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# Abuse of Rights: A Pervasive Legal Concept

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# Abuse of Rights: A Pervasive Legal Concept

Joseph M. Perillo\*

## TABLE OF CONTENTS

I. INTRODUCTION .....	38
A. <i>Thesis</i> .....	38
B. <i>Historical Background</i> .....	40
1. <i>England</i> .....	40
2. <i>France</i> .....	43
3. <i>The United States</i> .....	44
II. ABUSE OF RIGHTS THEORY .....	47
III. ABUSIVE DISCHARGE OF AT-WILL EMPLOYEES .....	52
A. <i>Classical Case Law</i> .....	52
B. <i>Abuse of Rights Theory and Discharges Against Public Policy or in Bad Faith</i> .....	54
IV. NON-EMPLOYMENT CASES OF RETALIATION .....	57
A. <i>Retaliatory Termination of Insurance Policies</i> .....	57
B. <i>Retaliatory Eviction Where Tenant Asserts Rights as Tenant</i> .....	58
C. <i>Retaliatory Eviction for the Exercise of Rights Unrelated to the Tenancy</i> .....	58
V. THREAT TO EXERCISE A RIGHT AS DURESS .....	60
A. <i>Abusive Civil Litigation</i> .....	60
B. <i>Threat to Discharge an At-Will Employee as Duress</i> .....	62
C. <i>Other Examples of the Exercise of Rights as Duress</i> .....	64
D. <i>The Tort of Abuse of Process</i> .....	64
E. <i>Liability Under Rule 11</i> .....	66
F. <i>SLAPP Actions and the Noerr-Pennington Doctrine</i> .....	67
VI. BAD FAITH IN THE PERFORMANCE OF A CONTRACT .....	69
A. <i>The Idea of Good Faith</i> .....	69
B. <i>Bad Faith Exercise of Discretion</i> .....	71

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C. *Conditions of Satisfaction* ..... 74  
D. *Requirements Contracts* ..... 75  
E. *Commercial Leases* ..... 76

VII. ABUSIVE REFUSAL TO CONSENT TO THE ASSIGNMENT OF A LEASE,  
DISTRIBUTORSHIP, OR FRANCHISE ..... 77  
A. *Leases* ..... 77  
B. *Franchises, Dealerships and Distributorships* ..... 79  
C. *Analogous Cases of Withheld Consent* ..... 80

VIII. ABUSIVE TERMINATIONS OF CONTRACTS ..... 81  
A. *Scope of the Topic* ..... 81  
B. *Abusive Insurance Terminations* ..... 82  
C. *Abusive Acceleration of a Debt or Calling in a Demand Note* .... 85

IX. BAD FAITH IN ENFORCEMENT OF THE CONTRACT ..... 87  
A. *Meaning of "Contract Enforcement"* ..... 87  
B. *Abusive Enforcement of Valid Covenants Not to Compete* ..... 88  
C. *Economic Waste in Enforcement* ..... 89  
D. *Abusive Cancellations for Breach* ..... 91  
E. *Abusive Bankruptcy* ..... 92

X. ABUSE OF RIGHTS AS A CRIME ..... 93  
A. *Blackmail* ..... 93  
B. *Obstruction of Justice* ..... 94

XI. MISCELLANEOUS CASES OF ABUSE OF RIGHTS ..... 95

XII. CONCLUSION ..... 96

I. INTRODUCTION

A. *Thesis*

This paper seeks to demonstrate the existence in American law of a doctrine of "abuse of rights," a term of French origin. This doctrine has been widely adopted in Civil Law countries. The United States has developed a similar doctrine, substantially separate,<sup>1</sup> from its Civil Law analogue. This development in American law has not been recognized by American scholars and lawyers,

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1. In Louisiana, the doctrine has not followed as independent a development. Various references to Louisiana law are made in the text below.

although many of its individual segments are well-known. English-language literature on the doctrine is sparse,<sup>2</sup> and normally concludes that there is no doctrine in the common law that is similar or comparable to the French-invented doctrine of abuse of rights, although there may be sporadic similarity of results. Sometimes this absence is stated with a note of regret,<sup>3</sup> other times with a congratulatory flourish,<sup>4</sup> and sometimes with an analysis purporting to explain why the common law needs no such doctrine.<sup>5</sup> The scope and shape of the doctrine varies from country to country, but a good restatement can be found in the new Civil Code of the Netherlands, effective as of January 1, 1992.<sup>6</sup>

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2. A partial bibliography includes the following: COUNCIL OF EUROPE, ABUSE OF RIGHTS AND EQUIVALENT CONCEPTS: THE PRINCIPLE AND ITS PRESENT DAY APPLICATION (PROCEEDINGS OF THE NINETEENTH COLLOQUY ON EUROPEAN LAW) (1990); David Angus, Comment, *Abuse of Rights in Contractual Matters in the Province of Quebec*, 8 MCGILL L.J. 150 (1962); Vera Bolgár, *Abuse of Rights in France, Germany and Switzerland: A Survey of a Recent Chapter in Legal Doctrine*, 35 LA. L. REV. 1015 (1975); Chris J.H. Brunner, *Abuse of Rights in Dutch Law*, 37 LA. L. REV. 729 (1977); Pierre Catala & John A. Weir, *Delict and Torts: A Study in Parallels II*, 38 TUL. L. REV. 221 (1964); John H. Crabb, *The French Concept of Abuse of Rights*, 6 INTER-AM. L. REV. 1 (1964); Julio Cueto-Rua, *Abuse of Rights*, 35 LA. L. REV. 965 (1975); Valerian E. Greaves, *The Social-Economic Purpose of Private Rights: Section 1 of the Soviet Civil Code, A Comparative Study of Soviet and Non-Communist Law*, 12 N.Y.U. L. REV. 165 (1934); H.C. Gutteridge, *Abuse of Rights*, 5 CAMBRIDGE L.J. 22 (1933); E.L. Johnson, *Abuse of Rights in Soviet Civil Law*, 1 THE SOLIC. 322 (1962); Albert Mayrand, *Abuse of Rights in France and Quebec*, 34 LA. L. REV. 993 (1974); Glenda Moreland Redmann, *Abuse of Rights: An Overview of the Historical Evolution and the Current Application in Louisiana Contracts*, 32 LOY. L. REV. 946 (1987); Richard O'Sullivan, *Abuse of Rights*, 8 CURRENT LEGAL PROB. 61 (1955); Kazuaki Sono & Yasuhiro Fujioka, *The Role of the Abuse of Right Doctrine in Japan*, 35 LA. L. REV. 1037 (1975); André Tunc, *The French Concept of abus de droit*, 1981 THE CAMBRIDGE LECTURES 151; David A. Ward et al., *The Business Purpose Test and Abuse of Rights*, BRIT. TAX REV. 68 (1985); David A. Ward & Maurice C. Cullity, *Abuse of Rights and the Business Purpose Test as Applied to Taxing Statutes*, 29 CANADIAN TAX J. 451 (1981); A.N. Yiannopoulos, *Civil Liability for Abuse of Right: Something Old, Something New . . .*, 54 LA. L. REV. 1173 (1994).

3. See RUDOLF B. SCHLESINGER ET AL., *COMPARATIVE LAW: CASES—TEXT—MATERIALS* 760 n.6 (5th ed. 1988) (noting American analogues to particular decisions in civil law countries, but lamenting that the pertinent American "rules appear to be enshrined in separate, seemingly air-tight compartments").

4. See Johnson, *supra* note 2; O'Sullivan, *supra* note 2.

5. Catala & Weir, *supra* note 2, at 237. There is less need for the doctrine in common law systems because rights are not defined as "generously" as in civil law systems. *Id.* See Anna De Vita, *Report, Abuse of Rights in Housing law*, in ABUSE OF RIGHTS AND EQUIVALENT CONCEPTS, *supra* note 2, at 128, 131 ("To start with, the concept of abuse only becomes necessary if rights are defined too generously. If from the start the contents of these rights are subject to qualifications and clarifications the idea may be quite superfluous. This is effectively what happens in common law systems. . ."); Ward et al., *supra* note 2.

6. NEW NETHERLANDS CIVIL CODE PATRIMONIAL LAW: PROPERTY OBLIGATIONS AND SPECIAL CONTRACTS (P.P.C. Haanappel & Ejan Mackaay trans. 1990); see Brunner, *supra* note 2, at 738 (discussing this section in draft form). As is the case with restatements in general, Civil Law countries are by no means in accord with one another with respect to the scope of the doctrine of abuse of rights. *Id.*

Recent statutory formulations of the doctrine include Luxembourg's, which was enacted in 1987 as Article 6-1 of its Civil Code. It reads as follows:

Any deliberate act which manifestly exceeds, by its purpose or by the circumstances in which it is carried out, the normal exercise of a right shall not be protected by the law, shall incur the liability of the person responsible and may constitute grounds for action to restrain him from persisting in the said abuse.

Georges Margue, *Abuse of Rights and Luxembourg Law*, in ABUSE OF RIGHTS AND EQUIVALENT CONCEPTS,

1. The holder of a right may not exercise it to the extent that it is abused.
2. Instances of abuse of right are the exercise of a right with the sole intention of harming another or for a purpose other than for which it was granted; or the exercise of a right where its holder could not reasonably have decided to exercise it, given the disproportion between the interest to exercise the right and the harm caused thereby.
3. The nature of the right can be such that it cannot be abused.

An English scholar, H.C. Gutteridge, surveying the common law in 1933, concluded that there was no comparable doctrine in the Anglo-American legal system.<sup>7</sup> However, apart from some casual footnote references to American law, the article was about English law rather than Anglo-American law. His summary is encapsulated succinctly: "Our law has not hesitated to place the seal of its approval upon a theory of the extent of individual rights which can only be described as the consecration of the spirit of unrestricted egoism."<sup>8</sup> As to English law, he appears to have been right, but as to American law, he was off the mark. It is the thesis of this paper that such a doctrine exists in American law and is employed under such labels as nuisance, duress, good faith, economic waste, public policy, misuse of copyright and patent rights, lack of business purpose in tax law, extortion, and others. It is also the thesis of this article that the lack of an overt recognition of a doctrine of "abuse of rights" creates injustices in cases not falling within one of these doctrines.

## *B. Historical Background*

### *1. England*

In *Mayor of Bradford v. Pickles*,<sup>9</sup> decided in 1895, a landowner sank wells in order to diminish the community's water supply. Why did he take this action? According to Lord Macnaghten, "it may be taken that [the] real object was to

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*supra* note 2, at 56.

7. Gutteridge, *supra* note 2, at 42.

8. *Id.* at 22.

9. [1895] App. Cas. 587.

[show] that he was master of the situation, and to force the [waterworks] corporation to buy him out at a price satisfactory to himself.”<sup>10</sup> It was held that there was no cause of action. As explained most clearly by Lord Macnaghten:

He may be churlish, selfish, and grasping. His conduct may seem shocking to a moral philosopher. . . . But the real answer to the claim of the corporation is that in such a case motives are immaterial. It is the act, not the motive for the act, that must be regarded. If the act, apart from the motive, gives rise merely to damage without legal injury, the motive, however reprehensible it may be, will not supply the element.<sup>11</sup>

Lord Halsbury agreed, stating: “If it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good his motive might be, he would have no right to do it.”<sup>12</sup>

Several years later, in *Allen v. Flood*,<sup>13</sup> the House of Lords essentially declared that a contract could be a license for cruelty and wickedness. Forty unionized boilermakers were in the employ of the Glengall Iron Company, repairing a ship. The plaintiffs were two at-will employees engaged by Glengall as shipwrights to repair woodwork on the same ship. The boilermakers learned that the plaintiffs had recently been doing ironwork for another firm, a task they deemed within the exclusive jurisdiction of their union. Some of the boilermakers were planning a wildcat strike to protest the presence of the plaintiffs at their job site. Allen, the boilermakers’ union delegate, dissuaded them from walking off the job impetuously, but threatened the Glengall Company that the union would call a strike if the Company did not fire the two shipwrights. The Company capitulated and dismissed the shipwrights who then sued Allen for tortiously interfering with their contracts of employment. In ruling that the plaintiffs had no cause of action, the House of Lords dwelt on the fact that the plaintiffs were mere at-will employees who had no right to continued employment; therefore, there was no right with which to interfere.<sup>14</sup> The fact that Allen, the union delegate,

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10. *Id.* at 600. Under modern American law, the defendant would be guilty of attempted extortion. MODEL PENAL CODE § 213.4 (1962).

11. *Mayor of Bradford*, [1895] App. Cas. at 601.

12. *Id.* at 594.

13. [1898] App. Cas. 1.

14. The opinions of the Law Lords and the advisory opinions of the judges of the High Court equivocate as to the nature of the contract of hiring. They accepted the testimony of the employer that the workers were free to quit at will. Under ideas of mutuality of obligation then prevailing, this meant that the employer was free to discharge the workers at will. Some of the opinions entertained the notion that the hiring was for the duration of the project. *See id.*

Lord Halsbury, dissenting, agreed, for the sake of argument, that the hiring was at will, and adopted as his own language from Baron Bramwell that the right interfered with was the “liberty of a man’s mind and will, to say how he should bestow himself, and his means, his talents and his industry . . .” *Id.* at 73.

acted with the purpose of injuring the shipwrights was immaterial. Lord Wills stated that:

[A]ny right given by contract may be exercised as against the giver by the person to whom it is granted, no matter how wicked, cruel or mean the motive may be which determines the enforcement of the right. It is hardly too much to say that some of the most cruel things that come under the notice of a judge are mere exercises of a right given by contract . . . .<sup>15</sup>

Lord Watson agreed and reasoned that “the existence of a bad motive, in the case of an act which is not in itself illegal, will not convert that act into a civil wrong for which reparation is due.”<sup>16</sup> Not all the judges agreed with this proposition. Three of the nine Law Lords dissented. Eight judges—all of the judges of the High Court—were summoned to attend the arguments and to give their advisory opinions to the Law Lords.<sup>17</sup> Six of the eight advised the Lords to affirm the judgment for the plaintiffs that had been entered by the trial court and which had been affirmed by the Court of Appeal. Judge Hawkins of the High Court best articulated a dissenting theory of abuse of rights in the following language in his advisory opinion:

There are, however, some acts the quality and character of which may be either rightful or wrongful, having regard to the motives with which they are done. Take, for instance, an act which is privileged when done *bonâ fide* in the exercise of a right to do it on a particular occasion, and precisely similar act done on a similar occasion, but not in the *bonâ fide* exercise of the right, but *malâ fide* in the abuse of it, for the purpose of injuring another under the cloak or false pretence of using a privilege. In the first case the act would be rightful, in the latter wrongful. Wrongful, not because it was a malicious use of the privilege, but because as the person doing it was not using his privilege at all his action was as unconnected with it as though it had no existence.<sup>18</sup>

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15. *Id.* at 46.

16. *Id.* at 92.

17. The case, which had grave implications for trade unionism, was highly charged with political overtones, although the reader cannot discern this from the opinions of the judges and the Law Lords. A scholar writes: “At this point, . . . [Lord] Halsbury summoned all the High Court judges to advise the House—a remarkable medieval throwback that had little justification and only one precedent since the appearance of Lords of Appeal in 1877.” ROBERT STEVENS, *LAW AND POLITICS: THE HOUSE OF LORDS AS A JUDICIAL BODY, 1800-1976*, at 93 (1978).

18. *Allen*, [1898] App. Cas. at 19.

Hawkins' dictum does not represent the law of England. A standard English treatise affirms that the decisions in *Mayor of Bradford and Allen*, on the issue of malevolence, state the current general rule in England.<sup>19</sup> Hawkins' dictum is, however, consistent with the law of France and of the United States.

## 2. France

The doctrine of abuse of rights had its origin in 1855 in what might be termed a spite-fence case.<sup>20</sup> The facts had an elegant Alsatian twist in that the offending structure was not a fence, but a tall dummy chimney built for the spiteful purpose of blocking the light of a neighbor by casting a shadow over some of the neighbor's windows. In ordering the owner to demolish the chimney, the court had to contend with Article 544 of the French Civil Code which provides: "Ownership is the right to enjoy and dispose of things *in the most absolute manner*, provided that use is not made of them which is prohibited by laws or regulations."<sup>21</sup> Since no law or regulation barred the owner from this kind of construction, and the French Declaration of the Rights of Man as well as the Civil Code seemingly prohibited court interference with the exercise of property rights,<sup>22</sup> the court's statutory authority to order the demolition of the chimney was doubtful.<sup>23</sup> Nevertheless, the court ordered its demolition, holding that the exercise of a right malevolently and without a legitimate interest was an abuse of the right.

A case much like *Mayor of Bradford v. Pickles*<sup>24</sup> had arisen in France in 1846.<sup>25</sup> The owner of a spring that produced marketable mineral water installed a powerful pump that extracted far more water than the owner could market or

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19. W.V.H. ROGERS ET AL., ON TORT 49 (1984).

20. Judgment of May 2, 1855, Cour d'appel, Colmar, 1856 Recueil Periodique et Critique [D.P.] II 9 (Fr.). There were Roman and Medieval precedents for such a doctrine. See Joseph Voyame et al., *Abuse of Rights in Comparative Law, in ABUSE OF RIGHTS AND EQUIVALENT CONCEPTS*, supra note 2, at 25-28. A favorite of the literature is the 1577 judgment in Aix against working men who burst into song in order to annoy a neighboring lawyer. *Id.* at 26; see *id.* (citing BONIFACE, ARRÊTS DE PROVENCE, Volume III, Book II, Section 1, Chapter 11, and E.H. Perreau, *Origines et développement de la théorie de l'abus de droit*, in REVUE GÉNÉRALE DE DROIT, DE LA LÉGISLATION ET DE LA JURISPRUDENCE 481, 488 (1913)).

21. CODE CIVIL [C. CIV.] art. 544 (John H. Crabb, trans., Fred B. Rothman & Co. 1977) (1976) (Fr.) (promulgated in 1804) (emphasis added).

22. See *infra* note 43 and accompanying text.

23. But see O'Sullivan, supra note 2, at 61 (finding the basis for the court's decision in Article 1382 of the French Civil Code). The Code provides: "Any act whatever of [an individual] which causes [injury] to another obliges [the one owing to whom it has occurred to make up for it]." C. CIV., art. 1382 (John H. Crabb, trans., Fred B. Rothman & Co. 1977) (1976) (Fr.). This Article and four others constitute the statutory basis for the French law of torts. It seems that not all French commentators are in accord with tying the doctrine of abuse of rights to Article 1382. See Voyame et al., supra note 20, at 32.

24. [1895] App. Cas. 587.

25. Judgment of April 18, 1856, Cours d'appel, Lyons, 1856 Recueil Periodique et Critique [D.P.] II 199 (Fr.).



use. The surplus was wasted and had the effect of diminishing a neighbor's production by two-thirds. The offending owner was ordered to reduce production. This order was made despite the text of Article 641 of the French Civil Code which then read: "He who possesses a spring within his field may make use of it at his pleasure . . ." <sup>26</sup> Once again, a right declared by statute to be absolute was held to be abused where it was exercised for an improper purpose.

### 3. *The United States*

The early American cases were in accord with the two decisions of the House of Lords discussed above. In *Jenkins v. Fowler*,<sup>27</sup> the defendant had a fence that had the practical effect of keeping the cattle of others from the plaintiff's wheatfields. For reasons that were found by the jury to be malicious, defendant removed part of that fence. Cattle entered the plaintiff's property destroying the crop. The trial court charged the jury that if the defendant removed the fence with "malice, or with the wicked and wanton intent to do the plaintiff an injury," they could find for the plaintiff.<sup>28</sup> In reversing, the Pennsylvania Supreme Court stated that "we cannot take cognisance of mere feelings and motives. These considerations may and do often aggravate the character of wrongs. Malicious motives make a bad act worse; but they cannot make that wrong which, in its own essence, is lawful."<sup>29</sup>

This was the prevailing view until the tide began to turn in 1888 with the Michigan decision in *Burke v. Smith*,<sup>30</sup> a typical spite-fence case. The defendant had built a fence for the purpose of depriving the plaintiff of light and air to plaintiff's downstairs windows. The court affirmed a judgment for the plaintiff to abate the fence as a nuisance. The majority opinion relied on moral law and a quote from a civil law authority, without citation or other identification of the source,<sup>31</sup> and said,

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26. C. CIV., art. 641 (A Barrister of the Inner Temple, trans.) (photo. reprint 1960) (1804). Article 641, now renumbered 642, was amended in 1898 to add a final limiting clause on the provision. "One who has a spring on his [property] may always use the waters of it as he wishes within the limits and for the needs of his [tenement]." C. CIV., art. 642 (John H. Crabb trans., Fred B. Rothman & Co. 1977) (1976) (Fr.). Other restrictions are also contained in the Article.

The author of a Canadian casenote urges that the abuse of rights notion be adopted in Canada for such cases. Ronald D. Lunau, Note, *Abuse of Rights of Ownership of Land: A New Tort?*, 13 OTTAWA L. REV. 417, 425 (1981).

27. 24 Pa. 308 (1855).

28. *Jenkins*, 24 Pa. at 310.

29. *Id.*

30. 37 N.W. 838 (Mich. 1888); see also *Greenleaf v. Francis*, 35 Mass. (18 Pick.) 117, 120 (1836) (dictum) (noting that a plaintiff who has a property interest in water may have an action against a person who knowingly and willfully deprives her of her property).

31. *Burke*, 37 N.W. at 841. The court also relied on dicta in *Chesley v. King*, 74 Me. 164, 172 (1882), in which the allegation was that the defendant had maliciously diverted water that had flowed to the plaintiff's spring. The actual holding was that there was insufficient evidence to support a finding of malice, but the court

[t]he [civil] law furnishes redress, because the injury is malicious and unjustifiable. The moral law imposes upon every man the duty of doing unto others as he would that they should do unto him; and the common law ought to, and in my opinion does, require him to so use his own privileges and property as not to injure the rights of others maliciously, and without necessity.<sup>32</sup>

The dissent relied on common law and civil law authorities as well, but none from the civil law as recent as the French court's adoption of a rule of abuse of rights. One of the two dissenting judges noted that the spite-fence problem had been met by legislation in a number of states and asserted that the legislature was the appropriate body to determine if such fences should be regulated or outlawed.<sup>33</sup>

In 1905, Harvard Law School Dean James Barr Ames surveyed the spite fence and malicious diversion of water cases and concluded:

[I]n England it seems to be settled that the owner may act in this malevolent manner with impunity. In France and Germany the owner is liable in tort in each case. In this country there is a strange inconsistency in the reported decisions. In thirteen of the fifteen jurisdictions in which the question has arisen the courts have declared that the malevolent draining of a neighbor's spring is a tort. On the other hand in six of the ten states in which actions have been brought for the malevolent erection of a spite fence, the opinion of the court was against the plaintiff.

