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Intentional Interference with Contract and the Doctrine of Efficient Breach: Fine Tuning the Notion of the Contract Breacher as Wrongdoer

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Intentional Interference with Contract and the Doctrine of Efficient Breach: Fine Tuning the Notion of the Contract Breacher as Wrongdoer

CLARK A. REMINGTON†

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INTRODUCTION

Two starkly opposing approaches to the tort of intentional interference with contract are currently being entertained by courts. One approach starts from the premise that a contract breacher is a wrongdoer and that anyone who intentionally causes such wrongdoing is herself a wrongdoer. The other approach builds from the notion that the contracting party who chooses to breach a contract has very likely made a socially desirable choice and that anyone who intentionally causes such behavior should be applauded. In each case, the blame- or praiseworthiness of the breacher's actions is extended to the alleged tortfeasor who has intentionally induced the breacher to breach.

The view of breacher as wrongdoer is quite inconsistent with modern contract law. When the tort of interference with contract is founded on this view it leads to the spectacle of tort law seeking to deter the very same behavior that contract law encourages. But the alternate view, as the courts seem to understand it, calls for the overturning of compelling interference precedents. This Article proposes a third approach to the tort of intentional interference with contract, one that recognizes that a contract breacher sometimes is, and sometimes is not, a wrongdoer. This approach is consistent with modern contract law and shows why some of the interference precedents present compelling cases for liability and should not be overruled. No hint of this approach is to be found in judicial opinions; yet it does such a remarkable job of explaining the outcomes of cases that one can only suspect that it comes closer to describing the intuitions of judges than the judges' own explanations of what they are doing.¹

1. One might ask why we should worry about interference doctrine if the outcomes of the cases are in line with my proposed third approach. The problem is that there are beneficial transactions that do not occur because they are deterred by an overbroadly stated rule. The approach that is followed by many courts is enough to scuttle any transaction that would fall within the overbroadly articulated rule. This would be less of a problem if it were possible for a prospective breacher and interferer to contract with respect to the risk of tort liability, for example, by having the breacher agree to indemnify the interferer for any tort damages owed to the aggrieved party. But such

Under long established principles of interference law, a person may commit a tort by persuading someone to breach a contract even though, under contract law, that person has every right to breach the contract. During the last twenty years, the tort has come under heavy fire. Professor Russell Weintraub's critical assessment is typical: "If you shopped for law in Bedlam, you would expect to find a 'tort' of interference with contract that could be committed by making a better offer."² He calls it a "counterintuitive and inefficient monstrosity."³ It is counterintuitive because it makes tortious the persuading or inducing of another to do something that she is free to do on her own initiative, that is, to breach a contract and pay damages. And it is inefficient because it interferes with the mechanism by which contract law encourages efficient breaches in a significant class of cases.

Recent criticism of the tort springs from the modern economic conception of contract law. The law has come to regard the obligation to perform a contract as being generally equivalent to an option to perform or pay damages. Holmes saw the matter this way more than one hundred years ago.⁴ More recently, the law and economics movement has succeeded in bringing into the mainstream the awareness that contract law operates in the way this remedies model would predict,⁵ though there is disagreement about whether that is a good thing.⁶ Contract remedies provide incentives to breach when the breaching party will be made so much better off by the breach that she will be able to pay damages to the aggrieved party and still come out ahead. The doctrine of efficient breach regards this as a positive

agreements are probably unenforceable. See *infra* notes 118-19 and accompanying text. Ask any experienced transactional lawyer and you will hear stories about deals that were put on hold upon discovery of the risk of interference liability and terminated upon knowledge of the unenforceability of risk-shifting agreements.

2. Russell J. Weintraub, *The Ten Billion Dollar Jury's Standards for Determining Intention to Contract: Pennzoil v. Texaco*, 9 REV. LITIG. 371, 373 n.6 (1990) (citing David A. Anderson, *An Errant Tort*, 9 REV. LITIG. 409 (1990)).

3. *Id.*

4. "The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else." Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

5. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 4.8 (5th ed. 1998); E. ALLAN FARNSWORTH, *CONTRACTS* § 12.3 (2d ed. 1990).

6. See *infra* notes 112-15 and accompanying text.

outcome. If someone is made better off by the breach and no one is made worse off, then the breach is efficient and should be encouraged.⁷

The economic understanding of contract stands in sharp conflict with the view of contract around which the tort of intentional interference with contractual relations has been constructed. Tort law has regarded the breacher of a contract as a wrongdoer.⁸ From that premise it follows easily that intentionally causing someone to breach a contract is itself a wrong—or, to put it in the current language of interference law, it follows that “mere interference” with a contract is improper in the sense that it permits the imposition of tort liability.⁹

For some twenty years now, however, the economic view of contract has been exerting pressure on the orthodox approach to the tort. According to the economic view, part of the mechanism for reaching desired outcomes in terms of the performance or nonperformance of contracts is the freedom of a contracting party to breach and pay damages. But if a person is free to breach and pay damages, why would we want to regard as tortious the persuading of that same person to do what she is free to do?

The old, orthodox view that mere interference is improper is under assault in many courts. The new, insurgent view that liability for intentional interference requires some independent wrong above and beyond merely causing a breach has been adopted by some courts and is being considered by others. There seems, however, to be a

7. Here and throughout this Article I use the word “efficient” to mean “Pareto superior,” unless something is said to the contrary. One state is Pareto superior to a second state when at least one person is better off in the first state relative to the second state, and no one is worse off. There are other criteria of efficiency that are less palatable from the standpoint of private law. Under the Kaldor-Hicks criterion, one state is superior to another if everyone is better off in the aggregate in the first state relative to the second. If I value your watch more than you do, then in a Kaldor-Hicks sense, focussing only on the particular transaction, it is efficient if I steal it from you. The theft is not Pareto efficient, however, because someone (the victim) is made worse off by it. If I value your watch more than you do, in a Pareto world I should negotiate to buy it from you. See Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 *ECON. J.* 549 (1939); J.R. Hicks, *The Foundations of Welfare Economics*, 49 *ECON. J.* 696 (1939); JACK HIRSHLEIFER & AMIHAI GLAZER, *PRICE THEORY AND APPLICATIONS* 445-46 (5th ed. 1992); POSNER, *supra* note 5, § 1.2.

8. See, e.g., RESTATEMENT (SECOND) OF TORTS § 766 cmt. v (1979).

9. See *infra* notes 10-23 and accompanying text.

tendency in the courts to regard these two approaches as exhausting the universe of choices: mere interference is either improper or it is not, without regard to the nature of the breach caused by the interference. Both the old and the new approaches are problematic. The old view is inconsistent with the freedom of a contracting party to breach and pay damages. The new view is consistent with the freedom to breach, but it would require the overturning of some interference precedents that present compelling cases for liability. When these precedents are examined with the focus on the actions of the tortfeasor, they appear to be cases of mere interference. When the focus is shifted to the breach that is caused by the interference, however, the case for liability appears to be strong not because the tortfeasor "merely interfered" with a contract, but because the tortfeasor intentionally caused what I will call a wrongful breach.

I argue that the courts should determine the impropriety of mere interference by looking to the nature of the breach that is caused by the interference. It is the rise of the economic view of contract that has created the current crisis in interference law, and the economic view of contract has something to tell us about the resolution of the crisis. Some breaches are desirable under the economic view. Mere interference that causes such a breach should not be deemed improper, as the insurgent view of the tort recognizes. But it would be a gross oversimplification of the doctrine of efficient breach to say that every breach that contract law currently encourages is a socially desirable breach. That might be so if contract law were perfect, but it is not. There are classes of breaches that the law of contracts would like to discourage, even though the rules of contract remedies actually encourage them.

Recognizing that there are cases of wrongful breach that the remedies rules of contract do nothing to deter is the key to the dilemma faced by the courts as they attempt to define the new contours of the tort of intentional interference in such a way that it does not work at cross purposes with contract law. The courts should look at the nature of the breach that is caused by the interference and should hold that mere interference is *not* improper unless it leads to a breach of contract that is wrongful.

Part I of this Article describes the tort with particular attention to cases of mere interference in which the alleged

tortfeasor does nothing worse than offer a contracting party a better deal. These are the cases that occupy the battleground between the two opposing approaches to the tort. Offering a better deal was regarded as improper and thus tortious unless privileged under the orthodox view that reigned almost unchallenged until 1980; it continues to be law in many if not most U.S. jurisdictions. Around 1980 the new view, which does not regard the offering of a better deal as inherently improper, begins to appear in some courts. The new view permits contract law's mechanism for encouraging efficient breaches to operate, but as Parts II and III will demonstrate, it cuts liability back too far.

Part II shifts the focus to contract law and develops the notion of wrongful breach. Wrongful breaches are those that contract law would prevent or deter if it were not for some failure within contract law itself. An example of this is the breach for which damages are not an adequate remedy and for which specific performance is not available.

Part III brings the focus back to tort law and examines the impropriety of mere interference while keeping in mind the distinction between breaches that are wrongful and those that are not. The cases that the orthodox view has regarded as mere interference cases are, for the most part, cases of interference leading to a wrongful breach. The rule that emerges—that mere interference should only be regarded as improper when the breach caused by the interference is wrongful—is one that appears to cut liability back from the orthodox view. But it is in fact remarkably consistent with the outcomes of cases.

I. INTERFERENCE WITH CONTRACT AND THE BETTER DEAL CASES

A. Intentional Interference with Contract

One who intentionally interferes with a contract between another and a third party is liable to the other in tort for damage caused by the interference, provided that the interference is improper.¹⁰ There are many variations on the elements of the tort. In some jurisdictions the contract interfered with must be enforceable or the plaintiff is

10. See RESTATEMENT (SECOND) OF TORTS § 766 (1979).

relegated to the related tort of interference with prospective contract, which affords the defendant a broader range of privileges.¹¹ In other jurisdictions liability for interference with contract may be found even where the contract is not enforceable by the aggrieved party because it is "at-will" or because the contract is voidable by the third party.¹² In some jurisdictions there can be no tortious interference with contract unless the contract has been breached;¹³ in others it is enough that the interference cause some diminution in the value of the other's contract rights.¹⁴ A party who

11. *See, e.g.*, *Macklin v. Robert Logan Assoc.*, 639 A.2d 112 (Md. 1994); *Idaho First Nat'l Bank v. Bliss Valley Foods, Inc.*, 824 P.2d 841 (Idaho 1991); *Quinn v. Cardiovascular Physicians, P.C.*, 326 S.E.2d 460 (Ga. 1985); *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 406 N.E.2d 445, 449-50 (N.Y. 1980). Running parallel to intentional interference with contract is a different variety of the same tort, intentional interference with prospective contract. The two are so related that a court's treatment of an interference-with-prospective-contract case is often a source of important information about that court's interference-with-contract jurisprudence. In the interference-with-prospective-contract cases, the courts have generally settled on the position that there can be no liability for offering someone a better deal. *See* RESTATEMENT (SECOND) OF TORTS § 768(1) (1979). It is surprising that there could ever have been any doubt about this, given the sort of marketplace upon which our economy is based. Allowing a plaintiff to collect damages in tort from a defendant who did nothing more than offer to do business with a third party with whom the plaintiff planned or hoped to do business (the plans or hopes not having risen to the level of a contract) would go a long way toward outlawing the very core of our competitive market system.

One way of characterizing the question asked by this Article is whether offering a better deal should be similarly privileged in the interference with contract cases. Much of what we know about the answer to that question comes from dicta generated while courts struggle with the related question of whether there is such a privilege in the law of interference with prospective contract.

