. *Id.*

112. 23 Edw. III (1349). *See supra* note 58 and accompanying text. Contracts terminable-at-will are not strictly enforceable. "[T]raditional contract remedies may seem less satisfactory in [these] cases than elsewhere . . . . If no fixed term is expressed, no remedy for breach of contract is available because no breach occurs." Perlman, *supra* note 4, at 85. *See also supra* note 57.

113. *See* A.S. Rampel, Inc. v. Hyster Co., 2 A.D.2d 739, 740, 153 N.Y.S.2d 176, 178 (App. Div. 1956) ("[t]here is no rule of law, however, in tort or in contract, which fixes liability upon a defendant for procuring, with economic self-interest, a termination of at-will relationships, in the absence of other unlawful or tortious acts").

nable- at-will as business relations. Yet some judicial prejudice against this type of action remains.

For example, in *Lockewill, Inc. v. United States Shoe Corp*,[114] the plaintiff had contracted with a shoe company to be its exclusive distributor in St. Louis.[115] The contract was terminable-at-will, because it was oral and of indefinite duration.[116] Several years later the shoe company allowed a St. Louis department store to distribute the same line of shoes.[117] The plaintiff distributor then sued the company for breach of contract and the department store for tortious interference with contract relations.[118] The court denied the contract claim and held that the terminable-at-will agreement was invalid after a reasonable period.[119] The court disposed of the interference with contract relations claim, and upheld the lower court's verdict without examining any of the legal or factual issues involved.[120]

Other courts have more thoroughly considered allegations of interference with terminable-at-will contracts, even when the facts seemed no more meritorious than those in *Lockewill*.[121] The court in *Ahern v. Boeing Co.*,[122] for example, held that a plaintiff stated a prima facie interference claim under facts almost identical to those in *Lockewill*.[123] In *Ahern*, the plaintiff had an exclusive terminable-at-will[124] agreement to distribute a unique incinerator.[125] The other

114. 547 F.2d 1024 (8th Cir. 1976).

115. *Id.* at 1026-27.

116. *Id.* at 1027. "The [oral] agreement was silent as to its duration and nothing was said about the right of either side to terminate the arrangement either with or without notice or with or without cause." *Id.* Under applicable law, where a "distributorship agreement . . . is silent as to duration and . . . does not deal specifically with termination . . . , the agreement is construed to be terminable at the will of either party." *Id.* at 1028-29.

117. *Id.* at 1025.

118. *Id.*

119. *Id.* at 1029.

120. *Id.* at 1030.

121. *See, e.g.*, Ahern v. Boeing Co., 701 F.2d 142 (11th Cir. 1983) (Plaintiff stated a prima facie tortious interference with business relations case against defendant, although the alleged business relation was terminable-at-will.); Unistar Corp. v. Child, 415 So. 2d 733 (Fla. 3d DCA 1982) (allowing injunction to prevent former employees-at-will from interfering with plaintiff's customer relations by using the same customer list); Livoti v. Elston, 52 A.D.2d 444, 384 N.Y.S.2d 484 (App. Div. 1976) (holding that a contract that is unenforceable is analogous to one terminable-at-will and may therefore be the basis for an interference claim). *But see* A.S. Rampel, Inc., v. Hyster Co., 2 A.D.2d 739, 740, 153 N.Y.S.2d 176, 178 (App. Div. 1956) (holding that no liability exists for interference with contracts terminable-at-will).

122. 701 F.2d 142 (llth Cir. 1983).

123. *Compare* 701 F.2d at 143 *with* 547 F.2d at 1026-27.

124. 701 F.2d at 143. "The court found that the joint venture agreement granted certain marketing rights to the appellants, but that the contract was terminable-at-will by either party on thirty days' notice." *Id.*

125. *Id.*

party to the contract eventually allowed a third party, the *Ahern* defendant, to distribute the incinerator.[126] The plaintiff sued under a tortious interference theory.[127] Although the appellate court upheld a factual finding that the defendant's motives were merely "competitive interests"[128] and not "ill will,"[129] the court found that the plaintiff stated a prima facie case. The court held that under applicable law the relevant test looks to the defendant's active inducement, and not to the defendant's motive. The court thus enforced a test seemingly more stringent than the *Lumley* malice standard.

These cases suggest that even courts in recent holdings seem confused as to the role and applicable standards of the interference torts in the context of modern business relations.[130] Interference case opinions will necessarily diverge to some degree, first, because all of these cases must rely heavily on their particular facts and, second, because, as a tort, interference actions are subject to the vagaries of each state's law.[131] The current law is sufficiently confused to make business dealings unpredictable. This confusion also tends to broaden the applicability of interference torts. The interference torts therefore should be limited in some way.[132]

III. CONTRACT LAW IMPLICATIONS OF THE INTERFERENCE ACTIONS: THE ECONOMIC PERSPECTIVE

A. *The Tort Law Conception of Contract*

Because the interference actions are in tort, they have traditionally imposed a tort law view of contracts.[133] That is, under the interference torts a contract right is analogous to a property right. This view extends at least as far back as *Lumley v. Gye.*[134] Under this view, a party entering a contract does not limit his rights to those arising from the contract itself. The very act of contracting spontaneously

126. *Id.*

127. *Id.*

128. *Id.* at 144.