That the conduct of the defendants in these cases is unconscionable no one will deny. That they should be forced to make reparation to their victims, unless paramount reasons of public policy forbid, would seem equally clear. But the absence of such reasons is evident from the fact that in France and Germany and so many of our states the courts have allowed reparation, and from the further fact that in at least six states statutes have been passed making the erection of spite fences a tort.<sup>34</sup>

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stated that "[o]ne of the legal rights of every one in a civilized community would seem to be security in the possession of his property and privileges against purely wanton and needless attacks from those whose hostility he may have in some way incurred."

32. *Burke*, 37 N.W. at 839-40.

33. *Id.* at 845 (Champlin, J., dissenting).

34. J. B. Ames, *How Far an Act May Be a Tort Because of the Wrongful Motive of the Actor*, 18 HARV. L. REV. 411, 414-15 (1905) (citations omitted); see also J. B. Ames, *Law and Morals*, 22 HARV. L. REV. 97, 111 (1908) (noting the various approaches courts took to address the issue of liability when an individual constructs a spite fence that interferes with a neighbor's view and urging courts to uniformly allow relief based upon principles of equity).

Since the decision in *Burke*, the courts have largely agreed that the erection of a structure for the purpose of depriving a neighbor of light and air is a nuisance; thus, it is unwise to build a spite fence almost anywhere in the United States today.<sup>35</sup> If one has an uncontrollable urge to erect such a structure, however, Missouri appears to be a safe haven.<sup>36</sup>

There are malevolent uses of property other than the erection of spite fences and the diversion of water: Towering blades are erected on a scaffold to deter balloon overflights in France;<sup>37</sup> windmills are constructed in the Netherlands to block a neighbor's river view;<sup>38</sup> a tower is erected to deter overflight of planes to the airport at Harrisburg, Pennsylvania;<sup>39</sup> and dry holes are unplugged in a Louisiana oilfield.<sup>40</sup> These examples are but to name but a few of the more egregious abuses of property rights. It is clear enough that under the abuse of rights concept of the Civil Law, and under American notions of nuisance, such

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35. See, e.g., *Norton v. Randolph*, 58 So. 283, 285-86 (Ala. 1912); *Brittingham v. Robertson*, 280 A.2d 741 (Del. 1971); *Hornsby v. Smith*, 13 S.E.2d 20, 24 (Ga. 1941); *Sundowner, Inc. v. King*, 509 P.2d 785, 787 (Idaho 1973); *Wilson v. Irwin*, 138 S.W. 373, 374 (Ky. 1911); *Parker v. Harvey*, 164 So. 507, 512 (La. Ct. App. 1935); *Flaherty v. Moran*, 45 N.W. 381, 381-82 (Mich. 1890); *Bush v. Mockett*, 145 N.W. 1001, 1002 (Neb. 1914); *Saperstein v. Berman*, 195 N.Y.S. 1, 2 (N.Y. Sup. Ct. 1922); *Welsh v. Todd*, 133 S.E.2d 171, 173 (N.C. 1963); *Barger v. Barringer*, 66 S.E. 439, 440 (N.C. 1909); *Hibbard v. Halliday*, 158 P. 1158, 1160 (Okla. 1916); *Racich v. Mastrovich*, 273 N.W. 660, 663 (S.D. 1937); *Schork v. Epperson*, 287 P.2d 467, 470-71 (Wyo. 1955); *Erickson v. Hudson*, 249 P.2d 523, 532 (Wyo. 1952); RESTATEMENT (SECOND) OF TORTS § 829 (1979). See also *Piccirilli v. Groccia*, 327 A.2d 834 (R.I. 1974) (stating that damages for the denial of right to air and light is not recognized but an injunction is available).

36. Old adages never die. In *44 Plaza, Inc. v. Gray-Pac Land Co.*, the court stated: "Missouri courts have not adopted § 829 of the Restatement [(Second) of Torts] nor the underlying rationale that malice can convert a lawful act into a nuisance." 845 S.W.2d 576, 580 (Mo.App. 1992).

37. Judgment of August 3, 1915, Cour de cassation, [D.P.] I 79 (Fr.).

38. See Brunner, *supra* note 2, at 736-37 (describing the case of *Stolk v. Van der Goes*:

[The case] arose out of a dispute between neighbors over a foot path. Stolk was denied its use by Van der Goes. In order to show to Van der Goes that an amicable settlement was to be preferred, Stolk erected high poles with rags on his land, which spoilt the fine view Van der Goes had from his terrace over the river Maas. Van der Goes obtained an injunction from the court ordering Stolk to remove the poles, as they served no useful purpose and had been erected with the exclusive intention to harm Van der Goes. Stolk removed them, but then built a huge water tower on the same spot. However, the tower, consisting of a water reservoir and an American windmill, was not connected to the water supply system nor to a well, so Van der Goes obtained a new injunction for its removal, since the building of the tower was still considered to be an abuse of right. Its removal was ordered by the court 'as long as it cannot function properly.' Stolk did not remove it, but connected it to the water supply system, claiming that it now served a useful purpose of watering his greenery. . . .

[T]he *Hoge Raad* [the Netherlands' Supreme Court] upheld the decision of the Court of Appeal, which had reconsidered the matter and had found that the tower, although connected to the water supply system, did not serve any useful purpose to Stolk and had been built with the exclusive intention to harm Van der Goes.).

39. *Commonwealth v. Von Bestecki*, 30 Pa. D. & C. 137 (1937).

40. See *Higgins Oil & Fuel Co. v. Guaranty Oil Co.*, 2 So. 206, 212 (La. 1919) (noting that a dry hole can reduce the flow of hydrocarbons in neighboring wells that pierce the underlying common reservoir, and recognizing that plugging a dry hole is inexpensive; thus, failure to plug such a well is an abuse of rights and the oil company that was responsible had abused its property rights).

malevolent use of property rights will generally not be permitted in most of the United States or most Civil Law countries.

It is not only the malevolent use of property rights that American law forbids. A classic case is that of a banker who opened a barber shop in a small town for the allegedly “wicked, malicious” purpose of driving the town barber out of business and out of town.<sup>41</sup> Also, roughly contemporaneously with *Allen v. Flood*,<sup>42</sup> cases in the United States reached conclusions contrary to that reached in the House of Lords. Both in the context of labor union organization<sup>43</sup> and outside that context,<sup>44</sup> at-will employees have been granted causes of action for malicious interference with their employment.

## II. ABUSE OF RIGHTS THEORY

The term “abuse of rights,” as a matter of pure semantic logic, is an oxymoron.<sup>45</sup> If an action is penalized by law, then logically the action is not the exercise of a right. Nevertheless, the term is in common currency and has taken on a meaning that can be defined. When a right that is generally considered absolute, or subject to defined limitations, is used in an inequitable fashion within those defined limitations, the use is a wrong. Three kinds of abusive actions are condemned by the doctrine: (1) the predominant motive for the action is to cause harm; (2) the exercise is totally unreasonable given the lack of any legitimate interest in the exercise of the right and its exercise harms another; and (3) the right is exercised for a purpose other than that for which it exists.

Many aspects of our law have evolved since our separation from England. The separation took place in the era of the Enlightenment. One aspect of

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41. *Tuttle v. Buck*, 119 N.W. 946, 946 (Minn. 1909).

42. [1898] App. Cas. 1; *see supra* notes 13-18 and accompanying text.

43. *See Lucke v. Clothing Cutters' & Trimmers' Assem.* No. 7507, 26 A. 505, 509 (Md. 1893) (finding that a non-union employee dismissed due to pressure from the labor union may have a cause of action if the dismissal was done in a violent or malicious manner).

44. *See Moran v. Dunphy*, 59 N.E. 125, 126 (Mass. 1901) (stating that:

We apprehend that there is no longer any difficulty in recognizing that a right to be protected from malicious interference may be incident to a right arising out of a contract, although a contract, so far as performance is concerned, imposes a duty only on the promisor. Again, in the case of a contract of employment, even when the employment is at will, the fact that the employer is free from liability for discharging the plaintiff does not carry with it immunity to the defendant who has controlled the employer's action to the plaintiff's harm.).

*See also Jones v. Leslie*, 112 P. 81, 83 (Wash. 1910) (taking issue with the decision of the House of Lords in *Allen v. Flood*, and finding that an employee had a cause of action where, upon the employee's giving notice to the employer of his intent to take a better position, the employer responded by threatening the new employer which resulted in the employee's loss of the new position).

45. A noted French critic of this terminology, wrote, “[t]his new doctrine is based entirely on language insufficiently studied; its formula ‘abusive use of rights’ is a logomachy, for if I use my right, my act is licit; and when it is illicit it is because I exceed my right and act without right, injuria . . .” 2 MARCEL PLANIOL, *TREATISE ON THE CIVIL LAW* 871 (La. St. L. Inst. trans. 1959) (1939). He preferred the term “abusive acts.” *Id.* at 872.

Enlightenment thinking was the firmly held belief in the existence of rights that are absolute. Article IV of The French Declaration of the Rights of Man provides the strong evidence of this thinking. It provides that “[t]he exercise of the natural rights of each man, has no other limits than those which are necessary to secure to every other man the free exercise of these same rights; *and these limits are determinable only by law.*” (emphasis added). The same theme is sounded in Article V of the *Declaration*: “[W]hat is not prohibited by the law should not be hindered; nor should anyone be compelled to that which the law does not require.” Article XVII is more specific as to property, stating, “[t]he right to property being inviolable and sacred, no one ought to be deprived of it, except in cases of evident public necessity, legally ascertained, and on condition of a previous just indemnity.”<sup>46</sup> While these provisions of the *Declaration* recognize that rights may be curtailed by the state, they are premised on the notion that once rights are defined by the state, no judge, administrator, or fellow citizen may curtail them.

We find even stronger evidence of the reverence for rights as absolutes in the writings of Immanuel Kant. One passage suffices: “Equity—a dumb goddess who cannot claim a hearing of Right . . . and a Judge cannot give a decree on the basis of vague or indefinite conditions. Hence it follows, that a COURT of EQUITY for the decision of disputed questions of Right, would involve a contradiction.”<sup>47</sup>

Blackstone was not immune from an absolute view of rights. “Chapter the First” of “Book the First” of his Commentaries is entitled “OF THE ABSOLUTE RIGHTS of INDIVIDUALS.” He thus describes property: “[t]he third absolute right, inherent in every Englishman is that of property; which consists in the free use, enjoyment, and disposal of all acquisitions without any control or diminution, save only by the laws of the land.”<sup>48</sup> Again, while the law of the land could curtail existing rights, no individual could. Because, in the Blackstonian scheme of things, judges did not make law, they merely found it, only Parliament could curtail rights.<sup>49</sup>

Since the era of the Enlightenment there has been a gradual decline in the concept of absolute rights<sup>50</sup> so that today hardly anyone believes in the existence

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46. *Declaration of the Rights of Man and the Citizen*, in THOMAS PAINE, *RIGHTS OF MAN* 84, 86, 110 (Easton Press 1989) (1791-1792) The Declaration itself was promulgated on August 27, 1789. A somewhat different translation appears in *Declaration of the Rights of Man and the Citizen*, in 8 *ENCYCLOPEDIA AMERICANA* 594, 595 (1984).

47. IMMANUEL KANT, *THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT* 51 (Hastie trans. 1887, 1974 reprint) (emphasis in original).

48. WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 134.

49. *Id.* at 63-64, 68-74.

50. See Paolo Grossi, *Legal Absolutism and Private Law in the XIX Century*, in 2 *ITALIAN STUDIES IN LAW* 3, 8 (1994) (declaring that “the absolutist house of cards crudely appeared as what in large part it had really been: an intelligent, very clever fiction. . . .”); see also Morris R. Cohen, *On Absolutisms in Legal Thought*, 84 *U. PA. L. REV.* 681 (1936) (addressing the question from a philosophical perspective).

of such rights.<sup>51</sup> Richard Epstein, however, professes such a belief when he states that “[o]ver vast ranges of human activity, absolute rights are the indispensable baseline against which various kinds of market transactions are conducted . . . . Effective markets in land cannot function without the secure baselines guaranteed by the absolute system of property rights at common law.”<sup>52</sup> This is pretty strong stuff—as tough as Immanuel Kant’s philosophy of law.<sup>53</sup> In the same essay, however, Epstein concedes “[i]t would be a mistake, however, to assume that all disputes over property rights, even in land, should be resolved by turning to Blackstone’s regime of absolute rights.”<sup>54</sup> He allows that in some circumstances of disagreements between neighbors, a regime of absolute rights would be “grotesque.”<sup>55</sup> More rigid is E. B. Watt who writes, “[i]t is out of place, indeed, to call something a right if it would be impossible to observe it without exception.”<sup>56</sup> “Legal rights,” he asserts, “when they appear to conflict, stand in like need of specification. If a wharf owner is not legally entitled to prevent a vessel in distress from docking at his wharf . . . that does not require us to deny that the legal rights of wharf owners are absolute. It does require us to make clear what the extent of those rights is.”<sup>57</sup> In an ideal world that does not exist, it might be possible to spell out *ex ante* the exact confines of each right.<sup>58</sup> Prussia tried, and failed.<sup>59</sup> The doctrine of abuse of rights, like other doctrines, such as impos

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51. See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991). Mary Ann Glendon is a well-known critic of the tendency for Americans to talk in terms of rights as if they were absolute. Even those who are critical of her thesis, such as Linda McClain, endorse the notion that rights can be overridden by other interests. See Linda C. McClain, *Rights and Irresponsibility*, 49 *DUKE L.J.* 989, 1045-49 (1994) (referring favorably to Dworkin’s ideas as to the limitations on rights). Both Glendon and McClain focus on constitutional rights, while this article concentrates on rights under private law.

52. Richard A. Epstein, *Rights and “Rights Talk”*, 105 *HARV. L. REV.* 1106, 1109 (1992) (reviewing MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991)).

53. See *supra* note 47 and accompanying text; see also *Morgan v. Illinois*, 112 S. Ct. 2222, 2242 n.6 (1992) (Scalia, J., dissenting) (repeating the more famous quote from Kant on legal absolutes, that “whoever has committed Murder, must die. . . . Even if a Civil Society resolved to dissolve itself with the consent of all its members[,] . . . the last Murderer lying in the prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realize the desert of his deeds”).

54. Epstein, *supra* note 52 at 1112.

55. *Id.*

56. E.B. Watt, *Taking Rights Seriously Enough: What Kind of Rights Could Be Trumps?*, 38 *AM. J. JURIS.* 257, 262 (1993).

57. *Id.* at 259; see *id.* (citing *Vincent v. Lake Erie Transportation Co.*, 109 *MINN.* 456 (1910)).

58. Watt continues with the idea that court pronouncements “are understood to declare what the law is, not to enact new law. . . .” *Id.* at 259. It is startling to find the expression of this naive thought in the last decade of the twentieth century.

59. See ARTHUR TAYLOR VON MEHREN & JAMES RUSSELL GORDLEY, *THE CIVIL LAW SYSTEM* 60 (2d ed. 1977) (explaining that

[t]he Prussian Territorial Code of 1794 (Allgemeines Landrecht) . . . of more than nineteen thousand paragraphs regulates all phases of social life and is not limited to private-law matters. The code was unusual for its time in that a committee composed of administrators rather than of representatives of the legal profession (especially law professors) prepared the draft. The legal spirit of the time is reflected in the task assigned the drafters: It was to set out natural law in a

sibility of performance, calls upon the Queen of goddesses,<sup>60</sup> Equity, to rectify the inability of mere humans to anticipate everything that could occur in the future, and to expend the social or transaction costs necessary to determine in advance how those occurrences should be dealt with.

One need not adopt a communitarian ideology to favor a theory of abuse of rights. A relational perspective is a sufficient basis. The property cases involve neighbors who are thrust into a relationship whether they wish it or not; their relationship stems from proximity. The civil procedure cases discussed below involve use of the mechanisms of the state for purposes for which they were not designed. The contract cases discussed below, involve relationships voluntarily assumed by the parties. In the words of Emile Durkheim:

[C]ontract is, par excellence, the juridical expression of cooperation. . . . To cooperate, in short, is to participate in a common task. . . . [Contract law] forces us to assume obligations that we have not contracted for, in the exact sense of the word, since we have not deliberated upon them. . . . We cooperate because we wish to, but our voluntary cooperation creates duties for us that we did not desire.<sup>61</sup>

Economic analysis supports this conclusion. Professors Goetz and Scott have demonstrated that best efforts clauses and obligations of good faith in distribution contracts have the purpose of requiring the distributor to take into account the interests of the manufacturer as well as the distributor's own.<sup>62</sup> What they have demonstrated as to distribution contracts, with appropriate modifications, applies to a vast array of contracts. As I have written elsewhere,

[A] contract establishes a relationship among the contracting parties that goes well beyond their express promises. The promise, or group of promises, or other bargain is fleshed out by a social matrix that includes custom, trade usage, prior dealings of the parties, recognition of their social and economic roles, notions of decent behavior, basic assumptions shared, but unspoken by the parties, and other factors, most especially including rules of law, in the context in which they find themselves.<sup>63</sup>

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comprehensive and exhaustive fashion so that learned jurists would have no opportunity to exercise their traditional skills. . . . Its fatal weakness proved to be the effort to deal with almost every facet of social life in a detailed and exhaustive fashion; the resulting detail and complexity made adaptation to changed social conditions very difficult if not impossible.).

60. Cf. *supra* note 47 and accompanying text (noting Immanuel Kant's description of this goddess).

61. EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 123-24, 214 (Free Press ed. 1964).

62. Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1111-26 (1981).

63. 1 ARTHUR L. CORBIN, *CORBIN ON CONTRACTS* 10 (Joseph M. Perillo rev. ed., 1993).

One of the basic assumptions underlying the contract is the unspoken thought that the rights created by the contract will not be abused.

Primitive law is replete with examples of literal interpretation of promises that are shocking to the conscience. As reported by Archdeacon William Paley, one of the influential writers on law of contracts:

*Timures* promised the garrison of *Sebastia*, that, if they would surrender, *no blood should be shed*. The garrison surrendered; and *Temures* buried them all alive. Now *Temures* fulfilled the promise in one sense, and in the sense too in which he intended it at the time; but not in the sense in which the garrison of *Sebastia* actually received it, nor in the sense in which *Timures* himself knew that the garrison received it: which last sense according to our rule, was the sense he was in conscience bound to have performed it.<sup>64</sup>

The chapter from which this passage is excerpted is the basis of “Dr. Paley’s Law,” one pillar of the objective theory of contracts. In the words of one court, “[t]he moral rule as laid down by Dr. Paley is also the accepted rule of law and equity, as well as the law of nations: ‘To give to the contract the sense in which the person making the promise believed the other party to have accepted it.’”<sup>65</sup> The common law was much more prone in the past to indulge in literal interpretations of contracts, even where it was rather clear that the promisor invoked a meaning that was quite abusive and unreasonable. Centuries ago, Justice Brook thundered from the bench: “The party ought to direct his meaning according to the law, and not the law according to his meaning, for if a man should bend the law to the intent of the party, rather than the intent of the party to the law, this would be the way to introduce barbarousness and ignorance, and to destroy all learning and diligence. For if a man was assured that whatever word he made use of his meaning only should be considered, he would be very careless

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64. WILLIAM PALEY, THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY 99 (the 6th American, from the 12th English ed. 1810) (italics in original); see also JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 8 (3d ed. 1987) (“English college students in the 18th and 19th century were exposed to [the moral basis of contract] in the many editions of Paley’s Principles of Moral and Political Philosophy. American college students received the same message from Paley or his principle American successor, Wayland.”) (footnotes omitted); cf. *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33, 35-37, 69 Cal. Rptr. 561, 563-64 (1968) (en banc). Justice Traynor assessed the plain meaning rule as “a remnant of a primitive faith in the inherent potency and inherent meaning of words”. *Id.*

65. *Weinstein v. Sheer*, 120 A. 679, 680 (N.J. 1923); see *id.* (quoting 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 557); see also E. Allan Farnsworth, “Meaning” in the Law of Contracts, 76 YALE L.J. 939, 946 (1967) (sketching Paley’s seminal role in the development of the objective theory); George E. Palmer, *The Effect of Misunderstanding on Contract Formation and Reformation Under the Restatement of Contracts Second*, 65 MICH. L. REV. 33 (1966). Paley in turn was likely influenced by David Hume. See DAVID HUME, A TREATISE OF HUMAN NATURE 523-26 (Selby Bigge ed. 1888) (1739-40).



about the choice of his words.”<sup>66</sup> Systems other than the common law have a similar history in that the primitive starting point is literal interpretation without regard to intent.<sup>67</sup>

Modern cases generally eschew literal interpretation or construction where the result would be abusive, but there are regrettable exceptions. Certain of these cases are discussed in subsequent segments of this paper. How does abuse of rights theory apply to the interpretation or construction of contract rights? Abuse of rights theory originated in the refusal to give literal application to statutory language where such literal exercise of the right created by statute would allow for a malevolent action, result in an intolerable distortion of the purpose for which the right existed, or produce an utterly unreasonable result. The same theory is applicable to the interpretation of contractual language.

Abuse of rights theory does not seek to do away with discrete doctrines such as nuisance, duress and the application of the covenant of good faith and fair dealing. Certain concepts are ubiquitous in our legal system. Consider “estoppel,” which appears in the law of contracts, torts, civil procedure and probably in every other field of law. “Unjust enrichment” underlies much of the law of restitution, but it also explains why donee beneficiaries may enforce an agreement to which they are not privy and for which they have provided no consideration. Indeed, the concept underlies many other contractual doctrines. In the same way, “abuse of rights” underlies many of the topics of this paper and many, many more. It can serve both as a free-standing concept and as the underlying rationale for the application of doctrines to particular cases. Standard interpretative techniques, including the application of notions of public policy, do not always adequately deal with abuses of rights.

### III. ABUSIVE DISCHARGE OF AT-WILL EMPLOYEES

#### A. *Classical Case Law*

Until the second half of the twentieth century, at-will employees<sup>68</sup> were given

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66. *Throckmerton v. Tracy*, 75 Eng. Rep. 222, 251 (K.B. 1554).