12. *See, e.g.*, *Nordling v. Northern States Power Co.*, 478 N.W.2d 498, 505 (Minn. 1991) ("[A]t-will employment subsists at the will of the employer and employee, not at the will of a third party meddler."); *Bochnowski v. Peoples Fed. Sav. & Loan Ass'n*, 571 N.E.2d 282 (Ind. 1991); *Pacific Gas & Elec. Co. v. Bear Stearns & Co.*, 791 P.2d 587, 590-91 (Cal. 1990); *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025, 1041 (Ariz. 1985); *see also* RESTATEMENT (SECOND) OF TORTS § 766 cmt. f ("It is not, however, necessary that the contract be legally enforceable against the third person."). But while these jurisdictions analyze at-will contracts under the rubric of interference with contract, it is generally true that they nevertheless afford the defendant the same broader range of privileges that are available under the tort of interference with prospective contract.

13. *See, e.g.*, *NBT Bancorp Inc. v. Fleet/Norstar Financial Group, Inc.*, 664 N.E.2d 492, 496 (N.Y. 1996).

14. *See, e.g.*, *Pacific Gas & Elec.*, 791 P.2d at 592; *Lewis v. Oregon Beauty Supply Co.*, 733 P.2d 430, 434 (Or. 1987) (holding that discharge not a

breaches a contract may be found liable in tort to the aggrieved party for conspiring with a third party in the breach.¹⁵ In other jurisdictions such a claim may be barred as an attempt to parley a contract claim into a tort claim.¹⁶

This section focuses upon a particular element of the tort: the requirement that the interference be improper.¹⁷ Sometimes the improper nature of an interferer's behavior is relatively clear. In many cases the interferer's actions can be recognized as independently tortious with respect to the interference plaintiff, even though all of the technical requirements of the independent tort cause of action may not be satisfied.¹⁸ In these cases the interference tort provides an alternative cause of action to the plaintiff, but one that may escape some of the technical requirements of pleading or proof associated with particular torts. Improper interference might also involve behavior that is independently tortious not toward the interference plaintiff, but toward a person with whom she has contracted.¹⁹ In these cases, the interference plaintiff would generally be regarded as outside the sphere of liability of the independent tort. The interference tort provides a means of extending liability for the underlying tort beyond persons who would otherwise be protected by tort law, but in a way that is limited by the requirements of the interference tort itself.²⁰

Sometimes it is clear that interference is *not* improper.

necessary element; it was enough that third party's interference caused aggrieved party to resign employment); RESTATEMENT (SECOND) OF TORTS § 766 (1979).

15. *Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1234-36 (Ind. 1994).

16. *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 869 P.2d 454 (Cal. 1994).

17. The Restatement chose the word "improper" for its characterization of the tort because it was a word that was not "traditionally identified with a different tort so as to possess a special meaning that would affect its meaning in connection with this tort" and because it did not suggest that issues connected with it "must be a matter for the case of either the plaintiff or the defendant." RESTATEMENT (SECOND) OF TORTS Ch. 37, 6 (1979).

18. *See, e.g., Lewis*, 733 P.2d at 434 (finding improper interference consisting of physical and verbal intimidation, threats and defamation).

19. *See, e.g., Swaney v. Crawley*, 157 N.W. 910 (Minn. 1916) (finding improper interference consisting of intentional misrepresentations addressed to breaching party).

20. For a more detailed analysis of the interference tort as a means to extend traditional tort liability in a carefully limited way, see Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. CHI. L. REV. 61, 69-78 (1982).

It is probably not improper interference to give honest, good faith advice to a friend or family member that causes the advisee to breach a contract.²¹ Nor is it improper for an agent, acting within the scope of her agency, to cause her principal to breach a contract.²² Without a version of this privilege corporate officers and directors could be found personally liable in tort for acting on behalf of their principal, the corporation, in making and implementing corporate decisions to breach contracts. In addition, it is not improper for a person to interfere with the contract of another in order to protect a vested economic interest.²³ Without this privilege plaintiffs could evade corporate veil piercing rules, making corporations liable in tort for causing their subsidiaries to breach contracts.

21. The Restatement describes a privilege that would cover the giving of advice where one is "charged with responsibility for the welfare of" the advisee. RESTATEMENT (SECOND) OF TORTS § 770 (1979). It describes another privilege that applies to the giving of "honest advice within the scope of a request for the advice." RESTATEMENT (SECOND) OF TORTS § 772. One can imagine many instances of advice not falling within either of these specific sections: for example, unsolicited advice to a sibling with whose responsibility one is not "charged." In such a case, the Restatement would have us turn to its general balancing test for determining impropriety—a relatively indeterminate factors test. RESTATEMENT (SECOND) OF TORTS § 767. Judges have shown common sense in dealing with cases of advice. *See, e.g.,* *Click Model Management Inc. v. Williams*, 561 N.Y.S.2d 781 (N.Y. App. Div. 1990) (finding no intent to procure breach where model was merely accommodating friend when she said friend should come over to Ford Agency).

22. *See, e.g.,* *Jones v. Runft, Leroy, Coffin & Matthews, Chartered*, 873 P.2d 861 (Idaho 1994) (holding that attorney who acted as representative of company could not be liable for causing company to breach contract); *Nordling v. Northern States Power Co.*, 478 N.W.2d 498, 507 (Minn. 1991) (concluding that company employee who acts in good faith is privileged to cause company to breach contract with other employee); *Murtha v. Yonkers Child Care Ass'n*, 383 N.E.2d 865, 866 (N.Y. 1978) ("[A] corporate officer who is charged with inducing the breach of a contract between the corporation and a third party is immune from liability if it appears that he is acting in good faith."). In the scheme of the Restatement, these cases fall under the privilege for those "charged with the responsibility for the welfare of a third person." RESTATEMENT (SECOND) OF TORTS § 770 & cmt. b.

23. *See, e.g.,* *Foster v. Churchill*, 665 N.E.2d 153, 156 (N.Y. 1996) (holding 75% shareholder of corporation privileged to interfere with contract of corporation "unless there is a showing of malice or illegality"); *Ran Corp. v. Hudesman*, 823 P.2d 646 (Alaska 1991) (holding that lessor was privileged to withhold consent to assignment of lease of his property); *Langeland v. Farmers State Bank of Trimont*, 319 N.W.2d 26, 32 (Minn. 1982) (finding that defendant's "entirely legal" debt collection efforts were "in furtherance of a superior legal right").

Between cases of otherwise wrongful behavior and cases of privileged interference is an important set of cases in which the only arguable wrong is the interference itself. This includes what I will call the "better deal cases," in which a party interferes with another's contract by offering to do business with the third party, knowing that the third party's acceptance of the offer will involve the third party's breach of the contract with the other. Whether the law should regard this kind of interference as improper is a fundamental question about the sort of economy we wish to have. It is a question that currently has an uncertain answer.

On one hand, we may wish to regard contract rights as inviolable and protect them against trespass by persons not party to the contract. A contract regime that punished contract breachers, unlike ours which scrupulously denies damages beyond compensation, would be consistent with this view. So might a regime that regarded compensatory damages as sufficient to do justice between the contracting parties but which nevertheless sought to deter that subset of breaches that involved interference by third parties. The traditional, expansive view of interference liability springs from some such premise. And there are scholars who defend it, finding no conflict between tort and contract in the better deal cases: tort and contract are said to be pursuing different values.²⁴ Such a view is puzzling, however, because if we were really interested in deterring breaches of contract we could do so by generally compelling performance of contracts or by assessing penalties beyond compensation for their breach. This view would lead to a marketplace in which people would be wary of dealing with those who had already contracted. Offering someone a deal would be acceptable behavior, but offering someone a deal in place of an existing one would be subject to reprobation.

On the other hand, we might regard contracts as

24. See Maura Lao, *Tortious Interference and the Federal Antitrust Law of Vertical Restraints*, 83 IOWA L. REV. 35, 60 (1997) ("If tortious interference is concerned with the preservation of community values that are not generally recognized in contract analysis, then it can be seen as complementary with contract law, not contradictory, despite its conflict with the efficient breach theory." (footnotes omitted)); William J. Woodward, Jr., *Contractarians, Community, and the Tort of Interference with Contract*, 80 MINN. L. REV. 1103, 1180-81 (1996) (discussing "different ways of thinking about and addressing the complexities of human relations and human exchange").

establishing rights and obligations solely between the contracting parties. Each person would then be responsible for her own contract obligations. This view would lead to a marketplace in which people would be free to offer to do business with others. If those others had prior commitments, that would be their concern. Whether or not they would be likely to live up to their commitments or breach them would depend in part on the rules of contract remedies. The recent turn toward reevaluating expansive interference liability is consistent with this approach.²⁵

While the question of whether the law should regard this kind of interference as improper currently has an uncertain answer in the law of torts, it is one that has been asked and answered in a closely related context. It is one of the questions at center stage in the debates over the nature of contract remedies.²⁶ Many argue for the first regime, but the law of contracts has chosen the second. Answering the question one way in the law of contracts and another way in the law of tortious interference is a strange sort of compromise. Since we have chosen the second in the law of contracts, why would we undercut it when it comes to interference law? Mixing the two regimes makes as much sense as a corporation deciding to construct a building, but, as a concession to a losing faction of the board, deciding to periodically demolish twenty percent of the building under construction. Recognizing that both contract and tort law are in the hands of the same court in each jurisdiction leads to an even stranger variation of this simile: it is as if the same construction crew worked four days a week constructing a building and then one day a week did excavation work on an adjacent lot, unwittingly undermining the very same building it was constructing.

The next two sections explore the two competing views on the improperness of mere interference—the two views that the courts seem to regard as their only choices. The first, that mere interference is improper, reigned almost unchallenged from soon after the birth of the tort in 1853 to about 1980. A number of articles were published around 1980 that seem to have set off a round of new scrutiny of the tort in many state high courts. Several of the courts have since said that mere interference would not be

25. See *infra* notes 70-85 and accompanying text.

26. See *infra* notes 112-15 and accompanying text.

regarded as improper in cases of interference with contract, but these pronouncements may be somewhat unstable. When these courts actually come face to face with a better deal case that involves a wrongful breach there is some danger that, consistent with their binary understanding of the issue, they will fall back to their settled positions and hold that interference is wrongful after all. This Article argues that the courts should recognize what is already implicit in their precedents: that there is an intermediate position that looks to the character of the underlying breach.

B. Mere Interference Prior to 1980

The orthodox view, that mere interference with contract is improper in itself, took shape not long after the modern tort was born in 1853. Prior to 1853 there was a common law action for "retaining another person's servant during the time he has agreed to serve his present master."²⁷ Blackstone tells us that "this, as it is an ungentlemanlike, so it is also an illegal act."²⁸ It would be anachronistic to regard this old action as a protection of a contract right. It is true that the action protected the master's right to the labor of his servant, but the master was entitled to this protection because of his status as master in relation to his servant. Husbands had a similar action for the abduction of their wives, and parents for their children. That these actions were a matter of relative status is supported by Blackstone's observation that "in these relative injuries, notice is only taken of the wrong done to the superior of the parties related . . . while the loss of the inferior by such injuries is totally unregarded."²⁹ It is only with the nineteenth century transformation of the action from one that protected the master-servant relationship to one that protected contract rights generally that it becomes meaningful to ask about the impropriety, as a legal

27. WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND 142 (1768). This action is itself a kind of generalization by the common law courts of two more specific earlier actions, one statutory and one in trespass. These actions can in turn be traced back to more ancient times. The law is indeed a seamless web.

