

# The Economics of Enmity

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*This Article considers whether courts should regard enmity between litigants as a transaction cost and thus as a justification for awarding damages when a property right would otherwise be available as a remedy. It begins by examining the phenomenon of enmity generally, and concludes that enmities can be both ethically justified and instrumentally useful depending on their origins. The normative status of enmity also depends on the consequences of how it is expressed. The law understandably tends to punish enmity when it motivates out-of-pocket expenditures to make someone else worse off, but generally not when it motivates the absorption of opportunity costs for that purpose. It is very difficult for courts to distinguish between “good” and “bad” enmities, however, and the Article argues that in most cases the best way for courts to cope with this uncertainty is to disregard enmity when fashioning remedies. Exceptions to the rule may be warranted in cases where particular enmities readily can be identified as offensive to public policy or where they will create significant costs for courts or innocent third parties. The Article defends these views against the claim that enmity is best understood as a variety of emotion that justifies damages remedies in cases where it is likely to be pervasive.*

## INTRODUCTION

There is a large literature on the pros and cons of using property rights (for example, injunctions) and liability rules (that is, damages) as remedies at the ends of various sorts of lawsuits.<sup>1</sup> The common premise of the literature is that in fashioning remedies courts ought to take into account, building on Ronald Coase’s famous insight,<sup>2</sup> that after judgment the parties may be able to bargain around whatever remedy the court has awarded. It can be argued, for example, that if bargaining between the parties will be easy, then using a property right as a remedy makes sense because the parties will be able to negotiate their way to an efficient allocation of the property after the case is over. Much of the ensuing discussion in the literature focuses

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<sup>1</sup> See, for example, Louis Kaplow and Steven Shavell, *Property Rules versus Liability Rules: An Economic Analysis*, 109 Harv L Rev 713 (1996); Ian Ayres and Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 Yale L J 1027 (1995); James E. Krier and Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 NYU L Rev 440 (1995).

<sup>2</sup> See Ronald H. Coase, *The Problem of Social Cost*, 3 J L & Econ 1 (1960).

on the complications created for such bargaining by rational, strategic, profit-maximizing behavior by either party.<sup>3</sup>

My interest here lies in a different set of possibilities: parties who do not have the preferences of *homo economicus*. In a prior article I examined a series of nuisance disputes that ended with the issuance of property rights to one side or another, but where no bargaining occurred after judgment either because relations between the parties had become too acrimonious by the time the case was over or because the parties regarded the rights involved as poor subjects for cash exchanges.<sup>4</sup> The purpose of this Article is to consider how courts ought to deal with the first of these possibilities—for example, the property, contract, or other case in which a plaintiff might seem entitled to an injunctive remedy, but where enmity between the parties runs high. If it is clear that the parties to such a case are not going to bargain after judgment—regardless of who wins, let us suppose—because the litigation has reached the status of “feud,” might this be a good reason to withhold the injunction and instead to award damages in an amount to which the parties might have agreed if their relations had not become so thoroughly poisoned?

Eric Posner suggests in a recent paper<sup>5</sup> that when a defendant’s behavior provokes enmity between himself and a plaintiff, courts should indeed be disinclined to award the plaintiff a property right as a remedy, as bargaining over it will be too difficult. I take a different view, regarding enmities as frequently normal and sometimes useful aspects of human preferences rather than as temporary emotional interruptions of the preferences people hold while in a “calm state.”<sup>6</sup> The question is a close and interesting one from the standpoint of economic analysis, which typically assumes not only that people try to satisfy their preferences efficiently, but also that the preferences generally consist of a desire to maximize wealth without reference to likes and dislikes toward possible trading partners. When this last assumption is relaxed, analysis becomes more complicated, requiring value judgments about how much weight to give to preferences that have a controversial ethical footing and unclear social consequences. The preferences bound up in the phenomenon known as enmity are especially vexing because enmity is both a fearsome engine of human misery and a natural and potentially salutary human reaction to injus-

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<sup>3</sup> See note 1.

<sup>4</sup> Ward Farnsworth, *Do Parties to Nuisance Cases Bargain after Judgment?: A Glimpse inside the Cathedral*, 66 U Chi L Rev 373 (1999). See also George Loewenstein, *Out of Control: Visceral Influences on Behavior*, 65 Org Beh & Human Dec Processes 272, 288 (1996).

<sup>5</sup> Eric A. Posner, *Law and the Emotions*, 89 Georgetown L J 1977, 2006–10 (2001) (“Money damages are the superior remedy when the nuisance creates anger and hard feelings. . . . Injunctions are more suitable when emotion is unlikely to interfere with bargaining.”).

<sup>6</sup> *Id.* at 1978.

tices and wrongs. Enmity thus furnishes a case study in how economic analysis might accommodate complex and difficult preferences.

I shall argue that enmity exists in good and bad varieties from both an ethical and economic standpoint. One of my goals will be to rehabilitate the bad reputation that enmity generally enjoys. Whether any particular instance of enmity is laudable or lamentable depends on its origins and expression. Unfortunately, courts usually lack the ability to differentiate between good and bad enmity in any given case, and any more general solution to the problem—treating enmity as a transaction cost, or treating it as just another source of preferences—is bound to create errors of various sorts. The important questions thus are which types of errors are most bothersome, and what other policies might be advanced or retarded by awards of property rights in circumstances dominated by enmity. My general thesis is that a liberal strategy of ignoring enmity, and thus of awarding property rights even where enmity will foreclose bargaining after judgment, is usually the better approach for courts to take.

I will begin in Part I by locating the problem of enmity within a larger set of commodification preferences people may have about whether and when to treat their entitlements as subjects of bargaining, and will suggest that the hard questions about such preferences from an economic standpoint are whether and when they should be considered types of transaction costs. Part II briefly discusses the relationship between enmity and settlement. Part III argues that enmity can be ethically justified and instrumentally useful depending on its origins and how it is expressed. It may be an ethically justified consequence of misbehavior by another party and the danger that enmity, if created, may cause bargaining to break down creates an important incentive for parties to cooperate *ex ante*. Part IV surveys the law's treatment of enmity elsewhere, and finds it broadly consistent with the understandings of enmity just described. It is punished when it motivates out-of-pocket expenditures to make someone else worse off, but generally not when it motivates the absorption of opportunity costs for that purpose. And enmity is not punished at all when the consequences it motivates are good, suggesting that, at least in this setting, the consequences of acts are more important to the law than their moral origins.

Part V of this Article argues that it is very difficult for courts to distinguish in practice between good and bad enmity, so the hard question is how enmity should be handled when the extent of its reasonableness is unknown and when it may result in a forgone transaction that otherwise would have made both parties better off. I argue that the law ordinarily should pay no attention to enmity when fashioning remedies, though exceptions to the rule may be warranted in

cases where the enmity readily can be identified as offensive to public policy or where it will create significant costs for courts or innocent third parties. Part VI defends this view against the claim that enmity is a variety of emotion that justifies damages rather than property rights when it is present.

### I. COMMODIFICATION PREFERENCES GENERALLY

In a world where everyone is happy to bargain over everything with anyone, there might be just two useful questions in thinking through problems of valuation and the efficient formulation of remedies: how much each person would be willing to bid for any given entitlement, and the size of the transaction costs involved (that is, how expensive bargaining would be as a practical matter). But in situations where people are not always happy to bargain over things, or to bargain with just anyone, it is important to have ways to think about such preferences. I will call those considerations *commodification preferences*. The term is meant to cover all preferences regarding whether and in what circumstances to sell an entitlement—not only whether to treat a right as a commodity, but also when and in exchange with whom. Occasionally such preferences may dominate all other preferences concerning an entitlement (for example, the animal that is “free to a good home” or the case in which *A* would rather not buy at all than buy from *B*); in other circumstances they may be inconsequential. It is useful in any event to have a way to denote and call attention to often overlooked preferences not quite *for* things but *about* those things and whether and when and to whom they should be sold.

It may be convenient to think of commodification preferences as those that diverge from the preferences participants in an auction would be expected to have. A seller at an auction normally wants to obtain the highest possible bid for his goods without caring who the bidder is. The farther we move toward areas of life in which people do not regard their rights as suitable subjects for an auction, the more significant the commodification preferences we encounter. This way of thinking has illustrative value but is potentially misleading, for bidders at auctions do have commodification preferences of their own; they have decided that the items on the block are suitable subjects for a cash sale, and express those preferences by participating in the auction. The commodification preferences are just less visible because they meld with the bidders' preferences for the goods on which they are bidding. But once a buyer succeeds in acquiring goods at an auction, a more interesting set of preferences may come into play: he may be disinclined to resell them, or more inclined to resell them to some bidders than to others. Those commodification preferences may affect his price, sometimes in complicated ways; and if those preferences no

longer meld seamlessly with the price he would pay (or require) at an auction, they are consequential and are of interest to students of valuation.

Vigorous commercial markets, like auctions, may be characterized by nearly invisible commodification preferences. In these situations—the market for peas, for instance—knowing how much customers are ready to bid for a good often will tell us everything useful to know about their valuation of it. It would not add anything to learn about the customers' commodification preferences, because they do not care where they buy the good, or from whom. One nevertheless can imagine separating commodification preferences from others even here. If you thought that peas were being treated as overly fungible, or that peas harvested by nonunionized workers should be the subject of a boycott, you might want to contest the prevailing and invisible commodification preferences widely held about peas.

The preferences I want to consider are those that do diverge from the preferences of participants in auctions. It is on those occasions that multiple and potentially conflicting dimensions of valuation are present and it is then that it becomes most useful to distinguish commodification preferences from other preferences. Litigation can furnish such instances. When people resort to courts to establish their rights, the rights often may be the subject of heated attachment and conflict. The process of resolving a dispute through litigation may itself cause changes in those attachments and conflicts, and in other aspects of the parties' relationships to their rights and to each other. And since in many litigation settings bilateral monopoly is a common characteristic of parties' relations after judgment, there often will be no room for an arbitrageur to enter the picture and mitigate the consequences of any commodification preferences the parties have vis-à-vis each other. Commodification preferences then have the potential to be an important source of error in valuation by a court, because by definition they often will not be registered in any visible market, making them difficult to price. The notion of commodification preferences that are distinct in interesting ways from the preferences people have at auctions thus may or may not be of great interest to an economist examining a thick market, but the idea has potential interest in particular for economic analysts of *law*.

Several additional points about commodification preferences are worth bearing in mind from the outset. First, my claim is not that commodification preferences are likely to be infinitely valuable to their holders. It is that they can be valuable enough to be consequential. If we speak of someone who regards a property right as incommensurable with cash, we generally do not mean that there is no price at which the person would sell the right. Such extraordinary

cases may or may not exist, but we normally have in mind the less dramatic situation where those views merely cause the holder of a right to resist bargaining enough to prevent a deal from being made. In effect, the price necessary to overcome the reservations about commensurability is greater than the surplus from trading that would exist if the resistance were not in the way. The commensurability problem, even if not infinite, is decisive and prevents a sale. The same story can be told about cases in which enmity or other preferences or norms about the circumstances of sale make otherwise productive bargaining prohibitively difficult.

Next, commodification preferences should be distinguished from irrationality. Rationality is, of course, a term used in many different ways by different writers. When economists use it, they typically mean people's propensity to match their means to their ends with as little waste of their resources as possible.<sup>7</sup> They normally aspire to agnosticism about the content of the preferences people may have: "Rationality means little more to an economist than a disposition to choose, consciously or unconsciously, an apt means to whatever ends the chooser happens to have."<sup>8</sup> But much economic analysis also relies on additional and less explicit assumptions:<sup>9</sup> that people have no objection in principle to bargaining over any given entitlements they hold, or that they will not permit their views of other people to interfere with an otherwise advantageous deal. At first these might seem to be aspects of the assumption mentioned a moment ago that people match their means to their ends. Perhaps people who want to avoid treating certain entitlements as bargaining chips are violating that assumption—and behaving irrationally—by failing to seize chances to maximize their pecuniary wealth. Yet it is an economic commonplace that people seek to maximize not pecuniary wealth but their satisfaction.<sup>10</sup> Thus if people take satisfaction in avoiding bargaining and are

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<sup>7</sup> A rich discussion of possible definitions is found in Jon Elster, *Sour Grapes: Studies in the Subversion of Rationality* 1–42 (Cambridge 1983). Cooter and Ulen define rationality as requiring that the parties' preferences be "stable" in the sense that they "must be transitive at any point in time, and they must not alter very quickly with the passage of time." Robert Cooter and Thomas Ulen, *Law and Economics* 234 & n 8 (Harper Collins 1988). See also Robert H. Frank, *The Strategic Role of the Emotions: Reconciling Over- and Undersocialized Accounts of Behavior*, 5 *Rationality & Socy* 160, 161–62 (1993) (examining definitions of rationality, including "the efficient pursuit of whatever goals one happens to hold at the moment of action" and "the efficient pursuit of self-interested preferences").

<sup>8</sup> Richard A. Posner, *Economic Analysis of Law* 17 (Aspen 5th ed 1998).

<sup>9</sup> See Elster, *Sour Grapes* at 10 (cited in note 7).

<sup>10</sup> Richard A. Posner, *Overcoming Law* 16 (Harvard 1995):

The individual imagined by economics is not committed to any narrow, selfish goal such as pecuniary wealth maximization. Nothing in economics prescribes an individual's goals. But whatever his goal or goals . . . he is assumed to pursue them in forward-looking fashion by comparing the opportunities open to him at the moment when he must choose.

willing to forgo benefits to indulge this preference, there is nothing inconsistent with economics in recognizing and accounting for this. At least much of the time, then, commodification preferences might best be considered aspects of the parties' ends: part of what they want, not impediments to their obtaining what they want. Perhaps some commodification preferences are indeed irrational, but there is no more reason to regard them that way generally than there is to condemn any other set of preferences as irrational.

Rationality may also be used in a lay sense to refer to reasonableness, or to an ability to discipline one's immediate wishes so that they do not interfere with one's long-term interests. It is in roughly these senses that "irrationality" becomes a pejorative. But neither of these senses of rationality is what economists mean by the term, nor is either what I mean by commodification preferences—which may or may not be reasonable, and which may or may not serve the long-term interests of their holders. The economist's assumption of rationality is not an assumption that people have reasonable-looking utility schedules; the investment banker, the oil painter, and the suicide bomber equally may be described as rational in the economist's sense. Likewise, the holder of vigorous preferences about whether to sell his entitlements, and to whom, may also be described as rational.

Third and finally, it is also possible to conflate too easily commodification preferences with transaction costs. Again, the latter term has been defined variously by different writers: it has been suggested that transaction costs are obstacles to bargaining that in principle could be overcome by technology,<sup>11</sup> or that "zero transaction costs" implies cooperative bargaining,<sup>12</sup> or that zero transaction costs is the assumption "that we can ignore all costs of buying and selling other than the price paid,"<sup>13</sup> or that a world without transaction costs is "an ideal world peopled by homines economici."<sup>14</sup> These verbal formulations obscure the distinction between obstacles to transacting that are practical (too many parties) and consensual (too much acrimony). But as they are applied in practice the definitions invariably refer to the practical obstacles that may prevent parties

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Economics "does not assume that individuals are motivated solely by selfishness or material gain. [Economics] is a method of analysis, not an assumption about particular motivations." Gary S. Becker, *Nobel Lecture: The Economic Way of Looking at Behavior*, 101 *J Polit Econ* 385, 385 (1993).