67. See Harry R. Sachse, *Unconscionable Contracts*, in *ESSAYS ON THE CIVIL LAW OF OBLIGATIONS* 270, 274 (Joseph Dainow ed. 1969) (explaining that

Primitive systems of law are often characterized by their formality and rigidity. If the right form is used, a contract may be enforced despite unfair terms or even vices of consent. This kind of contractual security is at the cost of permitting injustice. . . . The movement in Roman law from rigid contracts to consensual contracts and the development of a doctrine of good faith and judicial inquiry into both the fact of agreement and the fairness of terms is properly considered a sign of the maturation of Roman law.)

68. It is a commonplace default rule that, unless otherwise agreed, a hiring is at will. Current legal lore has it that this default rule was invented by treatise-writer H.G. Wood. H.G. WOOD, *LAW OF MASTER AND SERVANT* § 134 at 273 (1877). See, e.g., *Wagenseller v. Scottsdale Memorial Hospital*, 710 P.2d 1025, 1030 (Ariz. 1985) (en banc). Although the cases cited by Wood did not squarely support his generalization, it seems

no protection against abusive discharges by their employers, despite the protection they were granted against malicious intermeddlers in their employment relations. In *Payne v. Western & Atlantic R.R.*,<sup>69</sup> the court coined one of the most infamous, but frequently quoted and applied phrases in American law, stating that employers may dismiss their at-will employees “for good cause, for no cause, or even for cause morally wrong.”<sup>70</sup> Plaintiff operated a store in Chattanooga and much of its trade was with the employees of the defendant railroad. For reasons which were alleged to have been wicked and malicious, the defendant posted the following notice on its premises: “Any employee of this company on Chattanooga payroll who trades with L. Payne from this date will be discharged. Notify all in your department.”<sup>71</sup>

The plaintiff storekeeper pleaded various causes of action, all of which were dismissed. The court reasoned that there was nothing wrongful about the defendant’s threat to fire its employees.<sup>72</sup>

Perhaps typifying the extreme to which this view was taken is the Alabama case of *Comerford v. International Harvester*.<sup>73</sup> Plaintiff alleged that he had been dismissed in retaliation for his wife’s refusal to show affection to his immediate supervisor. The court echoed early American cases when it stated that “[i]f one does an act which is legal in itself and violates no rights of another, the fact that this rightful act is done from bad motives or with bad intent toward the person so injured thereby does not give the latter a right of action against the former.”<sup>74</sup> The court stated that its prior decision in a case involving the tort of interference with a contract was distinguishable, but failed to explain why.

An examination of the tort case that the court distinguished may prove profitable.<sup>75</sup> Plaintiff was a construction worker who suffered an eye injury on the job. No settlement was reached with the employer’s insurer and plaintiff brought suit under the workers’ compensation law. The insurance adjuster issued the employer an ultimatum. Based on the argument that “you can’t keep this man on

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intuitively incredible that such a widely-followed rule would be based on an author’s miscitation of a few cases. Cases on point that are earlier than Wood’s treatise include: *De Briar v. Minturn*, 1 Cal. 450 (1851); *Prund v. Zimmerman*, 29 Ill. 269 (1862); *Durgin v. Baker*, 32 Me. 273 (1850); *Harper v. Hassard*, 113 Mass. 187 (1873); *Prentiss v. Ledyard*, 28 Wis. 131 (1869). See Jay M. Feinman, *The Development of the Employment-at-Will Rule Revisited*, 23 ARIZ. ST. L.J. 733 (1991) (containing a more in-depth treatment of the state of the authorities); Mayer G. Freed & Daniel D. Polsby, *The Doubtful Provenance of “Wood’s Rule” Revisited*, 22 ARIZ. ST. L.J. 551 (1990) (same).

69. 81 Tenn. 507 (1884), *overruled on other grounds by* *Hutton v. Watters*, 179 S.W. 134, 137 (Tenn. 1915).

70. *Id.* at 519-20.

71. *Id.* at 510.

72. *Id.* at 526-28.

73. 178 So. 894 (Ala. 1938).

74. *Id.* at 895.

75. *U. S. Fidelity & Guaranty Co. v. Millonas*, 89 So. 732 (Ala. 1921). See also *American Surety Co. v. Schottenbauer*, 257 F.2d 6 (8th Cir. 1958); *London Guarantee & Accident Co. v. Horn*, 69 N.E. 526 (Ill. 1903).

the job while he's suing you," the adjuster threatened that the insurer would exercise a termination clause in the workers' compensation policy unless the insured fired the plaintiff. The employer, induced by the threat, discharged the plaintiff. As to the threat to effectuate a right to terminate the workers' compensation policy,<sup>76</sup> the court stated that such an exercise would be the "unlawful use of that lawful right."<sup>77</sup> The court here expressed a theory that I label as a theory of "abuse of rights."<sup>78</sup> It is dissonant with the theory expressed by the same court in the *Comerford* case discussed in the preceding paragraph. There are doubtless significant historical and policy differences between cases involving interference with the employment relation by outsiders<sup>79</sup> and cases involving employer-employee rights and duties *inter se*, but these differences are not articulated in either of the two cases discussed here. Instead, two irreconcilable jurisprudential outlooks on the absolute or relative nature of rights are expressed by the same court.

*B. Abuse of Rights Theory and Discharges Against Public Policy or in Bad Faith*

The absolute power to dismiss an at-will employee,<sup>80</sup> although frequently questioned, was firmly backed by court decisions until the last half of the twentieth century.<sup>81</sup> Ingenious efforts to circumvent the rule were rarely suc

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76. In Hohfeldian terms, the "right" to exercise a termination clause, is not a right, but a power. WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* 50-57 (Walter Wheeler Cook ed. 1964) (1919). The term "abuse of rights," as used in this paper, encompasses rights, powers, privileges, immunities, etc.

77. *Millonas*, 89 So. at 735. *Accord*, on almost identical facts, *London Guarantee*, 69 N.E. at 526.

78. In Civil Law systems, the problem of abusive discharge is regulated by statutes that are interpreted in the light of abuse of right doctrine. *See, e.g.*, Alex Bodry, *Abuse of Rights in Employment in Luxembourg Law*, in *ABUSE OF RIGHTS AND EQUIVALENT CONCEPTS*, *supra* note 2, at 124-28; Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1424 n.102 (1967).

79. Since the days of the Black Death, an employer has had a cause of action against anyone who enticed away a servant. *See* MARC LINDER, *THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW* 70-74 (1989); ROBERT STEINFELD, *THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350-1870* (1991).

80. There is a rebuttable presumption that a hiring is at-will. *Rowe v. Montgomery Ward & Co.*, 473 N.W.2d 268 (Mich. 1991).

81. Myriad cases could be cited. *See* *Bell v. Faulkner*, 75 S.W.2d 612 (Mo. App. 1934) (upholding the termination of plaintiff who alleged he was fired from his job as a laborer in a milk plant for not voting for certain candidates for local office). *See generally* Blades, *supra* note 78. A rare exception appeared in the pre-classical period of American contract law. *United States v. Jarvis*, 26 Fed. Cas. 587 (D. Me. 1846). In *Jarvis*, the plaintiff was appointed Navy Agent in April 1838 for a term of four years, but terminable at the pleasure of the President. He was dismissed by incoming President (Tippecanoe) Harrison on September 27, 1841. The court held that the plaintiff was an agent, whose agency under agency law and the terms of the contract was terminable at will. However, the court found that equity, good faith, and fair dealing required the United States to reimburse the plaintiff for certain reliance expenses that were wasted because of the dismissal, including, provided a jury found that such commitments were not imprudent, rent paid until the end of 1841 and salary

cessful.<sup>82</sup> What seems to have been the first break in the solid case law came in 1959, with the California case of *Peterman v. International Brotherhood of Teamsters, Local 396*.<sup>83</sup> The plaintiff had been employed by the union as a business agent. His supervisor instructed him to testify falsely to a legislative commission. Instead, he testified truthfully. In retaliation, he was dismissed the next day. The court ruled that a cause of action by the business agent against the union was stated. This decision inaugurated the public policy exception to the unfettered power of the employer to discharge an employee who was not hired under a contract with a specific duration term. From that lonely beginning, it can now be said that “the vast majority of states have recognized that an at-will employee” has an action “when he or she is discharged for performing an act that public policy would encourage or for refusing to do something that public policy would condemn.”<sup>84</sup> Although the employment continues to be labeled “at will,” the use of the power to discharge, if employed to thwart the public policy of the

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owed to a clerk who had been hired for a one-year term. *Id.*

82. See *Mims v. Metropolitan Life Ins. Co.*, 200 F.2d 800 (5th Cir. 1952) (holding against the plaintiff in a libel action due to insufficient publication under Alabama law). The plaintiff in *Mims* had been employed for thirty-two years by the defendant in various managerial positions. He was fired, allegedly because he declined to honor his supervisor’s request to donate \$1 to the presidential campaign of Senator Taft. Plaintiff complained to Senator Sparkman who wrote to the defendant demanding an explanation. The president of Metropolitan Life responded by claiming that the plaintiff’s services had been inefficient and unsatisfactory, and that Metropolitan Life’s only mistake had been in giving the plaintiff such a long period of time to prove himself. *Id.*

83. 344 P.2d 25 (Cal. App. 1959).

84. *Gantt v. Sentry Insurance*, 824 P.2d 680, 684 (Cal. 1992). See generally 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 4.2 (Joseph M. Perillo rev. ed. 1993). In *Palmateer v. International Harvester Co.*, 421 N.E. 2d 876 (Ill. 1981), an employee was discharged for providing authorities with information concerning criminal conduct of a fellow employee. The court explains the public policy exception in this context as follows:

Although there is no precise line of demarcation dividing matters that are the subject of public policies from matters purely personal, a survey of cases in other States involving retaliatory discharges shows that a matter must strike at the heart of a citizen’s social rights, duties and responsibilities before the tort will be allowed. Thus, actions for retaliatory discharge have been allowed where the employee was fired for refusing to violate a statute. Examples are: for refusing to commit perjury . . . for refusing to engage in price fixing . . . for refusing to violate a consumer credit code . . . for refusing to practice medicine without a license. . . . It has also been allowed where the employee was fired for refusing to evade jury duty. . . for engaging in statutorily protected union activities . . . and for filing a claim under a workers’ compensation statute. . . . The action has not been allowed where the worker was discharged in a dispute over a company’s internal management system . . . where the worker took too much sick leave . . . where the worker tried to examine the company’s books in the capacity of a shareholder . . . where the worker impugned the company’s integrity . . . where the worker refused to be examined by a psychological-stress evaluator . . . where the worker was attending night school . . . or where the worker improperly used the employer’s Christmas fund. The cause of action is allowed where the public policy is clear, but is denied where it is equally clear that only private interests are at stake. Where the nature of the interest at stake is muddled, the courts have given conflicting answers as to whether the protection of the tort action is available.

*Id.* at 878-79.

state, is an abuse, and damages will be assessed for the abusive exercise of the power.

In addition to the erosion of employer power by the public policy exception (to the arbitrary power of the employer to terminate the at-will employment contract) other cases have fashioned a "good faith" exception. In *Fortune v. National Cash Register Co.*,<sup>85</sup> the plaintiff, a sales representative, received a notice of termination the day after his employer received a \$5 million order that he had procured. The parties had a written agreement that expressly provided for an at-will duration. Plaintiff was entitled to a substantial "bonus" commission provided he remained in defendant's employ.<sup>86</sup> Bad faith consists of, *inter alia*, the attempt to deprive the other contracting party of the fruits of the contract for which he or she bargained,<sup>87</sup> and the jury found that the dismissal was in bad faith. The court held that the plaintiff had a contractual cause of action, based on the implied covenant of good faith and fair dealing that is present in every contract. Other cases have followed suit. The implication of a covenant of good faith and fair dealing, however, is frequently a fiction, if one views the implication as an implication of fact. Instead, the concept of abuse of rights operates as a rule of law, restraining the employer from a misuse of power. It is a more forthright way of explaining the abusive discharge decisions. As I have written elsewhere, "[r]ules of basic dignity whether based on legislation or not have been incorporated into the employment relation."<sup>88</sup> Such rules are not necessarily based on the intention of the parties. Louisiana adheres to the abusive discharge concept rule by application of the abuse of rights concept.<sup>89</sup>

Note that in the public policy and bad faith cases, the employer's motives were not necessarily malevolent. Retaliation against a worker because the worker has sued the employer or filed a workers' compensation claim is not necessarily vengeful. It is likely to be employed as a tool to discourage other workers from exercising their rights if they become similarly situated with the discharged worker.<sup>90</sup> In a case where a seaman was fired in retaliation for filing a lawsuit against the employer under the Jones Act, the court stated: "[t]he employer's discharge of the at-will seaman-employee, while it is in essence a lawful act, should not be used as a means of effectuating a 'purpose ulterior to that for which

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85. 364 N.E.2d 1251 (Mass. 1977).

86. *Id.* at 1252-53.

87. See Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 373 (1980) [hereinafter Burton, *Breach of Contract*].

88. 1 CORBIN, *supra* note 63, at 561.

89. See Clark v. Glidden Coatings & Resins, 666 F. Supp. 868 (E.D. La. 1987); see also *infra* note 209 and accompanying text (discussing the *Sanborn* case).

90. See *Framton v. Central Indiana Gas Co.*, 297 N.E.2d 425 (Ind. 1973) (involving a worker fired for filing a workers' compensation claim); *Cerracchio v. Alden Leeds, Inc.*, 538 A.2d 1292 (N.J. Super. Ct. App. Div. 1988) (involving facts where an employer had retaliated against an employee for filing a workers' compensation claim and reporting safety conditions to OSHA).

the right was designed.”<sup>91</sup> This language is remarkably similar to the language of abuse of rights as it appears in the Netherlands Code provision quoted above.<sup>92</sup> Other language in the opinion is also suggestive of a theory of abuse of rights. “Whether grounded in tort or contract, the cause of action is based on the notion that the employer’s conduct in discharging the employee constitutes an abuse of the employer’s absolute right to terminate the employment relationship when the employer utilizes that right to contravene an established public policy.”<sup>93</sup>

#### IV. NON-EMPLOYMENT CASES OF RETALIATION

##### A. Retaliatory Termination of Insurance Policies

In the discussion of at-will employment, two cases of employee discharge based on an insurer’s threat to cancel the employer’s workers’ compensation policy were considered. In both cases, the insurer was held to have been guilty of tortious interference with the employment relationship.<sup>94</sup> However, in *L’Orange v. Medical Protective Co.*,<sup>95</sup> the cancellation was in retaliation for the conduct of the insured. The policy covered dental malpractice. It was terminable on two express conditions: ten days notice and refund of the unearned premium. The plaintiff dentist testified in a malpractice action against another dentist. Thereupon, the plaintiff’s malpractice insurer gave the plaintiff ten days notice of cancellation and a check for the unearned premium. The plaintiff brought an action for breach of contract, alleging that the cancellation was an attempt to intimidate him in his capacity as a witness. The trial court dismissed the action for failure to state a claim. The Sixth Circuit reversed, agreeing with the plaintiff’s contention that “the particular purpose for which the power of cancellation was exercised renders the cancellation void.”<sup>96</sup> Ohio’s public policy against intimidation, stated forcefully in its penal statutes and in its case law, prevented abuse of the contractual power to terminate the contract. An overt concept of abuse of rights better explains the decision than the amorphous concept of public policy.

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91. *Smith v. Atlas Off-Shore Boat Service, Inc.*, 653 F.2d 1057, 1062 (5th Cir. 1981) (quoting *Blades*, *supra* note 78, at 1424); *see also* *Blades*, *supra* note 78, at 1413, 1421.

92. *See supra* note 6 and accompanying text.

93. *Smith*, 653 F.2d at 1062.

94. *See supra* notes 72-74 and accompanying text.

95. 394 F.2d 57 (6th Cir. 1968).

96. *Id.* at 62.

*B. Retaliatory Eviction Where Tenant Asserts Rights as Tenant*

A generation ago, the D.C. Circuit ruled that a tenant in an eviction proceeding could assert the defense of retaliatory eviction if the eviction proceeding was brought in retaliation for the tenant's complaint to the authorities of the landlord's sanitary code violations.<sup>97</sup> The defendant in that case was a month-to-month tenant who, under local law, was subject to eviction at the whim of the landlord, limited only by notice and procedural protections. However, the landlord's decision to evict was propelled by vengeance. The ability to wreak vengeance would foreseeably deter other tenants from reporting sanitary violations. Once again, it was held that the use of an admitted right to achieve an improper purpose is an abuse of that right and was struck down by the court.

Many states have followed the D.C. Circuit's reasoning. Others have accomplished the same result by finding that freedom from retaliatory eviction inheres in the warranty of habitability. Others have reached the same result by statutory enactment. Over the years, the defense of retaliatory eviction has been extended to protect tenants from eviction where tenants exercise any right granted to tenants in their capacity as tenants, such as the right to organize to protect their rights against landlords, to petition, to make repairs and deduct their cost, etc. To some extent these defenses have been created by case law and to some extent by legislation.<sup>98</sup> The disparity of reasoning in these cases can be narrowed if there were general recognition of a doctrine of abuse of rights.<sup>99</sup>

*C. Retaliatory Eviction for the Exercise of Rights Unrelated to the Tenancy*

*United States v. Beatty*<sup>100</sup> was an action brought by the United States under the Civil Rights Act<sup>101</sup> to enjoin the defendants from using various forms of coercion designed to deter African-American citizens of Haywood County, Tennessee, from exercising their rights to vote for candidates for federal offices. The trial court preliminarily granted much of the relief requested but denied any relief against white owners of land who evicted or threatened to evict black sharecroppers as a weapon to prevent them from voting or as punishment for having registered or voted.<sup>102</sup> The trial court's decision on this point was based on the

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97. *Edwards v. Habib*, 397 F.2d 687, 690 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

98. See generally ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* § 6.45 (1984); Annot., *Retaliatory Eviction of Tenant for Landlord's Violation of Law*, 23 A.L.R. 5TH 140 (1994).

99. See George M. Armstrong, Jr. & John C. LaMaster, *Retaliatory Eviction as Abuse of Rights: A Civilian Approach to Landlord-Tenant Disputes*, 47 LA. L. REV. 1 (1986).

100. 288 F.2d 653 (6th Cir. 1961).

101. 42 U.S.C.A. § 1971(c) (West 1994).

102. The trial court in *Beatty* reasoned as follows:

The Court has been asked to enjoin the eviction of some of the sharecroppers by certain of these defendant landowners and to enjoin the altering of the existing sharecropping contracts which

theory that the landlords were merely exercising or threatening to exercise their rights to evict tenants whose tenancies had expired or were about to expire. The Sixth Circuit reversed and remanded with the mandate that the trial court hear evidence about

any situation where a defendant-landowner evicts or threatens to evict a negro tenant or refuses to deal in good faith with said tenant for a continuation of occupancy and tenancy, and said eviction, threatened eviction or refusal to deal in good faith is found to be for the purpose of interfering in any way with the right of such negro tenant to become registered or to vote in Haywood County, Tennessee, and to vote for candidates for federal office, or as punishment for having previously registered or voted, such conduct would constitute a violation of the prohibitions of the order.<sup>103</sup>

Once again, we see the court restricting a right—the right to evict a tenant at the expiration of a tenancy—usually conceived as absolute—where the right is sought to be employed for an improper purpose.

State courts have also allowed tenants the defense of retaliatory eviction in cases where the act which induced the eviction proceeding is remote from the tenant's rights as a tenant. The Hawaii Supreme Court held that an eviction proceeding brought in retaliation against a group of month-to-month tenants who had testified before a land use commission in opposition to the landlord's application to change the classification of land from "agricultural" to "urban" uses was an improper assertion of rights, and the defense of retaliatory eviction was available to the tenants.<sup>104</sup> Similarly, in New Jersey, trailer-park tenants who had opposed their landlord's application for a zoning change were given the defense of retaliatory eviction.<sup>105</sup> The defense was also made available to California farm laborers who had made a claim against their landlord under the Farm Labor Contractor Registration Act.<sup>106</sup> These evictions can be seen as a class of SLAPP lawsuit discussed below.<sup>107</sup> In each of the foregoing cases the landlord had a property right entitling the landlord to reclaim possession, but this right was

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expire the first of the year or shortly thereafter. In effect, it seems to the Court the plaintiff is asking that the court make new rental contracts for certain of the parties in this litigation. It ought to be evident to all that relief of this type cannot be awarded, especially on an application for a preliminary injunction. The Congress, it is plain to see, did, in passing this Civil Rights Act, intend to protect the voting right but it did not, as the Court reads the Statute, vest the Courts with authority to adjudge contracts and property rights.

*Beaty*, 288 F.2d at 655.

103. *Id.* at 657-58.

104. *Windward Partners v. Delos Santos*, 577 P.2d 326, 334 (Haw. 1978).

105. *Pohlman v. Metropolitan Trailer Park, Inc.*, 312 A.2d 888, 890-91 (N.J. Super. Ct. Ch. Div. 1973).

106. *S. P. Growers Ass'n v. Rodriguez*, 17 Cal. 3d 719, 552 P.2d 721, 131 Cal. Rptr. 761 (1976).

107. *See infra* notes 153-163 and accompanying text.



subordinated to the tenants' freedoms of expression and petition because the landlord's right was being used in an abusive way.

It has been suggested to me that the thesis that there is an unrecognized doctrine of "abuse of rights" is not worth much if, in fact, there are sufficient discrete doctrines such as retaliatory eviction with which the legal system can work out just solutions. To counter this criticism, I shall bring forward cases in which the lack of recognition of such a doctrine produces what I consider an inequitable result. Consider the case of *Imperial Colliery Co. v. Fout*.<sup>108</sup> The plaintiff was a coal miner leasing a small trailer lot in tiny Burnwell, West Virginia, from a company that was an affiliate of the family of companies that included his employer. His tenancy was month-to-month; rental was one dollar a year. The lessor gave plaintiff notice of termination and brought an eviction proceeding that was allegedly triggered by the tenant's involvement with the United Mine Workers union and its selective strike against the employer. The court held that the retaliatory eviction defense could not be raised because "we are led to the conclusion that the retaliatory eviction defense must relate to activities of the tenant incidental to the tenancy."<sup>109</sup> By focusing on a narrowly drawn doctrine of retaliatory eviction, the court did not observe that retaliation for exercising rights granted by Congress under the N.L.R.A. is as abusive as retaliation for rights granted by the law of landlord and tenant. In contrast, under Louisiana law, retaliatory eviction has been treated under the general concept of abuse of rights.<sup>110</sup>

## V. THREAT TO EXERCISE A RIGHT AS DURESS

### A. *Abusive Civil Litigation*

Countless cases have stated that a threat to do or the doing of an act that one has a legal right to do cannot constitute duress.<sup>111</sup> A threat to bring a lawsuit is a threat to exercise a fundamental constitutional right provided there is a good faith basis to the asserted claim. Settlements are encouraged by the legal system and

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108. 373 S.E.2d 489 (W. Va. 1988).