28. *Id.*

29. *Id.*

matter, of mere interference with a contract.³⁰

Lumley v. Gye,³¹ the first modern case of interference with contract, was decided by the Court of Queen's Bench in 1853. Lumley, a concert promoter and lessee of the Queen's Theatre, succeeded in an action for damages against Mr. Gye, his counterpart at Covent Garden. Lumley had contracted with the famous opera singer Johanna Wagner to sing exclusively at the Queen's Theatre.³² Gye lured her away with an offer of higher pay, and for this he was liable to Lumley in tort. Justice Coleridge, the lone dissenter, objected to the expansion of the old action beyond the exceptional relationship of master and servant. He observed:

in respect of breach of contract the general rule of our law is to confine its remedies by action to the contracting parties, and to damages directly and proximately consequential on the act of him who is sued; that, as between master and servant, there is an admitted exception; that this exception dates from the Statute of Labourers, 23 Edw. 3, and both on principle and according to authority is limited by it.³³

If this opinion had carried the day, Mr. Lumley would have lost his case. Ms. Wagner was not a servant; she was merely under contract. The three other judges apparently saw no reason to limit the action in this way. Justice Crompton wrote:

I think that we are justified in applying the principle of the action

30. The link between the modern tort that protects a contract right and the older action that protected the master's property interest in his servant is evident in *Salter v. Howard*, 43 Ga. 601 (1871). Within eight days of the certification of the Thirteenth Amendment to the United States Constitution in December of 1865, one Georgia plantation owner, Mr. Howard, had already hired his former slaves to continue working for him as employee/servants. A neighbor, Mr. Salter, enticed Howard's former slaves to come and work for him. Howard succeeded in an action in damages against Salter "for enticing servants out of his employ." *Id.* at 603.

31. 118 Eng. Rep. 749, 2 El. & Bl. 216 (Q.B. 1853).

32. For well-told versions of the story of the birth of the interference tort, see Francis Bowes Sayre, *Inducing Breach of Contract*, 36 HARV. L. REV. 663, 663-75 (1923); G.A. Owen, *Interference with Trade: The Illegitimate Offspring of an Illegitimate Tort?*, 3 MONASH U.L. REV., 41, 41-58 (1976); Note, *Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort*, 93 HARV. L. REV. 1510 *passim* (1980) [hereinafter *Tortious Interference*].

33. *Lumley*, 118 Eng. Rep. at 760, 2 El. & Bl. at 246 (Coleridge, J., dissenting).

for enticing away servants to a case where the defendant maliciously procures a party, who is under a valid contract to give her exclusive personal services to the plaintiff for a specified period, to refuse to give such services during the period for which she had so contracted, whereby the plaintiff was injured.³⁴

Thus was the tort of interference with contract born. Expanding the coverage of the action to include contracts of exclusive personal service as well as master-servant relationships may not seem to be much of a change. But the shift that took place in *Lumley*, from viewing the relationship as one of master and servant to viewing it as a contractual one, was significant. It paved the way for the action to expand to include all contracts. The English Court of Appeal held in 1893 that the action would not be restricted to cases involving exclusive personal service.³⁵ The tort has followed a similar path in most jurisdictions in the United States, where the tort is not restricted to any particular type of contract.³⁶

Another factor mentioned by Justice Crompton in his characterization of *Lumley*—a factor that could have served to limit the tort—was that the procurement was malicious. In 1905, however, the House of Lords would say, in a case in which the trial court had found that the defendants acted “‘without malice of any kind against the plaintiffs,’”³⁷ that “[i]t is settled now that malice in the sense of spite or ill will is not the gist of such an action as that which the plaintiffs have instituted.”³⁸ The requirement of malice suffered a similar fate in the United States.³⁹ While the courts con-

34. *Lumley*, 118 Eng. Rep. at 755, 2 El. & Bl. at 231 (Crompton, J.).

35. *Temperton v. Russell*, 1 Q.B. 715 (C.A. 1893).

36. See, e.g., *Campbell v. Gates*, 141 N.E. 914, 915 (N.Y. 1923); *Knickerbocker Ice Co. v. Gardiner Dairy Co.*, 69 A. 405, 407-08 (Md. 1908); Comment, *Inducing Breach of Contract: Herein of Contracts Terminable at Will*, 56 Nw. U. L. REV. 391, 394 n.17 (1961) [hereinafter *Contracts Terminable at Will*]. That the tort was applicable to all employment contracts, “if not to contracts of every description” was established as early as 1871 in Massachusetts. *Walker v. Cronin*, 107 Mass. 555, 567 (1871).

37. *Glamorgan Coal Co. v. South Wales Miners' Fed'n*, 2 K.B. 545, 556 (1903) (C.A.) (quoting trial judge), *aff'd*, [1905] A.C. 239 (H.L.).

38. *South Wales Miners' Fed'n v. Glamorgan Coal Co.*, [1905] A.C. 239, 246 (H.L.) (Lord Macnaghten).

39. See, e.g., *Lamb v. S. Cheney & Son*, 125 N.E. 817, 818 (N.Y. 1920) (holding that malice “does not mean actual malice or ill will, but consists in the intentional doing of a wrongful act without legal justification”); *Cumberland Glass Mfg. Co. v. De Witt*, 87 A. 927, 931 (Md. 1913) (“Malice in this form of

tinued for some time to speak of a requirement of malice, Professor Sayre could say in 1923 "that such words are becoming little more than empty phrases, with small practical influence in the reaching of actual decisions."⁴⁰

When the malice requirement drops away, nothing stands in the way of viewing interference with contract as wrongful in itself. The connection is apparent in the following language quoted by the Mississippi Supreme Court in a recent case finding liability in a better deal case:

A contract confers certain rights on the person with whom it is made, and not only binds the parties to it by the obligation entered into, but also imposes on all the world the duty of respecting that contractual obligation. . . . If one maliciously interferes in a contract between two parties, and induces one of them to break that contract to the injury of the other, the party injured can maintain an action against the wrongdoer. . . . *When one has knowledge of the contract rights of another his wrongful inducement of a breach thereof is a wilful destruction of the property of another and cannot be justified on the theory that it enhances and advances the business interests of the wrongdoer. . . .* Maliciousness does not necessarily mean actual malice or ill will, but the intentional doing of a wrongful act without legal or social

action does not mean actual malice, or ill will, but consists in the intentional doing of a wrongful act without legal justification or excuse."), *aff'd*, 237 U.S. 447 (1915).

40. Sayre, *supra* note 32, at 675.

Justice Crompton mentioned a third factor in *Lumley*, which for a time would serve to limit the application of the tort. The contract, the breach of which was procured, was a valid one. *Lumley*, 118 Eng. Rep. at 755, 2 El. & Bl. at 231. This apparently continues to be a restriction on the tort under English law. See CLERK & LINDSELL ON TORTS 1185 (17th ed. 1995); *Contracts Terminable at Will*, *supra* note 36, at 395-96. Already in 1915 the United States Supreme Court would say, "[t]he fact that the employment is at the will of the parties, respectively, does not make it one at the will of others." *Truax v. Raich*, 239 U.S. 33, 38 (1915). Such a view was apparently in accord with a substantial number of state decisions. See *Contracts Terminable at Will*, *supra* note 36, at 396-97 & n.32. *But cf.* Sayre, *supra* note 32, at 701 ("[E]xcept for a few scattered *dicta*, the current of authority [in 1923] is wellnigh unanimous that no action for enticement can be brought where the service was at will."). Today it is widely accepted in the United States that there can be liability for interference with contract even though the plaintiff would have no right to enforce the contract that was the subject of the interference. See *Bochnowski v. Peoples Fed. Sav. & Loan Ass'n*, 571 N.E.2d 282, 285 (Ind. 1991); *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025, 1041 (Ariz. 1985); RESTATEMENT (SECOND) OF TORTS § 766 cmt. g (1979). New York is the exception. See *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 406 N.E.2d 445, 449-50 (N.Y. 1980).

justification.⁴¹

Different jurisdictions progressed through the stages of the tort at different tempos, but almost without exception the story is the same in each. A point is reached where the requirement of actual malice or unlawful means is dropped and from that point on the tort is characterized in such a way that liability for offering a better deal is at least threatened if not expressly assured. In 1908, for example, Maryland's high court declared: "Although many of the cases speak of the act as being maliciously done, it would seem to be clear that express malice is not necessary if the act is wrongful and unjustifiable."⁴²

Kentucky was one of the last states to relax its wrongfulness requirement. Kentucky was long said to be a state in which the tort was not recognized unless the act of interference involved an independent wrong such as fraud or the use of force.⁴³ In 1958 the Kentucky Supreme Court spoke of finding liability for interference with contract where the interference was "malicious or without justification."⁴⁴ More recently the court has stated that Sections 766B, 767 and 773 of the Restatement (Second) of Torts "fairly reflect the prevailing law of Kentucky."⁴⁵ The Kentucky court, having accepted the Restatement view on interference with prospective contract (Section 766B), is still free to shape its law of interference with contract as it will, but its relaxation of what had been a strong requirement of impropriety for the interference torts generally is a movement in the direction of the twentieth century orthodoxy.

41. *Ramondo v. Pure Oil Co.*, 48 A.2d 156, 160 (Pa. Super. Ct. 1946) (emphasis added) (quoting *Klauder v. Cregar*, 192 A. 667, 668 (Pa. 1937)), quoted in *Cranford v. Shelton*, 378 So.2d 652, 655 (Miss. 1980). In *Cranford* a lessee broke its lease in order to enter into a better deal with another lessor. This appeared to violate a nineteenth century statute (which was a descendent of the fourteenth century English statutes that spawned the interference torts). The court, doubting that the statute applied, analyzed the case under common law interference principles.

42. *Knickerbocker Ice Co. v. Gardiner Dairy Co.*, 69 A. 405, 410 (Md. 1908).

43. See *Contracts Terminable at Will*, *supra* note 36, at 394 & n.18.

44. *Derby Road Bldg. Co. v. Commonwealth*, 317 S.W.2d 891, 895 (Ky. 1958) (emphasis added), overruled on other grounds by *Foley Constr. Co. v. Ward*, 375 S.W.2d 392 (Ky. 1964).

45. *National Collegiate Athletic Ass'n v. Hornung*, 754 S.W.2d 855, 857 (1988).

The commentators during this long period of expanding liability do not appear to be focusing on the better deal cases as one of the primary evils against which the tort is directed. Nevertheless, to the extent that they mention the matter they uniformly take positions that would lead to liability in the better deal cases.⁴⁶

Professor Sayre, for example, in a 1923 article wrestled with the problem of open-ended liability that flowed from the relaxation of the malice requirement:

[T]oday the law undertakes to forbid not only the wanton destruction of property in the form of contract rights out of pure malevolence, but also the stealing or misappropriation of such property where the motive is to benefit, economically or otherwise, the defendant. In other words mere trade competition, henceforth, will no more constitute a justification for stealing another's property in promised advantages, than it will for stealing his cow.⁴⁷

Sayre was concerned that this broad tort would sweep too many cases within its ambit. He worried, for example, that a mother who caused a school to dismiss troublesome classmates of her children might be liable in tort.⁴⁸ Sayre proposed a distinction between breaches that were directly caused and those that came about "only as an incidental and undesired . . . by-product in the seeking of some quite different object, unconnected with the object which led to the making of the contract."⁴⁹ An incidental breach would be one where "the defendant was not seeking to appropriate for himself the promised advantages of the plaintiff, but was seeking an object quite foreign to that which the plaintiff sought in the making of the contract."⁵⁰ Liability would thus be "confined to cases of deliberately stealing or misappropriating another's promised advantage where the

46. See Sayre, *supra* note 32, at 683-86; Charles E. Carpenter, *Interference with Contract Relations*, 41 HARV. L. REV. 728, 754-57 (1928); Fowler V. Harper, *Interference with Contractual Relations*, 47 NW. U.L. REV. 873, 881 (1953); Charles Q. Kamps, *Interference with Contractual Relations: A Survey of the Wisconsin Law*, 43 MARQ. L. REV. 231, 242 (1959).