<sup>11</sup> Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 *S Cal L Rev* 669, 686–87 (1979).

<sup>12</sup> A. Mitchell Polinsky, *An Introduction to Law and Economics* 17 (Little, Brown 2d ed 1989).

<sup>13</sup> David D. Friedman, *Price Theory: An Intermediate Text* 100 (South-Western 2d ed 1990).

<sup>14</sup> A.W. Brian Simpson, *Coase v. Pigou Reexamined*, 25 *J Legal Stud* 53, 95 (1996).

from effecting their consent to a bargain—the logistics involved in getting large numbers of people together, or the difficulty tortfeasors would have in identifying their victims before injuring them. As I have argued elsewhere, “transaction cost” is best understood as a normative category; to label something a transaction cost is to say that it should not be counted—that it is something courts or others ought to try to reduce or eliminate.<sup>15</sup> Transaction costs get in the way of deals that would make both parties better off by their own lights. Nobody likes them. Commodification preferences, by contrast, refer instead to a variety of subjective values, to certain types of reasons why parties might not care to bargain even if it were technologically cheap to do so. As we shall see, it is arguable that some commodification preferences should be treated as transaction costs (in other words, that courts should try to get rid of them or minimize their impact). Indeed, one way to frame this Article’s inquiry is that it considers whether enmity should be considered a transaction cost. But again, as a *class*, commodification preferences are no more unreasonable or regrettable than any other preferences, and cannot be considered synonymous with transaction costs.

## II. ENMITY AND SETTLEMENT

This Article considers the difficulties raised by one sort of commodification preference: a preference of *A* not to sell to *B* because their relations are poisoned by enmity. The root of the problem is that, while one might not realize it by reading economic accounts of litigation, parties who litigate often dislike each other by the end of a suit, if not at the beginning. This can significantly complicate attempts at bargaining after the case is over. Of course, parties to some types of suits may regard litigation in a more cold-blooded fashion: they litigate to judgment simply because they have made divergent predictions about how the court will decide the case, and after the court renders its judgment they are ready to negotiate from whatever point of departure its decision has created. But a different pattern also is possible. Some people litigate to judgment in significant part because the process of private bargaining has broken down irreparably. The process of litigation that follows tends not to endear parties further to one another. By the time a court enters a decision in such a case, the prospects for productive negotiations between the parties may have been impaired or ruined by the bad blood between them. Then the court’s determination either way is likely to be final, just as in cases where conventional transaction costs run high. But here the reason

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<sup>15</sup> See Farnsworth, 66 U Chi L Rev at 408–10 (cited in note 4) (“[D]eciding whether [ ] departures [from economic rationality] are transaction costs involves a normative decision.”).



for the finality is not that bargaining is costly or infeasible, but rather that it is foreclosed by aspects of the parties' own preferences. How should a court respond? Should enmity be considered a type of transaction cost, justifying an award of damages rather than an injunction, or is it just another preference?

It seems clear enough as an initial matter that courts should not get into the business of making case-by-case assessments of whether the enmity that has developed between the parties in any given case is sufficient to make bargaining between them unlikely. For if anything were to hang on such a determination—the choice between damages or equitable relief, or anything else—a perverse incentive would be created for one side or the other to generate enmity. Nevertheless, it may be possible to identify in advance *categories* of cases in which, on account of the likely presence of enmity, it does not make sense to assume that the parties to a case will bargain to some desirable state of affairs after judgment.

A possible objection to this line of inquiry is that it focuses too much on cases that are litigated all the way to judgment. Of course, in many of those cases acrimony may run high; litigation is like that. But when courts make rules, the objection goes, they should assume that most of the people they affect will be settling in the “shadow of the law,”<sup>16</sup> with enmity a nonissue. I am not so sure. Elsewhere I have recorded skepticism about assumptions that even if people who litigate to judgment fail to act like *homines economici*, people who settle their disputes do act that way.<sup>17</sup> First, it is a mistake to suppose that if parties settle their cases, as they frequently do, enmity must not have been a significant or indeed decisive factor in the resolution they reached. If the law makes entirely clear that a lawsuit between *A* and *B* would end with the issuance of a property right to *A*, there is little reason for the parties to bother litigating to judgment; but this point is separate from the question of what *A* demands of *B* for purposes of settlement. *A* may stand on his rights and insist on their full enforcement without much in the way of compromise. Enmity between the parties may cause him to take this position even if a significant surplus from bargaining over the property right to which he is entitled would exist but for the enmity. If *B* decides to capitulate rather than litigate, as well he might when the likely outcome of the potential litigation is clear, a “settlement” results. But the settlement just means that the case in court was dropped, not necessarily that the parties

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<sup>16</sup> See generally Robert H. Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L J 950 (1979).

<sup>17</sup> See Farnsworth, 66 U Chi L Rev at 414–16 (cited in note 4) (suggesting that settlement might be motivated by noneconomic motives such as upholding local norms).

agreed to substitute cash for enforcement of the property right to which one of them was legally entitled.

The extent of the role enmity plays after judgment or in the settlement of any particular class of cases is unknown, but may be considerable in some circumstances. Imagine disputants arrayed along a spectrum according to their interest in ensuring that the resolutions of their disputes track the outcomes they would achieve with litigation to judgment. At one end of the spectrum are people<sup>18</sup> who may not be sure what a court would say about their disputes, and who are not interested in consulting a lawyer to find out. At the other end are those people interested *only* in what their lawyers tell them a court will be likely to do about their dispute. The likelihood that a court will award an equitable remedy or damages becomes more important to parties and their negotiations as we move from the beginning to the end of that spectrum. Now imagine another spectrum of disputants, this time arrayed according to the extent of their enmity. At one end are disputants who are friends. Then there are those who are not friends, but who have an interest in preserving decent relations with their adversaries, either for business reasons or out of a sense of community or decency. At the far end are those who detest each other and who would prefer not to make their adversaries better off if they can avoid it. It is only a modest extension of Professor Ellickson's research<sup>19</sup> to hypothesize that there is a considerable overlap between the two spectrums just described: that parties who get along well also are more likely to resolve their differences according to norms, and that parties who hate each other are likely to be among the most keenly interested in the details of whether they will get an injunction or damages from a court resolving, say, a property dispute between them. Of course, enmity is not the only predictor of whether parties will be negotiating squarely in the shadow of the law. No doubt the law also tends to become more important as the stakes of a dispute get larger. But if I am correct in describing the tendencies of disputants, it follows that when courts make rules about remedies, the class of settling litigants for whom the details of those rules are critical may also tend some significant percentage of the time to be a class for whom enmity is likely to be a factor.

Enmity also may be a phenomenon that consumes resources in negotiations, with the parties getting over it for a price—an acrimony

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<sup>18</sup> Corporate behavior may be a separate question. For a discussion, see *id.* at 411 (hypothesizing that corporations and their officers may act differently than individuals in the litigation context because of their duty to shareholders).

<sup>19</sup> See Robert C. Ellickson, *Order without Law: How Neighbors Settle Disputes* 270–75 (Harvard 1991) (noting that parties often settle nuisance disputes according to local norms rather than law).

premium of some sort.<sup>20</sup> Compare Judge Richard Posner's description of bilateral monopoly as a source of high transaction costs:

Although the frustration of a potentially value-maximizing exchange is the most dramatic consequence of bilateral monopoly, it is not the usual consequence. Usually the parties will bargain to a mutually satisfactory price. But still bilateral monopoly is a social problem, because the transaction costs incurred by each party in an effort to engross as much of the profit of the transaction as possible are a social waste. They alter the relative wealth of the parties but do not increase the aggregate wealth of society.<sup>21</sup>

It is possible to speak of enmity in comparable terms: sometimes likely to prevent an exchange that otherwise would seem to be value-maximizing, and also capable of just raising the cost of reaching an agreement. The important questions are (1) whether and when enmity is likely to play this sort of role in disputes, and (2) what stance the law should then take toward it.

This Article is concerned with the second question rather than the first. It assumes that there are areas—themselves bilateral monopolies, most likely in litigated disputes between individuals, and especially but not only between individuals in forced proximity to one another, as in a neighborhood—where enmity is likely to be significant. The question is how courts ought to respond to such situations: whether they ought to regard the enmity as a kind of transaction cost that justifies withholding equitable relief, and instead award damages meant to resemble the deal the parties might make for themselves if they were on good terms.

### III. ENMITY AS A SOURCE OF VALUE

This Part examines enmity as a source of value, suggesting that it is not always a bad thing. It argues for the importance of distinguishing between enmities along several dimensions: their origins (whether they are based on breaches of norms, or on unreasonable reactions to conflicts of interest), the appetites they create (the impulse to avoid an enemy, or the impulse to find pleasure in an enemy's misery), and how they are expressed (passively, through refusals to transact, or actively, through out-of-pocket expenditures to make an enemy worse off). Enmities corresponding to the first members of these pairs may be ethically defensible and economically useful. The second members of those pairs are what give enmity a bad name.

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<sup>20</sup> For a discussion of acrimony premiums, see Farnsworth, 66 U Chi L Rev at 392-94 (cited in note 4) (defining an acrimony premium as the "amount required to be added to [the] price in order to get the winner to hold its nose and make the deal").

<sup>21</sup> Posner, *Economic Analysis of Law* at 69 (cited in note 8).

First, what *is* enmity? When one person injures others, or breaks a promise, or otherwise seems to have violated a norm, it is easy to understand why the injured parties would take his behavior into account in planning their affairs and in deciding whether to expect him to behave that way again. But often aggrieved parties do more than merely take such behavior into account for planning purposes. They get *mad* at the person they perceive as a wrongdoer. They take it personally. They don't "like" the person anymore, and may develop an aversion to him. The result is enmity: a dislike of another, generally accompanied by a felt sense of hostility or identification of the other as an enemy.

Enmity is a curious and ethically ambiguous feature of human relations and preferences. There are people who do not like country music, or English cooking, or rats. They may feel strongly about these things, their judgments being backed by emotion as well as reason (what could it mean to have a purely *reasoned* opposition to English food?). A simple distaste for dealing with another may seem no more problematic than a taste or distaste of any of those other sorts, regardless of its emotional content. But enmity also can differ from these preferences because it involves distaste for another *person*—another member of the community whose own sense of utility is regarded as relevant, unlike the rat (at least on most views of whose utility counts). Complications thus arise when enmity gets expressed in a way that not only increases the utility of one of the players in a drama, but also depletes the utility or wealth of the other in some way, as either an intended or an incidental consequence. Then the ethical standing and likely consequences of enmity both are likely to depend heavily on details of context and expression: whether enmity is the force behind a public decision or a private decision; whether it is expressed in more or less destructive ways; whether the enmity is of a particular variety that is considered acceptable or unacceptable, or is thought to have costs for others not parties to the relationship; and why the enmity came into existence.

To begin with the first of these considerations, there are significant differences between the standing normally given to enmity as a motive for behavior in public and that afforded it in private life. When enmity is condemned as a motivator, it often is in the context of public decisionmaking—for example, in debates about the moral status of retributive anger as a basis for criminal punishment or the propriety of other expressions of emotion through law or by public actors.<sup>22</sup>

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<sup>22</sup> See generally Robert C. Solomon, *Justice v. Vengeance: On Law and the Satisfaction of Emotion*, in Susan A. Bandes, ed., *The Passions of Law* 123 (New York 1999), and many of the other essays in Bandes's book; Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U Chi L Rev 361 (1996); Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cam-

When making a utilitarian calculation at a collective level, of course, it is indeed necessary to make decisions about which kinds of benefits and preferences to count and which to “launder.”<sup>23</sup> Expressions of enmity toward individuals or groups through legislation or executive action generally are regarded as taboo for a variety of sound constitutional and policy reasons.<sup>24</sup> There is the sentiment, common to many political theories, that government ought to exist to serve all those citizens subject to it, and not to “get” any of them. There is the practical and well-known fact that when expressed collectively, the power of enmities to do annihilating harm is awful and difficult to restrain once loosed. These reservations about enmity may not prevent it from creeping as a motive into various corners of the law, but they do tend to drive it out of the discourse. Politicians supporting capital punishment usually say that it is for the sake of deterrence, and tend to renounce enmity toward murderers as an explicit reason for it or for any public action.<sup>25</sup> If courts cannot satisfy themselves that a public action has some basis other than enmity, they invalidate it.<sup>26</sup> This much at least is the law and custom in domestic affairs. In dealing with foreign adversaries, enmities regarded as just and well earned may on occasion be publicly displayed, perhaps as attempts to signal the presence of courage and moral hardness.<sup>27</sup>

Our question is a bit different, for it involves enmity as a motivator of private retaliation. Enmity in private life is commonplace, among other things as a residue of conflicts of interest and as a normal reaction to perceived misbehavior by others. The litigants in the nuisance cases considered in my prior study,<sup>28</sup> for example, usually were angry with each other because one of the parties was pursuing

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(Cambridge 1988).

<sup>23</sup> For a discussion of this sort of laundering, see Robert E. Goodin, *Utilitarianism as a Public Philosophy* 132–48 (Cambridge 1995).

<sup>24</sup> See Cass R. Sunstein, *Leaving Things Undecided*, 110 Harv L Rev 4, 69, 78 (1996) (discussing reasons why animus is regarded as a forbidden ground for public decisions).

<sup>25</sup> See Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 Harv L Rev 413, 434–51 (1999) (suggesting that capital punishment is a case in which citizens and officials emphasize arguments based on deterrence because of social norms against expressing contentious moral judgments).

<sup>26</sup> See, for example, *Romer v Evans*, 517 US 620, 634–35 (1996) (holding unconstitutional an amendment to the Colorado constitution because, among other reasons, the Court believed it was based on impermissible animus toward homosexuals).

<sup>27</sup> See, for example, Mike Allen, *An Unvarnished President on Display*, Wash Post A7 (Sept 19, 2001) (reviewing President George W. Bush’s spoken responses to the September 11, 2001, terrorist attacks); Blaine Harden, *After the Attacks: The Reaction; For Many, Sorrow Turns to Anger and Talk of Vengeance*, NY Times A15 (Sept 14, 2001) (describing the public reaction to the attacks); *National Editorial Pages Call for Retaliation*, White House Bulletin (Sept 12, 2001) (noting the retributive character of many national newspapers’ editorials in response to the attacks).

<sup>28</sup> Farnsworth, 66 U Chi L Rev at 381–82 (cited in note 4).

his interests in a way that to him seemed reasonable, but that in some way injured his neighbor and to him seemed unreasonable. The injured neighbor's indignation and protests, in turn, seemed to the first neighbor an unreasonable invasion of his right to do as he pleased. Each neighbor thus comes to view the other as threatening, and as a violator of norms. The neighbors come to dislike each other; their relations might be permanently soured and rounds of retaliatory moves might follow, including a refusal to bargain.