129. *Id.*

130. *See generally* Perlman, *supra* note 4, at 61 (arguing that in the area of the interference torts, "doctrinal confusion is pervasive, both within and among jurisdictions").

131. *See supra* notes 4, 44 and 130.

132. *See supra* notes 4 and 44.

133. Perlman, *supra* note 4, at 62 ("Courts have paid too little attention to the interplay of tort and contract policies and the proper role of each in resolving interference cases. . . .").

134. Note, *supra* note 24, at 1524 ("[A]ccording to *Lumley*, breach of a contractual promise is a violation of property rights"). *See generally* Comment, *Analysis of the Formation of Property Rights Underlying Tortious Interference With Contracts and Other Economic Relations*, 50 U. CHI. L. REV. 1116 (1983) (describing the property rights concept as it relates to the interference torts).

creates an intangible piece of property which everyone not a party to the contract must respect or else pay damages.[135] Thus, although the contract interference cause of action is in tort, it changes the very concept of what a contract is. As the *Lumley* court apparently recognized, to allow the tort is to consider "[i]ntangible property created by the promise of performance in a contract . . . as worthy of protection as physical property already created by labor or transferred by inheritance."[136]

Although equating contractual rights with property rights appears contrary to the philosophy of common law contract law,[137] to argue against the validity of the interference with contract tort on this ground would be ill advised. Whether a contract consists primarily of property aspects is an insoluble jurisprudential puzzle. It is not an issue that can be conclusively proved.

The question here concerns the validity of the interference torts. Modern opinion combines both interference torts as one action.[138] This view is commonly considered too broad.[139] The general notion that interference with contract is the more justified action,[140] however, is based only in tort law. Because interference is a tort, the relevant tort relationship is that between the plaintiff and defendant. In the context of the interference action, the second party to the contract is a third party.[141] Yet in order to impose a workable limit on the interference torts, it is crucial to distinguish the contract from tort aspects and policies.[142] Because debating the property character of contracts leads only to speculation, the remaining issues are those which concern torts and contracts.

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135. Note, *supra* note 24, at 1524. The author has elsewhere discussed the vagueness of the conception of what is "property." Dowling, *General Propositions and Concrete Cases: The Search for a Standard in the Conflict between Individual Property Rights and the Social Interest*, 1 J. LAND USE & ENVTL. L. 353, 358-65 (1985).

136. *See supra* note 135.

137. *See* Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461-64 (1897) (suggesting that a contract is ideally no more than a choice to breach or pay damages).

138. *See supra* notes 19 and 20.

139. *See supra* notes 33 and 34.

140. *See supra* notes 33 and 34.

141. In fact, the defendant must be the third party because the prima facie tort prohibits a plaintiff from suing the second party in tort. *See infra* note 216 and *supra* note 17.

142. *See* Perlman, *supra* note 4, at 62 (arguing that "courts have paid too little attention to the" conflict of tort and contract policies in this area). *But see* Sayre, *supra* note 8, at 686 (arguing against limiting the interference torts on the basis of protecting contract law).

B. *The Economic Perspective of the Interference Actions*

1. THE ECONOMIC THEORY OF CONTRACT

Hornbook contract law arguably exists only in theory.[143] Nevertheless, the contract theory is valid if only because lawyers accept it. According to Professor Gilmore, "generations of lawyers and judges and law professors grew up believing that the theory was true—and it is our beliefs, however absurd, that condition our actions."[144]

f the originators of this contract theory, Justice Holmes,[145] believed that a contract was a legal right or duty inextricably bound up with "the consequences of its breach."[146] To Justice Holmes a contract or other legal duty "is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this way or that by judgment of the court . . . ."[147] Grounding his reasoning in a 1675 opinion by Lord Coke,[148] Justice Holmes saw a contract as a relationship which merely obligated a party to make a choice.[149] He joined Lord Coke in objecting to the idea that there exists some moral, noneconomic imperative requiring parties to keep their contracts.[150] Modern writers on legal economics, such as Professor Posner, agree Justice Holmes's contract thesis continues to be valid.[151]

2. THE ECONOMIC THEORY OF CONTRACT AND THE INTERFERENCE ACTIONS

In their major writings, neither Justice Holmes nor Judge Posner applied this economic theory of contract to tortious interference with

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143. *See* G. GILMORE, *supra* note 57, at 18 ("[I]n its 'pure' form the [Contract Law] theory may never have existed outside the classrooms of the Harvard Law School. . . .").

144. *Id.* at 18.

145. *Id.* at 13-17. For a general discussion of Justice Holmes's impact on contract, see Sharp, *Mr. Justice Holmes: Some Modern Views—Contracts,* 31 U. CHI. L. REV. 268 (1964).

146. Holmes, *supra* note 137, at 458.

147. *Id.*

148. *Id.* at 462 (citing Bromage v. Genning, 81 Eng. Rep. 540 (1675) (Coke, J.) (addressing a landlord/tenant contract and holding that "ceo voilt subverter l'entent del' convenantor, quaint il intend a estre al son election a perder les damages ou a faire le leas")).