47. Sayre, *supra* note 32, at 676.

48. Under the scheme of the second Restatement, the mother could invoke the privilege of one "charged with responsibility for the welfare of" another. RESTATEMENT (SECOND) OF TORTS § 770 (1979). See *supra* note 21.

49. Sayre, *supra* note 32, at 678.

50. *Id.* at 683.

defendant seeks the same object which the plaintiff sought to secure by the making of the contract"⁵¹

For example, a manufacturer, who for a number of years has supplied a wholesaler but who is under no contract to do so, finds himself a buyer who is willing to pay more than the wholesaler. The manufacturer sells to the higher-paying buyer even though he knows of specific contracts that the wholesaler has with its customers that the wholesaler will now have to breach. Sayre thought it intuitively obvious that liability should not attach in this case.⁵² Applying his test we see that the manufacturer would be protected because it sought to enter into an advantageous business relation with a new buyer and did not seek to appropriate for itself the advantages promised to the wholesaler under the wholesaler's contracts with its buyers. If the manufacturer had induced a third party to breach a contract to buy from the wholesaler and to buy instead directly from the manufacturer, then presumably under Sayre's view there would be liability: the manufacturer would be seeking to secure the very object that the wholesaler sought to secure by making the contract with the third party. Sayre appeared to be interested primarily in cutting liability back, but the class of cases he left standing clearly included the better deal cases. Competition would "ordinarily justify injury to another's interest in trade expectancies but not ordinarily injury to another's interest in promised advantages."⁵³

It is a much discussed fact in the cases and articles of this long period of expansion, that the tort presents a clash of competing values—the sanctity of contract obligations on one hand and the freedom to behave competitively on the

51. *Id.* at 685.

52. *Id.* at 678.

53. *Id.* at 700. Dean Charles Carpenter proposed a distinction for determining whether a privilege of competition should be available for interference with contract:

[W]e must differentiate the cases where the defendant acts for the specific purpose or with the desire of invading, or knows that the end he seeks to accomplish in itself constitutes an invasion of the plaintiff's contract interests, from the cases where the act is done for a purpose other than a desire to invade, although an invasion incidentally and indirectly results from the acts done. Competition gives no privilege to invade in the former while it does in the latter group of cases.

Carpenter, *supra* note 46, at 754. Carpenter appears to have regarded the offering of a better deal as falling outside the privilege. *See id.* at 755-56.

other—a conflict that must be reconciled one way or another. What seems never to be noticed during this period is that the resolution of the conflict in the direction of treating contract rights as property, which supposedly honors the value of contract enforcement, leads to a deep inconsistency with one of contract's most fundamental features: that contract damages are substitutional and compensatory.

It is sometimes noticed, as it was by Justice Coleridge in his *Lumley* dissent, that the tort at the moment of expansion conflicts with then-existing doctrine. This does nothing more than acknowledge that expansion involves doctrinal change. What is missing is any sense of the conflict of principles that stand behind tort and contract doctrines. When Justice Coleridge remarked that "in respect of breach of contract the general rule of our law is to confine its remedies by action to the contracting parties, and to damages directly and proximately consequential on the act of him who is sued,"⁵⁴ he stopped short of asking why that should be so. The remedies rules of contract law are structured to encourage certain breaches. If we wished to change that, we could adopt a number of alternative regimes. Until such a change occurs, however, the expansive tort of interference with contract presents a conflict: it deters breaches that the law of contracts encourages.

The twentieth century orthodoxy leaves us then with the tort we would expect to find if we "shopp[ed] for law in Bedlam."⁵⁵ Liability can be imposed for "making a better offer."⁵⁶ It can be imposed in cases "in which honest representations are made to competent adults and there is neither threat, nor violence, nor abuse of confidence, nor undue influence, nor misuse of economic power."⁵⁷ Liability can be imposed in this way because judges, when wearing their tort hats as opposed to their contract hats, appear to agree with the Restatement (Second) of Torts when it calls both the interferer and the contract breacher, quite simply,

54. *Lumley v. Gye*, 119 Eng. Rep. 749, 760, 2 El. & Bl. 216, 246 (Q.B. 1853) (Coleridge, J., dissenting).

55. Weintraub, *supra* note 2, at 373 n.6.

56. *Id.*

57. Dan B. Dobbs, *Tortious Interference with Contractual Relationships*, 34 ARK. L. REV. 335, 343 (1980).

"wrongdoers."⁵⁸

C. *The 1980s: A New Note of Caution*

In the last twenty years the interference torts have come under a barrage of scholarly criticism, some of which has found an audience in the courts. A number of state high courts have either cut back tortious interference liability or at least announced that arguments for the expansion of interference liability would be subject to intense new scrutiny. Just where the better deal cases stand after this cutting back of the expansion of the tort will be taken up below. First, however, let us take a brief look at the articles that, at least in part, helped to bring about the new scrutiny of the tort in the courts.

Professor Dan Dobbs criticized the tort from a number of perspectives.⁵⁹ He argued that by allowing liability where the only improper behavior is having an improper motive, the defendant is punished for her state of mind.⁶⁰ By protecting the aggrieved contract party's right in the performance of the breaching party as a property right that is good against the world, we treat the breaching party as the property of another.⁶¹ By ignoring the fact that the decision to breach or not lies in the hands of the breaching party, we treat the breacher as a being without will.⁶² And by attaching liability to the giving of advice or the persuading of another to do what she is otherwise free to do, the tort chills behavior that potential defendants should be free to engage in, including speech.⁶³ This is a tort, he warned, that seemed to expand without reason: "It cannot be a principle of law that expansion of liability is in itself the goal, or a theorem of justice that liability is always just."⁶⁴

Dobbs argued against universal liability, but he conceded that "a universal rule of non-liability" would also be undesirable.⁶⁵ He went on to "suggest some lines of thought

58. RESTATEMENT (SECOND) OF TORTS § 766 cmt. v (1979).

59. Dobbs, *supra* note 57.

60. *See id.* at 347-50.

61. *See id.* at 350-56.

62. *See id.* at 358-59.

63. *See id.* at 361-63.

64. *Id.* at 337.

65. *See id.* at 365.

that might be capable of developing an analysis for less-than-universal liability.⁶⁶ All but one of his categories involved behavior on the part of the interferer that is improper independent of the interference itself. The one exception was his suggestion that liability might appropriately be found in cases of interference with "those contracts that are specifically enforceable,"⁶⁷ a notion that is entirely consistent with my broader suggestion that liability attach to interference that leads to a wrongful breach.

Professor Harvey Perlman argued forcefully from the standpoint of economic efficiency that interference with contract should not be found tortious unless it is somehow independently improper.⁶⁸ Professor Perlman would limit the tort of interference with contract to "cases in which the defendant's acts are independently unlawful"; or, somewhat reluctantly, he might also include a quite limited set of cases involving "improper motivation" where there were "objective indicia of activity producing social loss."⁶⁹ He would apparently find no liability in many of the cases involving what I will call below "wrongful breach," unless the defendant committed some additional wrong such as fraud. This position would require the overruling of quite a bit of established interference law.

Neither Dobbs nor Perlman focuses on the wrongfulness of the underlying breach in the sense that I do. While I do not think that my approach is contrary to the spirit of their analyses, Dobbs' and Perlman's articles certainly seem to envision a narrower tort than I do.

References to Perlman's or Dobb's article appear in opinions of the high courts of twenty different states. Taken together, those opinions (and the decisions that may have been influenced by them) portray a new era of caution with respect to the interference torts. The Louisiana court, for example, cited both Dobbs and Perlman in *9 to 5 Fashions, Inc. v. Spurney*,⁷⁰ a case that recognized the tort of interference with contract in Louisiana for the first time. Louisiana was the last of the fifty states to recognize the tort. At the same time that it did so the court said it was

66. *Id.*

67. *Id.* at 375. Professor Dobbs' analysis of this issue was admittedly sketchy, and he invited further development of it. *See id.* at 376.

68. Perlman, *supra* note 20.

69. *Id.* at 97-98.

70. 538 So.2d 228 (La. 1989).

not its intention

to adopt whole and undigested the fully expanded common law doctrine of interference with contract Some aspects of this tort have been subjected to serious criticisms, leaving open a good many questions about the basis of liability and defense, the types of contract or relationship to be protected, and the kinds of interference that will be actionable.⁷¹

The court left for the future the contours of the tort beyond the case before it, which held only that a corporate officer's privilege to interfere with the contracts of the corporation was not absolute.

Another case citing Dobbs and Perlman is *Wagenseller v. Scottsdale Memorial Hospital*⁷² in which the Arizona court discussed the breadth of "the 'privilege' of a supervisor to interfere in an employment relationship."⁷³ The court rejected an approach that would place the burden on the defendant of proving that its actions were justified, in favor of a requirement that the plaintiff show that defendant's actions were improper before liability can attach.⁷⁴

It is difficult to see anything defensible, in a free society, in a rule that would impose liability on one who honestly persuades another to alter a contractual relationship. [Cites to Dobbs and Perlman.] We find nothing inherently wrongful in "interference" itself. If the interferer is to be held liable for committing a wrong, his liability must be based on more than the act of interference alone. Thus, there is ordinarily no liability absent a showing⁷⁵ that defendant's actions were improper as to motive or means.

A certain shifting of burdens is apparent here—from requiring the defendant to show that its actions were justified (the position of the first Restatement) to requiring the plaintiff to show that the defendant's actions were improper (a position that is consistent with the range of possible readings of the black letter of the second Restatement). This shift is certainly important for deter-

71. *Id.* at 234 (citations omitted).

72. 710 P.2d 1025 (Ariz. 1985).

73. *Id.* at 1042.

74. The position of the Restatement on this point was self-consciously neutral on the issue of burdens. See RESTATEMENT (SECOND) OF TORTS, ch. 37, at 5 (1979); Perlman, *supra* note 20, at 67.

75. *Wagenseller*, 710 P.2d at 1043.

mining which tortious interference cases can be dismissed on the pleadings or decided on summary judgment. But it also tends to track the issue of liability in the better deal cases.⁷⁶ If interference is prima facie tortious, then to escape liability the defendant must convince us with something like the following: "My violation of an existing contract right was justified because I sought to further my own economic interest." Regimes that place the burden on the defendant to justify any intentional interference do not usually accept economic self-interest as a justification. However, there is nothing about placing the burden on the defendant that logically entails the rejection of self-interest as a justification. Likewise, in a regime in which it is the plaintiff's burden to show not only interference but *improper* interference, it would seem that the defendant would not be put to the task of justification in a better deal case because interference itself would not be regarded as improper. Again, however, there is no logically necessary connection between these positions. One could well imagine a regime that would require a showing of improper interference, but that would also regard "deliberately stealing or misappropriating another's promised advantage"⁷⁷ as improper.⁷⁸

The Arizona court in *Wagenseller* quite strongly sug-

76. For an illustration of the interplay between burdens and liability, see *Insurance Assoc. Corp. v. Hansen*, 782 P.2d 1230 (Idaho 1989), in which the majority found that defendant had not intentionally interfered, that in fact the defendant, acting on the advice of counsel, had tried hard not to interfere. On the dissent's view, the majority is making the mistake of requiring the plaintiff to show wrongfulness of interference, something that the plaintiff was unable to do in light of the defendant's reliance on the advice of counsel. According to the dissent, it is up to the defendant to show justification, something that this defendant failed to do, since reliance on counsel's mistake of law should be treated no differently than defendant's mistake of law.