109. *Id.* at 494.

110. *Real Estate Services, Inc. v. Barnes*, 451 So. 2d 1229, 1231 (La. Ct. App. 1984) (finding no retaliatory intent and therefore no abuse); *Armstrong, Jr. & LaMaster*, *supra* note 99.

111. See John P. Dawson, *Duress Through Civil Litigation: I*, 45 MICH. L. REV. 571, 579 (1947) [hereinafter Dawson, *Duress I*] (citing twenty cases which follow the stated proposition). In the three articles written by Professor Dawson for the Michigan Law Review, he clearly proved that in an extraordinary number of cases relief for duress was granted where no tortious or criminal act was threatened or accomplished. See John P. Dawson, *Duress Through Civil Litigation: II*, 45 MICH. L. REV. 679 (1947) [hereinafter Dawson, *Duress II*]; John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253 (1957).

there is general agreement that settlements should not easily be set aside.<sup>112</sup> Nonetheless, if the settlement is obtained by abuse of the legal machinery of the state or the threat of such abuse, the settlement may be voidable.

In one case a husband threatened his wife that he would bring a child-custody battle based on her adulterous behavior unless she assigned certain securities to him. The court held that it was a jury question whether the assignment thus procured was voidable for duress. The court stated:

The weight of modern authority supports the rule, which we here adopt, that the act done or threatened may be wrongful even though not unlawful, per se; and that the threat to institute legal proceedings, criminal or civil, which might be justifiable, per se, becomes wrongful, within the meaning of this rule, if made with the corrupt intent to coerce a transaction grossly unfair to the victim and not related to the subject of such proceedings.<sup>113</sup>

Thus, we once again, in an entirely different context, find language consistent with a pervasive doctrine of abuse of rights.

In *Fornell v. Rashid*,<sup>114</sup> there was a lawsuit for corporate control brought by a shareholder, Bertil Fornell, against the corporation in which he, his wife, his sister, and her husband held the majority of shares. The court ordered the sister and her husband joined as defendants and plaintiff's wife joined as a plaintiff. The defendants counter-claimed asking that Bertil be declared a spendthrift and that Bertil's wife be appointed as guardian. This relief was granted. When Bertil later contested the jurisdiction of the trial court to have granted such relief, the appellate court held that the trial court had had no jurisdiction to appoint a guardian. Although much of the reasoning concerns the relative roles of the Michigan probate and circuit courts of general trial jurisdiction, the court goes further and decries the vice of the use of guardianship proceedings as a tactic in unrelated litigation among family members. The nub of this branch of the decision is in this bit of wisdom: "By permitting a circuit court, in the exercise of its equity jurisdiction, to determine whether a party is a spendthrift, we would only be accentuating the opportunity for 'abuse of the machinery of the law for the purpose of securing an unconscionable advantage.'" <sup>115</sup> The court also quoted Professor Dawson to the effect that "the use of this type of remedy for the

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112. See 2 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 7.17 (Joseph M. Perillo & Helen H. Bender rev. ed. 1995) (discussing consideration in settlement agreements and expressing the need for finality in such settlements).

113. *Link v. Link*, 179 S.E.2d 697, 705 (N.C. 1971).

114. 198 N.W.2d 694 (Mich. App. 1972).

115. *Id.* at 701; see *id.* (quoting *Foote v. DePoy*, 102 N.W. 112, 115 (Iowa 1905)).

securing of private advantage is a misuse and diversion from its intended purpose."<sup>116</sup>

One could cite a multitude of cases in which courts have held that the abusive use of litigation or the threat thereof constitutes duress. To do this would be merely to retrace the path blazed by Professor Dawson in his two-part article, *Duress Through Civil Litigation*,<sup>117</sup> where he demonstrated "the broader conclusion that even threats in 'good faith' of civil litigation can become unauthorized pressure, where economic disadvantage prevents effective resistance and the terms thereby dictated are grossly unfair."<sup>118</sup> He also demonstrates that "[t]hough opinions again are divided, the cases allowing relief for duress give support for the view that means of pressure in themselves quite legitimate can become improper when used to exact an unjustified gain."<sup>119</sup> Despite this persuasive demonstration, we frequently encounter the old adage. It is repeated by Charles Fried, who quotes a Texas case to the effect that "[t]here can be no duress unless there is a threat to do some act which the party threatening has no legal right to do."<sup>120</sup> I do not urge that the doctrine of duress be supplanted by a theory of abuse of rights. However, abuse of rights doctrine can provide a clearer foundation for decisions setting aside agreements induced by the abuse of litigation processes.

### B. Threat to Discharge an At-Will Employee as Duress

Although, under the current majority view, an at-will employee cannot be discharged for a bad reason, the employee can otherwise be discharged at the pleasure of the employer. In *Laemmar v. J. Walter Thompson Co.*,<sup>121</sup> the plaintiffs had been employees and shareholders of the defendant. They alleged that officers of the employer had threatened that they would be fired unless they sold their shares to them or to the defendant employer. Coerced by this threat, they sold the shares to the employer at the price offered. Subsequently, they sued for rescission of the sale and restitution of the shares. It was held that they had stated a cause of action.<sup>122</sup> Once again, we see the threatened exercise of a lawful power as

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116. *Id.* at 710-11; see *id.* (quoting Dawson, *Duress II*, *supra* note 111).

117. *Supra* note 111.

118. Dawson, *Duress II*, *supra* note 111, at 695. In his two-part article, Dawson discusses the following categories of cases: (1) injunctive relief against repeated litigation of actions already litigated (action for simple money judgment), (2) personal (civil) arrests prior to judgment, (3) seizure of goods and appropriation of debts prior to final judgment, (4) executions under final money judgments, (5) assertions of liens, (6) dispossessions from real estate, (7) actions for injunctions, and (8) bankruptcies and receiverships. Various cases not quite fitting into these categories are discussed by him throughout the article. *Id.*

119. *Id.* at 696.

120. CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 151 n.10 (1981). Fried cites to another work by Dawson "for a critical discussion of this formulation of duress." See Dawson, *Economic Duress*, *supra* note 111, at 287-88.

121. 435 F.2d 680 (7th Cir. 1970).

122. *Id.* at 682.

becoming unlawful when employed for a purpose other than that for which it was designed. Other cases also indicate that a threat to fire an at-will employee constitutes duress if it overcomes the free will of the employee.<sup>123</sup>

However, the lack of a generally recognized concept of abuse of rights leads to similar statements in cases with apparently similar facts.<sup>124</sup> Plaintiff sought rescission of his release of option rights on grounds of duress and undue influence.

What plaintiff relies upon is the fact that he was told he would be involuntarily discharged, without severance pay and this might be disclosed to prospective employers. This can neither be considered a threat, nor false advice, since defendants had the right to discharge plaintiff, who was an employee at will, were not under any duty to continue his salary and were privileged to inform prospective employers of the circumstances surrounding the termination of his employment. A threat to do that which one has the legal right to do does not constitute duress or fraud.<sup>125</sup>

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123. See, e.g., *Wise v. Midtown Motors, Inc.*, 42 N.W.2d 404, 408 (Minn. 1950) (explaining that “[t]he fact is that the meeting in Schindler’s [the employer] office and Schindler’s statement to plaintiff in effect that he would be ‘through’ if this case [against his former employer] was not then settled, warranted plaintiff in believing that Schindler would discharge him if he did not sign the release and that the Sun company was cooperating with defendant. A threat to cause a person loss of employment may amount to duress . . .”). In *R.L. Mitchell v. C.C. Sanitation Co.*, plaintiff-employee, while driving the employer’s truck, was involved in a collision allegedly the fault of the driver of defendant’s vehicle. Defendant’s insurer would not pay for the damages to the employer’s vehicle unless plaintiff executed a release of his personal injuries. In exchange for reimbursement of only his out-of-pocket medical expenses, the plaintiff signed a release because the employer had purportedly threatened to discharge him if he did not sign. The court reversed the trial court’s grant of summary judgment for the defendant. The reversal contravened many Texas decisions that stood for the proposition that “[t]here can be no duress unless there is a threat to do some act which the party threatening has no legal right to do.” *R.L. Mitchell v. C.C. Sanitation Co.*, 430 S.W.2d 933, 937 (Tex. Ct. App. 1968). *Accord* *Cubbin v. Buss*, 144 N.W.2d 175 (Neb. 1966). In *Shurtleff v. Giller*, a signed promissory note for \$60,000 was given by the employee to his supervisor who had threatened to fire him if he did not sign. The money was owed because of an agreement with respect to a failed joint venture between the two of them. Surprisingly, a “take-nothing judgment” was entered on an action on the note. *Shurtleff v. Giller*, 527 S.W. 2d 214, 215 (Tex. Ct. App. 1975). Duress is a doctrine that generally only involves the cancellation or disgorgement of excess gain. See *CALAMARI & PERILLO*, *supra* note 64, at § 9-8. In *Perkins Oil Co. v. Fitzgerald*, the plaintiff, a young man, lost both of his arms in an on-the-job accident. The superintendent threatened to fire plaintiff’s stepfather, who was the sole support of the plaintiff’s brother and invalid wife unless he accepted a settlement offer of \$5000. His acceptance was found to be under duress. *Perkins Oil Co. v. Fitzgerald*, 121 S.W.2d 877, 880, 882, 885 (Ark. 1938).

124. The phrase “apparently similar facts” is chosen advisedly. In the quotation in the text and elsewhere in the opinion, there is a suggestion that the employee had been guilty of some sort of wrongdoing. There is also a suggestion that the plaintiff’s claim, if there was one, was barred by laches. These facts may justify the result, but do not justify the stated reasoning. *Bachorik v. Allied Control Co., Inc.*, 312 N.Y.S.2d 272, 275 (App. Div. 1970).

125. *Id.* at 275.

The refrain that constitutes the final sentence of the above quotation is belied by many cases. As more recently stated by the Oklahoma Supreme Court: "Economic duress may be found if the act is done under circumstances which are considered wrongful even if there was a legal right to perform the threatened act."<sup>126</sup> The *Restatement (Second) of Contracts* includes in its catalog of acts that could form the basis for duress: "what is threatened is otherwise use of a power for illegitimate ends."<sup>127</sup> These statements express a doctrine of abuse of rights.

### *C. Other Examples of the Exercise of Rights as Duress*

At the risk of multiplying too many examples, it may be noted that the following have been held to be conduct that formed a predicate for duress. An attorney who derives one-third to one-half of his income from the defendant bank is threatened with being replaced unless he signs a note for part of the indebtedness of a bank officer.<sup>128</sup> A wife abandons her husband and returns asking permission to enter his house to retrieve her clothing and to speak to her children; he refuses unless she signs a one-sided separation agreement. She signs.<sup>129</sup> In both of these cases the threat itself was to do or refrain from doing what the party had a perfect right to do except that it was threatened to be employed for a purpose other than that for which the right exists.

### *D. The Tort of Abuse of Process*

As formulated in the *Restatement (Second) of Torts*, the tort of abuse of process is a narrowly circumscribed version of the doctrine of abuse of rights as formulated in the Netherlands Code, quoted above.<sup>130</sup> Section 682 of the *Restatement* provides: "One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process."<sup>131</sup> In a rare case in which this tort is seen in relation to other forms of abuse of rights, Justice Ellen Peters, in holding that Connecticut would adopt the public policy exception to the at-will hiring rule, stated "[b]y way of analogy, we have long recognized abuse of process as a cause of action in tort whose gravamen is the

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126. *Centric Corp. v. Morrison-Knudsen Co.*, 731 P.2d 411, 419 (Okla. 1986) (involving a construction contractor who made a non-negotiable final offer to liquidate a sub-contractor's claim for extras at a time when the subcontractor was suffering financial distress).

127. *RESTATEMENT (SECOND) OF CONTRACTS* § 176(2)(c) (1981).

128. *Gerber v. First Nat'l Bank of Lincolnwood*, 332 N.E.2d 615, 617 (Ill. App. Ct. 1975).

129. *Eckstein v. Eckstein*, 379 A.2d 757, 759-60 (Md. Ct. Spec. App. 1978).

130. *See supra* note 6 and accompanying text.

131. *RESTATEMENT (SECOND) OF TORTS* § 682 (1977).

misuse or misapplication of process, its use 'in an improper manner or to accomplish a purpose for which it was not designed.'"<sup>132</sup>

Because the tort is generally treated as a writ with confined boundaries, we find this sentence in Prosser: "But it is clear that the judicial process must in some manner be involved. A repairman's notice of a lien and sale, for example, is not an invocation of process and cannot form the basis for an abuse of process action."<sup>133</sup> For the same reason, we find separate torts of malicious prosecution, the treatment of which occupies 22 sections of the *Restatement (Second) of Torts*,<sup>134</sup> and wrongful use of civil proceedings, the description of which occupies ten sections.<sup>135</sup> Throughout all three torts runs a common thread that a privilege has been abused. An overview might reveal that the unifying thread is more important than the differences among them.

Georgia, by court decision, has unified the torts of abuse of process and wrongful use of civil process into one.<sup>136</sup> In so doing, it achieved the goals of simplifying the nomenclature of the tortious acts,<sup>137</sup> and eliminating the need to clarify "[t]he substantive difference between the two torts [which] is often difficult to discern."<sup>138</sup> Perhaps, more importantly, a broadly understood tort of abuse of the litigation process takes within its scope abusive actions that fail to meet the precise elements of either of the pre-existing torts.<sup>139</sup> The tort of abuse of process arose in England at a time when, under the writ system, the court deemed itself powerless to expand the existing tort of malicious prosecution. Instead, the court permitted an action on the special case to the plaintiff whose ship's registry had been extorted from him by defendant by the bringing an action on a debt not yet due and arranging for the plaintiff's civil arrest as an abusive tool to obtain the registry.<sup>140</sup> Although the writ system was abolished well over a century ago it still remains sadly true that "the forms of action we have abolished, but they still rule us from their graves."<sup>141</sup>

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132. *Sheets v. Teddy's Frosted Foods, Inc.*, 427 A.2d 385, 387 (Conn. 1980).

133. WILLIAM L. PROSSER & W. PAGE KEETON, *HANDBOOK OF THE LAW OF TORTS* 898 (5th ed. 1984).

134. See *RESTATEMENT (SECOND) OF TORTS* §§ 653-673, ch. 29 (1977).

135. *Id.* at ch. 30.

136. See *Yost v. Torok*, 344 S.E.2d 414 (Ga. 1986). In Georgia the nomenclature for the two torts is "malicious abuse of process" and "malicious use of process." The rule laid down in *Yost* to the effect that the tort action could be brought by way of counterclaim in the allegedly abusive action has been affected by legislation, but the substance of the *Yost* ruling remains intact. See *Block v. Brown*, 404 S.E.2d 288 (Ga. Ct. App. 1991); see also *Nottingham v. Resource Materials Corp.*, 435 S.E.2d 447 (Ga. Ct. App. 1993), *cert. denied*. The *Yost* court declined to determine whether the tort of malicious prosecution would also be merged with the other two torts. *Yost*, 344 S.E.2d at 417. See generally V.S. Khanna, *Abuses of the Legal Process: To Tort or Not to Tort*, 22 VICTORIA U. OF WELLINGTON L. REV. 239 (1992) (urging that New Zealand adopt the Georgia approach).

137. See *Yost*, 344 S.E.2d at 416.

138. *Id.* at 415.

139. *Id.* at 416.

140. *Grainger v. Hill*, 132 Eng. Rep. 769 (1838).

141. F.W. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW* 2 (Cambridge Univ. Press 1962) (1909).

E. Liability Under Rule 11

Rule 11 of the Federal Rules of Civil Procedure provides, in part, that an attorney representing a client in a federal court action must sign every pleading, motion, or other paper.<sup>142</sup> It further provides that the signature of an attorney certifies, among other things, that the document “is not being presented for any improper purpose.”<sup>143</sup> Violation of the rule results in a liability for sanctions which may include an order that damages be paid to the other party to the litigation.

What does this rule have in common with rules of nuisance-abatement that apply to spite fences? The rule is designed to deter vexatious and frivolous legal actions, including law suits, motions or other court proceedings that are brought for purposes other than to obtain the relief sought in the pleading, motion, or other demand for relief. Fences may be built to keep animals or people within the boundaries of one’s property or to keep them out, or even for merely decorative purposes, but the building of a fence to vex or to extort money from a neighbor should not be tolerated in a civilized society. The same thrust is behind Rule 11, with this difference: The liability is placed (except in *pro se* litigation) on the attorney—the expert who should have knowledge of whether the client has a colorable claim—as well as the party who retained the attorney. Rule 11 decisions are numerous and have been the subject of exhaustive treatises.<sup>144</sup> The point is, Rule 11 fits well within the framework of abuse of rights theory. This paper will avoid cataloging the many Rule 11 violations that have been found to exist, but will focus only on litigation documents filed for an improper purpose.

In *Saltany v. Reagan*,<sup>145</sup> an action was brought against the United States, the United Kingdom, President Ronald Reagan, Prime Minister Margaret Thatcher, and other high officials of both governments for injuries suffered by plaintiffs as a result of the 1986 air strike on Libya by the United States from air bases in the United Kingdom. The District Court dismissed the complaint and commented that plaintiffs’ counsel “surely knew” that the case “offered no hope whatever of success”<sup>146</sup> but did not impose sanctions on the plaintiffs’ attorneys. The District Court surmised that the action was “brought as a public statement of protest of Presidential action with which counsel and, to be sure, their clients were in profound disagreement.”<sup>147</sup> The Circuit Court ruled that this statement of the

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142. FED. R. CIV. P. 11.

143. *Id.*

144. *See, e.g.*, GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE (2d ed. 1994); GEORGENE M. VAIRO, RULE 11 SANCTIONS: CASE LAW PERSPECTIVES AND PREVENTIVE MEASURES (2d ed. 1993); *see also* Nestor Cruz, *Abuse of Rights in Title VII Cases: The Emerging Doctrine*, 67 A.B.A. J. 1472 (1981) (focusing on attorneys’ fees in civil rights actions).

145. 886 F.2d 438 (D.C. Cir. 1989).

146. *Saltany v. Reagan*, 702 F. Supp. 319, 322 (D.D.C. 1988).

147. *Id.*

District Court was tantamount to a finding that plaintiffs' counsel were in violation of Rule 11 and remanded for the imposition of sanctions under that rule, stating that "[w]e do not conceive it a proper function of a federal court to serve as a forum for 'protests,' to the detriment of parties with serious disputes waiting to be heard."<sup>148</sup> Similarly, in the case of *In re Kuntsler*,<sup>149</sup> the Fourth Circuit sustained Rule 11 sanctions largely on the basis that the law suit was filed for improper purposes. Rule 11 itself gives examples of improper purposes: "such as to harass or to cause unnecessary delay or needless increase in the costs of the litigation." These, the *Kuntsler* court rules, are not an exclusive catalog of improper purposes. Starting a law suit with no intention to litigate the claims made in the complaint is an abusive purpose. Here the "circumstances surrounding the case . . . supported the conclusion that the primary motives in filing the complaint were to gain publicity, to embarrass state and county officials, to gain leverage in criminal proceedings, and to intimidate those involved in the prosecution of [their clients]."<sup>150</sup> Even if Rule 11 does not apply, the federal courts have inherent power to apply sanctions to a party or the party's attorney for bad faith complaints or other court papers filed in bad faith.<sup>151</sup> State courts also have such inherent power.<sup>152</sup>

#### F. SLAPP Actions and the Noerr-Pennington Doctrine

University of Denver Professors Penelope Canan and George Pring coined the term "SLAPP," an acronym for Strategic Lawsuits Against Public Participation.<sup>153</sup> In a typical SLAPP case, a developer applies for permits allowing the construction of a building or the subdivision of land. Neighbors oppose the project. The developer then sues the neighbors who have expressed opposition—often for millions of dollars, on any number of theories, such as interference with prospective advantage, defamation, or violation of the developer's civil rights under 42 U.S.C. § 1983. Considering the high cost of legal fees and the fear of a mistaken judgment, it frequently happens that the opposition collapses, or other

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148. *Saltany*, 886 F.2d at 440.

149. 914 F.2d 505 (4th Cir. 1990), *cert. denied sub nom. Kuntsler v. Britt*, 499 U.S. 969 (1991).

150. *Id.* at 519.

151. *See Hotel St. George Assocs. v. Morgenstern*, 819 F. Supp. 310, 322-23 (S.D.N.Y. 1993).

152. *See Spremo v. Babchik*, 589 N.Y.S.2d 1019 (N.Y. Sup. Ct. 1992).

153. *See Computer Assocs. Int'l, Inc. v. American Fundware, Inc.*, 831 F. Supp. 1516, 1522 n.3 (D. Colo. 1993) (attributing the term "SLAPP" to Professors Canan and Pring); *see also* Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 LAW & SOC'Y REV. 385 (1988). *See generally* George W. Pring & Penelope Canan, Symposium, "Strategic Lawsuits Against Public Participation" ("SLAPPs"): *An Introduction for Bench, Bar and Bystanders*, 12 U. BRIDGEPORT L. REV. 937 (1992); Jennifer E. Sills, Comment, *SLAPPs (Strategic Lawsuits against Public Participation): How Can the Legal System Eliminate Their Appeal?*, 25 CONN. L. REV. 547 (1993); Thomas A. Waldman, Comment, *SLAPP Suits: Weaknesses in First Amendment Law and in the Courts' Responses to Frivolous Litigation*, 39 UCLA L. REV. 979 (1992).



potential opponents are deterred from expressing their thoughts publicly. As described by one court, "SLAPP suits are characterized by an effort to punish political opponents for past behavior, an attempt to preclude their future political effectiveness, the desire to warn others that political opposition will be punished, the use of the judicial system as part of an economic strategy, or some combination of the above attributes. Groups targeted by SLAPP suits often lose members, funds and political potency."<sup>154</sup>

The United States Supreme Court has forged a doctrine in antitrust cases known as *Noerr-Pennington*<sup>155</sup> which since has been adapted to cope with such abusive lawsuits in areas other than antitrust. Under this doctrine, the SLAPP action will be dismissed because it is brought to stifle the exercise of the constitutional right to petition. The neighbors who oppose a proposed development, in the hypothetical discussed above, have an immunity from such suits brought for an improper purpose.<sup>156</sup> A penalty under Rule 11 or its state analogue may also be imposed.<sup>157</sup> Similarly, if the neighbors had brought an action to enjoin the development, whether or not they were successful, they would have a certain degree of immunity from actions against them for abuse of process.<sup>158</sup>

The *Noerr-Pennington* doctrine is not absolute. Even First Amendment rights to petition the government have abusive possibilities. Thus, the Supreme Court has stated in dictum that "[a] pattern of baseless, repetitive claims may emerge which leads the fact finder to conclude that the administrative and judicial processes have been abused. [A]ctions of that kind cannot acquire immunity by

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154. *Monia v. Parnas Corp.*, 278 Cal. Rptr. 426, 435 (Ct. App. 1991).