149. Holmes, *supra* note 137, at 462.

150. *Id.* Justice Holmes realized that his "mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can." *Id.* To Justice Holmes, however, these ethics-oriented thinkers have "been misled." *Id.* Justice Holmes's economic analysis of breach seems to have prevailed. Probably for this reason "punitive damages are not awarded in contract actions, no matter how malicious the breach." J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS 520 (2d ed. 1977).

151. R. POSNER, AN ECONOMIC ANALYSIS OF LAW 88 (2d ed. 1977); Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency,* 24 RUTGERS L. REV. 273, 274, 281, 292 (1970).

contract.[152] Nonetheless, the extension is inviting. Under the Holmes model, a party may either perform or breach, but he will normally breach only when to do so is cheaper than to perform.[153] This, according to Professor Posner, is the economic ideal because it will produce the most economically efficient behavior and the least economic waste.[154] When some chance exists that the breaching party will not be responsible at all on the contract, however, the party's economic forecast drastically changes.

For example, in a standard sales situation suppose seller *S* contracts with buyer *B* to sell ten widgets at ten dollars each. Before delivery, the widget market rises ten percent, and *X* offers to buy each of *S*'s ten widgets for eleven dollars. Under traditional sales contract damage theory, as codified in the Uniform Commercial Code,[155] if *S* sold to *X*, he would not realize any more money than if he had sold to *B*. *S* would initially gain ten dollars on the sale to *X*, but he would owe these dollars, the difference between the market price and the contract price,[156] to *B*.

To keep transaction costs and ill-will at a minimum, *S* in this situation would almost certainly perform his contract. Once *S* considers the element of tortious interference with contract, however, his assessment of the situation changes by the probability that *B* will sue *X* instead of *S*. Assume that because of *X*'s greater financial strength, *S* calculates there is a fifty percent chance that *B* would choose *X* as a defendant over *S*.[157] Then *S* has a real choice. He can either perform on the contract or he can sell to *X* and take his chances. *S* realizes $100 on the first choice, but his average realization on the second

152. Justice Holmes does not address the tort in *The Path of the Law, supra* note 140, and Judge Posner does not address it in AN ECONOMIC ANALYSIS OF LAW, *supra* note 155. Justice Holmes once had occasion to decide an interference-like action, and he predictably took a restrictive view of the concept. Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 308 (1927) (The plaintiff's' action "must be worked out through their contract relations with the owners, not on the postulate that they have a [property] right *in rem.*").

153. *See* R. POSNER, *supra* note 151, at 88 ("[I]n many cases it is uneconomical to induce the completion of a contract after it has been breached . . . ."); Perlman, *supra* note 4, at 80 ("breach will occur only when the promisor can gain enough from the alternative opportunity to buy out the promisee and have some additional gain left over").

154. R. POSNER, *supra* note 151, § 4.9, at 88-93.

155. *See* U.C.C. §§ 2-711 to -716 (1977); J. CALAMARI & J. PERILLO, *supra* note 150, at 546-49.

156. U.C.C. § 2-713(1) (1977).

157. In reality, the odds that *B* will sue *X* may be even greater than 50% due to the greater damages available in tort. "[T]he existence of an enhanced damages measure makes it more likely that the promisee will sue the inducer rather than the promisor." Perlman, *supra* note 4, at 88. *See also infra* note 161 and accompanying text.

choice is $105 (actually, $100 or $110, depending on whom *B* sues).[158] This situation will make *S* more likely to breach, which is precisely contrary to the *raison d'etre* of the interference with contract tort.[159]

Of course, the counter-argument is that, given the existence of the interference with contract action, *X* will be less likely to offer to buy *S*'s widgets. In practice this objection is weak for several reasons. First, a look at the cases shows that *S*, the party under contract, likely has more information about the relationship and about his contract.[160] The third party's (*X*'s) lack of information would logically tend to make him underestimate the probability of his being sued for tortious interference.[161] The rate of successful interference cases in society is probably low enough to make the odds of any single plaintiff filing a claim too idiosyncratic to measure. Further, if the third party did have enough information to consider the likelihood of a suit he might rely too heavily on the strength of a "lawful competition" privilege.[162] The prevalent attitude in the American business community seems to be that competition is an inherent part of the free enterprise system and, thus, is not actionable.[163]

3. THE ECONOMIC THEORY OF CONTRACT AND INTERFERENCE TORT DAMAGES

The existence of a cause of action for interference with contract could lead to more breached contracts, which is contrary to the societal ideal[164] and contrary to the purpose of the interference tort itself.[165] Another drawback of the tort, also based on the goal of soci-

158. For a discussion of the possible problem of double recovery, see *infra* notes 170, 171 and accompanying text.

159. Note, *supra* note 33, at 1493 (arguing that courts have "adopted an implicit assumption that the tort's sole *raison d'etre* is to protect the individual interests of particular plaintiff's"). *See infra* note 205.

160. *See, e.g.*, Studley v. Gulf Oil Corp., 386 F.2d 161 (2d Cir. 1967) (where a broker plaintiff had almost all the relevant information, but the third party to the brokerage contract did not even know of the plaintiff's existence).