77. Sayre, *supra* note 32, at 685.

78. The RESTATEMENT (SECOND) OF TORTS itself provides an illustration of this approach. On the question of burdens, the Second Restatement clearly did not require the defendant to prove justification in all cases where mere intentional interference had been shown. But the drafters were unwilling to move decisively in the other direction. Their scheme (with the choice of the words "improperly" and "subject to liability" in § 766) was meant to communicate neutrality on the complex question of burdens. See RESTATEMENT (SECOND) OF TORTS, ch. 37, at 4-7 (1979). At the same time, the Restatement's general test for determining impropriety would seem to leave open the question of impropriety in a better deal case. *Id.* § 767. The drafters, however, left no doubt in the comments that they regarded interference in the better deal cases as improper. *Id.* § 768 cmts. a & h.

gested, in the passage quoted above, an independent wrongfulness requirement of the sort advocated by Dobbs and Perlman, which would make room for the better deal cases. This is a narrower view of liability than that expressed in the Restatement comments. The court, however, went on to say that "[w]e therefore adopt the Restatement's required showing of an 'improper' interference."⁷⁹ It remains to be seen which way the Arizona court will go when it faces the issue squarely.

In a 1978 case, *Top Service Body Shop v. Allstate Insurance Co.*,⁸⁰ which has come to stand for a narrowing of interference liability,⁸¹ the Oregon Supreme Court said that liability for "intentional interference with contractual or other economic relations" would require that the interference be

wrongful by some measure beyond the fact of the interference itself. Defendant's liability may arise from improper motives or from the use of improper means. They may be wrongful by reason of a statute or other regulation, or a recognized rule of common law, or perhaps an established standard of a trade or profession. No question of privilege arises unless the interference would be wrongful but for the privilege; it becomes an issue only if the acts charged would be tortious on the part of an unprivileged defendant.⁸²

The court said in a footnote, "Commonly included among improper means are violence, threats or other intimidation, deceit or misrepresentation, bribery, unfounded litigation, defamation, or disparaging falsehood."⁸³ Perlman regarded this case favorably, referring to it as a "departure from . . . traditional analysis" that would have placed upon the interfering party the burden of proving "some overriding justification for his interference."⁸⁴ It certainly reduces the threat of liability in the better deal cases. A number of states have now followed Oregon, requiring that the plaintiff show that the interference was

79. *Wagenseller*, 710 P.2d at 1043.

80. *Top Service Body Shop v. Allstate Ins. Co.*, 582 P.2d 1365 (Or. 1978).

81. See *Ran Corp. v. Hudesman*, 823 P.2d 646, 649 (Alaska 1991); *United Truck Leasing Corp. v. Geltman*, 551 N.E.2d 20, 23 (Mass. 1990); Perlman, *supra* note 20, at 66.

82. *Top Service*, 582 P.2d at 1371 (footnote omitted).

83. *Id.* at 1371 n.11.

84. Perlman, *supra* note 20, at 66.

improper "beyond the fact of interference itself."⁸⁵

The confidence that one can place in these opinions as support for the absence of liability in the better deal cases should not be overestimated. While the relevant passages in these opinions clearly speak about the issue of the impropriety of mere interference with an enforceable contract, the facts of these cases do not raise the issue directly. The cases involve interference with a *prospective* contract or with an at-will contract, about which there is something approaching consensus that offering a better deal is privileged, justified or not improper.⁸⁶ Or they involve interference with contract where the defendant's actions are covered by an established privilege (other than the offering

85. *United Truck Leasing Corp. v. Geltman*, 551 N.E.2d 20, 23 (Mass. 1990) (quoting *Top Service*, 582 P.2d at 1371); see *Blake v. Levy*, 464 A.2d 52, 55 (Conn. 1983); *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293, 304 (Utah 1982). Cf. *Ran Corp. v. Hudesman*, 823 P.2d 646, 649 (Alaska 1991) (citing "Oregon rule" as one that "may be desirable" but "not necessary to decide whether it should be adopted at present").

86. See *Wagenseller v. Scottsdale Mem'l Hosp.* 710 P.2d 1025 (Ariz. 1985) (involving at-will contract); *Top Service Body Shop v. Allstate Ins., Co.*, 582 P.2d 1365 (Or. 1978) (involving interference with a prospective contract); *King v. Driscoll*, 638 N.E.2d 488 (Mass. 1994) (involving at-will contract); *Blake v. Levy*, 464 A.2d 52 (Conn. 1983) (involving interference with business relations).

In *King v. Driscoll*, 638 N.E.2d 488 (Mass. 1994), a case involving interference with contract, the court held that "[o]ne of the elements of intentional interference with contractual relations is improper motive or means," and that "[t]he motivation of personal gain, including financial gain" is generally "not enough to satisfy the improper interference requirement." *Id.* at 494-95 (citing *United Truck Leasing Corp. v. Geltman*, 551 N.E.2d 20 (1990)). This certainly appears to give teeth to the improper motive or means requirement, but it should be noted that the plaintiff here was an employee suing the president and shareholders of his employer for breach of his at-will employment contract. Ordinarily, on such facts, the defense would be privilege and the reply would be that malice defeats privilege. While the court is not analyzing it in these terms, a high hurdle of impropriety seems appropriate because the plaintiff must not only show improper interference but must defeat established privileges.

See *United Wild Rice, Inc. v. Nelson*, 313 N.W.2d 628 (Minn. 1982) for an illustration of the breadth of the privilege to compete in cases of interference with prospective contract, where the defendant's luring away of plaintiff's customers was found to be permissible even though his motive was in part to put the plaintiff out of business. And note that this is in a state that appears to lean toward the sanctity of contract. See *Langeland v. Farmers State Bank of Trimon*, 319 N.W.2d 26, 32 (Minn. 1982). The privilege is not always and everywhere construed so broadly. See, e.g., *Wear-ever Aluminum, Inc. v. Townecraft Industries, Inc.*, 182 A.2d 387 (N.J. Super. Ct. Ch. Div. 1962) (involving liability for luring away at-will employees).

of a better deal).⁸⁷ None of these cases involved the simple offering of a better deal. The Idaho court, for example, expressly adopted the *Top Service* approach, requiring interference to be independently wrongful, but it did so only with respect to the tort of interference with prospective contract.⁸⁸ In the same case it held that a plaintiff in an interference with contract case need not show wrongfulness; that after a showing of intentional interference it was up to the defendant to show justification—the determination of which would be a jury question. Thus, there is a certain instability in these decisions. The tendency to view the question of the impropriety of interference as a binary one—that interference is either improper or it is not, regardless of the nature of the underlying breach—will put enormous stress on the new rule the first time the court encounters a case of mere interference causing a wrongful breach.

The California Supreme Court prominently cited Perlman's article in *Pacific Gas & Electric Co. v. Bear Stearns & Co.*,⁸⁹ which held that a financial advisor could not be subject to interference liability for advising someone to seek a declaratory judgment on the right to terminate a contract. The court viewed the use of the interference torts as an attempt to make "an end run around the limitations

87. See *Ran Corp. v. Hudesman*, 823 P.2d 646, 649 n.4 (Alaska 1991) ("The Oregon rule may be desirable. However, it is not necessary to decide whether it should be adopted at present because the direct financial interest privilege . . . applies . . ."). The case that comes closest to being a mere interference case is *United Truck Leasing Corp. v. Geltman*, 551 N.E.2d 20 (Mass. 1990), in which the interferer was a lease consultant whose advice to a client that was a lessee of equipment led the client to breach a lease and enter into a lease with a different lessor. The trial court was held to have appropriately directed a verdict for the defendant/consultant as there was no evidence that he had used any improper means. The court said that the consultant's "apparent motives were to benefit his customers and himself financially." *Id.* at 24. If the consultant had induced the breaching party to breach his contract with the plaintiff and do business with the consultant himself, this would have been a prototypical better deal case. In the actual case, the consultant's actions were less directly self-interested, and they had about them at least a hint of the privilege to offer advice.

88. See *Idaho First Nat'l Bank v. Bliss Valley Food, Inc.*, 824 P.2d 841 (Idaho 1991); see also *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293, 304 (Utah 1982) (discussing primarily intentional interference with prospective economic relations).

89. 791 P.2d 587 (Cal. 1990).

on the tort of malicious prosecution.”⁹⁰ In this context, the court said, “[g]iven the criticism of these causes of action and the dangers inherent in imposing tort liability for competitive business practices, we have no motivation to expand these torts so that they begin to threaten the right of free access to the courts.”⁹¹ In the same paragraph the court referred explicitly to Perlman’s article and the threat that the tort of interference with contract poses to efficient breach of contract.⁹² All of this falls far short of an announcement by the court that it is about to overrule its precedents that allow liability in better deal cases.⁹³ It does, however, suggest at least an openness to arguments that such cases should be overruled.

Justice Mosk wrote an extensive concurring opinion in a 1995 case which addressed the issue directly: “Reason supports the conclusion that, even when there is a breach of contract, the interfered-with party should not be preferred over the interfering party: the breach may be ‘efficient.’”⁹⁴ Later in the same opinion he wrote, “A question that raises itself at this juncture is whether the related tort of intentional interference with contract . . . should be reformulated to require objective, and unlawful, conduct or consequences.”⁹⁵ Justice Mosk let the question go

90. *Id.* at 598.

91. *Id.*

92. *Id.* at 597-98 & n.20; see also *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 869 P.2d 454, 463 (Cal. 1994) (referring to potentially efficient and socially desirable breaches of contract).

93. Justice Traynor’s opinion in *Imperial Ice Co. v. Rossier* stated unequivocally that inducing breach by offering a better deal was tortious:

It is well established . . . that a person is not justified in inducing a breach of contract simply because he is in competition with one of the parties to the contract and seeks to further his own economic advantage at the expense of the other. Whatever interest society has in encouraging free and open competition by means not in themselves unlawful, contractual stability is generally accepted as of greater importance than competitive freedom. Competitive freedom, however, is of sufficient importance to justify one competitor in inducing a third party to forsake another competitor if no contractual relationship exists between the latter two A party may not, however, under the guise of competition actively and affirmatively induce the breach of a competitor’s contract in order to secure an economic advantage over that competitor.

Imperial Ice v. Rossier, 112 P.2d 631, 633 (Cal. 1941) (citations omitted).

94. *Penna v. Toyota Motor Sales, U.S.A., Inc.*, 902 P.2d 740, 755 (Cal. 1995) (Mosk, J., concurring) (citations omitted).

95. *Id.* at 761 n.9. The opinion goes on to say that this question “need not be

unanswered.