155. In *Eastern Rail Presidents Conference v. Noerr Motor Freight, Inc.*, the railroads had engaged in an advertising campaign designed to curtail the use of trucks for long distance hauling of cargo. They succeeded in having the Governor of Pennsylvania veto what was known as "The Fair Truck Bill." The truckers sued the railroads, claiming that this conduct constituted an antitrust violation. The Supreme Court ruled that petitioning the government could not constitute an antitrust violation. *Eastern Rail Pres. Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). In *United Mine Workers v. Pennington*, the union successfully petitioned the Secretary of Labor to increase the minimum wage applicable to coal miners. This had the effect of driving some smaller coal companies out of business. It was held that the Union's petition could not constitute an antitrust violation. *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

156. See, e.g., *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980); *Westfield Partners, Ltd. v. Hogan*, 740 F. Supp. 523 (N.D. Ill. 1990); *Webb v. Fury*, 282 S.E.2d 28 (W. Va. 1981) (reviewing a libel action by mining company against environmental groups that allegedly libeled the company in a newsletter and in communications to the government).

157. *Entertainment Partners Group, Inc. v. Davis*, is a typical case. Defendants opposed plaintiff's requested zoning permit for a nightclub. Plaintiff brought an action for tortious interference with business relations and prima facie tort. Aside from the fact that this was a SLAPP suit, the plaintiff was unable to allege the necessary elements for the tort claims. The court upheld the trial court's imposition of sanctions in the amount of \$10,000 and the award of attorneys' fees to each defendant. *Entertainment Partners Group, Inc. v. Davis*, 603 N.Y.S.2d 439 (N.Y. App. Div. 1993). In *Gordon v. Marrone*, a developer was penalized in the sum of \$10,000, even though the retaliatory suit to contest the tax exempt status of certain Nature Conservancy property was deemed "colorable." *Gordon v. Marrone*, 616 N.Y.S.2d 98 (N.Y. App. Div. 1994).

158. *Protect Our Mountain Env't, Inc. v. District Court of Jefferson County*, 677 P.2d 1361 (Colo. 1984).

seeking refuge under the umbrella of ‘political expression.’”<sup>159</sup> Courts have followed this limitation, known as the “sham” limitation.<sup>160</sup> At least one court, however, has followed a different notion of abuse than indicated by the Supreme Court dictum.<sup>161</sup> Several states have enacted special legislation to deal with SLAPP suits. Common provisions among these statutes include procedures under which such suits may be dismissed at an early stage, and compensatory and punitive damages against the plaintiffs who have abused the processes of the courts in a particularly brutal way and for a purpose that is inimical to the most basic constitutional values of the Republic.<sup>162</sup>

In perspective, a SLAPP suit can be seen as an abuse of right. The coercion is not aimed at obtaining money or vindicating a right, but at the gaining of a victory over a political opponent by abusing the machinery of justice. Abuse of rights theory demonstrates the commonality between the cases of duress by civil litigation discussed earlier in this paper and the SLAPP suit.<sup>163</sup>

## VI. BAD FAITH IN THE PERFORMANCE OF A CONTRACT

### A. *The Idea of Good Faith*

“Good faith” may be impossible to define in any meaningful way, even if we limit the definition to good faith in the performance of a contract. According to Professor Robert Summers, the term is an “‘excluder,’—it is a phrase which has no general meaning or meanings of its own, but which serves to exclude many heterogeneous forms of bad faith.”<sup>164</sup> According to Judge Posner, “the term [has

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159. *California Motor Transp., Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972).

160. *See, e.g., Oregon Natural Resources Council v. Mohla*, 944 F.2d 531 (9th Cir. 1991); *Computer Assocs. Int'l, Inc. v. American Fundware, Inc.*, 831 F. Supp. 1516 (D. Colo. 1993); *Protect Our Mountain Env't, Inc.*, 677 P.2d at 1361.

161. *Florida Fern Growers Ass'n, Inc. v. Concerned Citizens of Putnam County*, 616 So. 2d 562 (Fla. Dist. Ct. App. 1993); *see id.* (distancing its analysis from the Supreme Court dictum, in favor of a test of whether a privilege has been abused). Apparently, under this test, a malicious invocation of the right to petition would give rise to a *Noerr-Pennington* defense or cause of action. *Id.* The *Florida Fern Growers* court also distanced itself from *Sierra Club v. Butz*, 349 F. Supp. 934 (N.D. Cal. 1972), which had noted that malice is easier to plead and prove than “sham.” *Id.* at 565-67. Such distancing may not be permitted if *Noerr-Pennington* is rooted in the United States Constitution. *But see* Robert A. Zauzmer, Note, *The Misapplication of the Noerr-Pennington Doctrine in Non-Antitrust Right to Petition Cases*, 36 STAN. L. REV. 1243 (1984) (suggesting that the doctrine is not so rooted).

162. *See generally* John C. Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPS*, 26 LOY. L.A. L. REV. 395 (1993); Edward W. McBride, Jr., Note, *The Empire State SLAPPS Back: New York's Legislative Response to SLAPP Suits*, 17 VT. L. REV. 925 (1993).

163. *See supra* notes 107-116 and accompanying text.

164. Robert S. Summers, “*Good Faith*” in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 196 (1968) [hereinafter Summers, *Good Faith*]; *see also* Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810, 818-21 (1982) [hereinafter Summers, *The General Duty*].

no] settled meaning in law generally; it is a chameleon."<sup>165</sup> Those who believe the idea of good faith is adequately defined as "honesty in fact in the . . . transaction"<sup>166</sup> may be astonished by the definition of good faith in the law of warfare:

Absolute good faith with the enemy must be observed as a rule of conduct; but this does not prevent measures such as using spies and secret agents, encouraging defection or insurrection among the enemy civilian population, corrupting enemy civilians or soldiers by bribes, or inducing the enemy's soldiers to desert, surrender or rebel. In general, a belligerent may resort to those measures for mystifying or misleading the enemy against which the enemy ought to take measures to protect itself.<sup>167</sup>

Professor Burton has expressed a unitary theory of good faith performance with respect to contracts which is un-chameleon-like.<sup>168</sup> "Good faith performance," he states, "occurs when a party's discretion is exercised for any purpose within the reasonable contemplation of the parties at the time of formation—to capture opportunities that were preserved upon entering the contract, interpreted objectively."<sup>169</sup> Conversely, bad faith performance involves an attempt to capture opportunities that were forgone at the time of contracting. While it is doubtful whether this definition captures the universe of good and bad faith conduct in the performance of a contract,<sup>170</sup> this bad faith definition captures those in which a

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165. *Empire Gas Corp. v. American Bakeries, Inc.*, 840 F.2d 1333, 1339 (7th Cir. 1988).

166. U.C.C. § 1-201(19). The Restatement (Second) of Contracts did not adopt the U.C.C. definitions, but instead adopted Professor Summers' excluder analysis. See RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1979); Summers, *The General Duty*, *supra* note 164, at 820.

167. DEPARTMENT OF THE ARMY, *THE LAW OF LAND WARFARE* 22 (1956).

168. Professor Burton does not purport to define "good faith" in his article; rather, he limits his discussion to "good faith in performance." See Burton, *Breach of Contract*, *supra* note 87, at 372 n.17.

169. *Id.* at 373, 380; *see id.* (asserting that courts explicitly raise the implied covenant of good faith or interpret the contract in the light of good faith performance only in those case where one party has discretion in performance or there is an omission in the contract); *see also* Steven J. Burton & Eric G. Andersen, *The World of Contract*, 75 IOWA L. REV. 861, 868 (1990) (stating that "[s]uch discretion does not exist when the contract provides, for example, that the buyer will pay a fixed price on delivery for a fixed quantity of goods to be delivered at a specified place on a specific date."). It should be noted, however, that even here the buyer has discretion to accept or reject a tender that is non-conforming. Such a rejection can be held to be in bad faith if the discretion is exercised because of a falling market price rather than serious concern about the non-conformity. See *Oil Country Specialist, Ltd. v. Phillip Bros., Inc.*, 762 S.W.2d 170 (Tex. Civ. App. 1988); *see also* *Cambee's Furniture, Inc. v. Doughboy Recreat'l, Inc.*, 825 F.2d 167 (8th Cir. 1987) (noting that cancellation for breach would, if merely a pretextual reason, violate the covenant of good faith and fair dealing). Such conduct by the buyer, however, appears to come under the concept of good faith in enforcement rather than good faith performance.

170. *See, e.g.*, *Roth Steel Products v. Sharon Steel Corp.*, 705 F.2d 134, 146 (6th Cir. 1983) (finding that Sharon Steel practiced abundant bad faith in performance, not by abusing any discretion, but by deceptive and coercive tactics). Professor Gergen accepts Burton's analysis, but supplements it with two other kinds of bad faith. The first of these, lack of "conformity with customary norms of behavior," (citing to U.C.C. § 2-103(b)) seems to be subsumed in Burton's formulation. The second is an economic rationale: "Good faith forbids a

party's discretionary power is abused so as to deprive the other party of his or her reasonable expectations.

*B. Bad Faith Exercise of Discretion*

An illustrative case is *Pillois v. Billingsley*,<sup>171</sup> where in a letter agreement regarding the plaintiff's services to be rendered in procuring an exclusive representation and trademark from a French perfume house, the plaintiff agreed that "[m]y compensation for such services as I may render in this connection shall be such sum as you, in your sole judgment, may decide is reasonable."<sup>172</sup> The services were rendered. Defendant ratified the contract negotiated by the plaintiff despite his displeasure with its terms. Defendant set no value on the services and the court held that the defendant's obligation was to fix a value on the services in good faith, and its failure to do so created a right of action by the plaintiff in quantum meruit. While analysis in terms of good faith produces a satisfactory result,<sup>173</sup> a further analysis in terms of the principal's abuse of his power to determine compensation separates this kind of case from its chameleon-like cousins in the universe of good faith.

In *Automatic Sprinkler Corp. of America v. Anderson*,<sup>174</sup> the issue as framed by the court was "the question of whether good faith is a prerequisite in the exercise of an absolute discretion to withhold incentive compensation."<sup>175</sup> The plaintiff had been a sales representative of the defendant under a contract containing detailed formulas for the computation of incentive compensation.<sup>176</sup> He resigned<sup>177</sup> and requested payment of the deferred incentive earned under the contract. The employer, giving no reason, refused. In court, it relied on language in the contract to the effect that such payment to terminated employees "will rest completely in the absolute and final discretion of the Compensation Committee

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party from acting to harm the parties' joint interest in matters left open by the contract." Mark Gergen, *A Cautionary Tale About Contractual Good Faith in Texas*, 72 TEX. L. REV. 1235, 1264 (1994).

171. 179 F.2d 205 (2d Cir. 1950).

172. *Id.* at 207. See M.C. Dransfield, Annotation, *Validity of Contract which Leaves Amount to be Paid in Performance Thereof to Promisor's Determination*, 92 A.L.R. 1391, 1396-1412 (1931); see also *Sprick v. Regents of Univ. of Mich.*, 204 N.W.2d 62 (Mich. Ct. App. 1972), *aff'd*, 210 N.W.2d 332 (Mich. 1973). In *Sprick*, the University's lease with married students permitted the University to make unilateral changes in the rent. None of the judges contested the validity of such a reservation of power by the University. The dissent, however, thought that the power had been abused. *Id.* at 72.

173. Modern law recognizes that a unilateral power to determine price or compensation must be exercised in good faith. See *California Lettuce Growers, Inc. v. Union Sugar Co.*, 289 P.2d 785 (Cal. 1955). This proposition is now codified by U.C.C. § 2-305.

174. 257 S.E.2d 283 (Ga. 1979).

175. *Id.* at 28.

176. The contract terms are quoted at length in the opinion of the intermediate appellate court. *Anderson v. Automatic Sprinkler Corp. of America*, 248 S.E.2d 507, 508 (Ga. Ct. App. 1978).

177. This fact is not mentioned by the Georgia Supreme Court, but instead appears in the intermediate court's opinion. *Id.* at 508.

of the Board of Directors.<sup>178</sup> Based on this language, the trial court awarded summary judgment to the defendant.

The intermediate court reversed, saying that the defendant's good faith presented a factual issue. The Supreme Court, reinstating the judgment of the trial court, held that the presence or absence of good faith was irrelevant. Absolute discretion means, says the Court, absolute discretion. The Court would not imply a term to the effect that "our discretion will be exercised in good faith," but seemingly found an implicit term that "our discretion may be exercised in bad faith." Some, but not all, courts have disagreed with this case on the meaning of the term "absolute discretion."<sup>179</sup> As one court stated ninety years ago, "[i]f one party to a contract has the unrestrained power to say what it means, the other has no right except by sufferance . . . and human language is not strong enough to place them in that situation."<sup>180</sup>

If a concept of abuse of rights were generally adopted, the discussion would be conducted under a different framework. A court would ask, what is the purpose of awarding incentive compensation? If it is designed to instill employee

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178. *Id.*

179. *See, e.g., VTR, Inc. v. Goodyear Tire & Rubber Co.*, 303 F. Supp. 773, 777 (S.D.N.Y. 1969) (standing for the proposition that there is "absolute discretion" in contractual negotiations, and stating the general rule that there is a covenant of good faith and fair dealing in every contract "subject to the exception that the parties may, by express provisions of the contract, grant the right to engage in the very acts and conduct which would otherwise have been forbidden by an implied covenant of good faith and fair dealing."); *But see* U.C.C. § 1-102(3) (providing "that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement."); *see also* *Wagenseller v. Scottsdale Memorial Hospital*, 710 P.2d 1025, 1036 (Ariz. 1985) (en banc) (concluding that "[f]iring for bad cause—one against public policy articulated by constitutional, statutory, or decisional law—is not a right inherent in the at-will contract, or in any other contract, *even if expressly provided.*") (emphasis added); *A.W. Fiur Co., v. Ataka & Co.*, 422 N.Y.S.2d 419, 422 (App. Div. 1979) (noting that "[a]lthough the contract conferred upon [Ataka] America the 'absolute right to reject any orders for any reason whatsoever,' such a contract does not import the right arbitrarily to refuse to accept orders."). If one deems that a bad faith action is against public policy, the quoted phrase from *Wagenseller, supra*, is applicable to the kind of case under discussion. In *Newmac/Bud Light Team Bass Circuit, Inc. v. Swint*, the court held that a fishing-contest rule which provided that all interpretations of rules and final decisions would rest with the tournament director was not a potestative condition because the director had a duty to exercise sound judgment in interpreting the rules and to award prizes to those catching the most poundage of fish. A potestative condition is one that is entirely within the control of a party; a finding that it was such a condition would invalidate the contract on grounds similar to the common law notion of an illusory promise. *Newmac/Bud Light Team Bass Circuit, Inc. v. Swint*, 486 So. 2d 255, 256 (La. Ct. App. 1986). *See* *Martin v. Prier Brass Mfg. Co.*, 710 S.W.2d 466, 473 (Mo. Ct. App. 1986) (holding that an employer had the right to terminate the insurance plan, but it was in bad faith to terminate without notice). In *Richard Bruce & Co. v. J. Simpson & Co.*, the plaintiff, an underwriter, had the power to terminate, "if prior to the effective date the Underwriter, in its absolute discretion, shall determine that market conditions or the prospects of the public offering are such as to make it undesirable or inadvisable to make or continue the public offering hereunder." It was argued that the agreement was not binding because the underwriter's promise was illusory. The court disagreed, saying: "[t]he term 'absolute discretion' must be interpreted in context and means under these circumstances a discretion based upon fair dealing and good faith—a reasonable discretion." *Richard Bruce & Co. v. J. Simpson & Co.*, 243 N.Y.S.2d 503, 505-06 (N.Y. Sup. Ct. 1963). *See also* *Seymour Grean & Co. v. Grean*, 82 N.Y.S.2d 787 (N.Y. App. Div. 1948).

180. *Industrial & General Trust, Ltd. v. Tod*, 73 N.E. 7, 9 (N.Y. 1905).

loyalty and act as an incentive for the employee's remaining with the company and to work harder at his assigned tasks, the result reached by the court would be appropriate.<sup>181</sup> If, instead, it is designed to withhold earnings until the project is completed and paid for, abuse of rights analysis would conclude that the discretion had been abused.<sup>182</sup>

Justice Scalia engaged in much of this kind of reasoning when sitting on a similar case on the D.C. Circuit. In *Tymshare, Inc. v. Covell*,<sup>183</sup> the employer, Tymshare, was empowered to retain a portion of the sales representatives' earnings in a reserve fund. The earnings were calculated in part based on a sales quota assigned to each of the representatives. The quota could be raised or lowered from time to time and "management reserves the right to change . . . individual quota and reserve payments at any time during the quota year within their sole discretion."<sup>184</sup> Covell argued that a retroactive increase in his quota at the time of his termination was in bad faith. The employer urged that "sole discretion" precluded inquiry into its motives. Scalia stated that the phrase was "not necessarily the equivalent of 'for any reason whatsoever, no matter how arbitrary or unreasonable.'" The trial court had found that the employer had breached the contract by manipulating the quota plan. As understood by the Circuit Court, this meant the trial court found "that in using its quota adjustment authority (combined with its termination authority) to reduce Covell's compensation, Tymshare was not acting for any of the purposes implicitly envisioned by the contract. . . . [W]e agree that this would be a proper basis for judgment against Tymshare." A theory of abuse of rights was employed.

As Scalia states, "even the permissible act performed in bad faith is a breach only because acts in bad faith are not permitted under the contract."<sup>185</sup> This sentence is framed in the language of abuse of rights. The trial court was given a mandate to inquire into the purposes for which the employer retroactively raised Covell's quota at the time of the termination of his employment. If it was done to deprive him of his earned compensation, it was in bad faith and he was entitled

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181. In *Walker v. American Optical Corp.*, American's sales incentive plan promised bonuses to employees exceeding a certain quota provided they were still working for American at the time of distribution. Walker far exceeded his quota, but voluntarily left American before distribution. He sued for his bonus. The court affirmed a judgment for American, reasoning that an employer's duty to pay a bonus which is subject to a condition precedent of performance arises only when the condition is fulfilled. Here, the purpose of the plan was to secure the continued services of employees producing high levels of sales. The promise of a bonus helps advance that purpose, as does the denial of a bonus to an employee who leaves the company. *Walker v. American Optical Corp.*, 509 P.2d 439, 441 (Or. 1973) (en banc).

182. See Burton, *Breach of Contract*, *supra* note 87, at 379-85; see also *id.*, at 385 n.74 (noting that "[t]he purpose of the discretion exercising party is a key factor.").

183. 727 F.2d 1145 (D.C. Cir. 1984).

184. *Id.* at 1150.

185. *Id.* at 1150 n.3.

to damages. This reasoning is perfectly consistent with abuse of rights analysis.<sup>186</sup> Indeed, a Louisiana case, on similar facts, states that “the exercise of a right without legitimate and serious interest, even where there is neither alleged nor proved an intent to harm, constitutes an abuse of right which courts should not countenance.”<sup>187</sup>

### C. Conditions of Satisfaction

If a contract contains a provision that a party need not pay for a performance that is not satisfactory to him or her, a court reviewing that party’s expression of dissatisfaction, after determining that the contract does not contain a standard of satisfaction, must first pigeon-hole the condition into one of two categories.<sup>188</sup> If the performance is intended to gratify personal taste, fancy, or judgment, the courts have limited the review of an expression of dissatisfaction to the honesty of the party; if the dissatisfaction is eccentric, but honest, the party need not pay. This result is based on a straight-forward interpretation of the contract and does not engage any notion of abuse of rights.

On the other hand, where the performance involves mechanical fitness, utility or marketability, the court reviews the party’s expression of dissatisfaction utilizing the criterion of reasonableness as well as the test of good faith.<sup>189</sup> The test of reasonableness does not necessarily reflect the intent of the parties. Rather, it is a court-imposed standard based on the notion that, without such a constructive term, a party can abuse the power granted by the contract to refuse to pay for a performance.

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186. Similar reasoning is employed in *Wakefield v. Northern Telecom, Inc.*, where an incentive compensation plan contained an express condition that the employee be employed by the company on the date that the payment is due. The Second Circuit remanded with instructions that the jury be charged to determine if the defendant discharged the plaintiff for the purpose of avoiding the payment of the incentive commissions. *Wakefield v. Northern Telecom, Inc.*, 769 F.2d 109 (2d Cir. 1985). See *Wyss v. Inskip*, 699 P.2d 1161 (Or. App. 1985) (stressing in a “sole discretion” case that the purpose of the bonus program was to retain key personnel and that it had succeeded in keeping plaintiff on the job; his dismissal and denial of a bonus were for reasons unrelated to his performance of the job and therefore a breach of the promise of a bonus); see also *Hainline v. General Motors Corp.*, 444 F.2d 1250, 1255 (6th Cir. 1971) (stating in a bonus case that “discretion may not be abused by those to whom it is entrusted . . .”); *Holderman v. Huntington Leasing Co.*, 483 N.E.2d 175, 176 (Ohio Ct. App. 1984) (declaring that “any controversies regarding this plan shall be decided exclusively by [employer] in its sole discretion”). But see *Stinger v. Stewart & Stevenson Services, Inc.*, 830 S.W.2d 715, 720 (Tex. Ct. App. 1992) (stating in an incentive compensation case that “[the] arrangement may be modified or changed upwards or downwards at any time at the Company’s discretion,” and holding that the company had discretion to go downwards to zero).

187. *Morse v. J. Ray McDermott & Co.*, 344 So. 2d 1353, 1369 (La. 1976).

188. CALAMARI & PERILLO, *supra* note 64, at 503-04; 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 646 (1960); James Brook, *Conditions of Personal Satisfaction in the Law of Contracts*, 27 N.Y. L. SCH. L. REV. 103 (1981).