161. Perlman, *supra* note 4, at 85 (arguing that the unpredictability of tort damages as compared to contract complicates negotiation over liability between the inducer and breacher).

162. For citations to detailed discussions of this privilege, see *supra* note 43.

163. *See* Perlman, *supra* note 4, at 78-79:

> It is startling that doctrine of this sort [i.e., the interference action] is superimposed on an economic order committed to competition. As one member of the American Law Institute observed in the debate over Dean Prosser's draft on tortious interference for the RESTATEMENT (SECOND), foreign lawyers reading the RESTATEMENT as an original matter would find it astounding that the whole competitive order of American industry is prima facie illegal.

164. *See supra* note 159.

165. *See supra* note 159.

etal economic efficiency, is the problem of damages. Damages in contract are strictly defined, and this definition protects Justice Holmes's ideal of economic freedom to breach or not to breach. Contract remedies are meant only to put the injured party in as good a position as he would have been in had the other party performed.[166] Unlike tort theory, contract theory generally does not allow consequential, special, or punitive damages, unless specifically provided for in the contract.[167]

Adding the element of tortious interference with contract, however, throws off the delicate contract damage system. The cases show that once a victim of a breached contract can collect tort damages, he can actually be better off than he would have been had the contract been honored.[168] Under tortious interference with contract, a plaintiff can even collect punitive damages.[169] Also, because courts consider the interference and the breach to be independent wrongs, the tort creates the "spectre" of double recovery.[170] This problem goes back at least as far as *Lumley v. Gye,* where the plaintiff theater owner sued both the opera singer and the other theater owner.[171] If a plaintiff could succeed in each suit, his contract would in effect be paid off twice, which would create an economic loss to society of the value of the second judgment.

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166. U.C.C. § 1-106(1) (1977); J. CALAMARI & J. PERILLO, *supra* note 150, at 521-22.

167. *See supra* note 166.

168. For a classic example of this circumstance, see Alyeska Pipeline Serv. Co. v. Aurora Air Serv., Inc., 604 P.2d 1090, 1098 (Alaska 1979) (because the interference actions are intentional torts, they are subject to tort damage awards, including punitive damages).

169. *Id.*

170. Dade Enters. v. Wometco Theatres, Inc., 119 Fla. 70, 73, 160 So. 209, 210 (1935) (dictum allowing plaintiff to sue both on contract and in tort against third party); Mitchell v. Weiger, 56 Ill. App. 3d 236, 241, 371 N.E.2d 888, 892 (App. Ct. 1977) (holding that "[w]here a third party influences a contracting party to breach his contract, the innocent contracting party has a right of action against both the other contracting party and a right in tort against the third party"); Katz v. Thompson, 19 Misc. 2d 848, 851, 189 N.Y.S.2d 982, 985 (Co. Ct. 1959) (rejecting defendant's argument that the interference plaintiff suffered no damages as long as he had an enforceable contract right against the second party to the contract). *But see* Dombey, Tyler, Richards & Grieser v. Detroit, Toledo & Ironton R.R. Co., 351 F.2d 121, 125 (6th Cir. 1965) (requiring that the interference plaintiff exhaust contract remedies); Krause v. Hartford Accident and Indem. Co., 331 Mich. 19, 24, 49 N.W.2d 41, 43 (1951) (requiring that the interference plaintiff exhaust contract remedies).

171. Lumley v. Wagner, 42 Eng. Rep. 687 (1852). The plaintiff sued the singer unsuccessfully for specific performance on the singing contract. *Id.* at 689-90. *See* Lumley v. Wagner, 64 Eng. Rep. 1209, 1211-12 (1852).

A fascinating aspect of the *Lumley* holding, but beyond the scope of this discussion, concerns the effect this earlier litigation had on the outcome of *Lumley v. Gye.* The same parties had been litigating intensively the same factual problem before the same court. Did this have an effect when the plaintiff at last came to phrase the issue as interference with contract?

The purpose of entering a contract is to assure recovery in the event a situation does not turn out as planned.[172] The odds that a party will perform on a contract are an integral part of the transaction itself. The classic example of this is the simple loan, where a debtor with a better credit rating (that is, a party more likely to perform) pays less interest. The reason a party fails to perform is not an independent economic factor. [173] Whether someone fails to pay a loan because he loses his job or because a third party, knowing of the contract, swindles him out of his money is economically irrelevant.[174] In making the loan the creditor must take into account the debtor's potential for default. The debtor's susceptibility to negative third party influence is simply an additional factor.[175]

Further, in almost any breach of contract situation there is likely to be some third party, if only a spouse, involved in the breaching party's decisions.[176] Under current law, if this third party knew of the contract and was solvent enough to make an interference suit worthwhile, the other contracting party would likely have an action against him.

IV. LIMITING THE INTERFERENCE TORTS: THE UNLAWFUL MEANS TEST AND BEYOND

A. *The Unlawful Means Test*

In outlining the historical rise and the economic factors of the interference torts, much of the foregoing analysis has supported the proposition that intentional interference with business relations is more strongly based in economic logic than is interference with contract, largely because the plaintiff in the latter action has available a remedy he himself created. An article by Professor Harvey Perl-

172. *See* Holmes, *supra* note 137, at 462 ("[t]he duty to keep a contract means a prediction that you must pay damages if you do not keep it,—and nothing else").