When enmity so motivates private acts or refusals, it raises difficult problems of counting and discounting individual utilities that in some ways resemble but in other respects differ from the problems encountered when enmity motivates public decisions. The worries about abuse of public power recede, but problems of what satisfactions to include in the calculus of costs and benefits remain. Private acts motivated by enmity create satisfaction for their makers in a perfectly understandable sense of the term, and the satisfaction may well be expressible economically in dollars spent on the act or dollars forgone because of it. But the satisfaction often comes at the expense of others, unlike more usual economic activities that create benefits for the actor while making others better off as well. In some cases the satisfaction of enmity may simply require that the enemy be avoided. It may manifest, in other words, as a commodification preference against dealing with an adversary. In other cases enmity may motivate acts that are satisfying *only* to the extent that they make others worse off—the problem of interdependent negative utilities.<sup>29</sup> In such cases there may be no net increase in well-being. There may be a zero-sum game in which *A*'s pleasure increases precisely to the extent *B*'s decreases, or it may be that *A*'s satisfaction is smaller than *B*'s dissatisfaction.

Here the economic objection to the “transaction” is that it really results in no increase in net wealth or utility at all. Where there is a real gain—where *B*'s dissatisfaction is more than offset by the satisfaction *A* derives—economists may indeed recognize this as a wealth-maximizing move, but there remain other objections on economic grounds. They include the practical difficulty of knowing whether there really is a net gain from such a forced transaction, and the undesirability of forcing people to take costly precautions against such acts. The sum total of happiness in the world—and the sum total of wealth—may be greater the moment after *A* hits *B* in the face with a pie than it was a moment earlier, but the sum total in a world where

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<sup>29</sup> See Posner, *Economic Analysis of Law* at 228–29, 261 (cited in note 8) (discussing the treatment of interdependent negative utilities in the law of intentional torts and in criminal law).

such acts are permitted may be smaller than in a world where they are forbidden. The wealth-maximizing rule thus forbids most such acts, treating them as cases where the actor is bypassing the market despite the presence of low transaction costs.<sup>30</sup>

There is an additional danger in the act motivated by a wish to make another worse off, no matter how much satisfaction it brings its maker. The act may well create additional enmity in the person subject to it, and so give rise to more such acts—that is, retaliation and feuding. Each fresh act of retaliation may or may not bring its maker more satisfaction than it takes away from its victim, but again it is always hard to say and most people no doubt have a clear and general metapreference for avoiding the creation of this set of preferences in the first place. The vengeful satisfaction I obtain from burning down my enemy's house *because* he threw a pie in my face may outweigh his dissatisfaction (I might pay more to an arbitrageur for the pleasure of doing it than my enemy would pay to avoid it), but probably we both would prefer to have avoided having these preferences and the package of satisfactions and dissatisfactions they bring with them. All else equal, a society full of feuds is likely to be worse off—less desirable to all concerned—than a society with fewer of them, even if the parties to the feuds derive satisfaction from them. From the pleasure that a person may take in retaliating for a wrong once it has occurred, it does not follow that a community is better off with wrongs and cycles of retaliation than it is without those things.

The considerations just outlined might seem a conclusive case against giving effect to enmities through law, were it not for the importance of accounting for the *history* of an enmity before evaluating it—the importance, in other words, of viewing enmity as a dynamic rather than a static phenomenon. The history is important both because it may give an enmity strong ethical footing and because in a private social order enmity can serve as an important enforcer of norms and motivate the provision of a valuable public good. Envision a set of neighborly norms about keeping promises, respecting boundaries, playing music no louder than a certain volume, curbing one's dog, lending assistance to others in need, being flexible and willing to discuss compromises when interests conflict, and so forth. Some of these norms are backed by law, and some are not, but regardless of how they are backed, their usual observance and enforcement has little to do with their legal standing. They exert their pressure as a practical matter either because they have been internalized into obligations of conscience or because breaches are likely to lead to reputational sanc-

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<sup>30</sup> Id at 226 (“[W]hen market transaction costs are low, people should be required to use the market if they can and to desist from the conduct if they can’t.”).

tions or sublegal retaliatory sanctions by others. If you breach by playing loud music and are unresponsive to requests to modify your behavior, the first line of response may not be legal—I may retaliate by playing loud music of my own, by spreading damaging gossip about you, or by declining to help when you are in need.<sup>31</sup> Or I may retaliate by refusing to bargain with you, now or after judgment, if the dispute between us ripens into litigation.

A person's ability to give some effect to these sorts of enmities—and especially to reply to a wrongdoer by declining to transact with him—is an important feature of his autonomy. In some times and places it has been thought more obvious than in the present United States that incivilities are not appropriately redressed with cash.<sup>32</sup> Yet even in this day and age it normally is taken for granted that if we believe someone has done us wrong, we at least have the right to avoid him, to withhold consent to dealings with him, and to make these decisions on a basis that is felt as well as thought—a right to our enmities, in short, which may be well earned. Existence sometimes involves encounters with evil, not to mention more prosaic insults and obnoxiousness, and we define ourselves in part by our identification of those things and how we choose to react to them. Such decisions are constitutive of a person's character, so it is not surprising that they are the subject of teachings in most ethical and religious traditions. Those traditions tend to eschew enmity as a motive for action, of course, and in a moment we will consider some possible reasons why. They may also counsel against entertaining enmities at all,<sup>33</sup> though in fact their teachings tend to be a good deal more complicated than that. Most moral traditions acknowledge a place for earned enmities of various sorts, or at least for choosing to avoid helping or transacting with others whose behavior is morally objectionable.<sup>34</sup> In any event, there can

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<sup>31</sup> See Ellickson, *Order without Law* at 57–59 (cited in note 19) (describing self-help retaliatory measures taken by ranchers in trespass disputes).

<sup>32</sup> See the interesting discussion in James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 *Yale L J* 1279, 1316–34 (2000) (exploring past and current regulation of civility in Germany and France).

<sup>33</sup> See, for example, Leviticus 19:17 (King James Version) (“Thou shalt not hate thy brother in thine heart.”); Matthew 5:44 (“But I say unto you, Love your enemies, bless them that curse you, do good to them that hate you, and pray for them which despitefully use you, and persecute you.”); Luke 6:27–36 (Sermon on the Plain).

<sup>34</sup> See, for example, 3 *Séfer haHinnuch: The Book of [Mitzvah] Education* 79 (Feldkeim 1984) (Charles Wengrov, trans) (authorship ascribed to Rabbi Pinhas HaLevi of Barcelona) (“On the hatred of wicked people, though, there is no prohibition; it is rather a religious duty to hate them after we reprove them many times about their sins and they yet do not wish to retract them.”); Leviticus 20:6 (“I will even set my face against that soul, and will cut him off from among his people.”); Psalms 5:4–6 (“For thou art not a God that hath pleasure in wickedness: neither shall evil dwell with thee. The foolish shall not stand thy sight: thou hatest all workers of iniquity. Thou shalt destroy them that speak leasing; the Lord will abhor the bloody and deceitful man.”); Psalms 139:19–22 (“Surely thou wilt slay the wicked, O God: depart from me, there-



be no question that most people regard as a significant liberty their right to opt into or out of those traditions—their ability to identify as they see fit their friends and enemies, their loves and hatreds, and above all their power to choose the partners with whom they enter into transactions of all kinds. The harder ethical problems arise when enmities are expressed in ways that go beyond choosing partners—the ethics of self-help measures taken to vindicate an affronted sense of corrective justice.

Those also turn out to be problematic matters from an economic standpoint that recognizes threats of retaliation of various sorts as serving important practical purposes. Enmity and the desire to avoid it are examples. They are powerful enforcers of the norms that govern most everyday behavior. They are cheap and effective alternatives to legal ordering and legal sanctions. But the various forms of private retaliation that enmity can generate vary considerably in their associated economic as well as ethical risks. We therefore find that the expression of enmity is regulated not only by law but by second-order norms that govern the type of retaliation considered permissible in reply to a breach of first-order norms. Enmity can be expressed in ways that are useful and limited in the costs they are likely to create. But it may also be expressed in ways that have awesome destructive potential. Second-order norms attempt to confine the expression of enmity to the former varieties—which also are the least bothersome from an ethical standpoint. One example of such a norm is that informal sanctions should be kept in proportion to the offenses that provoke them.<sup>35</sup>

Another common norm, more important for our purposes, is a rough distinction between passive and active sanctions for a breach. *Active* retaliatory measures—physical abuse, putting up a spite fence, or otherwise incurring significant out-of-pocket costs to make someone else worse off—are regarded as controversial in most civilized communities, and understandably so on a consequentialist view. They may give rise to other active and destructive responses, which can es-

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fore, ye bloody men. For they speak against thee wickedly, and thine enemies take thy name in vain. Do I not hate them, O Lord, that hate thee? and am I not grieved with those that rise up against thee? I hate them with perfect hatred: I count them mine enemies.”); Proverbs 22:24–25 (“Make no friendship with an angry man; and with a furious man thou shalt not go: Lest thou learn his ways and get a snare to thy soul.”); Matthew 18:21–35 (parable of the unforgiving servant); Matthew 7:21–23 (only those who do the will of God will enter the kingdom of heaven); Matthew 12:31–32 (blasphemy against the Holy Spirit shall not be forgiven); Luke 16:19–31 (parable of the rich man and Lazarus); *The Analects of Confucius* 205 (Bradford & Dickens 1956) (Arthur Waley, trans) (“Friendship with the obsequious, friendship with those who are good at accommodating their principles, friendship with those who are clever at talk is harmful.”).

<sup>35</sup> See Ellickson, *Order without Law* at 57–60, 72–76, 79–81, 207–29 (cited in note 19) (discussing the role of norms in resolving cattle-trespass disputes).

calate into a larger scale feud. They can be (and sometimes are) used in measured, carefully calibrated ways, but I would suggest that the tendency as communities increase in density seems to be away from them.<sup>36</sup> *Passive* retaliatory measures, however, generally are understood to be well within one's rights—refusing to deal, declining to help, or otherwise either refusing to incur costs in order to help someone or suffering opportunity costs in order to make someone worse off. Again, the sense of the distinction seems to be keyed to the destructive potential involved. If passive measures are reciprocated, they soon are likely to bottom out in an unfortunate but manageable state of affairs where neighbors or partners simply are not speaking or dealing with each other. This has real costs, but their ability to escalate is limited. They can be no larger than the lost surpluses from bargains that the parties have forgone. The escalation of active measures is not likewise limited. It always is possible to spend an additional dollar to make someone else miserable.

The utility of passive sanctions is best illustrated by a return to the basic right not to transact as a sanction for a breach of some norm. Suppose one trading partner decides not to make any more contracts with another who has shown that he does not keep his promises. The decision may be experienced by either or both parties as an expression of enmity. Regardless, the ability to make such a decision is important to the promotion of efficiency as well as autonomy. No doubt it often is more important than the threat of a lawsuit in persuading parties to keep their promises. Making enemies generally is bad business, and this simple principle typically is responsible for a large share of the economic and social order any community enjoys. When an economist predicts that the “market will take care of” some problem, this is part of what is meant: the behavior we want to secure will be produced by private decisions, including private decisions to avoid behavior that will make trading partners mad and so redound to the actor's own detriment.

We also can think of the enmity and the passive retaliation it may motivate as a sanction for a perceived defection in a cooperative game. Many of the norms in any community are likely to give rise to the usual iterated prisoner's dilemmas. Everyone is better off if everyone cooperates with the norms than if no one does, but given that others are cooperating it may be in the immediate self-interest of each to defect. Then one of the neighbors defects, or so the others come to believe. Norms require that retaliatory measures of some sort must follow. Robert Axelrod's famous game theoretical study of cooperation concludes that “tit-for-tat”—the strategy of starting with

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<sup>36</sup> For examples from rural Shasta County and the Old West, see *id.* at 57–59.

cooperation, and then doing whatever the other player did on his previous move—generally is the optimal, welfare-maximizing strategy for rational players of games of this sort.<sup>37</sup> A suitable punishment for a neighbor who breaches one norm of neighborliness thus is a proportional departure from the same norm, or a different one, by others. One form of retaliatory breach is an abandonment of the usual norm favoring resolution of conflict through talk, compromise, and bargaining.

With some difficulty one can try to reverse-engineer the behaviors of the parties to the nuisance cases described earlier to determine what strategy they impliedly must have been pursuing in arriving at their acrimonious positions. It may be that they were playing tit-for-tat, but badly. Tit-for-tat works well if both sides have the same definition of what counts as defection and implement it accurately. Since it is a “nice” strategy in which neither side will be the first to defect,<sup>38</sup> there will be no *willing* defections at all if both sides stick to it. But the strategy is sensitive to mistakes, and produces unhappy results if either side errs in assessing the behavior of the other. A behavior mistakenly believed to be a defection results in a retaliatory defection, which may result in another retaliatory defection in kind, and so forth *ad infinitum*.<sup>39</sup> Each actor becomes convinced that the other is unreasonable and perhaps unethical, neither wants to deal with the other, and the rounds of retaliation take on a life of their own. (Another possibility is that at least one of the parties is playing a strategy different from tit-for-tat altogether, for example, the one-strike rule: if the other side ever defects, then *always* defect.) Any of these stories seems consistent with the nuisance cases, which by their end had generally descended by one path or another into impassable hostilities. The only necessary point here is that retaliation and the threat of it, even when it leads to an uncooperative stalemate, can serve a useful purpose in the enforcement of cooperative norms. And in a well-functioning community we might well expect nevertheless to see instances where mistakes—perhaps even reasonable mistakes—have the ultimate consequence of ending all dealings between the parties, or where the same result is reached not by mistake but by an unfortunate collision of incompatible interests.

It might seem odd to use the language of game theory to discuss behavior that seems to have a significant emotional component. The accounts in the prior article of the enmities that can characterize nui-

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<sup>37</sup> See Robert Axelrod, *The Evolution of Cooperation* 122–23 (Basic 1984) (explaining the success of tit-for-tat as a strategy in iterated games).

<sup>38</sup> See *id.* at 113–17 (discussing the benefits of not defecting first).

<sup>39</sup> See Ellickson, *Order without Law* at 227 (cited in note 19) (“[A] single error may lead to an endless echo of reprisals.”).

sance litigation do not sound like accounts of strategic choice. But the emotional basis of some enmity and retaliation on the one hand, and the usefulness of those things on the other, have to be considered in light of one another. The emotional impulse for retribution is a means by which the strategic benefits of retaliation are gained. I do not mean to claim that the emotional impulse exists in order to make humans more effective strategic players;<sup>40</sup> that may or may not be the case. But as a practical matter there are benefits to following tit-for-tat or other strategies of retaliating against defections in many walks of life, and the emotionally rooted desire to have revenge conveniently implements that strategy without the need for calculation or conscious resolve.<sup>41</sup> The aggrieved party need not measure out units of obstinacy as a sanction for his adversary's offensive acts or bad manners. All he may know, and all he needs to know, is that his adversary has succeeded in getting his goat and that he therefore is inclined to take a harder line with him from now on.