189. *Duplex Safety Boiler Co. v. Garden*, 4 N.E. 749 (N.Y. 1886) (concerning the remodeling of a boiler); *Johnson v. School Dist No. 12*, 312 P.2d 591 (Or. 1957).

D. Requirements Contracts

Other abuse of rights cases decided under the heading of good faith include those where the core of the problem is the discretionary exercise of a right. These include cases in which the contract gives a party the power to determine the quantity term. In *Orange & Rockland Utilities, Inc. v. Amerada Hess Corp.*,<sup>190</sup> an electric utility entered into a contract to purchase its requirements of oil from a refiner for a fixed period at a fixed price. The market price of oil skyrocketed. The utility started to generate more power than usual and sold it to neighboring utilities at prices that were cheaper than they could generate on their own. The refiner resisted the utility's orders to the extent they exceeded historical quantities, and successfully defended an action for breach as the utility was acting in "bad faith."<sup>191</sup> As to this requirements contract, the good faith obligation is explicit in the applicable provision of the Uniform Commercial Code,<sup>192</sup> the obligation, however, had been developed at common law.<sup>193</sup> The rationale is simple. Although on its face the contract appears to have permitted the utility to buy all the oil its facilities could use, it was not within the contemplation of the parties that the purchases would be for the purpose of furnishing electricity on a wholesale basis, beyond what had been its custom, to other utilities. The apparently absolute right to buy its requirements had been abused. This result can be obtained by the process of contract interpretation rather than a court-imposed doctrine of abuse of right. One of the rules of contract interpretation is designed to deter abuses of rights. As Corbin states, "[i]f . . . the words of agreement can be interpreted so that the contract will be fair and reasonable, the court will prefer that interpretation."<sup>194</sup>

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190. 397 N.Y.S.2d 814 (N.Y. App. Div. 1977).

191. *Id.* at 820; accord *City of Lakeland v. Union Oil Co.*, 352 F. Supp. 758 (M.D. Fla. 1973); *Homestake Mining Co. v. Washington Public Power Supply System*, 476 F. Supp. 1162 (N.D. Cal. 1979), *aff'd per curiam*, 652 F.2d 28 (9th Cir. 1981). A requirements-contract case arising out of the same oil and gas shortage that affected *Orange & Rockland* reached the conclusion that on its own facts, there was no breach of the good faith obligation of the buyer, although the buyer purchased considerably more jet fuel pursuant to the contract. The practice known as "fuel freighting"—filling the plane's tank at the location where the price is most favorable—was both a trade usage and course of dealing and performance between the parties. *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429 (S.D. Fla. 1975).

192. U.C.C. § 2-306; see also *American Original Corp. v. Legend, Inc.*, 652 F. Supp. 962, 963-64, 68 (D. Del. 1986) (applying the U.C.C. provision). The contract provided that "The American Original Corporation will supply adequate cages for fishing operations." The supplier, in turn, agreed to buy the other party's output of surf clams and quahogs up to a stated maximum. It contended that the quoted provision gave it absolute discretion as to the number of cages it would provide. The court ruled that this provision required American Original to supply an adequate supply of cages measured by the buyer's requirements. *Id.*

193. *New York Central Iron Works Co. v. United States Radiator Co.*, 66 N.E. 967 (N.Y. 1903).

194. 3 CORBIN, *supra* note 188.



A buyer under a requirements contract may go out of business in good faith, thereby ceasing to have requirements.<sup>195</sup> However, if the requirements buyer incorporates the business in which the product is used, and announces that the requirements are now zero, the buyer will be liable for breach of contract.<sup>196</sup> The right to go out of business has been abused and liability attaches, although from a formal perspective no breach of the obligation to take requirements has occurred. Once again, in another context, courts have struck down an abuse of rights.

### E. Commercial Leases

Another context where the abuse of rights has been held to violate the implied covenant of good faith and fair dealing is in cases of commercial leases. In *Dutch Crystal Dairies, Inc. v. Neisloss*,<sup>197</sup> the lease expressly gave the tenant an exclusive right to operate a supermarket in a shopping center. The landlord's subsequent plan to build a supermarket structure on adjacent land for a competitor of the tenant was enjoined. The court remarked that the percentage lease between the landlord and tenant required "extreme good faith by each party, both as to the interpretation and as to the performance of the agreement."<sup>198</sup> Clearly, the decision is not based on an interpretation of the agreement which specifically described the boundaries of the tenant's exclusive rights. Rather, its basis is the law-imposed duty to refrain from an abusive exercise of one's rights. The landlord's conduct constitutes what Professor Summers calls evasion of the spirit of the deal.<sup>199</sup> From another perspective, decisions of this kind "prevent a party from acting opportunistically—acting in a way that diminishes the parties' joint return on a contract in order to capture a larger return for itself—under circumstances that the parties probably did not anticipate when drafting the contract."<sup>200</sup>

Of course, tenants as well as landlords are capable of abusing a percentage lease. Under a percentage lease, the tenant is required to occupy the premises and use good faith efforts to maximize revenues unless the lease provides otherwise

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195. See, e.g., *Empire Gas Corp. v. American Bakeries Co.*, 840 F.2d 1333 (7th Cir. 1988); *Angelica Uniform Group, Inc. v. Ponderosa Systems, Inc.*, 636 F.2d 232 (8th Cir. 1980); *R.A. Weaver & Assocs., Inc. v. Asphalt Constr., Inc.*, 587 F.2d 1315 (D.C. Cir. 1978); *HML Corp. v. General Foods Corp.*, 365 F.2d 77 (3d Cir. 1966); *Tennessee Valley Auth. v. Imperial Prof'l Coatings*, 599 F. Supp. 436 (E.D. Tenn. 1984); *Wilsonville Concrete Products v. Todd Bldg. Co.*, 574 P.2d 1112 (Or. 1978); 1 CORBIN, *supra* note 84, at § 4.6.

196. See *Western Oil & Fuel Co. v. Kemp*, 245 F.2d 633 (8th Cir. 1957); see also RESTATEMENT (SECOND) OF CONTRACTS § 205 illus. 1 (1979).

197. 190 N.Y.S.2d 737 (App. Div. 1959), *aff'd mem.*, 167 N.E.2d 643 (N.Y. 1960); see also RESTATEMENT (SECOND) OF CONTRACTS § 205 illus. 2 (1981) (using *Dutch Crystal Dairies* as the basis of its illustration); *Carter v. Adler*, 291 P.2d 111 (Cal. Dist. Ct. App. 1955); *Tabet v. Sprouse-Reitz Co.*, 409 P.2d 497 (N.M. 1966).

198. *Dutch Crystal Dairies, Inc.*, 190 N.Y.S.2d at 738.

199. See Summers, *Good Faith*, *supra* note 164, at 234-35.

200. Gergen, *supra* note 170, at 1273.

or provides for a substantial minimum rent.<sup>201</sup> If the tenant under such a lease ceases to do business or operates a competing operation in the immediate vicinity of the leasehold, liability may ensue. This liability may be based on a theory of bad faith, the doctrine of prevention, or ostensible interpretation of the contract.

In the above cases, the court's employment of the good faith rationale produces results that are satisfactory. Why then is there a need to employ an abuse of rights rationale? It is simply that the concept of good faith is so multifarious as to provide little guidance to the court. Abuse of rights thinking, although itself somewhat elastic, provides a steadier rudder. An examination of some cases where good faith analysis failed to provide a result consistent with civilized norms of decision may prove the point. These are reviewed in Part VII of this paper.

## VII. ABUSIVE REFUSAL TO CONSENT TO THE ASSIGNMENT OF A LEASE, DISTRIBUTORSHIP, OR FRANCHISE

### A. Leases

Courts applying classical contract law hold that a lessor, franchisor, or manufacturer can withhold consent to an assignment of a lease, distributorship, or franchise without any liability. *Gruman v. Investors Diversified Services, Inc.*<sup>202</sup> is a typical case of abuse of landlord power. The tenant wished to vacate commercial space under a lease that had a clause forbidding subletting or assignment without the consent of the landlord. The tenant found that the post office was a willing assignee. The landlord refused to approve the assignment. One may speculate that a landlord may have good reason not to want the post office as a tenant, but such speculation does not explain the conduct in this case, inasmuch as "it was stipulated that the postmaster-general of the United States was in all respects a highly satisfactory, desirable, and suitable subtenant. . . ."<sup>203</sup> One might speculate further as to why the landlord withheld consent. Did the landlord want to capture an increase in rental value by dealing directly with a new tenant?<sup>204</sup> Not

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201. See, e.g., *Fifth Avenue Shopping Center, Inc. v. Grand Union Co.*, 491 F. Supp 77 (N.D. Ga. 1980); *College Block v. Atlantic Richfield Co.*, 254 Cal. Rptr. 179 (Ct. App. 1988); *Slater v. Pearle Vision Center, Inc.*, 546 A.2d 676 (Pa. Super. Ct. 1988); *Ingannamorte v. Kings Super Markets, Inc.*, 260 A.2d 841 (N.J. 1970); *Swartz v. War Memorial Comm'n of Rochester*, 267 N.Y.S.2d 253 (App. Div. 1966). In *Stop & Shop, Inc. v. Ganem*, 200 N.E.2d 248 (Mass. 1964), the court indicated that if the tenant vacated the premises out of "spite or to inflict harm," there would be liability, even where there was a substantial minimum rent. *Id.* at 253.

202. 78 N.W.2d 377 (Minn. 1956).

203. *Id.* at 379.

204. See *Truschinger v. Pak*, 513 So. 2d 1151 (La. 1987) (holding that a landlord's refusal to consent to a sublease was not an abuse of right, even though the sublessee was willing to completely assume the lease). The landlord refused to consent to the sublease unless one-half of \$80,000 promised to the prior lessee from the sublessee were to be paid to him. This was held not to be an abuse of right. The landlord's economic motive

so. The tenant vacated the premises. The premises remained vacant and the landlord brought an action for rent. The court framed the issue as follows: "The only issue is whether under the lease clause above quoted plaintiffs could arbitrarily refuse to accept the suitable subtenant proffered by defendant."<sup>205</sup> It answered with candor that the landlord can arbitrarily refuse to approve a subletting and may arbitrarily refuse to mitigate damages. If one function of contract law is to be in the service of the commercial economy, is a standard of "arbitrary" discretion an appropriate commercial standard?

Some courts have thought that it is not an appropriate standard. According to the California Supreme court, "[a] growing minority of jurisdictions now hold where a lease provides for assignment only with the prior consent of the lessor, such consent may be withheld *only where the lessor has a commercially reasonable objection to the assignment. . . .*" (Emphasis in original).<sup>206</sup> Such a rule is consistent with an evolutionary change in other areas of contract law. Most contracts are imbedded in a commercial context. If the naked words are stripped from the context, their meaning is distorted. Classic contract law imposed such distortion. Modern contract law is seriously concerned with the context of the words.

In France, such landlord conduct is treated as an abuse of right.<sup>207</sup> Louisiana is the only jurisdiction in the United States to have overtly adopted a doctrine of abuse of rights. Its courts have stated that the refusal to consent to a sublease is subject to the abuse of rights doctrine, holding, however, on the facts of the cases that there had been no abuses.<sup>208</sup>

A non-lease Louisiana case illustrates the utility of the abuse of rights doctrine. In *Sanborn v. Oceanic Contractors, Inc.*,<sup>209</sup> the plaintiff had worked for the defendant Oceanic in Dubai in the United Arab Emirates. Some months after the employment terminated, plaintiff was offered a job in Dubai with Scimitar, another employer. The immigration regulations in the Emirates provided that he

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was legitimate, violated no moral rules, was not in bad faith or in violation of elementary fairness. *Id.*

205. *Gruman*, 78 N.W.2d at 379. The court cited cases from a score of jurisdictions that were in accord. In the subsequent bankruptcy proceeding of *In re Bellanca Aircraft Corp.*, 850 F.2d 1275 (8th Cir. 1988), the issue was the value of two agreements licensing the bankrupt to manufacture and market two kinds of aircraft. Both contracts had clauses prohibiting assignability without the consent of the licensor. The trial court rules that under Minnesota law the contracts had no value because the licensors could arbitrarily and irrationally withhold consent. The Eighth Circuit affirmed.

206. *Kendall v. Ernest Pestana, Inc.*, 709 P.2d 837, 841 (Cal. 1985) (en banc). *Accord* *Economy Rentals, Inc. v. Garcia*, 819 P.2d 1306 (N.M. 1991).

207. See Judgment of Feb. 22, 1968, Cass. civ. 3e, Recueil Dalloz [D.S. Jur.] (Fr.); see also VOYAME ET AL., *supra* note 19, at 25.

208. See, e.g., *Illinois Cent. Gulf R.R. v. International Harvester*, 368 So. 2d 1009 (La. 1979) (assessing a case where a landlord refused to consent to sublease, but instead counter-offered to rescind the lease because the property value had risen substantially). Abuse of right has been unsuccessfully invoked in Louisiana eviction cases, as well. See, e.g., *G.I.'s Club of Slidell, Inc. v. American Legion Post # 374*, 504 So. 2d 967 (La. Ct. App. 1987); *Housing Authority v. Herbert*, 387 So. 2d 693 (La. Ct. App. 1980).

209. 448 So. 2d 91 (La. 1984).

was eligible for entry only if the former employer “released his work visa.” Oceanic refused to supply such a release. Plaintiff brought an action for tortious interference with a contract. The lower court dismissed the complaint, ruling that plaintiff had failed to show any duty on the part of Oceanic to provide a release. The Supreme Court of Louisiana remanded with instructions to allow the plaintiff to amend his complaint to allege that Oceanic had abused its right not to provide a release, and, alternatively, that a duty existed under Emirate law to provide the necessary release. The doctrine of abuse of rights, as applied to these facts, was framed in the following fashion:

Also, even if Oceanic had the right afforded by laws of the United Arab Emirates, not to consent to plaintiff’s employment with Scimitar, the exercise of that right, without any benefit to Oceanic . . . might constitute an actionable abuse of rights which would support an award of damages.<sup>210</sup>

*B. Franchises, Dealerships and Distributorships*

In *Walner v. Baskin-Robbins Ice Cream Co.*,<sup>211</sup> the court expressed the classical view of a franchisor’s power to disapprove the assignment of a franchise. “Once it is established that [the franchisor] possessed the right to disapprove a transfer, contract law permits [the franchisor] to exercise that right without regard to good faith or motive.”<sup>212</sup> This view has been challenged.

In *Larese v. Creamland Dairies, Inc.*,<sup>213</sup> a franchise agreement provided that it could not be assigned without the consent of the franchisor.<sup>214</sup> Acting under this provision, the franchisor refused to consent to the franchisee’s sale of the business. It argued that its right to withhold consent was absolute. The court disagreed, holding that the franchisor had a duty to act in good faith and in a commercially reasonable manner. A contrary result could be reached only by the implication of a covenant that the franchisor could withhold consent in bad faith and unreasonably. The court refused to pass on the hypothetical question of the effect of a provision “expressly granting the right to withhold consent unreasonably.”<sup>215</sup>

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210. *Id.* at 94.

211. 514 F. Supp. 1028 (N.D. Tex. 1981).

212. *Id.* at 1031.

213. 767 F.2d 716 (10th Cir. 1985).

214. *Id.* at 717.

215. *Id.* at 718; accord *Dunfee v. Baskin Robbins*, 720 P.2d 1148, 1153-54 (Mont. 1986). *Contra* *Hubbard Chevrolet Co. v. General Motors Corp.*, 873 F.2d 873, 878 (5th Cir. 1989) (stating that there is no room for the covenant of good faith and fair dealing when contract language on the issue of relocation is clear). See also *Morrison v. International Harvester Co.*, 204 F. Supp. 6 (D. Colo. 1962), *appeal dismissed*, 306 F.2d 492 (10th Cir. 1962). The dealership contract contained an express nonassignability clause. Nonetheless, the

C. Analogous Cases of Withheld Consent

There are other cases in which a contract obligates a party to refrain from otherwise rightful conduct without the consent of the other. Perhaps typical is *Castle v. McKnight*.<sup>216</sup> A ranch owned by two brothers, containing internal fences, was divided between them by agreement. The boundary lines were not marked by fences. One of the brothers sold some of his portion to third parties who requested and obtained an agreement from the brothers to the effect that neither the brothers nor the purchasers would move fences near the boundary lines without the consent of the other party. The agreement made it clear, however, that the parties recognized that the fences did not mark the boundaries. Some years later, a successor in interest to the purchasers decided to erect new fences at the boundary line to take advantage of forty-four acres of pasture. After formal negotiation with the brothers, their consent was not obtained. The trial judge ruled that there was no limitation on the right of the brothers to withhold consent. The Supreme Court of New Mexico disagreed. Since the contract was silent as to the question of reasonableness of the withholding of consent, the court adopted the *Restatement (Second) of Contracts'* approach to omitted terms, stating "if a contract is silent as to the manner of performance, 'a term which is reasonable in the circumstances is supplied by the court.'"<sup>217</sup> The technique of implying a covenant of reasonableness is not dissimilar to the implication of a covenant of good faith. On the margins, however, an unreasonable determination may be made in good faith because the standard is objective rather than subjective. Among the justifications for implying a covenant of reasonableness, however, was a rationale normally associated with the covenant of good faith: "Neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract."<sup>218</sup>

One could greatly multiply examples in this category of "analogous cases of withheld consent." However, this paper will merely mention cases cited by the

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manufacturer was notified of the proposed assignment, participated in the negotiations and found the proposed buyers to be satisfactory. Later, but before the assignment was effectuated, it decided that no dealer was needed at that location. It was held liable for interfering with the contract between its dealer and the prospective purchaser. The court was able to characterize the manufacturer's conduct as a waiver of the nonassignability clause. *Id.* at 7-8; *see also* *Anthony Pools, A Division of Anthony Industries, Inc. v. Charles & David, Inc.*, 797 S.W.2d 666, 675 (Tex. Ct. App. 1990) (denying error where consent had been given in writing, but the scope of it had been subsequently drastically limited; an action by the franchisee for interference with a contract was allowed).

216. 866 P.2d 323 (N.M. 1993).

217. *Id.* at 326; *see id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 204 (1981)).

218. *Id.* at 326; *see id.* (quoting *Economy Rentals, Inc. v. Garcia*, 112 N.M. 748, 759 (1991), which quoted *Kendall v. Ernest Pestana, Inc.*, 709 P.2d 837, 842 (Cal. 1985)). The ultimate source of the quotation appears to be *Kirke La Shelle Co. v. Paul Armstrong Co.*, 188 N.E. 163 (N.Y. 1933). In *Kirke La Shelle*, the quoted sentence concludes with the clause, "which means that in every contract there exists an implied covenant of good faith and fair dealing." *Id.* at 167.

court to buttress its opinion. The *Castle* court quoted dictum from an Iowa decision that one principle of contract construction provides that "a contract will not be interpreted as giving discretion to one party in a manner which would put one party at the mercy of another."<sup>219</sup>

In one of the cited cases in point, a separation agreement provided that the wife would not remove property from the husband's house without his consent.<sup>220</sup> When he refused to give his consent, she sued for conversion. Once again, a trial court dismissed the complaint. On appeal, it was held that the denial of consent could not be arbitrary. This was held both on the grounds of interpreting the probable intent of the parties and of implying terms for the purpose of doing equity. Abuse of rights analysis leads to the same result. Despite his property rights and his contractual privilege to withhold consent, his act of depriving his wife access to her property was an abusive exercise of those rights; whatever purpose the contractual clause was designed for, it was not to deprive her perpetually from possession of her personal property.

## VIII. ABUSIVE TERMINATIONS OF CONTRACTS

### A. Scope of the Topic

As used here, "termination" is restricted to the ending of a contractual relationship by exercise of a power expressly provided in the contract other than for breach.<sup>221</sup> A termination clause may require so little notice as to be unconscionable as of the time the contract is made.<sup>222</sup> This is not the concern of this paper. Rather, we will examine some cases to see if courts sanction abusive terminations. It has long been the law of South Carolina that an actionable wrong is committed "if the manner of termination is contrary to equity and good conscience."<sup>223</sup> Similarly, a Nevada court has ruled that a public contract containing a provision that it could be terminated for the convenience of the county is subject to the implied covenant of good faith and fair dealing.<sup>224</sup> Contrariwise, a court applying the law of Idaho has ruled that good faith is not relevant where the

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219. *Castle*, 866 P.2d at 326; *see id.* (quoting *Iowa Fuel & Minerals, Inc. v. Iowa State Board of Regents*, 471 N.W.2d 859, 863 (Iowa 1991)).

220. *Clayburgh v. Clayburgh*, 218 N.Y.S. 457 (App. Div. 1926).

221. This is consistent with the definition of "termination" in U.C.C. § 2-106.

222. *Ashland Oil Co. v. Donahue*, 223 S.E.2d 433, 440 (W. Va. 1976); *see also* U.C.C. § 2-309(3). *But see* *Corenswet, Inc. v. Amana Refrigeration, Inc.*, 594 F.2d 129, 136 (5th Cir. 1979), *cert. denied*, 444 U.S. 938 (1979).

223. *deTreville v. Outboard Marine Corp.*, 439 F.2d 1099, 1100 (4th Cir. 1971); *see id.* (citing *Philadelphia Storage Battery Co. v. Mutual Tire Stores*, 159 S.E. 825 (S.C. 1931), and *Gaines W. Harrison & Sons v. J.I. Case Co.*, 180 F. Supp. 243 (E.D.S.C. 1960)).