173. *See* Perlman, *supra* note 4, at 90 ("[I]f contract doctrine allows a contracting party to avoid an agreement when that party discovers a better deal, it should not matter that the information about the better deal is provided by a third party . . . .").

174. *Id.*

175. A Supreme Court of Illinois decision supports the theory behind this debt analogy by arguing that its holding against an interference plaintiff is just because the plaintiff entered a risky venture which could have turned out profitably for him. Swager v. Couri, 77 Ill. 2d 173, 192-93, 395 N.E.2d 921, 929 (1979) ("[I]n the hope of earning a very substantial fee, the plaintiff's took a very substantial risk on the success of a highly speculative venture, and on the character of the defendants. That their judgment apparently was wrong on both counts is not a basis for liability in tort.").

176. Perlman, *supra* note 4, at 62 ("a person's economic relationships are so numerous and so independent with the activities of others that some interference is inevitable").

man,[177] which is a leading economic discussion of the interference torts, proposes that these two actions be limited by a standard called the "unlawful means test."[178] Following is an explanation of this test, and a proposed expansion of it, based on the notion that the interference torts are conceptually distinct, and that interference with business relations, the more historically and economically sound action, deserves stronger protection under any proposed limit on the torts.

Professor Perlman's unlawful means test attempts to replace the less definite *Lumley v. Gye* malice standard[179] as a limit on the interference torts.[180] The test is rooted in an economically sound rationale, but its application to interference with contract is overbroad because it allows a plaintiff a remedy that is superfluous to his already existing action in contract.[181]

The test, in a limited degree, exists in some jurisdictions already.[182] It divides interference cases into two categories—those in which the defendant's interference was otherwise lawful, and those in which the defendant's act itself was independently wrongful.[183] The test in general proposes that if the defendant could be liable for a fully independent tort, such as fraud, libel, or an antitrust violation, the law should encourage the plaintiff to take the direct route and sue under that tort.[184]

Because most other torts do not traditionally deal with purely economic damages, the unlawful means test recognizes that some situations may more appropriately fit within the interference torts.[185] The structure of the interference actions, also, may provide the plaintiff with a procedural advantage.[186] Although the prima facie cases of many torts would require a plaintiff to show, for example, special

177. Perlman, *supra* note 4, at 65.

178. *Id.*

179. *See supra* notes 22-26 and accompanying text.

180. *See supra* notes 22-26 and accompanying text.

181. *See infra* discussion.

182. *See supra* text accompanying notes 122-132 (discussing Ahern v. Boeing). For a discussion of an unlawful means-type test in New York, see Note, *supra* note 33, at 1503-04. Furthermore, Professor Perlman argues that the unlawful means test corresponds to the results, if not the dictum, in many contemporary interference cases. Perlman, *supra* note 4, at 199 (arguing the unlawful means analysis "closely . . . reflects the outcomes in decided cases"). *See generally infra* note 191.

183. Perlman, *supra* note 4, at 62.

184. *Id.* at 69, 70, 126.

185. *Id.* at 70-76.

186. *Id.* at 77. Of course, retaining the plaintiff's burden of proving the defendant's independent unlawful behavior would effectively abolish the interference torts, because any plaintiff who could meet this burden could proceed under the independent action and would have no need for the interference tort.

damages,[187] under the interference torts once the plaintiff shows the defendant's intent, which usually amounts only to a showing that the defendant acted knowing of the contract or relationship,[188] the burden of explanation more readily shifts to the defendant.[189]

This phenomenon remains intact under the unlawful means test. The test requires, however, that a court focus on the question of whether the defendant used economic power in an independently unlawful way to affect an existing contract or business relationship.[190] Because the focus of the tort itself has become the lawfulness of the competition, this eliminates the need for a defendant's privilege of lawful competition.[191]

B. *Economic Justification of the Unlawful Means Test*

At first this unlawful means test may seem an unusually strict limit on the plaintiff's interference action, but the outcomes of actual reported interference cases apparently follow the predicted outcome under the test rather closely.[192] The unlawful means test[193] is grounded in a thorough economic analysis;[194] however, a reasoned examination of this issue is beyond the scope of the present discussion. Briefly, the policy underlying the test derives from Justice Holmes's concept that the law attaches no stigma or special sanction to a contracting party who for economic reasons chooses to breach.[195] If breaching a contract is not itself blameworthy, then "[t]o hold an inducer liable, his behavior must be at least as culpable as that of the breaching promisor; to impose a liability rule more onerous than that imposed on the promisor, the inducer must be more culpable."[196]

This "more culpable" standard requires independent unlawfulness. An interference defendant under this test will be liable only

187. Perlman, *supra* note 4, at 77.

188. *See supra* note 17.

189. Perlman, *supra* note 4, at 77.

190. *Id.* at 110.

191. *See supra* note 43 and accompanying text; *see also* Dean Prosser's argument that the unlawful means test exists to some degree as a limit on the defendant's lawful competition privilege. W. PROSSER, *supra* note 13, § 129, at 936-37 ("[M]ethods which are tortious in themselves, such as violence, threats of intimidation, defamation, misrepresentations, the counterfeiting of a product, bribery, or the harassing of agents, will not be privileged even where the defendant is acting for a purpose justifiable in itself.").