The fact that useful retaliation frequently is prompted by emotion creates some difficulties, since it can be hard to keep the emotion coextensive with its underlying justification. The emotional impulse to retaliate may be triggered too easily and may be hard to turn off. A drastic refusal to bargain with an adversary after litigation may be an example of such an instance in which the emotions behind retributivism are outliving their actual usefulness. But not necessarily. As Robert Frank has argued, an advantage in being an emotionally retributive sort of person lies precisely in the promise that when crossed, I will take punitive measures even if they do not seem to be in my own self-interest.<sup>42</sup> A retributive spirit thus has value as a deterrent that may not be replaced effectively by a direct commitment to deterrence. Sometimes the best deterrence is an indifference to deterrence as an explicit concern. Fear of emotional reactions and behaviors by neighbors is likely to be a more effective deterrent against discourtesy than fear that the neighbor is an economist who may (though then again may not) determine that the discourtesy is worthy of a sanction in response. One way to achieve these good deterrent results is to pretend to be a hothead, but another is to *be* a hothead.

The emotional root of much enmity and retaliation can further be understood as usefully securing the provision of a public good, for the infuriated neighbor may be doing others a favor at his own expense. If he refuses to bargain out of a sense of indignation, from at

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<sup>40</sup> On the perils of facile assumptions of this sort, see Elster, *Sour Grapes* at 101–08 (cited in note 7).

<sup>41</sup> See Robert H. Frank, *Passions within Reason: The Strategic Role of the Emotions* 29–37 (Norton 1988) (describing the success of tit-for-tat retaliation in strategic games).

<sup>42</sup> *Id.* (explaining why tit-for-tat retaliation leads quickly to strategic cooperation).

least one perspective he is hurting himself as well as his enemy. By assumption, the bargains lost would have made them both better off if they had been on good terms. But the wrongdoer, and other potential wrongdoers, may learn a lesson from the experience and behave better next time. Others will benefit from this, regardless of whether the party who imposes the sanction does. He may just be taking part in the maintenance of a cultural practice that, like throwing away trash rather than leaving it on the ground, has great value in general but puny benefits to him on any given occasion. It may be better in general for everyone, though not necessarily good for you, if you overreact to the misbehavior of others, and the emotional root of such overreactions helps ensure that they will occur. Hence Frank's view that emotions help to solve otherwise difficult cooperation games.

Note that the consequences of the enmities involved in litigation and bargaining afterwards can be particularly significant because they may arise in circumstances in which there is no market to which the parties can turn for relief from their hostilities. One reason passive refusals to deal often cause quite limited harm is that the parties can find second-best trading partners elsewhere. But the aggrieved plaintiff and defendant in a nuisance dispute often cannot turn away from each other and make substitute deals with others. One side has the rights that the other side wants, and nobody else does. Moving away usually is a possibility for one party or the other in such settings, but that tends to be a very costly measure. As a practical matter a refusal to bargain thus may have more severe consequences after a nuisance case ends—or after the end of any case where the parties are locked in with each other—than it usually will in an ordinary commercial setting. When the parties are locked into a bilateral monopoly, all of the potential surplus from trade between them may be lost.

A purpose of this discussion has been to destabilize the common intuition that enmity necessarily is a bad thing. By way of summary, let us draw some distinctions between the various standpoints from which enmity can be viewed. It is possible to think of enmity just as a type of taste, and to consider the power to indulge it—particularly in selecting trading partners—an aspect of a person's autonomy presumptively entitled to respect. On this liberal view the right to give effect to enmities after judgment might be constrained only by whether the community at large has, for whatever reason, deemed the particular type of enmity (for example, racial enmity) an unacceptable basis for the exercise of autonomy. Enmities also can be viewed from a moral perspective, approved or disapproved individually according to whether they comport with a given ethical view or with the understandings of the community or its representatives. Some enmities, ap-

appropriately expressed, are quite consistent with leading moral and ethical traditions; others are not.

From an economic or utilitarian standpoint enmity likewise is ambiguous. Actions motivated by it may make its holder feel good, but often will not make others better off, and may make them worse off. On the other hand, the risk of creating enmity provides an incentive for people to avoid breaching norms, and the threat that enmity will result from such breaches is made credible by people who are moved to impose sanctions because of it. Enmity and the retribution it motivates may indeed be worthy of praise, in the same way one can praise a well-drawn set of criminal sanctions while regretting the occasions for its use. Of course some enmities do not serve this useful purpose. In this sense it may be possible to distinguish between “good” and “bad” enmities from a utilitarian as well as from a moral perspective, which commonly will overlap.

An important issue separate from the goodness or badness of an enmity is the way it is expressed. Acts motivated by enmity can reduce immediate welfare while at the same time serving a normal and healthy purpose in sustaining a web of welfare-maximizing norms. Passive sanctions—opportunity costs incurred out of enmity—tend to serve those useful norm-reinforcing purposes while minimizing the welfare losses associated with the behavior enmity can motivate. Active sanctions—out-of-pocket expenditures to make someone else worse off—have a greater potential to provoke escalation and feuding, thus making the welfare-reducing aspect of enmity more prominent and costly and also multiplying the number of acts that provoke additional enmities.

The normative difference between active and passive sanctions also can be understood by reference to the different appetites for satisfaction that enmity can generate. Some behaviors motivated by enmity are satisfying to those who engage in them just because they reduce the welfare of someone else. This is the most repellent side of enmity, and it is especially likely to be the case where one person actively spends resources to make another person worse off—that is, where the sanctions are active in the sense described above. Yet enmity also can cause people not to revel in the suffering of the others who are the object of it, but just to shun them on principle—to decline to transact with them. These passive expressions of enmity tend to be far less ethically or economically objectionable, and may indeed be meritorious on both grounds.

#### IV. LEGAL REGULATION OF ENMITY

We have seen that enmity and its expression are regulated in part by norms, but they are also regulated by law. What can we learn from

the law's treatment of enmity elsewhere? Here again we find that enmity has an ambiguous status, but one generally consistent with the perspectives on enmity considered in the previous section. Some possible generalizations, with examples and comments, are these:

1. Torts and crimes often are punished more heavily when motivated by enmity.

*A* deliberately destroys *B*'s property. *A* is subject to a criminal penalty. If the motive for the destruction was enmity toward the property owner, *A* may be subject to an increased penalty. The increased penalty does not depend on whether *A* knew the identity of the property owner, but it does require that *A* was hostile toward the owner, whoever that was.<sup>43</sup>

*A* sells a house to *B*, and deliberately conceals the fact that the well behind the house has insufficient access to water. *A* is liable to *B* for compensatory damages—that is, the difference between what *B* paid for the house and its actual value. But *A* is liable to *B* for additional sums—punitive damages—if the motive for *A*'s fraud was enmity toward *B*.<sup>44</sup>

Why does the law make a point of punishing enmity when it motivates acts already prohibited in themselves? Perhaps it is because people motivated by enmity are felt to be morally worse than those who violate others' rights out of economic desperation or for other impersonal reasons. Another possibility, however, is that wrongs motivated by enmity are more likely than random wrongs to provoke a felt need for private retaliation if no extra sanction is awarded. A person who attacks another randomly is unlikely, if he commits another attack, to go after the same person, whereas one who attacks another out of personal enmity is much more likely to single him out again later (or again to single out a member of his group, if the enmity was against a class rather than against an individual); evidently not just any victim will do. We therefore might expect to find that the human appetite for revenge, whether it takes the form of "teaching a lesson" to a wrongdoer or discharging the impulse to "get even" with him, seems most vigorous when a wrongdoer's initial act was motivated by enmity. The need for the victim to retaliate in order to deter more attacks—and thus the possibility of a feud characterized by escalating

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<sup>43</sup> See *Massachusetts Model Jury Instructions for Use in the District Court* § 5.301 (Admin Office of Dist Ct 1988 & Supp 1989) (enumerating elements of willful and malicious destruction of property: (1) defendant injured or destroyed the property and (2) defendant did so willfully and with malice).

<sup>44</sup> See, for example, *Waters v Novak*, 94 Ohio App 347, 115 NE2d 420, 422 (1953).

lawlessness—is greatest then. Nor should it be surprising that the law provides punitive damages on such occasions, and that courts sometimes have recognized the role that punitive damages play as “a substitute for personal revenge by the wronged party.”<sup>45</sup> It is true that occasionally enmity can help to reduce the severity of a criminal sanction, as when the killer of his wife’s paramour is found guilty of manslaughter rather than murder.<sup>46</sup> But the reduction in that case seems critically keyed not to the enmity at play in the situation but to the high level of uncontrollable emotion that may be thought involved in it, for when the emotion recedes, the enmity no longer serves as a defense.

2. Affirmative acts not otherwise considered wrongful sometimes are punished when motivated by enmity.

*A* is a neighbor of *B*. *A* builds a fence along their property line that he knows will annoy *B*. The fence does not affect the market value of either party’s property. If *A* was motivated by enmity in building the fence, he is liable to *B* and must remove it. If *A* was not motivated by enmity, he is not liable to *B* and may retain the fence.<sup>47</sup>

*A* buys a horse from *B*, and concludes that the horse contains a defect. At a seminar on the breeding of horses, *A* publicly declares that *B* sold him a defective horse. In fact the horse was not defective. *A*’s statement nevertheless is privileged as a matter of “common interest.” But *A* is liable to *B* for defamation if he was motivated in making the statement by enmity toward *B*.<sup>48</sup>

It is unusual but not unheard of for the law to treat an act not otherwise wrongful as wrongful when it is motivated by enmity. There is a popular maxim from Cooley that “[m]alicious motives make a bad

<sup>45</sup> *Kemezy v Peters*, 79 F3d 33, 35 (7th Cir 1996); *Perry v Melton*, 171 W Va 397, 299 SE2d 8, 13 (1982); *Kessel v Leavitt*, 204 W Va 95, 511 SE2d 720, 816 (W Va App 1998); *Woodard v City Stores Co*, 334 A2d 189, 191 (DC App 1975).

<sup>46</sup> See Wayne R. LaFave & Austin W. Scott, Jr., 2 *Substantive Criminal Law* § 7.10(b)(5) at 258–60 (West 2d ed 1986); *State v Thornton*, 730 SW2d 309, 315 (Tenn 1987) (setting aside a murder conviction for a man who killed his wife’s lover upon finding them *in flagrante delicto*); *Vaughn v Commonwealth*, 204 Ky 229, 263 SW 752, 755 (1924); *Haley v State*, 123 Miss 87, 85 S 129, 131 (1920); *Whidden v State*, 64 Fla 165, 59 S 561, 561 (1912). See also William Blackstone, 2 *Commentaries on the Laws of England* \*191–92 (Chicago 1979).

<sup>47</sup> See generally Deborah Tussey, Annotation, *Fence as Nuisance*, 80 ALR3d 962, 965 (1977). For examples of the rules courts have devised to resolve these questions, see *Larkin v Tsavaris*, 85 S2d 731 (Fla 1956); *Hornsby v Smith*, 191 Ga 491, 13 SE2d 20 (1941).

<sup>48</sup> *Lundquist v Reusser*, 7 Cal 4th 1193, 875 P2d 1279, 1279 (1994) (“[A] defendant who makes a statement to others on a matter of common interest is immunized from liability from defamation so long as the statement is made ‘without malice.’”), quoting Cal Civ Code § 47(c) (1994).



act worse, but they cannot make that a wrong which in its own essence is lawful,"<sup>49</sup> but that formulation is too strong to capture the rules the courts in fact have created. Liability for the erection of a spite fence is an example of a departure from Cooley's view in jurisdictions that provide for it (not all do). The liability is understandable from a consequentialist standpoint, because the building of the fence is an out-of-pocket provocation between neighbors who are locked into close relations, and where a feud therefore has more than the usual likelihood of eruption and destructive potential. Naturally, the administrative cost of identifying true spite fences and separating them from the look-alikes may be considerable. The tradeoff between that burden and the benefit of keeping the lid on a feud is a difficult one, so it is not surprising that courts vary in their handling of it.

The malicious supply of a false and damaging reference is a related example, and is based on the same general principle as the case of the defective horse described above. In such cases one party makes another worse off with conduct—making statements of “common interest”—ordinarily considered privileged. The privilege serves the useful purpose of facilitating the transmission of valuable information. A showing that the statements were motivated by enmity creates liability because it dissolves the premise of the privilege, suggesting that the acts were not furthering a useful purpose after all. The law in these cases is not quite punishing enmity per se. It is punishing the infliction of harm because enmity has vitiated the usual excuse for it. Even the most resilient privileges, such as the constitutional maxim that truth is an absolute defense to a defamation claim, have been known to be set aside by courts in private circumstances where a damaging true utterance is motivated by enmity.<sup>50</sup> Apart from whether the holdings of such cases reflect sound understandings of the First Amendment,<sup>51</sup> they illustrate the strength of the judicial impulse to find liability where someone goes to trouble and expense to make another worse off.

Some jurisdictions go still further, recognizing a creature known as a “prima facie tort” that consists of any otherwise lawful act engaged in just to injure another.<sup>52</sup> This strand of law had its beginnings

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<sup>49</sup> Thomas M. Cooley, *A Treatise on the Law of Torts, or The Wrongs Which Arise Independent of Contract* 690 (Callaghan & Co 1879). See also *Hadley v Southwest Properties, Inc*, 116 Ariz 503, 570 P2d 190, 193 (1977); *Krause v Hartford Accident & Indemnity Co*, 331 Mich 19, 49 NW2d 41, 44 (1951); *Johnson v Aetna Life Insurance Co*, 158 Wis 56, 147 NW 32, 33 (1914).

<sup>50</sup> See, for example, *Johnson v Johnson*, 654 A2d 1212, 1215–16 (RI 1995) (holding that truth is not a defense when private libel is uttered maliciously); *People v Heinrich*, 104 Ill 2d 137, 470 NE2d 966, 970 (1984) (similar).

<sup>51</sup> See *Garrison v Louisiana*, 379 US 64, 72 n 8 (1964) (reserving the question of constitutional protection of private libel).

<sup>52</sup> See Kenneth J. Vandeveld, *The Modern Prima Facie Tort Doctrine*, 79 Ky L J 519, 538

in Holmes's remark that "*prima facie*, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape."<sup>53</sup> In most jurisdictions that recognize the *prima facie* tort doctrine, it may mean little more than that courts have the power to identify intentional, harmful conduct as tortious even if they cannot fit the conduct into an existing pigeonhole of tort law. As such, it is just a way of recognizing the courts' ability to create new torts as new social conditions require.<sup>54</sup> While a showing of malicious motive is relevant, it is neither necessary nor sufficient to warrant this use of the doctrine.<sup>55</sup> A few other courts, however, have understood the doctrine differently, regarding it as creating liability just for intentional acts motivated by "disinterested malevolence"—any acts, in other words, that make another worse off and are done solely for that purpose.<sup>56</sup> A curious and entertaining feature of the doctrine is that it does not apply if the actor's motives included any ingredient other than enmity; if he was motivated mostly by enmity but also by a dash of self-interest, there is no tort.<sup>57</sup>

New York has been the leader in advancing the doctrine just described,<sup>58</sup> but perhaps the most vivid example is the Illinois case of *Pendleton v Time, Inc.*<sup>59</sup> The plaintiff was an artist who claimed to have painted the first portrait of President Truman. When *Life* magazine was unable to negotiate with him for the right to reproduce his work, the magazine published a different portrait of Truman and claimed

(1991) (stating that some courts find a *prima facie* tort where a lawful act is done solely out of malice or ill will); Annotation, *Prima Facie Tort*, 16 ALR3d 1191, 1194 (1967) (collecting cases that discuss "the existence and nature of the cause of action for 'prima facie tort'").