224. *A.C. Shaw Constr. v. Washoe County*, 784 P.2d 9, 9-10 (Nev. 1989).

contract contains an express termination clause.<sup>225</sup> The law is in flux in this area and shockingly, U.C.C. § 2-309 is not even noticed in many cases in which it clearly or arguably provides the governing rule.<sup>226</sup> A comment in the *Louisiana Law Review*, after reviewing the cases, urges the Louisiana courts to apply the doctrine of abuse of rights to terminations that are in bad faith, or on short notice.<sup>227</sup> The argument is moot in the many jurisdictions where the legislature has stepped in with franchising legislation to regulate terminations and non-renewals of franchises thus rectifying the inadequacy of the common law decisions.<sup>228</sup>

### B. Abusive Insurance Terminations

Several days before the great Chicago fire of October 8-10, 1871, the plaintiff obtained fire insurance coverage from the defendant. The policy was terminable on notice and on the return of the premium. As the fire raged, an agent of the company notified the plaintiff of termination of the policy and claimed to have tendered the return of plaintiff's premium. The court upheld a judgment for the plaintiff enforcing the insurance policy, saying, "[i]t cannot be claimed that an insurer against fire can, when the fire is approaching the property insured, cancel the policy . . . Of what avail would it be, to take a policy against fire, to permit its cancellation when the fire is approaching?"<sup>229</sup>

Today, the insurance termination or non-renewal problem that confronts the insured most severely involves the health insurance policy. In *Cataldie v. Louisiana Health Service & Indemnity Co.*,<sup>230</sup> insured's dependent daughter had brain cancer. She was covered by a non-group family policy that was terminable by simply giving notice. The insurer, in effect terminated the policy by decreasing coverage, and radically increasing the deductible and the premium. The court held that the policy as originally written continued in effect. It was able to reach this

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225. *Triangle Mining Co., v. Stauffer Chemical Co.*, 753 F.2d 734 (9th Cir. 1985); *see id.* (involving a mineral lease of phosphate bearing land and an obligation of the lessee to supply the lessor's requirements of phosphate). In *Triangle Mining Co.*, though, no one seemed to think that the U.C.C. had any relevance to this mixed mineral lease and requirements contract, even though footnote 5 of the opinion noted that several cases have held that the good faith requirement of the U.C.C. does not limit the exercise of a termination clause. Apparently such a clause, in the courts opinion, creates an absolute power. *Id.* at 740.

226. *But see STO Corp. v. Henrietta Building Supplies, Inc.*, 609 N.Y.S.2d 746, 747 (App. Div. 1994) (stating that "[a]bsent an agreement with respect to the duration of their relationship, either party was at liberty to terminate the distributorship at any time upon reasonable notification to the other (*see* U.C.C. 2-309 [2], [3]).").

227. Pannal A. Sanders, Comment, "At Will" Franchise Terminations and the Abuse of Rights Doctrine: *The Maturation of Louisiana Law*, 42 LA. L. REV. 210 (1981).

228. *See* 1 GLADYS GLICKMAN, FRANCHISING ¶ 9.03[14][b] (Gary I. Cohen ed. 1994).

229. *Home Insurance Co. v. Heck*, 65 Ill. 111, 114 (1872).

230. 456 So. 2d 1373 (La. 1984).

conclusion on the basis of a provision of a Louisiana statute. In so doing however, it surveyed the law in the other states, stating:

When confronted with this type of situation all modern authorities we have found conclude that the policy cannot be terminated as to illness, injury or condition arising before the insurer's cancellation. They differ only as to the theory of the decision: Ambiguity—*Sparks v. Republic National Life Insurance Co.*, [647 P.2d 1127 (Ariz. 1982), *cert. den.* 459 U.S. 1070] (cancellation of medical benefits policy); Public Policy—*Brown v. Blue Cross & Blue Shield of Mississippi*, 427 So. 2d 139 (Miss. 1983) (cancellation of medical benefits); *Gulf Guaranty Life Insurance Co. v. Kelley*, 389 So. 2d 920 (Miss. 1980) (attempted cancellation of credit life policy following insured's heart attack); Detrimental Reliance—*Mutual Ben. Life Ins. Co. v. Robison*, 54 F. 580 (C.A. Iowa) *aff'd* 58 F.723 (8th Cir. 1893); Implied Covenant of Good Faith—*Spindle v. Travelers Insurance Co.*, 136 Cal.Rptr. 404, 66 Cal.App.3d 951 (2d Dist. 1977) (cancellation of medical malpractice policy). Reasonable Expectations of Insured Honored—*See, Keeton Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV.

*See also*, *Blue Cross-Blue Shield of Alabama v. Turner*, 43 Ala. App. 542, 195 So. 2d 807 (Ala. App. 1966) (pregnancy benefits payable despite prior cancellation of group hospital and medical expenses policy); *National Life & Accident Ins. Co. v. Dove*, 167 S.W.2d 257 (Tex. Civ. App. 1942) (cancellation of health benefits not operative as to benefits for continuing illness). *Dossey v. Life & Casualty Ins. Co. of Tenn.*, 177 So. 427 (La.App. 2d Cir. 1937) (right to cancel life, health, and accident policy suspended as per insurance contract for disability existing at notice of cancellation); *National Life Ins. Co. v. Jackson*, [18 Ga.App. 494, 89 S.E. 633 (1916)].

These theories involve many of the considerations which we would employ in deciding such a case as this under the abuse rights doctrine. *See e.g.*, Cueto-Rua, "Abuse of Rights," 35 LA. L. REV. 965 (1975); Comment, 42 LA.L.REV. 210 (1981). Since we have concluded that our decision is governed by the contract and statutory law, there is no need for us to consider that doctrine in this case.<sup>231</sup>

If, as Karl Llewellyn taught, the right decision in a case where the facts are uncontroverted is "immanent,"<sup>232</sup> the various courts that have passed on the

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231. *Id.* at 1376-77.

232. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* 122 (1960).



termination of insurance policies after the insured is stricken with a critical medical condition have found the right answer. The right answer is then shored up by the most variegated reasoning. An overt acceptance of a doctrine of abuse of rights would provide sound grounds for such holdings.<sup>233</sup>

"Claims made" professional errors and omissions policies are common. They cover only those claims that are made against the insured for the life of the policy regardless of when the alleged tortious act occurred or when the injury ensued. In *Heen & Flint Associates v. Travelers Indemnity Co.*,<sup>234</sup> a mine exploded, resulting in death and destruction. The insured, an engineering partnership, notified the insurer that the situation *potentially* would result in claims, but no claims were made during the policy period and the insurer refused to renew the policy. Despite the general availability of retroactive coverage, no other insurer would write coverage for the partnership without specifically excluding coverage for any liability stemming from the mine explosion. The court points out that only one of many cases in the United States had held that a policy that limits coverage to "claims made" to be against public policy and that the rest upheld such policies on the ground that retroactive coverage was available.<sup>235</sup> After aligning itself with the majority, the court ruled that the contract was unconscionable because the insurer refused to renew and no other insurer would accept the retroactive risk. The court quoted the unconscionability provision of the *Restatement (Second) of Contracts* which requires that unconscionability be viewed from the vantage point of the time of making the contract, not from the time of performance.<sup>236</sup> Yet the court's reasoning seems to view the subsequent conduct of the insurer as the unconscionable event. A theory of abuse of right supplies a rationale that is sounder. If the exercise of a right is unconscionable, it is abused. Unconscionability is best left in its role of policing the contract terms *ex ante*.

More clear cut cases of abuse of rights can hardly be imagined. There is no doctrine in the library of classical or neoclassical contract law to explain the

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233. Insurance experts might disagree that such holdings are sound. One writes, "[i]n accident and sickness insurance, to take one example, cancelable policies are written at premium rates *considerably below* those for noncancelable policies." FRANK J. ANGELL, *INSURANCE: PRINCIPLES AND PRACTICES* 61 (1959) (emphasis in original). This information, however, is available to actuaries and rarely to insureds. Our expert, however, continues, "a few companies apparently are abusing this [cancellation] privilege." *Id.* Another text defending the difference between cancelable and noncancelable policies, based on cost, notes that "the loss of health insurance at the time when it is most needed might be a serious financial blow." EMMETT J. VAUGHAN & CURTIS M. ELLIOTT, *FUNDAMENTALS OF RISK AND INSURANCE* 248 (1978); *see id.* (discussing in the context of a refusal to renew rather than termination of a policy).

234. 400 N.Y.S.2d 994 (1977).

235. *Id.* at 997; *see id.* (quoting from *Jones v. Continental Casualty Co.*, 303 A.2d 91 (N.J. Super. Ct. Ch. Div. 1973)). In *Jones*, the court stated "[c]learly the policy provisions in effect inhibit freedom of contract. In order for plaintiff to maintain coverage or have continuity of coverage, he must continue to have defendant as the insurance carrier. Such provisions do inhibit freedom of action in this field." *Jones*, 303 A.2d at 94.

236. *Heen & Flint Assocs.*, 400 N.Y.S.2d at 998; *see id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981)). The actual citation was to § 234 of the tentative draft, which has been renumbered in the final document.

results in these cases, although one may always trot out “public policy” or “bad faith” as the horse on which to saddle it. An overt doctrine of abuse of rights would be a much more satisfactory explanation.

In *Murphy v. Seed-Roberts Agency, Inc.*,<sup>237</sup> the insurer issued three-year policies with a 90-day termination clause. The insurer sent out notices of termination, allegedly on the grounds that it wanted to reissue the policies at a higher rate of premium. The insureds brought an action. The court ruled that summary judgment for the insurer was improper. The insureds might be successful on any one of three theories: (1) Parol evidence could show that the intent of the parties was that there could be no termination except for cause; (2) evidence could be adduced showing that the terminations were in bad faith,<sup>238</sup> or (3) it might be shown that the terminations were against public policy. This is a less clear cut case of abuse of rights than the other insurance termination cases discussed above. A court, using abuse of rights theory, would want to know the purposes served by insurance termination clauses. There is likely an industry understanding (whether or not known by the industry’s customers) that would show what purposes such clauses serve in the actuarial practices of the industry. If the termination here was inconsistent with those purposes, the exercise of the termination clause was abusive.

### C. Abusive Acceleration of a Debt or Calling in a Demand Note

A bank promises a grocery business a line of credit of \$3.5 million, fully secured by inventory and accounts receivable. The agreement permits the bank to call in the loan on demand. After a period of time, the business puts in its requisition for \$800,000, which would make the bank’s exposure somewhat less than \$3.5 million. The bank refuses to advance the funds despite that, as confirmed by the bank’s own audits, the loan was more than fully secured, despite that no prior notice was given of the bank’s intentions, and despite the bank’s knowledge that its refusal would doom the borrower’s business. A jury verdict for \$7.5 million against the bank was upheld.<sup>239</sup> The bank was aware that the borrower’s continued existence was entirely at the whim or mercy of the bank. Therefore, good faith required either (a) prior notice of refusal to honor the line

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237. 261 N.W.2d 198 (Mich. Ct. App. 1977).

238. *Id.* at 203. In a case with similar facts, the court held that an allegation that the cancellation was in bad faith was sufficient to withstand a demurrer. *Spindle v. Travelers Ins. Cos.*, 136 Cal. Rptr. 404, 408 (Cal. App. 1977).

239. *K.M.C. Co., v. Irving Trust Co.*, 757 F.2d 752, 766 (6th Cir. 1985); *see id.* (applying New York law); *see also* Barbara A. Fure, *Contracts as Literature: A Hermeneutic Approach to the Implied Duty of Good Faith and Fair Dealing in Commercial Loan Agreements*, 31 DUQ. L. REV. 729 (1993) (arguing that such results should be based on the reasonable expectations of the borrower rather than on the duty of good faith); Jay M. Zitter, Annotation, *What Constitutes “Good Faith” under U.C.C. § 1-208 Dealing with “Insecure” or “At Will” Acceleration Clauses*, 85 A.L.R. 4TH 284 (1991) (discussing related cases).

of credit, or (b) a valid business reason, "some objective basis upon which a reasonable loan officer in the exercise of his discretion would have acted in that manner."<sup>240</sup> Note that the "bad faith" of the bank did not consist of malice or an intent to injure; its behavior was merely "an abuse of discretion," conduct that was utterly unreasonable and inconsistent with standard banking practices.<sup>241</sup>

It is noteworthy that on facts that were quite similar, the Supreme Court of Canada reached the same result, applying the concept of abuse of rights under the law of Quebec.<sup>242</sup> According to the court,

[T]he time has come to assert that malice or the absence of good faith should no longer be the exclusive criteria to assess whether a contractual right has been abused. . . . [T]here can no longer be a debate in Quebec law that the less stringent standard of 'the reasonable exercise' of a right, the conduct of the prudent and reasonable individual, as opposed to the more stringent test of malice and the absence of good faith, can ground liability resulting from an abuse of contractual rights.<sup>243</sup>

In *Tymshare, Inc. v. Covell*,<sup>244</sup> Justice Scalia, in discussing the limitations of the duty of good faith in contract performance or enforcement, stated in dictum "[w]e cannot imagine, for example, entertaining a claim that a demand for payment of a demand note has been made 'in bad faith.'"<sup>245</sup> But the jurisprudence of "we recognize absolute rights when we see them" is precisely that which was rejected in the two banking cases just discussed. A knowledge of commercial practice is essential before such judgment can be made that the rights and obligations created by a demand note are what is written on a piece of paper. The

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240. *K.M.C. Co.*, 757 F.2d at 761 (citation omitted).

241. *Id.* at 760.

242. *Banque Nationale du Canada v. Houle*, [1990] 3 S.C.R. 122; see Rosalie Jukier, Case Comment, *Banque Nationale du Canada v. Houle* (S.C.C.): Implications of an Expanded Doctrine of Abuse of Rights in Civilian Contract Law, 37 MCGILL L.J. 221 (1992). This Canadian case is complicated by the fact that the action was by the shareholders of a family owned corporation, rather than the corporation itself. Before the action was brought the shareholders had sold the corporation at a price considerably lower than might have been obtained had the bank not taken the precipitous action that it took. *Houle*, [1990] 3 S.C.R. at 122.

243. *Houle*, [1990] 3 S.C.R. at 154-55.

244. 727 F.2d 1145 (D.C. Cir. 1984).

245. *Id.* at 1153. Some cases have so held. See, e.g., *Center Bank v. Distributors, Inc.*, 705 S.W.2d 42, 46-48 (Mo. Ct. App. 1985) (holding that the imposition of a good-faith defense for payment of the demand note transcends the performance or enforcement of the contract). See generally Dennis M. Patterson, *Good Faith, Lender Liability, and Discretionary Acceleration: Of Llewellyn, Wittgenstein, and the Uniform Commercial Code*, 68 TEXAS L. REV. 169 (1989) (discussing the meaning and application of demand notes and acceleration clauses in loan agreements); Patricia A. Milon, Note, *Recent Development, Implied Covenants of Good Faith and Fair Dealing: Loose Cannons of Liability for Financial Institutions?*, 40 VAND. L. REV. 1197 (1987); Jay M. Zitter, Annotation, *What Constitutes "Good Faith" under U.C.C. § 1-208 Dealing with "Insecure" or "At Will" Acceleration Clauses*, 85 A.L.R. 4TH 284 (1991 & Supp. 1994); Lori J. Henkel, Annotation, *Bank's Liability for Breach of Implied Contract of Good Faith and Fair Dealing*, 55 A.L.R. 4TH 1026 (1987 & Supp. 1994).

attempt to catalog *a priori* the rights that are “absolute” seems doomed to failure, and it should be so doomed. It is probably impossible to foresee how any particular right may be abused in such a way as to violate civilized norms, or, less grandly, customary norms of commercial behavior.

Most of the cases under this heading exemplify the third category in the Dutch restatement quoted above,<sup>246</sup> that is, when a right “is exercised in circumstances in which, taking into account the interests served and those which are harmed, no reasonable person would have decided to exercise it.”

## IX. BAD FAITH IN ENFORCEMENT OF THE CONTRACT

### A. Meaning of “Contract Enforcement”

Section 1-203 of the Uniform Commercial Code imposes an obligation of good faith in the “performance and enforcement” of any contract or duty governed by the Code, as does the *Restatement (Second) of Contracts*. Although the Code does not provide much guidance as to what is meant by good faith in enforcement, a comment to the *Restatement* provides some guidance,<sup>247</sup> and an excellent law review article by Eric Andersen is a further guide.<sup>248</sup> Enforcement is frequently by litigation, but enforcement mechanisms may be agreed-upon components of the contract itself. As Professor Andersen points out, a termination clause may be “a device by which the parties’ performance obligations may be brought to an orderly conclusion,”<sup>249</sup> or it may be an enforcement clause.

According to Andersen, in approaching the question of whether there has been an abuse of an enforcement mechanism provided by contract, the first question to ask is whether the contract term is an enforcement mechanism.<sup>250</sup> The second question to ask is whether under the circumstances, the invocation of the term will advance the purposes the term was intended to promote.<sup>251</sup> It is abusive if it (a) does not advance the purposes and serves purposes other than those it for

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246. See *supra* note 6 and accompanying text.

247. See RESTATEMENT (SECOND) OF CONTRACTS §205 cmt. e (1981) (stating:

The obligation of good faith and fair dealing extends to the assertion, settlement and litigation of contract claims and defenses. . . . The obligation is violated by dishonest conduct such as conjuring up a pretended dispute, asserting an interpretation contrary to one’s own understanding, or falsification of facts. It also extends to dealing which is candid but unfair, such as taking advantage of the necessitous circumstances of the other party to extort a modification of a contract for the sale of goods without legitimate commercial reason. . . . Other types of violation have been recognized in judicial decisions: harassing demands for assurance of performance, rejection of performance for unstated reasons, willful failure to mitigate damages, and abuse of power to determine compliance or to terminate the contract. (Cross references and citations omitted)).

248. Eric G. Andersen, *Good Faith in the Enforcement of Contracts*, 73 IOWA L. REV. 299 (1988).

249. *Id.* at 302.

250. *Id.* at 312.

251. *Id.*

which it was designed, or (b) the invocation for a proper purpose could have been avoided by reasonable steps the invoking party might have taken without prejudicing the party's own position.<sup>252</sup> Andersen's analysis is within the main stream of abuse of rights theory.

*B. Abusive Enforcement of Valid Covenants Not to Compete*

Covenants not to compete ancillary to employment contracts are not favorites of the law. They deprive the public of the competitive services of the employee. Also, they frequently act harshly on the employee. There is no intent to discuss here the many facets of the legal problems affecting such covenants. The topic here is limited to the employee who has entered a *valid* covenant that meets the tests of consideration and public policy and suffers from no infirmity such as fraud. If such an employee is discharged without cause, will the covenant be enforced? Would not such enforcement be unconscionably abusive? The answer of classical contract law is that a valid contract exists and should be enforced.<sup>253</sup> Yet, very many cases have employed flanking devices such as artful interpretation,<sup>254</sup> the exercise of equitable discretion,<sup>255</sup> and even by stretching the

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252. This is a paraphrase of the elements of bad faith enforcement as stated by Andersen. *See supra* note 248, at 312.

253. *See Torrington Creamery v. Davenport*, 12 A.2d 780, 782-83 (Conn. 1940) (enjoining the violation of a covenant not to compete between a discharged manager and the new owners of a dairy creamery, but finding significant the fact that the owners had requested that the manager be enjoined from competing only in two towns); *see also Robert S. Weiss & Assocs. v. Wiederlight*, 546 A.2d 216, 222 (Conn. 1988) (interpreting an employment contract which contained a covenant restricting the employee from engaging in commercial business within a 15-mile radius for two years, and holding that upon expiration of the four-year term of employment the covenant was activated); *Orkin Exterminating Co. v. Harris*, 164 S.E.2d 727, 728-29 (Ga. 1968) (granting injunctive relief for violating a restrictive covenant, and concluding that "[t]hese covenants (restrictive) on the part of the employee shall be construed as an agreement independent of any other provision in this agreement, and the existence of any claim or cause of action of the employee against the company whether predicated on this agreement or otherwise, shall not constitute a defense to the enforcement by the Company of said covenants"); *Gomez v. Chua Medical Corp.*, 510 N.E.2d 191, 195 (Ind. Ct. App. 1987) (holding that where an at-will employment was terminated by the employer, the covenant would be enforced even if the firing were "essentially arbitrary"); *MacIntosh v. Brunswick Corp.*, 215 A.2d 222, 225 (Md. 1965) (discussing the rule that restrictive covenants not to compete will be enforced if the restriction is confined as to area and duration within limits no wider than necessary to protect the business and without imposing undue hardship on the employee or disregarding the interests of the public); *Spaulding v. Mayo*, 122 A. 899, 900 (N.H. 1923) (raising this issue but not answering it, as it was the employees, apparently at will, who quit and entered into competition); *Vermont Elec. Supply Co. v. Andrus*, 315 A.2d 456, 458 (Vt. 1974) (saying of an employee who voluntarily quit, "[h]e was not placed in the double bind of being both fired and subject to five years of employment restraint.").

254. *See Grant v. Carotek, Inc.*, 737 F.2d 410 (4th Cir. 1984) (construing a restrictive covenant strictly and determining that it was unreasonable and unenforceable); *Derrick, Stubbs & Stith v. Rogers*, 182 S.E.2d 724, 726 (S.C. 1971) (holding that termination of the contract of employment also terminated the covenant). Many covenants are written to prevent such a holding.

255. *See Frierson v. Sheppard Bldg. Supply Co.*, 154 So. 2d 151, 155 (Miss. 1963) (stating that "[h]ad the chancellor found that appellant's discharge was arbitrary, capricious, or in bad faith, he could have refused to lend the aid of equity in enforcing the contract"); *Ma & Pa, Inc. v. Kelly*, 342 N.W.2d 500, 502-03 (Iowa

equitable doctrine of “unclean hands.”<sup>256</sup> Other courts basically have sputtered that enforcement would be unjust.<sup>257</sup> A recognized doctrine of abuse of rights would explain why such a covenant will not be enforced by either law or equity where the employee is discharged for the convenience of the employer. The shared purpose of an employment agreement containing a covenant not to compete is to protect the employer from conduct that is in the penumbra of unfair competition while assuring the employee a means of practicing the trade or profession for which the employee is trained. The employee’s purpose in agreeing to the covenant is to practice this trade or profession with the employer who has now destroyed the assurance of a job while seeking to prevent the employee from working at such a job elsewhere. Such enforcement would be a grave abuse of rights.

### C. Economic Waste in Enforcement

There is a recent federal common-law, cutting-edge case in the area of economic waste and contract enforcement. In *Granite Construction Co. v. United States*,<sup>258</sup> the plaintiff agreed to construct a lock and a dam for the United States. The lock and dam walls consist of concrete monoliths 60 feet high, 42 feet long and 30 feet wide. Plaintiff was required to install PVC waterstop in the joints between the monoliths. After approximately 10% of the waterstop had been applied, the Corps of Engineers determined that the waterstop did not meet contract specifications and required that the waterstop be removed and replaced. Plaintiff filed a \$3.8 million claim for the removal and replacement work. Under

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1984) (holding that the cause for the termination was only one factor in determining whether an injunction should issue); *Security Services, Inc. v. Priest*, 507 S.W.2d 592, 595 (Tex. App. 1974) (noting that “equity may deny enforcement of the covenant if the employer acts arbitrarily and unreasonably in discharging the employee. . .”).

256. See *Chicago Towel Co. v. Reynolds*, 152 S.E. 200, 201 (W. Va. 1930) (denying an injunction on the basis of the “unclean hands” doctrine; the employee had been discharged without notice on the ground that his salary was too high).