192. *See* Perlman, *supra* note 4, at 97-128. Part III of Professor Perlman's discussion is a detailed proof of the thesis that outcomes in decided cases closely reflect the unlawful means analysis. *See generally supra* note 182.

193. Note that the test does exist, to some degree, in some jurisdictions. *See supra* note 186.

194. *See* Perlman, *supra* note 4, Part II, at 69-97.

195. *See supra* text accompanying notes 143-151.

196. Perlman, *supra* note 4, at 93.

when his act of interference was independently tortious, given that in assessing whether an act is independently unlawful a court may go beyond the relatively strict bounds of traditional tort law.[197]

C. *Expanding the Unlawful Means Test*

Professor Perlman's unlawful means test ignores the fundamental distinction between interference with contract and interference with business relations,[198] which has been the subject of the previous sections of this discussion. Both the historical rise of the torts and their economic basis militate for the argument that society should protect the business relations action and restrict the tort of interference with enforceable contracts. Professor Perlman's unlawful means test ultimately proves inadequate because it does not recognize this distinction.[199] A more comprehensive test would require a two-step analysis. First, discern whether an enforceable contract exists; and second, apply one of two standards—a stricter one for valid contracts and a looser one for business relations.

What these two standards should be, specifically is of course a question of the policy of each jurisdiction. One suggestion would be entirely to abolish actions for interference with enforceable contracts, and force plaintiffs to sue third parties under whatever independent tort the plaintiff could prove. If a plaintiff could show no enforceable contract existed, only then he could sue under interference with business relations, as modified by Professor Perlman's unlawful means test. Under this theory, first, the plaintiff would have the burden of proving first that no enforceable contract existed and, second, that the defendant intended to interfere with the plaitiff's relationship. The burden would then shift to the defendant to prove that he did not commit any civil or criminal wrong.

A plaintiff suing under interference with business relations who could show both tort and contract damages, and who could show sufficient injury, might then be in a position to recover twice. The second recovery would be justified because existing noninterference law sees the plaintiff as the victim of two separate wrongs.[200]

197. *See id.* at 98.

198. *See id.* at 82-85.

199. *See id.*

200. The analysis is the same as if a plaintiff recovered for the breach of a contract and for a separate tort committed by a third party during the same transaction.

1. THE ECONOMIC ARGUMENT FOR THE RECOMMENDED EXPANSION OF THE UNLAWFUL MEANS TEST

In his economic analysis of the unlawful means test, Professor Perlman's own justification supports the thesis that the test, as stated, is too lenient for the interference with contract actions.[201] In analyzing the reasons for limiting the interference with contract action, Professor Perlman lists three main economic arguments.[202] Each of these arguments actually rejects all interference liability, except where a plaintiff can independently prove a separate tort. Professor Perlman's first argument is that the policy behind the interference actions contradicts the tenet of contract law which allows the breach of a contract when it is the most economically efficient alternative. The interference action discourages *all* breaches, even those which would maximize efficiency.[203]

Although in practice the interference actions may not in fact achieve this policy,[204] preventing breaches is certainly the goal behind these torts.[205] This policy conflict goes to the heart of the interference with contract action. Because it allows a plaintiff under a contract to rely on interference with contract, Professor Perlman's unlawful means test limits, but does not eliminate this problem. Only a requirement that the plaintiff shoulder the burden of proof of an entirely independent tort would reconcile this situation.[206] This argument against liability cannot apply to interference with business relations because the contract law policy of supporting efficient breaches does not extend to informal noncontract relationships.

Professor Perlman's second and third arguments for instituting the unlawful means test similarly urge a complete limit on the tort. Neither of these arguments applies as forcefully to the interference with business relations action. Professor Perlman's second argument contends that liability for interference with contract increases the transaction costs between a would-be inducer and a would-be breacher of a contract. The uncertainty as to which party will be sued increases the transaction costs relating to how the parties allocate the

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201. Perlman, *supra* note 4, at 82-85.

202. *Id.*

203. *Id.* at 83 ("[C]ontract rules seem designed to facilitate breach where efficiency gains result; the inducer liability rule, in contrast, seems designed to reduce the number of such breaches and thus runs counter to a plausible objective of contract doctrine.").

204. *See supra* notes 156-59 and accompanying text.

205. *See supra* notes 159 and 203.

206. In fairness, a plaintiff alleging interference with an enforceable contract should have available the nontraditional torts which Professor Perlman mentions. *See supra* note 191 and accompanying text.

amount which the plaintiff might eventually recover.[207] Professor Perlman's third argument is that interference with contract liability will increase negotiation and salvage costs because of the communication problems among the three parties.[208]

Although both these arguments may seem rather trivial, both support the recommendation that the courts eliminate interference liability for enforceable contracts. Surprisingly, Professor Perlman seems to address and support this point.[209] Further, neither of these two arguments is as compelling when applied to interference with business relations, because when no formal contract exists, transaction costs and comunication problems are less affected by any original two-party relationship.