<sup>53</sup> *Aikens v Wisconsin*, 195 US 194, 204 (1904). See also Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 Harv L Rev 1, 3 (1894) ("[T]he intentional infliction of temporal damage . . . is actionable if done without just cause.").

<sup>54</sup> See *Clark v Associated Retail Credit Men of Washington, DC*, 105 F2d 62, 64 (DC Cir 1939) (recognizing that a court may fill "'open spaces' in the law of [its] jurisdiction" in light of "social interests").

<sup>55</sup> See *Vandavelde*, 79 Ky L J at 535 (cited in note 52) ("Malice is neither necessary nor in all cases sufficient for a finding that the defendant's conduct was not justified."); Restatement (Second) of Torts § 870 (ALI 1979) ("One who intentionally causes injury to another is subject to liability . . . if his conduct is generally culpable and not justifiable.").

<sup>56</sup> See, for example, *Marcella v ARP Films*, 778 F2d 112 (2d Cir 1987); *Miller v Geloda/Briarwood Corp*, 136 Misc 2d 155 (Sup Ct NY 1986), 518 NYS2d 340, 342 (1987); *Squire Records, Inc v Vanguard Recording Society, Inc*, 25 AD2d 190, 268 NYS2d 251, 254 (1966).

<sup>57</sup> See *Marcella*, 778 F2d at 119 ("[T]he sole motivation for the damaging acts must have been a malicious intention to injure. . . . When there are other motives . . . there is no . . . *prima facie* tort."); *Miller*, 518 NYS2d at 342 (holding that the plaintiff failed to assert a *prima facie* tort claim because the defendant's actions were not motivated solely by malice); *Squire Records*, 268 NYS2d at 253–54 (holding that a *prima facie* tort only sounds where "the sole motivation for the damaging acts ha[s] been a malicious intention to injure").

<sup>58</sup> See note 56.

<sup>59</sup> 339 Ill App 188, 89 NE2d 435 (1949).

that it was the first ever painted of him. The plaintiff alleged that the magazine made this claim solely to spite him by reducing the value of his work. The court held that the plaintiff had a property right in the value of his portrait and that he had stated a good claim for the intentional destruction of it: "When, as alleged in the complaint, this injury to plaintiff's property right was willfully, maliciously and intentionally committed by defendant, there must be a remedy afforded for this wrong to the plaintiff."<sup>60</sup> *Pendleton* can be understood as a case of mistaken legal identity by the court; perhaps it would have been better treated as an instance of indirect commercial disparagement.<sup>61</sup> But the case has sometimes been considered as well a seminal instance of a prima facie tort—a case where an otherwise lawful act became unlawful just because of the motive behind it.<sup>62</sup> *Pendleton* is an odd case, and it involves a doctrine that might fairly be considered trivial because it covers few fact patterns. It is unusual for a significantly harmful act done solely out of malice to be otherwise lawful. The case, along with much of the prima facie tort doctrine and especially the judicial rhetoric that accompanies it, nevertheless illustrates again the persistent tendency of the common law to seek ways to punish enmity when it motivates out-of-pocket expenditures to make others worse off.

3. Enmity does not make a failure to act—an incurring of opportunity costs—culpable, unless the enmity is of a particular variety that collectively has been deemed an unacceptable basis for decision.

*A* is the employer of *B*. They have no formal employment contract; *B* is an at-will employee. *A* fires *B*, and in doing so is motivated by enmity toward *B*. *A* is not liable to *B*.<sup>63</sup>

*C*, an outsider to the at-will relationship between *A* and *B*, successfully importunes *A* to fire *B*. If *C* was motivated by personal enmity toward *B*, *C* is liable to *B*.<sup>64</sup>

<sup>60</sup> *Id.* at 438.

<sup>61</sup> See Kerry A. McHugh, *Product Disparagement: Expanding Liability in Texas*, 41 Sw L J 1203, 1242 n 40 (1988) (citing *Pendleton* as an example of a disparagement case).

<sup>62</sup> See Vandevelde, 79 Ky L J at 555 n 36 (cited in note 52) (citing *Pendleton* as an instance of the prima facie tort doctrine); Madelyn C. Squire, *The Prima Facie Tort Doctrine and a Social Justice Theory: Are They a Response to the Employment At-Will Rule?*, 51 U Pitt L Rev 641, 664 n 98 (1990) (same).

<sup>63</sup> *E.I. DuPont de Nemours & Co v Pressman*, 679 A2d 436, 444 (Del 1996) (holding that malice is insufficient to create a cause of action for termination of an at-will employee); *White v Ardan, Inc*, 239 Neb 11, 430 NW2d 27, 30 (1988) (same); *Fawcett v G.C. Murphy & Co*, 46 Ohio St 2d 245, 348 NE2d 144, 147 (1976) (same).

<sup>64</sup> *Nordling v Northern States Power Co*, 478 NW2d 498, 505 (Minn 1991) (finding third-party liability for interference with an at-will employment relationship); *Toney v Casey's Gen-*

*A* declines to hire *B* for a position because of *A*'s enmity toward members of *B*'s race. *A* is liable to *B*.

These results might be understood to trace the line between active and passive expressions of enmity—or more precisely between opportunity costs (discontinuing employment) and out-of-pocket costs (importuning an employer to discontinue employment) incurred to express it. The absorption of opportunity costs rarely is a basis for liability. The exception is the discrimination case where the enmity has been broadly forbidden as a basis even for a decision to forgo a transaction; but ordinary personal enmity remains a satisfactory basis for dismissal from at-will employment. Part of the reason may be that the parties to such enmities usually do not have the high barriers to escape experienced by a neighbor confronted with a spite fence. In a well-functioning job market the costs of dismissal on account of enmity usually are not all that high. But this cannot be the whole story, because while dismissing an at-will employee out of spite is legally permissible, successfully *agitating* for his dismissal out of spite is a tort:

In determining whether the interference (with another's employment) is improper, it may become very important to ascertain whether the actor was motivated, in whole or in part, by a desire to interfere with the other's contractual relations. If this was the sole motive the interference is almost certain to be held improper. A motive to injure another or to vent one's ill will on him serves no socially useful purpose.<sup>65</sup>

Why does this rule not apply to employers themselves? The distinction might be explained by the difficulty of separating cases of illegitimate animus from those where the employer is exercising his legitimate right to get rid of employees because they are incompetent or difficult to deal with. When a busybody ruins someone else's at-will employment relationship, he has no comparable legitimate interests that we worry about infringing. Or the difference might be explained by the impracticality of requiring the employer to retain an employee he detests, a state of affairs which can be costly for others not parties to their relationship<sup>66</sup>—and again may not be a problem if the employer retains an employee whom an *outsider* detests. But the distinction may also reflect a general lack of concern for the spectacle of an

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*eral Stores, Inc.*, 460 NW2d 849, 851 (Iowa 1990) (same); Restatement (Second) of Torts § 766 comment g (discussing interference by a third party with an at-will employment contract).

<sup>65</sup> Restatement (Second) of Torts § 767 comment d.

<sup>66</sup> See *Avitia v Metropolitan Club of Chicago, Inc.*, 49 F3d 1219, 1231 (7th Cir 1995) (reviewing the harm that may be inflicted on workers and consumers when reinstatement or other equitable remedies are imposed on employers).

employer ceasing to carry an employee he hates, while also a heightened sense of worry about the third party who goes out of his way to make the employee worse off and so may provoke active gestures of retaliation. If strikes undertaken on a tit-for-tat basis so turn active rather than passive, it may be hard to prevent them from veering into escalating rounds of tortious or criminal misconduct.

4. Enmity is disregarded in situations where the behavior it motivates has positive social consequences.

*A* opens a business that competes with *B*'s firm. *A*'s firm is a big success, and ultimately drives *B*'s out of business. *A* was motivated solely by enmity toward *B*. *A* is not liable to *B*.<sup>67</sup>

*A* makes defamatory public statements about *B*, a public figure, regarding matters of public concern. The statements are false, but *A* is not aware of this and was not reckless regarding this possibility. *A* is motivated in making the statements by enmity toward *B*. *A* is not liable to *B*.<sup>68</sup>

These examples can be understood as cases where the *acts* involved create large social benefits. Speech about public figures contributes to public deliberation, and competition contributes to consumer welfare. The law therefore is indifferent to whether enmity motivates these acts. Courts in antitrust cases have made clear that ill will is not relevant to the question of "antitrust intent";<sup>69</sup> it is to be expected that competitors will detest each other since their interests conflict, and indeed this may be a good thing if the enmity causes

<sup>67</sup> See *Olympia Equipment Leasing Co v Western Union Telegraph Co*, 797 F2d 370, 379 (7th Cir 1986):

[I]f conduct is not objectively anticompetitive the fact that it was motivated by hostility to competitors ("these turkeys") is irrelevant. . . . Competition, which is always deliberate, has never been a tort, intentional or otherwise. See *Keeble v. Hickeringill*, 11 East. 574, 103 Eng. Rep. 1127 (K.B. 1706 or 1707). If firm *A* through lower prices or a better or more dependable product succeeds in driving competitor *B* out of business, society is better off, unlike the case where *A* and *B* are individuals and *A* kills *B* for *B*'s money. In both cases the "aggressor" seeks to transfer his victim's wealth to himself, but in the first case we applaud the result because society as a whole benefits from the competitive process. . . . Most businessmen don't like their competitors, or for that matter competition. They want to make as much money as possible and getting a monopoly is one way of making a lot of money. That is fine, however, so long as they do not use methods calculated to make consumers worse off in the long run.

<sup>68</sup> See *Batson v Shiflett*, 325 Md 684, 602 A2d 1191, 1213 (1992) (acknowledging that a defamation claim requires a defendant to make the statement at issue "with knowledge that it was false or with reckless disregard" as to its truth or falsity), quoting *New York Times Co v Sullivan*, 376 US 254, 279-80 (1964).

<sup>69</sup> See *Olympia Equipment Leasing*, 797 F2d at 379 (suggesting that ill will in the antitrust context can spur competition that benefits society).

them to compete more ferociously. The attention of the law thus turns to the propriety of the defendant's behavior, and not to whether he is acting out of ill will toward the plaintiff.

The pattern that emerges from these sets of examples roughly tracks the logic of the norms proposed and discussed in the previous section. When an actor decides to express enmity by going outside the law and committing a fraud or an act of violence, this is the stuff feuds and cycles of revenge are made of; if a tit-for-tat strategy is followed, it will lead to more lawlessness. The law accordingly punishes the lawbreaker motivated by enmity more heavily than it otherwise would. When an actor expresses enmity through means that involve no law-breaking but do involve out-of-pocket expenditures to make another unhappy, the law is ambivalent. It often will try to find a way to penalize and discourage this, though there are limits on how far it can go as a practical matter.

But the law generally lets people express their enmities *passively*—by incurring opportunity costs—all they like, unless the enmities can be classified easily and decisively as distinctively offensive to public policy. And the law recognizes that enmities sometimes serve such good purposes in stimulating the provision of good things. In those cases, the courts are careful *not* to penalize enmity. This is not the result we would expect if enmity per se were considered a morally offensive reason for action. It is the result we would expect if enmity were considered problematic because of the consequences it often, but not always, produces when it motivates behavior.

## V. ENMITY IN POST-JUDGMENT BARGAINING

### A. Uncertainties

Having examined some conditional defenses of enmity and examples of its treatment elsewhere in the law, it is time now to assess how it should be handled in areas where it may complicate bargaining after judgment. We can imagine several stylized approaches to the question.

From a brutally utilitarian standpoint, enmity of any type and from any origin is just another preference and potential source of satisfaction.<sup>70</sup> If we set aside the problem of how to measure enmity, we can imagine a case on those grounds for trying to get rights into the hands of whoever values them the most even if the source of the valuation is gratified enmity. If we wanted to go that far, the case for property rights in situations dominated by enmity might be simple

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<sup>70</sup> See J.J.C. Smart, *An Outline of a System of Utilitarian Ethics*, in J.J.C. Smart and Bernard Williams, eds, *Utilitarianism: For and Against* 3, 26 (Cambridge 1973) (“[T]here are no pleasures which are intrinsically bad.”).

and overpowering, just as it tends to be strong in any other case where subjective values run high.<sup>71</sup> Nobody is likely to want to go that far, however, because the prospect of treating all preferences as valuable, no matter how odious, is ethically unappealing and has potentially unsavory consequences.<sup>72</sup> The difficulty, as we have seen, is that there are bad enmities and good, enmities that should be credited and others that, all else equal, we might prefer to see the law override or treat as transaction costs, if it feasibly can. This makes it hard to embrace enmity comfortably as always just another preference.

An alternative at the other extreme is to regard all enmities as bad,<sup>73</sup> and to say that the only other-regarding preferences the law ought to be prepared to respect are the altruistic preferences. If enmity of any type is found to be a common impediment to bargaining in a class of cases, then on this view those are indeed cases of high transaction costs where damages are warranted.<sup>74</sup> This may seem a more attractive normative basis for decision than the idea that every enmity is just a preference entitled to the same recognition as any other. But the altruism-only approach should be rejected as well, and for the same reason. Depending on its origin and expression, an enmity can be both socially useful and an important expression of its holder's autonomy. Enmity is a marvelous study in the complexity of human preferences precisely because it is so ambiguous—so capable of being enormously justified or enormously unjustified. That dual po-

<sup>71</sup> See Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 Mich L Rev 779, 843–44 (1994) (suggesting that when subjective values are high the case for specific performance is strong); Thomas S. Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 Mich L Rev 341, 365 (1984) (“[S]pecific performance offers the most efficient mechanism for protecting subjective values attached to performance.”).

<sup>72</sup> See, for example, Matthew D. Adler and Eric A. Posner, *Implementing Cost-Benefit Analysis when Preferences Are Distorted*, 29 J Legal Stud 1105, 1121–22, 1131–33 (2000) (discussing how government agencies correct for objectively bad preferences in performing cost-benefit analyses); John C. Harsanyi, *Problems with Act-Utilitarianism and with Malevolent Preferences*, in Douglas Seanor and N. Fotion, eds, *Hare and Critics: Essays on Moral Thinking* 89, 96–99 (Clarendon 1988) (arguing that antisocial preferences should be given no weight); Robert E. Goodin, *Laundering Preferences*, in Jon Elster and Aanund Hylland, eds, *Foundations of Social Choice Theory* 75, 75 (Cambridge 1986) (acknowledging that some preferences may be “so awfully perverse as to forfeit any right to our respect”); Richard A. Posner, *The Economics of Justice* 56–58, 65, 82–83 (Harvard 1981) (discussing the “utility monster’s” conflict with society’s moral intuitions); Robert Nozick, *Anarchy, State, and Utopia* 41 (Basic 1974) (describing the problem of the “utility monster”).