257. See *Bailey v. King*, 398 S.W.2d 906, 908 (Ark. 1966) (explaining that “if an employer obtained an agreement of this nature from an employee, and then, without reasonable cause, fired him, the agreement would not be binding. In other words, an employer cannot use this type of contract as a subterfuge to rid himself of a possible future competitor”); *Post v. Merrill, Lynch, Pierce, Fenner & Smith*, 397 N.E.2d 358, 361 (N.Y. 1979) (noting that “[w]here the employer terminates the employment relationship without cause, however, his action necessarily destroys the mutuality of obligation on which the covenant rests as well as the employer’s ability to impose a forfeiture. An employer should not be permitted to use offensively an anticompetition clause coupled with a forfeiture provision to economically cripple a former employee and simultaneously deny other potential employers in his services”). The attempt to base the result on mutuality of obligation is like the flailing of a non-swimmer. First, mutuality of obligation is an obsolete and abandoned doctrine. See *CALAMARI & PERILLO*, *supra* note 64, at § 4-12(c); *CORBIN*, *supra* note 112, at ch. 6. Second, in the typical at-will employment, there is no obligation on the employee, except perhaps the covenant itself. A theory of abuse of rights is inherent in the rest of this quotation. In *Dutch Maid Bakeries v. Schleicher*, 131 P.2d 630 (Wyo. 1942), the court said that the employer’s conduct “savored with injustice.” *Id.* at 636.

258. 962 F.2d 998 (Fed. Cir. 1993), *cert. denied*, 113 S.Ct. 965 (1993).

the contract, the government had the power to require the contractor to replace all material which did not comply with the contract requirements, “unless in the public interest, the Government consents to accept such material or workmanship with an adjustment in the contract price.”<sup>259</sup> The facts tended to show that the waterstop that had been applied, although in violation of the specifications, was more than adequate for the performance standards of the project by a factor of twenty. They also demonstrated that the Corps had failed to consider the contractor’s offered alternative methods to improve the waterstopping strength of the already installed material. Moreover, it was clear that the deviation from the specifications was the fault of a supplier and not of the contractor; also, the Corps had been remiss in exercising oversight during the time the non-conforming waterstop was applied. Relying on Judge Cardozo’s opinion in *Jacob & Youngs, Inc. v. Kent*,<sup>260</sup> and its progeny, the Federal Circuit held that the removal and replacement of the waterstop involved economic waste and the contractor was entitled to recover for the additional work.<sup>261</sup>

There is a considerable leap from the holding in *Jacob* to that of *Granite Construction*. In the former case, the issues were whether (a) a condition should be constructed, and (b) what would be the proper measure of damages—questions of remedies. The answers to such questions are supplied by law and only to a limited extent by the agreement of the parties.<sup>262</sup> In *Granite Construction*, the court was dealing with an agreement that required the contractor to comply with the government’s directives as to the method of cure and the contractor did in fact comply with the directive.<sup>263</sup> The Court held that the government’s unreasonable demand was an abuse of its right to administer the contract and therefore, entitled the contractor to compensation.<sup>264</sup>

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259. *Id.* at 1005.

260. 129 N.E. 889 (N.Y. 1921), *reh’g denied*, 130 N.E. 933 (N.Y. 1921).

261. 962 F.2d at 1007-08. See generally Hal J. Perloff, Comment, *The Economic Waste Doctrine in Government Contract Litigation*, 43 DE PAUL L. REV. 185, 218-22 (1993) (discussing the *Granite Construction* decision in the context of economic waste).

262. See CALAMARI & PERILLO, *supra* note 64, at 595-96 (referring to “the dubious assumption that damages for breach of contract are based upon the contracting parties’ implied or express promise to pay damages in the event of a breach, rather than based upon a secondary duty imposed by law as a consequence of the breach”).

263. In *Jacob & Youngs v. Kent*, the architect ordered the contractor to redo the piping work. The order was not carried out. In denying rehearing, the court explained

The court did not overlook the specification which provides that defective work shall be replaced.

The promise to replace, like the promise to install, is to be viewed, not as a condition, but as independent and collateral, when the defect is trivial and innocent. The law does not nullify the covenant, but restricts the remedy to damages.

*Jacobs & Young v. Kent*, 130 N.E. 930, 933 (1921).

264. *Accord Toombs & Co.*, ASBCA Nos. 34590 et al., 91-1 B.C.A. (CCH) 23,403 at 117,433; 1990 WL 172728 (A.S.B.C.A.). Claim #IX in this case involved a contracting officer’s order for the contractor to remove and replace some metal boots at a location where return air ducts terminated on floor grilles. The boots were in violation of specifications because they were bent; the contractor had failed to brace them adequately while pouring concrete around them. The contractor refused, asserting correctly that the defects were not

D. Abusive Cancellations for Breach

In *Publicker Chemical Corp. v. Belcher Oil Co.*,<sup>265</sup> the contract for the storage of oil provided that “[i]n the event either party shall default in the performance of any obligation” that is not cured within fifteen days, the other party could terminate the contract.<sup>266</sup> Because of the declining storage price, the defendant stood to save \$2,500,000, if it could cancel the contract. Despite a “no offsets” clause, the plaintiff unjustifiably withheld \$4,800 for “agitation charges.” The defendant, after a fifteen day period, canceled the contract. The court, applying Louisiana law, ruled that the cancellation was ineffective, saying “[t]ermination of a \$5 million dollar [sic] contract because of [a] \$5,000 dispute, if not absurd, is surely unreasonable.”<sup>267</sup> Rather than utilize the Louisiana theory of abuse of rights, the court indulged in a frequently employed covert tool—artful interpretation. It held that the default clause permitted cancellation only for failure to perform a primary obligation. Such an interpretation made the clause meaningless because Louisiana law permits cancellation for material breach even without such a clause.<sup>268</sup> If a theory of abuse of rights were employed by the court, a less disingenuous explanation might have been given.

Other enforcement mechanisms permitted by the U.C.C., such as stoppage in transit, have been faulted when used in an abusive way, for example: failing to notify the buyer of stoppage of deliveries that were en route to Pennsylvania from Norway and Japan.<sup>269</sup> Rejection of goods that fail to conform to the perfect

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visible and had no effect on the air flow. The contracting officer withheld \$20,000 as the cost of repair. It was held that repair would have involved unreasonable economic waste and the contractor should be paid. *Id.*

265. 792 F.2d 482 (5th Cir. 1986).

266. *Id.* at 484 n.2 (emphasis added); see also *Liza Company v. Mark Hellinger Theatre, Inc.*, 240 N.Y.S.2d 1000, 1002 (App. Div. 1963) (discussing an advertising clause which provided that “a violation of this clause shall be considered a violation of the whole contract”); *id.* at 1006 (dismissing the fact that the clause had been violated, and reasoning that the “[defendants] had already determined to end the theatre agreement, and the claim of the advertising breach was also a mere afterthought seized upon by them in an effort to justify a position which they had already assumed”).

267. *Publicker Chemical Corp.*, 792 F.2d at 487.

268. Not all civil law jurisdictions accept the idea that a contracting party can cancel for material breach. See Joseph M. Perillo, *Unidroit Principles of International Commercial Contracts: The Black Letter Text and a Review*, 63 FORDHAM L. REV. 281, 306-08 (1994). Louisiana law does provide for such self help. LA. CIV. CODE ANN. art. 2013 (West 1987).

269. *Indussa Corp. v. Reliable Stainless Steel Supply Co.*, 369 F. Supp. 976 (E.D. Pa. 1974). The judge withdrew his earlier bench opinion to the effect that “I do consider it morally reprehensible that [seller] gave no such notice to [buyer], and I would certainly hope that in similar situations in the future [seller’s] corporate conduct would be guided by proper moral principles.” *Id.* at 983-84. Similarly, cancellation without prior notice of a contract for specially manufactured goods, the production of which was overdue, was held to be a violation of the duty of good faith. *KLT Indus. v. Eaton Corp.*, 505 F. Supp. 1072 (E.D. Mich. 1981). This can be seen as another abusive cancellation case.



tender rule has been held to be a breach where the motive for the rejection was to take advantage of falling market prices.<sup>270</sup>

### *E. Abusive Bankruptcy*

Although creditors may be injured when an obligor declares bankruptcy, such injury is regulated by the Bankruptcy Act and generally the creditor has no legal redress outside of the bankruptcy proceeding. In *Pernet v. Peabody Engineering Corp.*,<sup>271</sup> the plaintiff sold his business to a subsidiary of the defendant. In return, the subsidiary promised to employ defendant for five years at a stated salary plus commissions. The defendant parent corporation guaranteed the subsidiary's obligations to the plaintiff in the event the subsidiary defaulted because of its sale, merger, dissolution, or the like. Plaintiff was held to have stated a cause of action by alleging that the defendant caused the bankruptcy of the subsidiary to deprive the plaintiff of his employment rights. In other words, if defendant used its management prerogatives in an abusive way so as to cause the subsidiary's bankruptcy, it would be in violation of the agreement—even though the guaranty did not apply to the risk of bankruptcy of the subsidiary.

In another case, the owner of undeveloped land defaulted on the mortgage. The mortgagee brought an action to foreclose. The owner, who had no other major assets, filed a petition for bankruptcy reorganization. Such a petition has the effect of suspending the state court foreclosure action. The petition was summarily dismissed as having been brought in bad faith since there was no prospect of a successful reorganization. Although the multifaceted concept of good faith was employed, the more targeted concept of abuse of rights provides a more coherent explanation: It is a case of a right being employed for a purpose other than that for which it was created.<sup>272</sup>

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270. See *T.W. Oil, Inc. v. Consolidated Edison Co.*, 443 N.E.2d 932 (N.Y. 1982); *Oil Country Specialists, Ltd. v. Phillip Bros., Inc.*, 762 S.W.2d 170 (Tex. Ct. App. 1988); see also *Cambee's Furniture, Inc. v. Doughboy Recreational, Inc.*, 825 F.2d 167, 175 (8th Cir. 1987) (cancellation for breach would, if merely for a pretextual reason, violate the covenant of good faith and fair dealing); accord *Neumiller Farms, Inc. v. Cornett*, 368 So. 2d 272 (Ala. 1979); *Printing Ctr. of Texas, Inc. v. Supermind Publishing Co.*, 669 S.W.2d 779 (Tex. Ct. App. 1984).

271. 248 N.Y.S.2d 132 (App. Div. 1964).

272. *Matter of Little Creek Dev. Co.*, 779 F.2d 1068 (5th Cir. 1986) (collecting cases). See generally Lawrence Ponoroff & F. Stephen Knippenberg, *The Implied Good Faith Filing Requirement: Sentinel of an Evolving Bankruptcy Policy*, 85 NW. U.L. REV. 919 (1991).

X. ABUSE OF RIGHTS AS A CRIME

A. *Blackmail*

The paradox of blackmail has intrigued theorists of many schools of thought.<sup>273</sup> If I am free to reveal to my neighbor's wife that her husband is having an affair, and if I am equally free to keep this information a secret, and if I am also free to sell this information to a newspaper or other medium of information, or gossip about it with my friends and acquaintances, why then is it a crime to make a bargain with the husband to keep this information secret?<sup>274</sup> An answer is that it is an abuse of my freedoms of speech and silence. James Lindgren explains it best: the blackmailer is seeking an advantage by threatening the victim with the wife's power to end the marital relationship or otherwise react negatively to the husband's infidelity.<sup>275</sup> Similarly, where a blackmailer who has information about criminal conduct threatens to go to the police or prosecutor with that information unless the blackmail victim pays him \$10,000, the blackmailer is using the power of the state for his own financial gain. "Thus when a blackmailer threatens to turn in a criminal unless paid money, the blackmailer is bargaining with the states's chip."<sup>276</sup> Lindgren points out that blackmail, bribery, payola, insider trading, and commercial bribery have a common thread. The criminal uses the resources or power of another for the criminal's own benefit. He describes this use of public leverage as a "misuse."<sup>277</sup> This analysis falls well within a theory of abuse of rights. Our legal system, indeed the Constitution, assures us of freedom to speak and freedom to be silent. One could enumerate numerous purposes these freedoms serve.<sup>278</sup> But freedom to bargain away, for private gain, our right to give information to the police or to the prosecution is not among these purposes. If the bargain is initiated by the person having the harmful information, the crime is blackmail. If the initiative comes from the party who is fearful of prosecution, this party's crime may be conspiracy, obstruction of justice, or

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273. See, e.g., Symposium, *Blackmail*, 141 U. PA. L. REV. 1565 (1993); see also James Lindgren, *Blackmail: An Afterword*, 141 U. PA. L. REV. 1975 (1993) (summarizing the different views on the reasons for criminalizing blackmail); Peter Alldridge, 'Attempted Murder of the Soul': *Blackmail, Privacy and Secrets*, 13 OXFORD J. OF LEGAL STUD. 368 (1993) (expressing an additional view).

274. MODEL PENAL CODE § 223.4 (1962) is entitled "Theft by Extortion" and includes what is commonly known as "blackmail." It provides, in part, that "[a] person is guilty of theft if he purposely obtains property of another by threatening to: . . . expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute . . ." *Id.*

275. See James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. PA. L. REV. 1695, 1705-08 (1993).

276. *Id.* at 1706.

277. *Id.* at 1707; see *id.* (quoting James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670, 702-03 (1984)).

278. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-1 (2d ed. 1988) (discussing free trade in ideas, an essential tool in self-government, individual dignity, and autonomy).

compounding a felony. No matter which of the crimes has been committed, the party who has been promised payment for silence cannot enforce the bargain.<sup>279</sup>

### *B. Obstruction of Justice*

Anyone is free to communicate with a prosecutor to argue that leniency be afforded a defendant. However, when a social acquaintance of the prosecutor recommends leniency towards a convicted drug dealer, lying about his own motives he is guilty of obstruction of justice.<sup>280</sup> According to *United States v. Mitchell*,<sup>281</sup> the gravamen of the offense in the obstruction of justice case discussed, was the “*use of otherwise legitimate arguments for concealed or falsified ends.*”<sup>282</sup>

Thus, where Mitchell and others attempted to influence the S.E.C.’s investigation into the activities of Robert Vesco, “while concealing the purported motive for those efforts,” their conduct constituted an obstruction of justice.<sup>283</sup> Once again, we see the paradox of behavior that is lawful *per se*, becoming unlawful when exercised for improper purposes. Other examples of this paradox exist elsewhere in the criminal law.<sup>284</sup> These paradoxes are explained by the semantic oxymoron called abuse of rights.

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279. See 6A ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1421 (1962).

280. *United States v. Polakoff*, 121 F.2d 333 (2d Cir. 1941); see *id.* (concealing the fact that he was to receive \$500 for his efforts to assist the defendant, and lying about a local politician’s interest in the case and about his business relationship with the drug dealer) .

281. 372 F. Supp. 1239 (S.D.N.Y. 1973), *appeal dismissed*, 485 F.2d 1290 (2d Cir. 1973).

282. *Id.* at 1251 (emphasis in original); see *id.* (quoting *Polakoff*, 121 F.2d at 333).

283. *Id.* at 1254; see also *United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976) (involving a conspiracy to induce the CIA to prevail upon the FBI to halt its investigation of the Watergate incident).

284. There is a line of cases under 18 U.S.C.A. §§ 1341, 1343, which prohibit mail and wire fraud, involving public officials who did what they were entitled to do but did it for improper motives; the motives combined with the failure to disclose those motives were what made their acts criminal. This line has come to an abrupt end, based on statutory construction. *McNalley v. United States*, 483 U.S. 350 (1987). Citations to this line of cases can be found in the dissenting opinion of Justice Stevens. *Id.* at 362. Other expressions of Justice Stevens, consistent with a doctrine of abuse of rights, include his dissent in *Town of Newton v. Rumery*, 480 U.S. 386, 411 (1987). The plaintiff had been arrested on state charges. An agreement was reached whereby charges would be dropped in exchange for his release of all claims for any harm caused by his arrest. He subsequently brought an action under 42 U.S.C.A. § 1983 against the town and its officers for the alleged violation of his constitutional rights. The court held that the action was barred by the release, which the trial court had held to be voluntary. Stevens, in dissent, wrote that “a defendant who is required to give up such a claim in exchange for a dismissal of a criminal charge is being forced to pay a price that is unrelated to his possible wrongdoing as reflected in that charge.” *Id.* at 412. In short, the prosecutor was using his power to keep the plaintiff in jail as a bargaining chip for the desired release. “The public,” Stevens asserts, “is entitled to have the prosecutor’s decision to go forward with a criminal case, or to dismiss it, made independently of his concerns about the potential damages liability of the Police Department.” *Id.*

## XI. MISCELLANEOUS CASES OF ABUSE OF RIGHTS

Abuse of rights has been the overt basis for decisions in the patent and copyright fields.<sup>285</sup> The doctrine is well known in international law.<sup>286</sup> Numerous cases in which equitable discretion is exercised to refuse specific performance could be analyzed to show their consistency with abuse of rights theory.<sup>287</sup> The world of corporate law is a ripe candidate for abuse of rights analysis, as minority shareholders sometimes successfully protect their interests in court against the majority shareholders.<sup>288</sup> The doctrine of “business purpose” in tax law is another context in which such analysis works. Not surprisingly, there is no similar doctrine in England—still a bastion of the absolute nature of property and contract rights.<sup>289</sup> Most especially ripe for abuse of rights analysis are cases of the abuse of governmental power in the administrative process.

Let me close this “Miscellaneous” category with a mention of a case under the Homestead Act. The defendant in a criminal prosecution had entered upon forested land, staked a Homestead claim, and clear-cut an acre. The logs were taken to a sawmill where they were allegedly sold. The land belonged to the United States and title would vest in the homesteader after five years of cultivation. Another statute prohibited the cutting of trees on “lands of the United States,” except for use by the Navy. The court, in upholding a charge to the jury that the cutting of timber on Homestead land for purposes of sale violated the statute, stated that during the five year period:

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285. See, e.g., *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970 (4th Cir. 1990). In *Lasercomb America*, the plaintiff licensed a copyrighted software package for use in die-making. The license contained a provision obligating the licensee not to produce or sell computer-assisted die-making software of any kind. Defendant licensee produced and marketed infringing software. Held: the action for infringement is dismissed. “Misuse of copyright” is a defense to infringement by analogy to “misuse of patent” defense. *Id.* at 978. See generally Marshall Leaffer, *Engineering Competitive Policy and Copyright Misuse*, 19 U. DAYTON L. REV. 1087 (1994).

286. See 7 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 1 (1984); see also IAN BROWNLEE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 444-46 (4th ed. 1990).

287. See, e.g., *McDowell v. Biddison*, 87 A. 752, 756 (Md. 1913) (commenting that “[i]f to enforce specifically an agreement would do one party great injury and the other but comparatively little good, so that the result would be more spiteful than just, the chancellor will not require its execution” (quoting *McCutcheon’s Heirs v. Rawleigh*, 76 S.W. 50, 51 (Ky. 1903))); see also *Brooks v. Towson Realty, Inc.*, 162 A.2d 431 (Md. 1960). In *Brooks*, vendor would not sell one of two parcels separate from the other. Purchaser acquiesced but asked that the agreement be in two separate contracts with a very low price expressed in one and a high price for the second parcel, explaining that this would be helpful to the purchaser’s income tax liability. Vendor acquiesced and two contracts were made. Purchaser terminated the high price contract pursuant to a clause permitting termination if unrestricted title insurance could not be obtained and sought specific performance of the low price contract. This relief was granted only on the condition that both contracts be performed. *Id.* at 432-37.

288. See *Singer v. Magnavox Co.*, 380 A.2d 969, 975 (Del. 1977) (stating that “Delaware case law clearly teaches that even complete compliance with the mandate of a statute does not, in every case, make the action valid in law.”).

289. See *Ward et al.*, *supra* note 2; *Ward & Cullity*, *supra* note 2.

[S]uch settler had the right to treat the land as his own, so far, and so far only, as is necessary to carry out the purposes of the act. The object of this legislation is to preserve the right of the actual settler, but not to open the door to *manifest abuses of such right*. Obviously the privilege of residing on the land for five years would be ineffectual if he had not also the right to build himself a house, outbuildings, and fences, and to clear the land for cultivation and to that extent the [Homestead] act modifies the act of 1831. . . . It is equally clear that he is bound to act in good faith to the government, and that he has no right to pervert the law to dishonest purposes, or to make use of the land for profit or speculation. (Emphasis added).<sup>290</sup>

This quotation is not a mere linguistic coincidence with the creation of the doctrine of abuse of rights in France decades earlier. Despite many divergences between the conceptual frameworks of the common law of the United States and the codified law of nineteenth century France, there has been much intellectual interchange between the two countries. I do not suggest an interchange that contained a dialogue on the concept of abuse of rights, although that is not impossible.<sup>291</sup> Just as there was a concurrent development of the notion of the absolute nature of rights in the common and civil law,<sup>292</sup> though, there has also been a gradual but concurrent abandonment of such notions of absolutism in the two systems. This erosion of absolutism continues.

## XII. CONCLUSION

This paper does not favor the wholesale importation of a doctrine of abuse of rights from abroad. Rather, it favors the recognition of a concept that can be constructed from cases, doctrines, and statutes indigenous to the United States. Doubtless, there will be those who will consider that such a concept introduces uncertainty into the law. All equitable doctrines, to some extent, increase the law's uncertainty. Long ago, Francis Bacon addressed this issue: "But to this Objection it may be answered in general that where Conscience is to direct the Judge, that Court cannot with any Propriety of Sense or Speech, be said to be

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290. *Shiver v. United States*, 159 U.S. 491, 497 (1895).

291. Professor Yiannopoulos traces the French doctrine of abuse of the rights of ownership to the treatises of Domat and Pothier. Yiannopoulos, *supra* note 2, at 1175. These pre-Napoleonic treatises were well-known in the United States. A Westlaw search for Domat in the SCT-OLD database turns up 57 cases and case briefs citing to Domat. Pothier is also cited with some frequency. Because of the appearance of many references to other individuals surnamed Pothier in this database, no count has been made.

292. *See supra* notes 43-48 and accompanying text.

arbitrary. The Judge knows and is sensible that he sits there, not to dictate according to his Will and Pleasure, but to be guided by that infallible Monitor within his own Breast; and surely he who is bound to determine according to the original and eternal Rules of Justice; is no more arbitrary, then he that is bound to judge according to positive Laws and Statutes . . . .<sup>293</sup>

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293. SIR FRANCIS BACON, *MAXIMS OF EQUITY* 1 (the second of two pages numbered 1 in the 1978 photo reprint of a 1727 printing) (1623).