The economic rationale for limiting the interference actions depends largely upon the existence of a contract. When Professor Perlman argues to apply the unlawful means test to the business relations action,[210] he has little economic logic to rely on and his argument is correspondingly shorter.[211] The thrust of his analysis is that given the economic reasons for limiting interference with contract and because a contract is necessarily more worthy of protection than is a mere business relation, a business relations action must take precedence over a contract action.[212]

The three preceding sections have been wholly devoted to dispelling this tort law view of the interference actions. The pre-*Lumley v. Gye* common law demonstrated that courts protected business relations long before they came to protect contracts. At the time the courts took this step, they faced the objection that to do so would undermine contract law.[213] An economic analysis also shows contract law depends on the notion that by contracting, a party creates a remedy for itself in case its transaction does not proceed as planned.[214] To indiscriminately treat a contract as a chattel which a third party can violate is to allow the victim of a breach of contract a choice of defendants. The very existence of this choice affects the

207. Perlman, *supra* note 4, at 83-84.

208. *Id.* at 84-85.

209. *Id.* at 84. The transaction costs related to allocation of liability, of course, "would be eliminated in the absence of liability." *Id.*

210. *Id.* at 89.

211. *Compare* Perlman, *supra* note 4, § 2, at 82 *with* Perlman, *supra* note 4, § 5, at 89.

212. Perlman, *supra* note 4, at 90-91 ("[I]f the efficiency principles of contract law suggest that a third party using lawful means should not be liable for inducing breach of enforceable promises, then a fortiori, the same rule should apply to *un*enforceable expectancies.").

213. *See supra* notes 74-85 and accompanying text (discussing *Aldridge v. Stuveysant*); notes 86-102 and accompanying text (discussing *Lumley v. Gye*).

214. *See supra* text accompanying notes 143-51.

common law of contract. For this reason, courts do not allow a party to a contract to sue in tort the other party to the contract. That the interference torts can provide greater damages than can breach of contract compounds this problem.[215]

This analysis undermines Professor Perlman's assumption that the economic policies behind the interference with contract action apply even more strongly to interference with business relations. The unlawful means test is a rational policy as it applies to interference with business relations because it allows a plaintiff with no other remedy some chance to proceed against a third party who has committed a wrong against him. When a plaintiff has arranged for a course of recovery by forming a contract, however, the law should not provide any alternate remedy against another defendant, if the alternate remedy, like tortious interference, arises from the same contract.

A plaintiff who has provided himself with the protection of a contract always has available both his remedy in contract against the second party and the common law noninterference tort actions against all third parties. If a third party's actions rise to the level of any other tort, the plaintiff who could show sufficient damages might even proceed against two parties, one in tort and one in contract, without creating any ideological problem.

2. THE LOGICAL ARGUMENT FOR THE RECOMMENDED EXPANSION OF THE UNLAWFUL MEANS TEST

The foregoing analysis has concentrated on economic arguments showing the interference torts are ideologically suspect where they conflict with principles of contract law. An economic argument alone, however, seems insufficient to overcome a hundred-year line of tort cases. Because of the unique nature of interference torts, a logical, policy-oriented analysis proves useful in examining these issues and testing the recommended extension of the unlawful means test.

In a two-party breach of contract, the victim of the breach cannot bring an interference action against the other contracting party, even if that other party's behavior satisfies all the elements of the prima facie interference case.[216] The prima facie interference case requires that the defendant be a third party to the contract.[217] There-

215. *See supra* note 168 and accompanying text.

216. Ryan v. Brooklyn Eye & Ear Hosp., 46 A.D.2d 87, 91, 360 N.Y.S.2d 912, 916 (App. Div. 1974) ("[T]he plaintiff may not assert a cause against the [contracting party] for inducing the breach of a contract right which could only have come from the [contracting party] in the first place."). *See also* W. PROSSER, *supra* note 12, § 129, at 934 ("[T]he defendant's breach of his own contract with the plaintiff is of course not a basis for the tort."). *See supra* note 141.

217. *See supra* notes 17, 141, and 216.

fore, the same acts and states of mind amount to a tort if a third party commits them, but not if a contracting party does.[218] This rule is essential to prevent all contract actions from instantly being brought in tort. In its absence, the only nontortious breach of contract would probably be an "unintentional breach."[219]

The interference action is, therefore, analogous to criminal solicitation; current law makes a "solicitation" tortious while the principal act—breach of contract—is no tort at all.[220] This phenomenon makes the interference action suspect as a traditional tort, and the issue of damages heightens the disparity. The "solicitor" or interferer is subject to actual damages under tort law, while the "principal" or breacher receives protection from the limited damages available under the contract.

Professor Perlman's unlawful means test attempts to reconcile this by insuring that the "solicitation" will be of an independently actionable nature.[221] The recommended extension of the test would require that if the "principal" breached an enforceable contract, the "solicitor" could be liable only if his solicitation amounted to an actual tort, for which he would be liable anyway.