<sup>73</sup> See, for example, John C. Harsanyi, *Morality and the Theory of Rational Behavior*, in Amartya Sen and Bernard Williams, eds, *Utilitarianism and Beyond* 39, 56 (Cambridge 1991):

A person displaying ill will toward others does remain a member of this community, but not with his whole personality. That part of his personality that harbours these hostile anti-social feelings must be excluded from membership, and has no claim for a hearing when it comes to defining our concept of social utility.

<sup>74</sup> This is the approximate result Eric Posner reaches. See text accompanying notes 91–93.

tential is as damaging to this second alternative solution as it is to the first.

Against this it might be argued that an override of acrimonious preferences by a court is justified if it represents what a party actually would want—his preferences about his preferences—as measured at some other moment in time. This is a standard argument for “laundering” preferences: some of them may be offensive to a number of our multiple selves.<sup>75</sup> But are enmities in this category? It is clear that we might wish to avoid *occasions* for them, but whether we would want to relinquish our ability to give effect to them once circumstances make them seem appropriate is another matter. The answer might be obvious if the question was whether we want to strip away our power to give *lawless* effect to enmities, for then an affirmative answer might be inferred from the doctrines considered earlier that punish law-breaking more heavily when enmity motivates it. Those doctrines reflect a judgment taken in advance about how we want enmity to be dramatized, regardless of what contrary desires we have when the enmity is our own. But the question here is whether what people want, most of the time, is to have deals made for them by courts when, by assumption, they do not want to make deals for themselves for reasons that seem compelling to them at the time. There is little reason to believe that this is, in fact, what people want. The power to withhold consent—to express a commodification preference against bargaining over one’s rights, apart from whatever price one would put on them if forced to do so at an auction—is a significant feature of human autonomy, and we should not too easily imagine people eager to forfeit it; likewise the ability to enjoy the moral satisfaction of a well-earned enmity in the appropriate case. It is all a matter of speculation, and the guesses we make about how much others value their right to indulge their enmities seem likely to be heavily influenced by whatever preferences we each hold for ourselves.

If it were possible to generalize accurately about the likelihood that the enmities that follow judgment or otherwise arise between litigants usually fall into the good or bad categories, it might be easy enough to say that one of the two extreme approaches described above is close enough to correct to be the right one. There is no apparent basis for such a generalization. What about solutions that fall between these polls, and attempt to split the difference? Regrettably, irreducible uncertainties similar to those just discussed spoil the prospects of several intermediate solutions that are premised on the idea

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<sup>75</sup> See Goodin, *Utilitarianism as a Public Philosophy* at 132–48 (cited in note 23) (defining self-laundering as a situation in which an individual’s preferences offend his personal values).



that enmities can be just or unjust, creditworthy or condemnable, and that try to untangle them accordingly. Let us consider some examples.

First, if it were possible to know whether and when parties to a case were justly and unjustly enraged, the argument for damages rather than property rights as remedies in cases fraught with bad enmity might be tempting. But judges do not have the tools to make factual findings or normative judgments about most of the reasons why parties might hate each other. The story of a case is presented to a court in a choreographed fashion orchestrated by lawyers and constrained by rules of evidence and time limits. The court renders a decision against a background of extralegal norms and interactions that are likely to make the ultimate consequences of its decisions hard to predict; it typically is contributing a hastily worded paragraph to a story with a complicated past and perhaps a complicated future, and with which it is barely familiar on a human level. Aside from the factual obscurities that frequently surround an enmity's origins and rationale, there are large problems of normative evaluation as well. A stylized way to think of the general problem of good and bad enmities is to imagine a rabbi and a Nazi living side by side, each wanting to avoid bargaining with the other: the Nazi because of his anti-Semitism, which the community condemns and does not want to honor; and the rabbi because of his anti-Nazism, which the community endorses and does want to honor. The justness of the rabbi's enmity and the unjustness of the Nazi's are clearly visible and are matters of normative consensus for our hypothetical community. Alas, examples so clear are quite unusual. In real life, figuring out which side is which—or whether both sides fall into one category or the other—tends not to be normatively cut and dried. Litigants get mad at each other for reasons that typically are bound up not in ideology or philosophy but in matters of temperament, manners, and personal values that are hard to assess by reference to any ethical metric a judge might feasibly apply. This normative complexity can be understood as a large and probably prohibitive measurement cost.

Second, there is the related but slightly different argument that if a court is sure the parties want to make a deal but just cannot bring themselves to execute it, then it can do them both a favor by awarding damages. In that case the court might be giving the parties what they really want then and there: the *result* of a deal without the face-losing ordeal of consenting to it. Some legal interventions can be understood this way. Imagine a world where parties routinely make trades with members of their own race, but are forbidden by taboo from trading with members of other races even when they secretly, or in their better natures, wish they could. In these circumstances it is possible that by awarding damages rather than property rights a court would be

making a Pareto-optimal adjustment. Its award may in effect strike a deal for the parties that does make them both better off by helping them around a custom that has come to serve them poorly. This is one way to think about the function of Title VII and other antidiscrimination laws at some times and places. It also is a way of understanding laws that attempt to overcome dysfunctional norms by changing the social meaning of an act—such as a law that, in Professor Lessig's example, requires the passenger in a cab to fasten a seatbelt, and thus strips away the risk that the act of fastening it might insult the driver and thus not be done at all.<sup>76</sup> Interventions like these allow the actor to effect his preference against bargaining, or against delivering an insult, or against being viewed by others as *choosing* to fraternize with a member of a despised race. At the same time they give the actor the result that the fear of those things threatens to prevent—a result he might like to have if only he did not have to incur such distasteful process costs.

The difficulty again lies in distinguishing such possibilities from the case in which, on our facts, the victor in the lawsuit really does not want an exchange at all: he will be galled by an award of damages just as he would be by the act of bargaining; in his way of conceptualizing the dispute, his opponent will be getting away with something untoward if he is able to wriggle out of liability by writing a check. He wants the rights. If that is how litigants experience their disputes, it is hard to justify damages on the ground that they give the winner what he really wants in some meaningful sense. In practice, no doubt, there are all sorts of litigants and all sorts of ways for them to think and feel about their disputes, their opponents, and the relationship between rights and money. If courts were likely to be good at sorting out these variables from case to case, they might make useful additions to the set of considerations judges worry about in fashioning their remedies. But again, courts are not likely to be good at that. They are in no position to make complicated assessments of litigants' inner lives.

So the appeal of the easy positions tends to be overwhelmed by uncertainties: enmities that may or may not have an honorable pedigree; enmities that may or may not be socially useful; enmities that may or may not reflect the considered desires of their holders at other times, or even at the time they arise; enmities that may cause their holders to take pleasure in making their adversaries worse off, or that may just cause their holders to decline on principle to bargain with their adversaries. We thus are in the position of requiring a general and necessarily crude response to a complicated, context-sensitive

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<sup>76</sup> See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U Chi L Rev 943, 952, 998, 1002 (1995) (discussing the effect of norms on the use of seatbelts in Budapest cabs).

problem. Any answer we devise is going to produce errors of one variety or another—or perhaps several types at once—some share of the time. The best we likely can do is to consider the different types of errors a rule can generate, and ask which seem most tolerable. I argue for a presumption against treating enmities as a reason to award damages. I believe this has advantages over the alternative from the standpoints of both efficiency and autonomy.

## B. Errors

Consider the choice of rules for handling enmity to be a tradeoff between the false positives and false negatives that such rules can create. By a false positive, I mean a case where damages are awarded because the enmity between the parties is thought to be shallow or unworthy of respect, but where the enmity in fact has a distinguished pedigree: *A* has a reason for declining to deal with *B* that either is very good or should have an unusually strong claim to immunity from public second-guessing. An example of a good reason would be a heinous wrong committed by *B* that all would agree should entitle *A* to have nothing further to do with *B*—perhaps a flagrant violation by *B* of an important norm, such as deliberate attempts by *B* to make *A* miserable.<sup>77</sup> An example of a reason with a strong claim to immunity from being second-guessed would be acrimony based on a difference in certain types of private values: *A* takes the position that she is answerable to no authority but the Lord, and so will not bargain,<sup>78</sup> or wants little to do with *B* because she finds *B*'s politics offensive.<sup>79</sup> Those are high-visibility examples in the sense that the actor's basis for the refusal is a type of objection that outsiders can comprehend and may deem important enough to the actor's autonomy to be worthy of respect. More commonly the reasons for enmity are not linked to politics or religion, and therefore are less visible to outsiders and more difficult for them to grasp and assess—yet nevertheless may be comparably important to their holders and entitled to the same weight. An award of damages on account of enmity thus may amount to a forced sale of rights under circumstances where it is feasible to let the parties decide whether to make a consensual exchange, and where

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<sup>77</sup> See, for example, *O'Cain v O'Cain*, 322 SC 551, 473 SE2d 460, 467 (SC App 1996); *44 Plaza, Inc v Gray-Pac Land Co*, 845 SW2d 576, 577–78 (Mo App 1992); and discussion of the background of those cases in Farnsworth, 66 U Chi L Rev at 428–33 (cited in note 4).

<sup>78</sup> See *Ball v Jorgenson*, 147 Or App 55, 934 P2d 634, 635 (1997) (refusing to bargain toward an efficient result when Jorgenson diverted water onto Ball's property), and discussion in Farnsworth, 66 U Chi L Rev at 428–33 (cited in note 4).

<sup>79</sup> In *Parker v Ashford*, 661 S2d 213, 214 (Ala 1995), discussed in Farnsworth, 66 U Chi L Rev at 402, 427–28 (cited in note 4), one of the lawyers explained that animosity between the parties ran high in part because Parker was a “property rights Democrat” in a Republican county.

the parties' reasons for not bargaining may be as good as any reasons parties ever have for failing to reach a deal. A false positive in this sense can amount to a serious invasion of the parties' autonomy. Similar examples of false positives would be cases where enmities are overridden with damages because this is thought to be what the parties "really" want in some sense—only it is not, in fact, what they really want.

By a false negative, I mean a case where a court awards a property right and no bargaining follows because of acrimony that is of the most irrational or objectionable variety: for example, bigotry or rank *schadenfreude* on the part of the winner. Here the cost of the error is the gain in wealth prevented by the preferences that should not count, according to some collective determination. Likewise, cases where courts award property rights and the parties fail to bargain because of enmities that they will regret later (but then it will be too late), or that every other self in their repertoire would wish not to see given effect; or enmities that cause the parties to avoid bargaining just to avoid the humiliation of making concessions to one another, while both privately wish on some level that there were some way to get the deal done without the ritual of a consensual exchange. These error costs should not be presumed small. With the parties to litigation frequently locked into bilateral monopolies, the results of bad enmity can be ugly.<sup>80</sup>

Now we could, of course, try to imagine a simple head-to-head comparison of these various possible error costs. An economic analysis might regard as an error cost in false positive cases the difference between whatever award of damages a court might make and the actual price that would have been required to get the parties to set aside their well-earned hard feelings or values. That error cost could then be compared to whatever costs result in false negative cases when an otherwise promising bargain is blocked by bad acrimony. But the errors involved in cases of false positives arguably are different in kind from the errors when false negatives occur. In the case of a false positive, the court is not merely ordering a sale at the wrong price; in a sense the court may be considered wrongful in ordering a sale at all. That is the difference between the cases involving acrimony that we are discussing here and superficially similar cases where subjective values run high and are likely to render an award of damages inaccurate. In cases involving large subjective values, the notion of a sale it-

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<sup>80</sup> See Richard A. Epstein, *Principles for a Free Society: Reconciling Individual Liberty with the Common Good* 224–28 (Perseus 1998) (discussing the possibility that “bad blood” between parties may prevent them from bargaining around property rights in encroachment cases, and arguing that this outcome is justified by the incentive that property rights create for parties to take precautions against encroaching in the first place).

self may not be repugnant to the parties. They dispute only the price. But when the notion of a bargain is itself repugnant to either or both parties (on account of enmity, norms against transacting, or both), ordering a transfer of rights for cash does some violence to the parties' liberty—their ability to express their values through choices about whether and when to bargain and enter into exchanges, as distinct from their choice of price.<sup>81</sup> In other words, there is something bothersome in tallying as just another error cost the damage done in overriding a party's wish not to think in terms of cost. It amounts to coping with commodification values by steamrolling them into primary values: the decision not to haggle over *X* is itself regarded as subject to haggling. This may eat away at norms against haggling. Perhaps seeing forced transactions ordered by courts makes unforced transactions in the same circumstances seem more palatable.

Even apart from all this, there is the conundrum of how to measure preferences to avoid measurement and treatment of an earned enmity as subject to pricing. By their nature, these sorts of commodification preferences against pricing and bargaining are peculiarly resistant to estimation by reference to any market. Estimating their size in an error cost analysis is itself an error-prone exercise in unguided speculation.

False positives—forced transactions when for good reason there would be no consent—also create economic risks for reasons that by now are familiar: the court would be meddling in an iterated game, the other innings of which are not likely to be clearly visible. We *want* parties to worry that if they treat each other shabbily—either before the lawsuit or during the course of the litigation—one consequence may be the befouling of negotiations, including negotiations after any eventual judgment between them. Removing that sanction in the pursuit of efficiency may have consequences that are unintended, invisible, and inefficient. Courts, like the individuals described earlier in this Article,<sup>82</sup> often may advance efficiency best by maintaining a certain indifference to it, rather than gumming up the works with an excess of cleverness.

The false negatives—cases where bad enmities are allowed to prevent an otherwise welfare-improving bargain—do not seem as bothersome. A litigant's refusal to bargain with an adversary corresponds roughly to the expressions of enmity to which the law justifiably is indifferent elsewhere. If *A* wants to make a deal with *B* but gets nowhere in negotiations because of enmity between them, he cannot

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<sup>81</sup> For a discussion of this distinction and how it is drawn by various critics of economic analysis, see Jane B. Baron and Jeffrey L. Dunoff, *Against Market Rationality: Moral Critiques of Economic Analysis in Legal Theory*, 17 *Cardozo L. Rev.* 431, 432 (1996).

<sup>82</sup> See text accompanying notes 37–42.

go to court and demand that the transaction be ordered on terms the judge sees fit. (Actually he *can* do this in certain classes of cases where the enmity has been collectively judged an unacceptable basis for decision, but not in cases where the enmity is personal.) I argued earlier that part of the sense behind the public indifference to cases like this is that a refusal to bargain is a passive sanction that does not involve out-of-pocket expenditures to make another worse off. The analogy from these cases to those that involve no bargaining after judgment is rough because parties to a litigated dispute frequently will be locked into a bilateral monopoly. As we have seen, a rebuffed trading partner normally can find other partners with whom to transact, making the cost of the rejection relatively small; but the cost becomes larger if the rebuffed party cannot turn to a larger market for relief. Yet, even then the immediate pecuniary loss is capped at the size of the lost surplus from bargaining, and the passivity of the sanction makes it less likely to provoke expensive and escalating rounds of retaliation. Of course the litigation itself may well have involved such expenditures, again making the issue a bit more complicated. But so far as we know, litigation is a sufficiently well-cabined and explicitly law-governed form of feuding that it does not normally provoke the kind of escalations that make active, out-of-pocket expressions of enmity worrisome.