The New York Court of Appeals also seemed to be pulling back on the reins of the interference torts in 1996, in *NBT Bancorp Inc. v. Fleet/Norstar Financial Group, Inc.*⁹⁶ Sixteen years earlier, the Court of Appeals had appeared to be taking a very broad view of the tort in *Guard-Life Corp. v. Parker Hardware Manufacturing Corp.*⁹⁷ That opinion included an exegesis of Sections 766, 767 and 768 of the Second Restatement, then newly adopted, that surely left some careful readers with the impression that the court was endorsing the Restatement's expansive view of the tort.⁹⁸ In *NBT Bancorp*, however, plaintiff's counsel was chided for suggesting any such thing. The court stated that "[t]he Guard-Life holding, as well as its reasoning, put to rest NBT's assertion that the Court in that case was adopting the test propounded in the Restatement (Second) of Torts § 766."⁹⁹ Section 766 of the Restatement speaks of interference "*with the performance of a contract*,"¹⁰⁰ and it does not require that there be a *breach* of the contract. The New York court held in *NBT Bancorp* that there could be no tortious interference with contract unless there was a breach of contract and that there could be no tortious interference with *prospective* contractual relations unless the interference was caused by some wrongful means.

The court said that it "[stood] by [its] considered precedents."¹⁰¹ It would be difficult, however, to read the *Guard-Life* and *NBT Bancorp* opinions back to back without noticing a distinct difference in the court's approach to the interference torts in the two cases—particularly in the respect accorded to the Restatement's formulation of interference with contract. For what it is worth, in *NBT Bancorp*, immediately after the just-quoted reference to the court's "considered precedents," the court said in a footnote that "[t]he subject of tortious interference with contract continues to excite scholarly commentary, much of it suggesting that the tort be limited so as to

addressed here" and that the question might be answered either affirmatively or negatively. *Id.*

96. 664 N.E.2d 492 (N.Y. 1996).

97. 406 N.E.2d 445 (N.Y. 1980).

98. *Id.* at 448-50.

99. *NBT Bancorp*, 664 N.E.2d at 496 n. 1.

100. RESTATEMENT (SECOND) OF TORTS § 766 (1979) (emphasis added).

101. *NBT Bancorp*, 664 N.E.2d at 497.

protect lawful competition.¹⁰²

One might hope that the court's backing away from the tone of *Guard-Life* would signal an openness to arguments that a privilege of economic interest should be recognized that is broad enough to include the better deal cases.¹⁰³ While the *NBT Bancorp* decision does not rest on this point, the court seemed to go out of its way to dash any such hope. The court focused on *Guard-Life*'s holding that interference with prospective contractual relations requires employment of some wrongful means. But it also referred to *Guard-Life*'s interference-with-contract holding that "persuasion to breach alone, as by an offer of better terms, has been sufficient to impose liability on one who thereby interferes with performance."¹⁰⁴ This reaffirmation of *Guard-Life*'s better deal holding is of course dictum, but it does not suggest a court that is seeking to reconsider the point.

There is certainly a new, hard look being taken at the interference torts in many of the high courts. But interference with contract continues to be characterized by many courts in such a way that offering a better deal is a tort. And even the courts that have confidently announced a requirement of wrongfulness beyond mere interference have done so in cases that were not better deal cases. It is far from certain that those courts can be counted on to follow through with their announced wrongfulness requirements when they are finally faced with cases that involve mere interference that causes a wrongful breach. If the choice is viewed as a binary one—mere interference is either improper or it is not—then there is a good chance that even the courts that have announced a wrongfulness requirement will revert to the old orthodoxy. Faced with a case in

102. *Id.* at 497 n.2 (citations omitted).

103. New York recognizes a privilege of economic interest, but the desire to do business does not qualify. In *Foster v. Churchill*, 665 N.E.2d 153 (N.Y. 1996), which was decided the same day as *NBT Bancorp*, the New York court held that a person who induces the breach of a contract while acting to protect a vested economic interest (here a majority interest in a corporation) acts under a qualified privilege and will not be found liable for tortious interference with contract absent "a showing of either malice on the one hand, or fraudulent or illegal means on the other." *Id.* at 157 (citation omitted).

104. *Guard-Life*, 406 N.E.2d at 450-51 (citations omitted). The Court of Appeals in *NBT Bancorp* mistakenly said that it "affirmed an award to plaintiff" on the interference-with-contract part of the *Guard-Life* case. In fact, the court had ordered that the case be remitted to the lower court for trial on the issue.

which liability for mere interference is compelling because the underlying breach is wrongful—a notion that will be developed in the next section—these courts may fall back to the orthodox position that mere interference is improper in and of itself.

But the choice is not a binary one. The California and New York courts, for example, can harmonize the interference torts with the remedies principles of contract law without overturning their better deal precedents, which appear to hold that mere interference is improper in and of itself. Those precedents present reasonable cases for liability, but they do not demonstrate that mere interference is improper. Rather, they demonstrate that mere interference may be improper when it causes a wrongful breach. The next section develops in some detail the notion of a wrongful breach of contract, the mere interference with which may be found improper.

II. WRONGFUL BREACHES IN THE LAW OF CONTRACTS

A. Prologue: *The Right to Breach*

“The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else.”¹⁰⁵ This famous characterization of contract obligations by Holmes leads to the heart of the riddle of tortious interference. If a person is free to breach a contract and pay damages, why should it be tortious for a third party to induce the contract party to do what she is free to do? But are we justified in concluding, from the fact that contract law imposes only compensatory damages, that it is not wrong for a contract party to breach? Such a conclusion is certainly not justified when it comes to breaches that would lead to orders of specific performance.¹⁰⁶ A party is only free to breach in such a case if the aggrieved party fails to assert her right to compel performance. But what about those breaches that lead only to the imposition of money damages?

105. Holmes, *supra* note 4, at 462.

106. Holmes, of course, recognized that there were cases “in which equity [would] grant an injunction,” but he “hardly [thought] it advisable to shape general theory from the exception . . .” *Id.* at 462-63.

I have said that contract law encourages certain breaches; I have steered clear of saying that contract law “means to encourage” certain breaches, but putting it that way raises the point directly. Is it possible that this feature of contract law—the incentive to breach in certain cases that flows from contract damages being substitutional and compensatory—is an accident or a flaw? Contract law is so structured that certain breaches are encouraged. But what reason do we have for thinking that this fact of encouragement is a feature of contract law that we should regard in a positive light? Isn’t the very fact of the twentieth century tortious interference orthodoxy powerful evidence that contract law’s stopping short at compensation should not be taken as encouragement? Why should we not believe the comment of the Restatement (Second) of Torts that says that one who breaches a contract is a “wrongdoer”?¹⁰⁷

One can imagine three positions that might be taken with respect to these questions. The first would run something like this: yes, one has the option under the law of contracts either to perform or to breach and pay damages. But what appears to be encouragement of certain breaches is simply an unintended consequence of damages being justly limited to an amount that compensates the aggrieved party. The fact that the breacher can get away with paying only compensation does not mean that the breacher has not committed a wrong. We should say that a contracting party has the option either to perform or to *commit a wrong* by breaching and paying damages. According to position number one, the remedies rules of contract are fine as they are, and there is simply no conflict between these rules and a law of tortious interference that regards mere interference with contract as improper.

The problem with this position is that it does not account for contract remedies being generally substitutional and not specific. If there is still an unremedied wrong after substitutional damages are paid, then the general remedy should be specific performance. If we are unwilling to do away with contract law’s insistence on damages as the presumptive remedy, presumably that is because there is some advantage to allowing the breaching party to pay only compensatory damages. Anyone who believed in such an

107. See RESTATEMENT (SECOND) OF TORTS § 766 cmt. v (1979).

advantage should be unwilling to undercut it with an interference tort that deters some of the very same breaches that contract law encourages. Anyone who does not believe that there is such an advantage would have no reason to support contract remedies as they are.

The second position is that the rules of contract remedies should be changed to make specific performance the general rule. One might take this position for economic reasons, believing that a specific performance rule is at least as likely to lead to efficient behavior as the current rule, or simply because one believes that breaching is wrong. An interference tort that regards mere interference with contract as improper would be consistent with such a view.

This is a reasonable position. The assumption of this Article, however, is that such a fundamental change in the principles of contract law is not on the horizon. If there were a referendum on the subject, I would vote to keep the current regime of contract remedies rather than to change to a specific performance regime. I lean toward believing that there is an advantage to allowing the breaching party to pay only compensatory damages, but I firmly intend to stay out of that debate in this Article. My purpose in describing the rationale for dividing contract claims into damage claims and specific performance claims¹⁰⁸ is not to win anyone over to support the current remedies regime. Rather, my purpose is to convince readers that as long as we have the current remedies regime which encourages certain breaches of contract, it makes no sense for tort law to undercut it by holding someone liable who encourages such a breach. Such a conflict would be understandable if we had contract courts warring with tort courts over the desirability of efficient breaches—but, of course, we do not.

The third position is that the current division of contract law cases into damages cases and specific performance cases makes sense because it encourages certain breaches. This argument, sketched out below, serves as a basis for understanding why breaches that lead to specific performance and, more generally, breaches for which there is no adequate remedy in damages should be regarded as wrongful.

My rejection of the first position, my leaning away from

108. See *infra* notes 111-21 and accompanying text.

the second and my embracing of the third all turn on the idea that the split between damages and specific performance cases is a sensible one in light of the incentives it creates for contracting parties to behave efficiently. Section B sketches out this argument in some detail, describing the split between specific performance and damages cases and the way that parties are encouraged to perform or not depending on whether performance would be efficient. The section is not intended as a brief for the current remedies regime. Rather, it is an attempt to show, particularly for those who have not followed closely the law and economics debate on contract remedies, how the current regime works, the nature of some of the benefits that flow from it, and the argument that as long as we have such a regime, tort law should not be undercutting it. If we have a presumptive rule of damages, and we do, then it makes no sense to undercut its only advantage—which is that it encourages certain breaches. The breach that would lead to specific performance emerges from Section B as a breach that is wrongful. Contract law stands ready to prevent such a breach.

Sections C and D explore two categories of breach in which contract law recognizes, explicitly in one case and obscurely in the second, that a damage remedy is in some way inadequate even though it is the best that contract law can do. First are those cases of breach for which money damages are not an adequate remedy but for which specific performance is not available. The law of contracts has struggled with these cases. We will see that the law of tortious interference was born directly out of this struggle. Even though the law of contracts refuses to compel performance in cases of this kind it is clear that the law does not seek to protect the breaching party's "right" to breach in this fashion. Historically, equity had jurisdiction over such breaches because the common law did not manage to reach just outcomes. The reasons that the law is unable or chooses not to fashion specific relief in these cases do not translate into an endorsement of, or even an expression of indifference toward, the breacher's actions.

The second group of cases, the subject of Section D, involves cases of bad faith breach. American law insists on preserving a person's right to resist legitimate claims and to force claimants to sue. A breaching party can deny the existence or enforceability of valid obligations under a

contract, forcing the other party to sue, without the risk of paying the aggrieved party's attorneys' fees. The breaching party must steer clear of court-imposed sanctions, but there is plenty of leeway for fairly outrageous "stonewalling" behavior on the part of breaching parties that goes unpenalized under the combined effect of contract law and the American Rule on attorneys' fees.¹⁰⁹ Just as there are cases in which the breaching party cannot be said to have a right to breach even though the law of contracts fails to impose any penalty beyond compensatory damages, so there are cases of bad faith breach in which the breaching party is able to get away with reprehensible conduct that is not penalized by the rules of contract law. We will explore below why it is that contract law is incapable of identifying these cases and why tort law does not suffer from the same incapacity.