This is where the criminal law analogy breaks down: although a criminal solicitor might be held liable for the crimes of the principal,[222] breaching a contract is a business decision, and trying to influence another's business decision does not seem as blameworthy as soliciting another to commit a crime. Yet present law penalizes the influencer even more than it punishes the decisionmaker himself.[223] Therefore, tort damages should be available only in cases of interference with business relations where the plaintiff has no alternate remedy. Where the plaintiff does not have an enforceable contract, only one of two parties, the defendant or the interferer, could conceivably be liable, and a policy question arises as to which of these should bear the loss. Under the expanded unlawful means test, the interferer will be liable if he cannot meet his burden under Professor Perlman's

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218. *See supra* note 216.

219. Even an "unintentional breach" might conceivably be actionable in a jurisdiction which recognizes negligent interference with business relations. *See infra* note 232 and accompanying text.

220. *See supra* note 216.

221. For a discussion of the Holmes theory of contract damages and its effect on interference actions, see *supra* notes 143-63 and accompanying text.

222. *See* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 58, at 414-23 (1972). If party *A* solicits *C* to kill *B*, and *C* does kill *B*, "[u]nder either the common law concept of accessory before the fact or modern principles of accountability, *A* is also guilty of murder." *Id.* at 414 n.1.

223. *See supra* note 102 and accompanying text.

unlawful means analysis. Not meeting this burden will necessarily show that the interferer is more at fault than the defendant, and therefore should bear the plaintiff's loss. In all other situations, either the breacher of the enforceable contract will be legally liable, or the inducer will be liable under an independent tort.

3. CONDITIONAL CONTRACTS

A quirk in this analysis arises in a conditional contract where a third party, the defendant, prevents the condition from occurring. Because a conditional contract is legally valid,[224] this situation would traditionally fall under interference with contract. Because the condition never occurred, however, the plaintiff would have no enforceable remedy in contract against the contracting party. The plaintiff's practical position is identical to that of a plaintiff suing under interference with business relations. In this situation the plaintiff should have available the interference action, as modified by the unlawful means test.

Richardson v. La Rancherita[225] is a good example. The *Richardson* plaintiff was an unsuccessful restauranteur who decided to get out of his business. He contracted to sell his restaurant, but the contract was conditioned upon the plaintiff obtaining his landlord's consent to assign the lease of the building.[226] The landlord, who wanted to raise the rent, would not consent, so the plaintiff sued him for intentional interference with the restaurant sale contract.[227] Although a valid conditional contract existed, it was not enforceable.

These circumstances are analytically closer to an interference with business relations action because the alleged interference relates directly to the condition on which the validity of the contract turned. The effect for the plaintiff is the same as if no valid contract had existed. Thus, the plaintiff in a *Richardson*-type situation should be able to invoke the interference action, as modified by the unlawful means test.

V. CONCLUSION

The expansion of the unlawful means test rests on the thesis that the plaintiff in an interference with contract action has an alternate remedy which he himself created; therefore, his alleged injury is less

224. *See* J. CALAMARI & J. PERILLO, *supra* note 150, at 383-84.

225. Richardson v. La Rancherita of La Jolla, Inc., 98 Cal. App. 3d 73, 159 Cal. Rptr. 285 (Ct. App. 1979).

226. *Id.* at 77, 159 Cal. Rptr. at 286-87.

227. *Id.*

worthy of legal protection than is the injury involved in interference with valid business relations. Although the law does not generally favor restricting the scope of torts,[228] the example of heart-balm legislation is relevant in this area because it abolishes intentional interference with personal contracts and relations.[229] This family law solution of totally abrogating the action would seem overbroad in a business context because additional reasons to abolish these family law torts exist which do not apply to business contexts.[230]

Finding an appropriate standard for the business torts is difficult. Standards in the existing cases are not uniform.[231] In fact, one jurisdiction has abolished the intent requirement and allowed an action for negligent interference.[232] The situation therefore demands a uniform limit on the torts. In searching for this limit the history of the actions demonstrates that interference with business relations is older and more logically justified than is interference with contract; an economic analysis seems to support this idea.[233]

This is true notwithstanding the contemporary notion that the contract action is more worthy of protection because the alleged injury is more definite.[234] In fashioning this thesis into a workable limit, the framework of the unlawful means test proves useful.[235] Once this test expands to restrict further the interference with contract action, as the preceding historical and conceptual analysis requires, a test emerges based both on an inquiry into the existence of an enforceable contract and on the existence of independently tortious behavior. This expanded test could provide a solution to the inadequacies of the interference torts.

228. Dobbs, *supra* note 4, at 357 ("[C]ourts have been in an expansive mood for a long time.").

229. *See supra* text accompanying notes 8-14.

230. *See supra* text accompanying notes 8-14.

231. *See generally supra* Part III.

232. The case chiefly cited for this proposition is J'Aire Corp. v. Gregory, 24 Cal. 3d 799, 598 P.2d 60, 157 Cal. Rptr. 407 (1979). For general discussions of the negligent interference action, see W. PROSSER, *supra* note 12, § 129, at 938-42; *id.* at § 130, at 952; Note, *Negligent Interference with Economic Expectancy: The Case for Recovery,* 16 STAN. L. REV. 664 (1964). *But see* RESTATEMENT (SECOND) OF TORTS § 766C (1979) (denying liability for negligent interference).

233. *See generally supra* Part III.

234. *See generally supra* Parts II and III.

235. *See supra* Part IV.