There is another point to add to the benefit side of the ledger as well, even in cases involving false negatives—that is, cases in which a property right from a court gives the upper hand to a party with unkind designs on his adversary, and in circumstances where there is no market into which the adversary can escape. The threat of this possibility naturally induces great care *ex ante* by parties eager to avoid being put into such a position. This is not *always* good. There is such a thing as too much care, whether in inefficient efforts to fulfill a contract or in excessively costly measures to avoid creating a nuisance. But in some circumstances the cost of taking precautions is low—and in some cases, too, the problems created by a mistake or conflict of uses are terribly difficult for a court to remedy or undo in a satisfactory manner. Disputes over the sale of a piece of real property, or encroachment over its boundaries, are frequent examples. The values involved in such cases may be hard to quantify accurately, making the expected error costs from any judicial decision high. Indeed, equitable remedies traditionally are reserved for precisely such cases—those where money seems (for this reason or others) an unsatisfactory remedy for the wrong done.<sup>83</sup> It often is highly desirable that those wrongs be avoided in the first instance because their accurate rectification is

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<sup>83</sup> See Douglas Laycock, *The Death of the Irreparable Injury Rule 3-7* (Oxford 1991).

so difficult. The threat of the potentially brutal outcome in which the parties' legal obligations must be carried through without likely relief by negotiation creates a large incentive for care in such instances.<sup>84</sup> We thus indulge one type of arguable error cost—occasional beastly behavior by a party armed with a property right—to avoid another: more than occasional cases in which courts have to award damages to remedy injuries that are hard to monetize, and in doing so make error-prone judgments about valuation that threaten a different sort of violence to the parties' preferences.

Finally, there is no reason to think that if indefensible enmities are indulged they will have bad *systemic* effects. Racism was mentioned earlier as a ground for refusing to transact that is regarded as invidious and thus impermissible, at least in contexts where it can be detected at manageable cost. If enmity generally were on the same footing as racism, that might be a ground for treating enmity like a transaction cost in situations where it commonly arises. But racism has effects that tend to work to the systematic disadvantage of select groups of people. The effects of enmity, and the nontransacting it may cause in some settings, are likely to be distributed randomly among plaintiffs and defendants who themselves are not likely to share any characteristics in particular. Perhaps the rule can be said to be hard on the irascible, but that is a class whose membership we might just as soon see diminished in any event.

A special case in favor of judicial intervention to circumvent enmities might be made when the enmities are a result of the litigation process itself. It could seem perverse for a court to defer in fashioning a remedy to preferences that were formed by the very process of seeking the remedy. Even if it makes sense for a court generally to take the parties' preferences as it finds them, it might seem quite another matter for a court first to shape the parties' preferences by establishing an adversarial process for resolving their dispute and then to defer the preferences as if they had been found in the world rather than made in the courthouse. I present this view because it holds some appeal, but I am not inclined to agree with it. Litigation is endogenous to the rest of life. If *B* behaves dishonorably in conducting a lawsuit, and *A* decides not to bargain with him after judgment as a result, why should a court undo this decision? (And why should a court relieve *B* of the fear that *A* might exercise such leverage as a sanction for bad behavior during the litigation?) One can imagine a judge, after supervising a lawsuit for a year or so, drawing conclusions about the parties' behavior within it and taking at least this much into ac-

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<sup>84</sup> For elaboration of the point, see Epstein, *Principles for a Free Society* at 225–28 (cited in note 80).

count in devising a remedy by reference or analogy to the doctrine of unclean hands.<sup>85</sup> But even within suits, supervising judges often are in a poor position to assess whether enmities are justified. They may participate in a conference call or conduct a settlement conference, but they are likely to miss out on the little moments of misbehavior and discourtesy in a litigation that give enmities gusto. So here as elsewhere, by second-guessing private preferences and overriding them, a court risks upsetting other balances and orderings between the parties that have a logic and efficiency of their own.

There may, of course, be sound arguments for using procedures in litigation that reduce the likelihood of enmity between the parties. Nobody *wants* enmity, or is made better off by it per se; so if a situation that generates acrimony can be avoided altogether, all else equal it ought to be avoided, perhaps by considering less acrimonious ways to resolve cases than by an intensely adversarial process. But some institution must serve as the last resort for those parties who cannot resolve their differences amicably. Litigation will tend to be the place such parties turn, often with enmities already well on their way to maturity.

### C. Liberalism, Utilitarianism, and Commodification Preferences

The handling of enmity recommended above—that is, leaving it alone—can be understood as a liberal rather than a more directly utilitarian response to the difficulties it presents. Those two approaches differ slightly in the weight they give to consensual decisions by the parties; the differences can be traced to different understandings of property rights and their purposes. The hard line consensualist position might be understood as following from basic principles of liberalism—Blackstone’s notion of property as “sole and despotic dominion”<sup>86</sup> over external things, or in Elster’s phrasing, the idea that “all individuals should have a private domain within which they are dictators.”<sup>87</sup> Liberalism favors the assignment to individuals of spheres of authority that are absolute or nearly so. The decision not to sell property to a neighbor is, perhaps with a few exceptions, really not

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<sup>85</sup> See Dan B. Dobbs, *Law of Remedies: Damages—Equity—Restitution* § 2.4(2) at 68–72 (West 2d ed 1993) (discussing the unclean hands doctrine).

<sup>86</sup> Blackstone, 2 *Commentaries* at \*2 (cited in note 46). For a discussion suggesting that this famous definition is a “cartoon or trope,” and was understood as such by Blackstone, see Carol M. Rose, *Canons of Property Talk, or Blackstone’s Anxiety*, 108 *Yale L J* 601, 631 (1998).

<sup>87</sup> Elster, *Sour Grapes* at 31 (cited in note 7). For similar definitions focusing on the notion of an individual’s jurisdiction, within which choices are immune from scrutiny, see Randy E. Barnett, *The Structure of Liberty: Justice and the Rule of Law* 64–65 (Clarendon 1998) (“[T]o have property in a physical resource—including one’s body—means that one is free to use this resource in any way one chooses provided that this use does not infringe upon the rights of others.”).



open to public second-guessing regardless of the reasons for it. In addition to securing a measure of individual autonomy that often is considered attractive, this approach has the advantage of facilitating the creation of wealth by requiring entitlements to change hands through voluntary transactions that by assumption will make both parties better off. On this view, if it is appropriate to use liability rules to protect rights when transaction costs are high, it is because that practice is consistent with what we believe are the parties' desires.

While liberalism regards economic improvement as a happy and predictable byproduct of rights devised primarily to protect liberty, utilitarianism—or, more specifically, the variety of welfare economics that amounts to a modified utilitarianism—regards liberty as a good consequence of property rights devised primarily to maximize welfare or wealth. The two approaches function similarly—so similarly that a utilitarian might favor the liberal approach as a more efficacious means of maximizing utility than a more direct economic utilitarianism. The chief practical drawback of the liberal view is that it leaves little room for tampering when, as in the case of enmity, a firm commitment to property rights and their voluntary exchange might sometimes seem at odds with the well-being of the parties measured in some other way. The chief drawback of the utilitarian impulse to meddle in such situations is that the practice of meddling may do more overall harm than good. For once revealed preferences and voluntary exchanges can be overridden by planners with ideas different from those of the parties about what is best for them or what they “really” want for themselves, the door is open to a number of potential abuses and blunders.

The differences between the liberal and utilitarian approaches generate different perspectives on the problem of bargaining after judgment. One way to interpret the problem of enmity is by asking whether a consensual bargain in which *B* buys the rights from *A* is significant only as *evidence* that *B* values the rights more than *A*. If that is the case, then it remains possible that the evidence is misleading—that even if the two parties would not be interested in consenting to a deal for whatever reason, *B* still might value the rights more than *A*. Perhaps *B* would bid more for the rights at an auction, and this, rather than whether the parties would enter into an exchange, is the best measure of valuation. Compare this alternative interpretation: if *B* would outbid *A* if the rights were auctioned, this is mere evidence bearing on whether the parties would want to make a deal if they could in which *A* sells the rights to *B*. The important question remains whether mutual consent to a bargain exists, either literally or in some plausible hypothetical sense, and is being frustrated by external obstacles that call for a court's intervention. It follows from this

view that if bargaining between the parties is practically feasible, awarding property rights makes sense even if the parties are unlikely to bargain over them on account of enmities or other preferences they hold.

While either of those models of rights is capable in principle of accommodating commodification preferences, liberal models are likely to do a better job of it. Utilitarian approaches to rights create more opportunities for public estimates of people's valuation of rights because they are less likely to regard opportunities for consent as comprising a conclusive case against the making of such estimates. Commodification preferences tend not to do well in those public estimates for a number of reasons. The estimates usually are based on market measures that presuppose a decision to put the rights up for sale. The set of relevant values plugged into the planner's cost-benefit calculator tends to be thin: nonpecuniary or moral preferences easily are regarded as too speculative, trivial, irrational, awkward to discuss, or hard to measure to be worth worrying about. When individuals make their own decisions about the use of their entitlements, they implicitly take account of commodification preferences in ways that are difficult for public tribunals to simulate. They can digest the disparate values at stake—commensurable and not, nonpecuniary and moral preferences, as well as preferences for cash—and express the resulting synthesis not in words but in a *decision* that can be rich in its inputs and unlikely to hurt others too badly if it is not.

The liberal tradition thus provides a natural mechanism for the conservation and expression of complicated commodification preferences. It is a natural mechanism for coping with enmity in particular, because it obviates the need for imponderable collective judgments about whether particular enmities are a good or bad thing. Individuals confronted with complicated problems like enmity in their own lives tend to be better positioned to render nuanced judgments and decisions about them than public officials theorizing about their lives generally and at a distance. And efficient decisions as well: judges are not the only ones whose common sense may be informed by a sense of costs and benefits; ordinary people can be the same way, and they know more about their cases and their lives than the judges do. Hence the preference of liberalism for resolving doubtful cases fraught with empirical and conceptual uncertainties, such as the conundrum of enmity, in favor of resolution by individuals on behalf of themselves.

These arguments bear a resemblance to positions sometimes taken in debates about incommensurability, a problem most often associated with social judgments about valuation and about the kinds of bargains people ought to be allowed to make. The most prominent claim in the debate is that people ought to be limited in the contracts

they can make because some goods are considered incommensurable with cash—not by the parties (who by assumption want to make a trade), but by their society, or by the courts called upon to enforce the parties' deal.<sup>88</sup> My interest here is in the opposite question about commensurability: whether and when parties ought to be forced by the courts to regard their rights or their anger as commensurable with cash, accepting damages even where a property right is an available remedy and where they would not want to bargain over such rights if they were awarded. The critical question in debates about commensurability typically is not just whether given values are commensurable, but who should decide whether they are commensurable. Economists who favor broad private rights of contract, and the privatized decisions about commensurability that such rights entail, may nevertheless be untroubled by the opposite prospect of awarding parties damages instead of property rights based on estimates of the pecuniary gains from trade to be had between them and the existence of bothersome transaction costs. No doubt this is partly because of the implicit assumptions economists often make about the content of people's preferences—that they usually are ready to peddle their entitlements without being distracted by problems of enmity or commensurability. Those who believe that commodification preferences are a larger, more important, and more attractive feature of valuation than that naturally should be more skittish about authorizing damages when relying on consensual trades is feasible.

#### D. Limitations

The discussion so far has considered whether property rights are desirable remedies from a perspective mostly internal to a case—a perspective that assumes, in other words, that the only parties who stand to lose anything as a result of the enmity are the ones embroiled in the dispute. Of course the decision to award equitable relief may be affected by any number of other considerations, many of them involving the costs such relief can create for others: for third parties affected by the remedy, for example, or for the court that has to administer it. Those remain solid reasons for withholding equitable remedies—and perhaps become stronger reasons—where enmity is pervasive. First, the remedy a court issues may affect third parties who may have had no part, or anyway no culpable part, in whatever drama gave rise to

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<sup>88</sup> For general discussions, see Richard A. Epstein, *Are Values Incommensurable, or Is Utility the Ruler of the World?*, 1995 Utah L Rev 683, 699 (discussing the commensurability of parties' subjective preferences); Sunstein, 92 Mich L Rev at 849–51 (cited in note 71) (claiming that certain goods should neither be bought nor sold); Elizabeth Anderson, *Value in Ethics and Economics* 55–64 (Harvard 1993) (discussing incommensurable goods). See also Margaret Jane Radin, *Compensation and Commensurability*, 43 Duke L J 56, 56 (1993).

the enmity between the parties to the suit. In cases where the costs of a refusal to bargain so ripple out toward others, the costs of a false negative—an incorrect conclusion that the enmity is warranted or otherwise is a legitimate source of utility—can multiply. And since the third parties by assumption are innocent of anything that would warrant enmity toward them, they are being punished for nothing. They feel the brunt of the enmity without being deterred by the prospect of it. Sometimes it may be plausible to suppose that the costs of enmity to innocent third parties are impounded in the offer made to buy the property right by means of contracts the third parties have with the party against whom the enmity is directed. But often this is infeasible, and then we are confronted with cases in which the costs and benefits of letting a party effect enmity with a property right are balanced less favorably.

Second, a court may find that situations where enmity is significant present especially difficult problems of supervision. It depends on the case and the details of the remedy. Even apart from enmity, a remedy in the form of a property right that thrusts the parties into an extended relationship is a worry to a court that will have to monitor their compliance with it. The worries merely are multiplied if the parties' relations are beset with enmity, because it is liable to create friction in the relationship the court will be supervising. It is hard enough for a court to evaluate compliance with an ongoing injunction when the parties are acting in good faith, even of the reluctant variety. Enmity can motivate heightened efforts by parties to overenforce the terms of an injunction or to evade its spirit, as well as efforts by one side to tweak the other in ways that will produce satisfaction for the antagonist without being substantial or visible enough to be caught by the court. All this makes it harder for a court to supervise effectively the enforcement of the injunction, and supports an extra measure of judicial reluctance to issue orders subject to these risks. The issue admittedly is a delicate one, because a practice of avoiding injunctions where enmity threatens to undercut their efficacy creates an incentive for the party opposing such a remedy to manufacture enmity in appearance or in fact.

As an example of these considerations, think of a case where a court finds that the plaintiff has been wrongfully discharged from his job. At the remedial stage the plaintiff requests a court order reinstating him; the employer argues for an award of front pay with no reinstatement. Assume that if the employee were ordered reinstated, the employer would want to get rid of him, and thus would be ready to offer an amount of cash sufficient to cover the employee's actual pecuniary damages (that is, enough to cover wages for however many weeks it is likely to take the employee to find alternative employ-

ment, perhaps along with some additional sum in case the next job does not pay as well). But then also assume that relations between the parties have been sufficiently befouled by the litigation to make a bargain of this sort unlikely. The employee wants his job back, and has been too embittered by past dealings with the corporate employer to sit still for negotiations of the sort just described. For a large enough sum—a substantial enough “acrimony premium”—he no doubt would change his mind, but those sums are unlikely to be forthcoming from the employer. What to do?