B. *Specific Performance*

1. *The Bifurcation of Contract Remedies.* The clearest category of wrongful breach comprises those breaches for which the law provides the remedy of specific performance. This is the only category of wrongful breach I will identify that is actually recognized by the law of contract in terms of outcomes. This category will be explored in more detail than would be necessary to show that the specific performance case involves a wrongful breach in the sense that contract law stands ready to compel performance, a proposition that is intuitively clear. This detailed exploration demonstrates that the rationale that underlies the special treatment of the specific performance breach applies equally to the two other categories of wrongful breach. While those other categories are not treated any differently by the law of contracts in terms of case outcomes, they should nevertheless be understood to involve wrongful breaches for the same reason that the specific performance breaches are wrongful. It is due to other characteristics of these breaches—characteristics that are irrelevant to the impropriety of a third party's interference—that contract

109. See Jonathan K. Van Patten & Robert E. Willard, *The Limits of Advocacy: A Proposal for the Tort of Malicious Defense in Civil Litigation*, 35 HASTINGS L.J. 891, 891-901 (1984); Comment, *Controlling the Malicious Defendant*, 2 STAN. L. REV. 184, 185-87 (1949).

law is unable to fashion a remedy that is responsive to the wrongfulness of the breach.

If a breaching contract party is *ipso facto* a wrongdoer, there would be nothing to stop the law of contracts from making the remedy of specific performance generally available.¹¹⁰ Instead, contract law draws a distinction between those cases in which the aggrieved party's contract right is protected by a liability rule, which awards damages based on the court's (or jury's) valuation of damage suffered by the aggrieved party on account of the breach, and those in which the right is protected by a property rule, which gives the aggrieved party a right to compel performance of the contract, a right which the aggrieved party is free to sell to the breaching party at a negotiated price.¹¹¹

It is possible for a party to opt out of performance under either rule. Under the damage rule a party can breach and pay damages; under the specific performance rule a party who wishes to escape performance can do so by negotiating with the other party for a release. The effect of this is that contracts can be "breached" in either case. In the first case it is the court that determines damages; in the second it is the aggrieved party that determines the amount of "damages" through negotiation.

Thus, there are two different routes to efficient non-performance. In the damage case, a party can breach and enter into a better deal, paying damages in the amount that would be determined by the court to make the aggrieved party whole. By this route the breaching party keeps whatever amount remains (the surplus) after compensating the aggrieved party. In the specific performance case, a party who wishes to enter into a better deal can negotiate a release at a price that at least makes the aggrieved party whole (we may assume, since the aggrieved party has voluntarily parted with her right to compel performance). By this route the party wishing to enter into the better deal

110. Specific performance is generally available in some other legal systems. See Dawson, *Specific Performance in France and Germany*, 57 MICH. L. REV. 495 (1959).

111. For the classic exposition of the distinction between liability and property rules, see Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106-10 (1972). The distinction continues to be a vital one. See Saul Levmore, *Symposium: Property Rules, Liability Rules, and Inalienability: A Twenty-Five Year Retrospective*, 106 YALE L.J. 2149, 2150-53 (1997).

keeps the surplus minus whatever portion of the surplus the aggrieved party manages to negotiate as payment beyond the compensation that would have just made her whole.

The crucial question for understanding the bifurcation of contract remedies is this: why is the law of contracts willing to allow the court to determine the aggrieved party's damages and the breaching party to keep the entire surplus in one set of cases, while in another set of cases it leaves the determination of damages in the hands of the aggrieved party, which leads to a division of the surplus between the contracting parties? There is ongoing scholarly debate about this question. Some argue that contract law should be reformed to grant specific performance as a general remedy for breach.¹¹² These are serious arguments; if the law of contracts were so changed, then much of the criticism of the law of tortious interference with which this Article is concerned would evaporate. The broad view of tortious interference liability, that mere interference is improper, would be consistent with this kind of general specific performance rule in contract.¹¹³ Others argue that contract law should continue its practice of providing a damage remedy for an important class of breaches.¹¹⁴ It is not necessary for the purposes of this Article that this controversy be resolved. Contract law might someday change to provide a universal rule of specific performance, but it shows no signs of doing so now.¹¹⁵

112. See, e.g., Thomas S. Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 MICH. L. REV. 341 (1984); Peter Linzer, *On the Amoralism of Contract Remedies—Efficiency, Equity, and the Second Restatement*, 81 COLUM. L. REV. 111 (1981); Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271 (1979); see also Harold Greenberg, *Specific Performance Under Section 2-716 of the Uniform Commercial Code: "A More Liberal Attitude" in the "Grand Style"*, 17 NEW ENG. L. REV. 321 (1982).

113. See Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1, 20-23 (1989).

114. See Edward Yorio, *In Defense of Money Damages for Breach of Contract*, 82 COLUM. L. REV. 1365 (1982); Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351 (1978); POSNER, *supra* note 5; see also Richard Craswell, *Contract Remedies, Renegotiation, and the Theory of Efficient Breach*, 61 SO. CAL. L. REV. 629 (1988).

115. Douglas Laycock, *in The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687 (1990), appears at times to be arguing that contract law has moved to a general rule of specific performance. But he in fact makes repeated references to a class of cases involving "the loss of fungible goods or services in

The law currently provides that in a significant class of cases the breaching party can breach, pay damages and keep the surplus. The law of tortious interference attacks this by making the third party offeror of a better deal a tortfeasor. Tort damages may be significantly greater than contract damages, putting the surplus at risk. But even if damages were no greater than contract damages, the breacher and the tortfeasor would be unable to predict whether the aggrieved party would sue the breacher in contract or the tortfeasor in tort. This could be overcome by the breacher agreeing to indemnify the tortfeasor for any tort damages, but such an agreement may well be unenforceable as an agreement that contemplates the commission of a tort.¹¹⁶ This drives careful would-be better dealers to have the prospective breacher buy a release from the contract. Thus, what is accomplished by the bifurcation of contract remedies is undone by the law of tortious interference.

2. *An Example of an Efficient Breach.* An example of a breach of contract that arises from the offering of a better deal will serve to illustrate some of these ideas. In this example A and B are parties to a contract. A is the Aggrieved party if the contract is breached, and B is the Breaching party or the party that is considering whether or not to breach. T is the potential Tortfeasor, the party who offers the better deal to B.

A and B enter into an enforceable contract, with A promising to employ B for one year at a salary of \$200 per week. B later learns that the services she agreed to provide to A would be worth \$300 per week in the relevant market. That means that if B were to breach, A would have to pay someone else \$300 per week and B would be answerable to A in damages for \$100 per week. Now suppose that B has certain skills that are of no interest to A but which make T willing to pay B \$400 per week. T discusses the matter with B and learns of the contract between A and B. The contract notwithstanding, T offers to pay B \$400 per week if B will agree to indemnify T for any amount (up to \$100 per week) that T might have to pay A if T is found liable to A for interference with A and B's contract. The breach of contract

an orderly market" for which damages are adequate. *See, e.g., id.* at 695.

116. *See* RESTATEMENT (SECOND) OF CONTRACTS § 192 & cmt. b (1981).

that T encourages B to make is an efficient breach. If B breaches, A can hire a replacement and be made whole by damages of \$100. B is better off by \$100 per week after compensating A, T is better off by getting the desired contract with B, and A, who has been fully compensated, is no worse off. The law of contract remedies reaches an efficient result: damages of \$100 per week. But tort law, as currently articulated by the majority of courts, interferes with this result.

Assume that B has accepted T's offer and breached her contract with A. Even though, as a matter of contract law, B is free to breach this contract and pay damages to A, T's inducing of B to breach it is a tort.¹¹⁷ B would be liable to A in contract. But T would also be liable to A in tort for damages not necessarily bounded by A's contract damages,¹¹⁸ and T and B have no way of predicting which of them A will sue. Moreover, the agreement between T and B that attempts to distribute this uncertain liability is unenforceable, and indeed the entire contract of employment between T and B is unenforceable because it contemplates the inducement of a breach.¹¹⁹

None of this would be troubling if we regarded B's breach as a wrong. Contract law, however, does not regard B's behavior as wrongful. The bifurcation of contract remedies contemplates that B be permitted to breach and pay damages. The effect of tort law is to undercut this and force B to act as if the general rule of contracts were specific performance. T is unlikely to contract with B unless B first negotiates a release from A, pursuant to which A is likely to demand compensation of \$100 plus some portion of B's \$100 surplus. Contract law would protect A's contract right by a liability rule; tort law overrides this and protects it by a property rule.

117. It is possible that T would escape liability by being found to have acquiesced in the breach rather than to have induced it. See *Frontier Cos. of Alaska, Inc. v. Jack White Co.*, 818 P.2d 645, 650-51 (Alaska 1991); RESTATEMENT (SECOND) OF TORTS § 766 cmt. n (1979). That somewhat uncertain escape hatch would be unavailable here as T appears to be the instigator.

118. See RESTATEMENT (SECOND) OF TORTS § 774A.

119. See Perlman, *supra* note 20, at 88; RESTATEMENT (SECOND) OF CONTRACTS §§ 192, 194 (1981). The problem is not that A can recover twice for the same damages; she cannot. See RESTATEMENT (SECOND) OF TORTS § 774A(2). The problem is that B and T cannot know in advance whom A will sue, and any agreement between B and T for indemnification would be unenforceable.

3. *The Rationale for the Bifurcation of Remedies.* The remainder of this section is a brief summary of the rationale for the distinction made by contract law between rights that are protected by a property rule and those protected only by a liability rule. This summary is written particularly for those readers who have not followed the debates in the law and economics literature on the nature of remedies. Whether or not one is generally sympathetic to economic arguments in the law, for an understanding of the bifurcation of contract remedies it is crucial to have an intuitive grasp of the insights that flow from economic analysis.

It is important to note at the outset that the bifurcation bears no direct relationship to the line between cases of efficient and inefficient breach. Some breaches that lead only to awards of damages are efficient; others are not. Some breaches that lead to awards of specific performance are efficient; others are not. The contract remedies rules provide incentives for the parties to reach efficient outcomes. In the damages cases a party is given the incentive to breach when the breach is efficient. In the specific performance cases a party is given the incentive to negotiate for a release when non-performance would be efficient.

A contract that is subject to a liability rule amounts to nothing more than an option to perform or to pay damages. Under such a rule, if B is offered a deal by T that is so attractive that B can breach her contract with A, compensate A for her damages and still come out ahead, then no one is harmed by permitting this breach. In our example, B can breach, compensate A, and still enjoy a \$100 surplus. Notice, however, that even under a specific performance rule the parties might well reach an efficient outcome, but by a different route. Under a specific performance rule A could compel B to perform, and T could approach A and negotiate B's release from the contract (or B could approach A and negotiate her own release). Neither A nor B would be harmed, T would get B's services, and the \$100 surplus would be distributed among the parties depending upon the outcome of the negotiations.

If both rules lead to an efficient outcome, why does the law of contracts apply one rule to some cases and another to the rest? First imagine that we enforced all contracts by award of damages. If the promised good or service were commercial or fungible, we could be comfortable that the

value attached to the transaction by the promisee would be the same as the value attached by the market.¹²⁰ In such a case a liability rule would be sufficient to protect the promisee's rights. If the subject of the promise were somehow unique (for example, land, unique goods or unique personal services) we would be less comfortable with a liability rule since there would be no market upon which to measure the value and no market upon which to change the damage award into the equivalent of that for which the parties contracted. In this case a property rule would more effectively protect the invaded right of the promisee. The property rule honors one of the fundamental premises of contract law: that no one is better positioned than the aggrieved party to judge the value she placed on the rights she acquired when she entered into the contract. The property rule, or specific performance rule, leads to the enforcement of contracts by courts without their having to second guess the values placed on the contract by the parties. The damages cases, in contrast, are those cases in which the existence of markets makes the determination of damages relatively cheap and error free.