Judge Posner has analogized reinstatement in similar circumstances to a forced marriage in a regime without divorce:<sup>89</sup> it may have untoward consequences for third parties. The costs of the enmity may not just be the forgone bargain the employer and employee would be able to make if it were not present. Coworkers and consumers may be made worse off, too, if the enmity manifests itself in low-level ways—sullen interactions with customers, efforts to poison the attitudes of colleagues, or acts of sabotage difficult to prove or prevent. In principle the employer might raise the size of the offer it makes to the employee to reflect its interest in avoiding these risks, but it is not clear why the employer should have to do this. It effectively would be paying the employee not only to forgo the enforcement of his remedy but also to prevent him from doing things he is not supposed to do but might be able to pull off under cover of the remedy. Any amount the employer did offer for this purpose would be highly imprecise, and would be passed on to customers and other employees who likewise would be paying to avoid aspects of the remedy the court did not mean to create. And the prospect of such payments would give the employee an incentive to make himself more menacing and the risks of trouble he might create more ominous so as to extract a large ransom from the employer. None of these problems might be serious in a world of perfect judicial information, but again the cost to a court of detecting all these behaviors accurately would be prohibitive.

In addition, supervising the resulting employment relationship may be a nightmare for the court. Assume the enmity runs from employer to employee as well as (or instead of) vice versa. Reassignment of the employee to less satisfying work for bogus reasons, hyperattentive and officious supervision of his labors, and petty exercises of discretion against his interests all are complaints the employee might raise. They might be false complaints; they might be true, but the employer’s actions might be necessary correctives to the sullen behavior

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<sup>89</sup> *Avitia v Metropolitan Club of Chicago, Inc.*, 49 F3d 1219, 1231 (7th Cir 1995) (“[T]he costs in reduced productivity caused by locking parties into an unsatisfactory employment relation [ ] is the industrial equivalent of a failed marriage in a regime of no divorce.”).

mentioned a moment ago (an instance of escalation); or the complaints might be entirely valid, and the employer's actions unnecessary. A judge likely would have difficulty discriminating between these possibilities, finding both that it takes a long time and that the resulting judgments are prone to error. These all are good reasons for special hesitation before using property rights as remedies in cases where enmity is likely and the remedy, rather than being a one-shot intervention, would force the parties into a longer-term relationship under the court's jurisdiction. They amount to limitations—"utilitarian constraints," in Professor Epstein's usage<sup>90</sup>—on the liberal strategy of using property rights to cope with enmity and the other complicated preferences parties hold.

## VI. ENMITY AND EMOTION

In an insightful paper discussing various intersections of law and emotions, Eric Posner has suggested that the existence of enmity between parties involved in some types of disputes might be a good reason to withhold property rights as remedies.<sup>91</sup> He reaches this view by suggesting that enmity is a product of emotion, or perhaps a species of it; this permits him to assimilate the problem of enmity after judgment into a more general model that calls for comparisons of parties' preferences when they are in the "calm state" and the "emotion state," enmities being an example of the latter. The model treats emotions as forces that cause temporary changes in people's preferences. When they are in the grip of emotions, people try to satisfy their new, emotionally produced preferences with the same means-ends rationality they use the rest of the time. The challenge for the law is to give people incentives, where feasible, to avoid situations likely to provoke emotions that will cause them to have undesirable temporary preferences. So hotheads should avoid bars where they are prone to get into fights, and the law should encourage the avoidance by punishing them if they fail to do so. But more latitude should be given to people whose emotions get them into trouble in ways that could not easily have been predicted, since difficulties of prediction make deterrence difficult as well.<sup>92</sup>

Without more, economic conclusions follow one way or the other from a preference's psychological origins. There is no general reason to treat preferences with an emotional pedigree as less socially valuable than others. Sometimes they may be more valuable. Posner's ar-

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<sup>90</sup> Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 *J Legal Stud* 49, 50 (1979).

<sup>91</sup> Posner, 89 *Georgetown L J* at 2010 (cited in note 5).

<sup>92</sup> *Id* at 1981, 1995–97.

gument is, first, that when emotions cause people to behave in ways considered undesirable on independent grounds, it makes sense to prefer and appeal to their calm state preferences. If the emotion state creates preferences for violence, for example, then the preferences of the calm state will be the privileged ones—not because preferences produced by emotions necessarily are bad, but because a preference for violence has been deemed bad. But enmity that makes bargaining impossible is not quite like that, because the decision to favor the calm or the emotional preferences cannot be made by saying that the *behavior* caused by the one (bargaining) is better than the behavior caused by the other (no bargaining). To say that would be circular because it would beg the critical question of which preferences should be used to measure the efficiency of the outcome: those in the calm state or those in the state of enmity. The preference not to bargain is not like the choice to be violent; it cannot be condemned with an appeal to larger judgments against it made elsewhere in law or society.

Posner's other principal argument is that preferences experienced during emotional states should be discounted if that is what the party would want while in the calm state from which he began and to which he will return. In the contract setting, Posner thus argues that a practice of awarding specific performance to parties who are unable to reach agreement on account of enmity would make contracting more expensive *ex ante*: when the contract is drawn up, the seller will anticipate that if he later tries to breach, the buyer may become upset and enforce his right to specific performance despite settlement offers that would seem reasonable but for his indignation. Since this would make life more expensive for the seller, the buyer will have to pay up front to cover such a possibility—in effect, as Posner says, being “forced, against his calm state preferences, to purchase the right when angry to spite the seller!”<sup>93</sup> But this may not quite characterize the situation accurately. It is true that the calm state preference of the buyer is not to spite the seller, but that is because as yet he has been given no reason to do so. His calm state preference also is that the seller behave in conformity with whatever norms are in place, including norms of promise-keeping and performance, and thus avoid precipitating any enmities. If the seller is anxious that he be able to disappoint those expectations without being subject to too much retaliation, he can try to specify a damages remedy in the contract—and now he may be the one who ends up paying “extra,” this time for the privilege of being able to engage in behavior that normally would cause relations between the parties to sour and would make it harder for him to extricate himself from his obligations.

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<sup>93</sup> *Id.* at 2008.

I do not know what the actual consequences of these competing hopes and fears would be for the price of contracts. Perhaps none. My point is only that identifying people's calm state preferences at the time they enter into contracts is more complicated than simply asking whether they *then* have any wish to spite their partners. They may well have "if, then" wishes to preserve their rights if betrayals or other unappetizing contingencies arise—the right, in short, to get justifiably angry and take a hard line if circumstances warrant, which everyone assumes they will not. It probably is unwise to try to predict too confidently whether, how, or how effectively parties anticipate in their contracts the possibility that their preferences may later be fundamentally changed by the behavior of their transacting partners.

I believe a more fundamental difficulty with Professor Posner's framework is his decision to style enmity as an emotion, defining emotions as temporary disruptions of baseline preferences—preferences that soon return. It no doubt is true that a key question in deciding whether to privilege the preferences of any earlier state over those of a later state is whether and in what form the earlier state returns and is accompanied by regret over what was done in the interim. If we are sure the calm self will return and regret the acts of the emotional self, we may have a basis for discounting the emotional self's preferences, for then we are giving the person what he (most of the time) wants. But if the earlier self never returns, or if it returns unaccompanied by regret over the acts committed while it was away, it is hard to see why its preferences necessarily should be king. It might seem odd to imagine the emotion state to be permanent, and the calm state never to return. But the reason for the oddity is the decision to classify enmity or anger as emotions, and thus as temporary. The classification is misleading. People can be calm and angry at the same time; to put the point differently, we might, with Aristotle, distinguish between the "irrationality" of anger and the rationality of hatred.<sup>94</sup> Hatred is more durable. Classification problems to one side, the important point is that the enmities people develop when they believe they have been wronged can last a long time and cause permanent changes in their preferences.<sup>95</sup>

Think of a seller who breaches a contract, causing the buyer to become indignant. The buyer's enmity, and resulting new preference

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<sup>94</sup> Aristotle, *The Politics* \*1312b, lines 18–34 (Chicago 1984) (Carnes Lord, trans).

<sup>95</sup> For discussion of the durability of anger, see Jon Elster, *Emotions and Economic Theory*, 36 *J Econ Lit* 47, 70–72 (1998) (discussing the enduring nature of anger); Stephen Wilson, *Feuding, Conflict, and Banditry in Nineteenth-Century Corsica* 30, 280 (Cambridge 1988) (describing long-lasting acrimonious quarrels in Corsica). For a general discussion, see Milovan Djilas, *Land without Justice* (Harcourt Brace 1958) (discussing centuries-long acrimonious struggles in Yugoslavia).



to avoid the seller, may go away in a few days, or it may result in disillusionment that never quite dissipates and that causes him to lose interest in making deals with his new nemesis, whether much later on, or after judgment in any litigation that results, or in negotiations that serve as a substitute for litigation. It then is neither here nor there whether the reaction is labeled a form of anger, enmity, or emotion. There is just an earlier self and a later self, separated by events that caused a change in attitudes and beliefs. There is no calm self to which the seller reverts after a temporary interruption.

My difference with Professor Posner may be largely empirical: he describes the enmities that can follow judgment as temporary disturbances that make someone seem not himself—his calm state—for a little while. I agree that enmities sometimes are accompanied by gusts of emotion that have those characteristics, but regard them as potentially lasting much longer and as more likely to change the identity of the self and its preferences in an ongoing way. I view them as likely to be felt preferences rather than as emotions in the sense just described. But I might add that if Posner is correct, then the problem he describes seems at least somewhat self-regulating. If the anger associated with a litigated contract dispute is of the short-lived variety associated with most of the other types of emotions he discusses in his paper,<sup>96</sup> then in most cases the party's calm state preferences presumably will spring back to their former shape in time to make bargaining after judgment possible. If the anger is durable enough to wipe out all chances for bargaining throughout the time period in which negotiations would be feasible, then perhaps the anger is entitled to more respect after all; for then it seems not to be the sort of brief outburst that we are comfortable bracketing as an anomalous bit of turbulence in the actor's preferences.

The difference between our views as a practical matter, at any rate, is that Professor Posner believes property rights should be *least* available as remedies when the defendant's breach of contract is "egregious" or, in nuisance cases, where the nuisance creates "anger and hard feelings."<sup>97</sup> It is not entirely clear what Posner has in mind in speaking of an egregious breach of contract, but in the context of his argument it seems just to mean any breach likely to make the promisee angry, presumably by offending his sensibilities or norms that he values. Whether the resulting enmity is justified depends on the ethical and economic standing of those norms and sensibilities, and as we have seen these may be subtle questions to which there are no

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<sup>96</sup> For example, the anger that may entitle a defendant to receive a shorter sentence if it causes him to kill, or the revulsion jurors feel when they see gruesome pictures of crime scenes.

<sup>97</sup> Posner, 89 *Georgetown L J* at 2009–10 (cited in note 5).

general answers possible and no specific answers available to a court. But I see no reason to presume that a party at the short end of an “egregious” breach would be unreasonable in experiencing enmity as a result, and in consequently taking a hard line in any negotiations with the promisor. Without such a presumption we are left with the proposition that the more offensive the defendant’s acts, the more likely the plaintiff is to refuse to bargain with him, and the more important it then becomes that the plaintiff be denied a property right and given damages instead. That is approximately the opposite of the position argued in this Article, which is that if a violation of the plaintiff’s rights is of a nature that has a profound effect on his commodification preferences, causing him not to want to bargain over his rights with the party who committed the invasion, the law generally should regard that as no reason to deny him a property right as a remedy. Exceptions to the principle may be warranted if the basis of the enmity evidently offends public policy, but making exceptions to it in precisely those cases where the enmity most likely is justified seems backward.

#### CONCLUSION

This Article has argued for a view of enmity between parties as one of many commodification preferences they may hold. Commodification preferences are preferences about whether to bargain over rights and with whom, as opposed to measures of value that in effect just ask how much a person would charge for his rights (or bid for them) if they were sold at an auction. Commodification preferences often can be important aspects of value in legal settings, but are easy for economists to overlook because economic analysis usually focuses on values registered after the decision to participate in a market has been made or forced on a party.

Enmity can generate particularly ambiguous commodification preferences. Hardly anybody wants enmity; most people would prefer to avoid the occasions for it, and the satisfaction of it is not a source of utility that the law tries to maximize. Yet, in a private setting, enmity may be a reasonable and socially useful source of preferences. It is a common reaction to conflicts of interest and to breaches of cooperative norms, and the threat of enmity and of retaliation is an important enforcer of those norms. Ordinarily it is not likely to cause great harm so long as its expression is channeled into passive forms, meaning forms that may be costly to others but that do not involve out-of-pocket expenditures to make others worse off. This helps explain why the law punishes enmity when it motivates affirmative harmful acts, especially ones unlawful on other grounds. It also helps explain why the law generally does not punish enmity when expressed passively,

and is careful not to punish it, even where it is harmful to its object, if the behavior it causes also promotes some social good.

When a court is presented with a request for a property right as a remedy, it generally should not be dissuaded from issuing it by the possibility, in the particular case or in the class of cases to which it belongs, that enmity will spoil the possibility of bargaining between the parties after judgment. Assuming bargaining is feasible as a practical (that is, technological) matter, the court should leave the parties to their own devices. This result seems counterintuitive on normal understandings of the Coase theorem because it hypothesizes a case in which there may well be no bargaining no matter what a court does, yet in which property rights properly are awarded as remedies anyway. The reason for this anomaly is that there are powerful commodification preferences in play in such situations; they are bona fide preferences, and they should be given room for expression even if their roots are in enmity. The enmity may be well earned. Naturally, there are invidious and irrational enmities as well that serve no good social purposes, but separating those enmities from the reasonable and useful ones often is exceptionally difficult, and the danger of overriding good enmity with damages is more troubling, from the standpoint of autonomy and efficiency, than the danger that a plaintiff will express bad enmity through obstinate enforcement of a property right.

There are some limits on this principle. If it seems clear that the source of the enmity is one that can be condemned without hesitation on some ground of public policy, withholding a property right that would be used to express it may be defensible. Likewise if it becomes clear that the parties would regard themselves as better off if the court were to make the deal for them by awarding damages that they cannot bear to make for themselves. But neither of these possibilities is likely to be clear to a court as a practical matter. More plausibly, a court might find itself confronted with a situation where enmity is running high and preventing bargaining, and thereby work a hardship on third parties or on the court itself. Where these possibilities are present they are good reasons for a court to hesitate before awarding a property right as a remedy.

Otherwise the law should treat enmity neither as a source of value to be maximized nor as a transaction cost to be minimized. The wiser course in the usual case is simply to take no notice of it. Where enmity exists it is an economically and ethically complicated feature of the private ordering the parties have created, and the law is not likely to be able to meddle with it fruitfully.