The foregoing explains why we might choose to enforce certain contracts with specific performance, but it does not tell us why we do not enforce *all* contracts with specific performance. Even when a contract involves fungible goods or services there is still some cost to determining damages and some risk of error. What benefits outweigh these costs? The benefit is that we avoid transaction costs associated with the specific performance rule. If there is someone in the world that values the goods or services that are the subject of the contract more than the buyer under the contract, then we would like to get the goods or services to her. In the cases that we are considering here (cases involving fungible things or services) the sellers of those items are more likely on average to be the cheaper searchers for the higher valuers of those items. The damage rule provides greater and more certain compensation to sellers who succeed in finding higher valuers than would the specific performance rule: greater, because the seller

120. Or, in the event that the promisee placed some higher-than-market value on a truly fungible good or service, then compensation based on market value would enable the promisee to go into the market and obtain the special value through a substitute transaction.

captures the entire surplus under the damage rule rather than having to split it with the buyer; more certain because the specific performance rule leads to negotiations that sometimes break down for strategic reasons.

It is worth observing again that the line between the damage cases and the specific performance cases does not coincide with the line between efficient and inefficient breach. The determination that a breaching party must pay damages is not a determination that the breach was efficient. Nor is a determination that a contract is specifically enforceable in connection with a particular breach equivalent to a finding that the breach was inefficient. Rather, in the damage cases, allowing the breaching party to decide whether or not to breach, taking account of expectation damages, is thought to be more likely to lead to the efficient outcome than the alternative rule. In the specific performance cases, giving the aggrieved party an entitlement to enforce the contract specifically or to bargain it away, is thought to be more likely to lead to the efficient outcome than the alternative rule.¹²¹

The bifurcation of contract remedies provides a transactional infrastructure that guides contracting parties toward efficient transactions. Contract rights are protected in certain cases by a property rule, and in these cases the breaching party commits a wrong by failing to perform without negotiating a release. In other cases the breaching party is free to breach and pay damages. If the rationale behind the property/liability split could be realized completely, then the breaching party should be free to breach in any case in which damages rather than specific performance would be awarded for the breach. As the next two sections demonstrate, contract law fails in two classes of cases. These are cases in which the aggrieved party's contract right is not adequately protected by a liability rule, but contract law has found no other satisfactory way to protect it. The result is that a breaching party can get away with breaching and paying damages even though her breach is wrongful.

121. For a case in which Judge Posner explicitly analyzes the availability of specific performance in these terms, see *Walgreen Co. v. Sara Creek Property Co.*, 966 F.2d 273 (7th Cir. 1992).

C. No Adequate Damages

The prerequisite for the equity courts' jurisdiction in a suit for specific performance was that there be no adequate remedy available at law. The inadequacy of damages continues to be a necessary but not sufficient condition of an order of specific performance. Even though damages may not be adequate there are a number of reasons why a court might decline to award specific performance.

The primary example of a contract obligation that will not be enforced specifically is the contract for unique personal services. A promise to sing the role of Isoldé at the Met or to play quarterback for the Dallas Cowboys will not be enforced specifically. In these cases, the aggrieved party does not have an adequate remedy at law in damages, and it is that failure that opens the door to the remedies of "equity," of which specific performance is one. The problem is that equity would not, and modern courts will not, order someone to sing or to quarterback. The rationale often given is that a court cannot enforce such an order because the breaching party would have to be ordered not just to sing or to quarterback, but to do so with artistry, and what court has the "exquisite sensibility" necessary to craft such an order or to judge the artist in contempt of it?¹²² It is also sometimes said that compelling personal service would "run[] afoul of the Thirteenth Amendment's prohibition against involuntary servitude."¹²³

122. See *De Rivafinoli v. Corsetti*, 4 Paige Ch. 263, 270 (N.Y. 1833).

I am not aware that any officer of this court has that perfect knowledge of the Italian language, or possesses that exquisite sensibility in the auricular nerve, which is necessary to understand and to enjoy with a proper zest the peculiar beauties of the Italian opera, so fascinating to the fashionable world.

Id.; 5A CORBIN ON CONTRACTS § 1204 (1964).

123. *Beverly Glen Music, Inc. v. Warner Communications, Inc.*, 224 Cal. Rptr. 260, 261 (Cal. Ct. App. 1986). Involuntary servitude and a court order of specific performance may seem to be miles apart, but they are chillingly close. Immediately after the Thirteenth Amendment abolished slavery as a legal institution in the United States, slave owners turned to contract as a means of maintaining control over their former slaves. The person who enticed away a southern plantation owner's newly hired slaves-turned-servants was liable in damages. *Salter v. Howard*, 43 Ga. 601 (1871). If orders of specific performance for contracts of personal service had been available, the passage of the Thirteenth Amendment would have been far less significant to the workers on the plantation of Mr. John Howard in Houston County, Georgia, during 1866. *Id.* at 602 (referring to testimony by the plaintiff, Mr. Howard, that he had "said

The breach of contract that underlay the first modern Anglo-American tortious interference case was a breach by an opera singer of just such a contract for which the remedy of damages was *not* adequate. In 1852, Johanna Wagner, cantatrice of the court of His Majesty the King of Prussia, repudiated her agreement to sing exclusively at Her Majesty's Theatre in London by accepting an offer to sing for higher pay at Covent Garden. In the case of *Lumley v. Wagner*,¹²⁴ the Lord Chancellor upheld an injunction barring Ms. Wagner from singing at Covent Garden. This case stands in the contract treatises for the proposition that while a court will not order the specific performance of a contract for personal service, it will issue an injunction in appropriate circumstances preventing the breaching party from performing the unique service for anyone other than the aggrieved party during the contract term.¹²⁵ The case of *Lumley v. Wagner* was not about tortious interference, and it is usually not mentioned in connection with the history of the tort. But the seminal tortious interference case, *Lumley v. Gye*,¹²⁶ arose from the very same breach of contract.

It appears that Ms. Wagner was not persuaded by the injunction to repent from her breach and sing at Her Majesty's Theatre. Mr. Lumley sued again, this time in a court of law rather than equity, against Mr. Gye, the promoter at Covent Garden. The plaintiff alleged that the defendant not only procured Ms. Wagner's breach of contract, but enticed her "after certain proceedings in equity . . . to continue her default for the residue of the term."¹²⁷ The Court of Queen's Bench held "that an action lies for maliciously procuring a breach of contract to give exclusive personal services for a time certain . . . and produces damage[s]."¹²⁸

Lumley v. Gye marked the birth of the modern interference tort. While it involved a contractual breach by a party that was not free to breach—that is, the underlying breach was one for which equity would have ordered specific performance if only it could have—the judges did

he would send the sheriff after [his former slaves] and [the defendant] too").

124. 42 Eng. Rep. 687 (Ch. 1852).

125. FARNSWORTH, *supra* note 5, at 855-56; JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* 667 n.49 (3d ed. 1987).

126. 118 Eng. Rep. 749, 2 El. & Bl. 216 (Q.B. 1853).

127. 118 Eng. Rep. at 760, 2 El. & Bl. at 245 (Coleridge, J., dissenting).

128. 118 Eng. Rep. at 749, 2 El. & Bl. at 216.

nothing to highlight this aspect of the case. *Lumley v. Gye* did involve the breach of a contract for unique personal services. Had the tort remained limited to such cases, Mr. Gye's interference might have come to be understood as improper because it caused Ms. Wagner to breach wrongfully, or in a way that left Mr. Lumley with no adequate remedy.

Related to the personal service cases are cases involving complex tasks such as construction projects. Courts have often declined to grant specific performance in cases such as these because administering or supervising the orders would be difficult.¹²⁹ A related reason for declining to award specific performance is uncertainty or indefiniteness in the contractual provision sought to be enforced. Such uncertainty may be present even though the contract is definite enough to be enforceable. The obligation to modernize and expand a steel mill may be definite enough to be enforceable, but the obligation looks quite different when the judge sits down to draft an order to compel the builder's performance.¹³⁰

Finally, there are cases in which courts will decline to award specific performance because the plaintiff has "unclean hands" or has failed herself "to do equity," or because the contract itself or the manner in which the aggrieved party sought to enforce it is unfair or oppressive. In these cases the aggrieved party has forfeited the right to have its obligation protected by a property rule. Unlike the cases of wrongful breach in which the court either compels performance, or would like to compel performance but cannot, here one has the sense that the court denies specific relief with some enthusiasm and would award damages with some reluctance.

We will see below that the no-adequate-damages cases make up a substantial percentage of the cases that the courts treat under the broad heading "mere interference" or "interference that is not independently wrongful." As long as the focus is on the actions and blameworthiness of the interferer, it is reasonable to think of these tort cases as involving mere interference. When we look to the character of the breach, however, we see that we are dealing not with

129. See, e.g., *Northern Delaware Indus. Dev. Corp. v. E.W. Bliss Co.*, 245 A.2d 431 (Del. Ch. 1968).

130. See *id.*

“mere” interference, but with interference leading to a breach that the breaching party was not free to make.

D. *Bad Faith Breach*

The other type of breach that contract law would prevent if it could is the bad faith breach. Contract damages are supposed to be compensatory, putting the aggrieved party in the position she would be in if the contract had been performed. But actually obtaining the compensation that is due is not costless.¹³¹ Under the American rule on attorneys’ fees, unless a statute or agreement provides otherwise, each party bears her own litigation expenses.¹³² This means that even a party who is clearly in breach risks little, other than her own attorney’s fees, if she engages in stonewalling behavior.¹³³ Contracting parties can refuse to perform, refuse to pay, or deny the existence or enforceability of a contract.¹³⁴ Often, refusal or denial is part of a good faith dispute, but it is sometimes engaged in by parties who are certain about their obligations. The refusal to perform under a contract combined with the refusal to compensate the aggrieved party for such failure, providing that the relevant obligation is not the subject of a good faith dispute, is what I am calling a “bad faith breach.” The rules of contract law actually provide incentives to behave in this way.

There are many non-legal factors that may discourage

131. This is, of course, true for all breaches, not only the bad faith breach. The aggrieved party must pay to enforce her contract right under the American rule, whether she is entitled to damages or specific performance. This enforcement cost distorts the incentives that contract law provides for efficient transactions, but it is not at all clear that this distortion argues against the current bifurcation of remedies. In any case, it is hard to imagine why, if we were troubled by enforcement costs, we would seek to mitigate its effects in only that arbitrary set of cases implicated in the interference tort. See Perlman, *supra* note 20, at 88-89.

132. See Van Patten & Willard, *supra* note 109, at 904.

133. In some cases the litigation costs of the bad faith defendant are actually outweighed by the return that the defendant is likely to earn by investing the plaintiff’s money. See *Hersch v. Citizens Sav. & Loan Ass’n*, 194 Cal. Rptr. 628, 633 (Cal. Ct. App. 1983); Van Patten & Willard, *supra* note 109, at 893 & n.9.

134. “[M]alicious motive may be important in determining whether a material breach has occurred, but it is immaterial in so far as damages for contract breach are concerned.” *Wild v. Rarig*, 234 N.W.2d 775, 790 (Minn. 1975), *cert. denied*, 424 U.S. 902 (1976).

such bad faith behavior: the contracting party may be concerned about her reputation or she may feel that such behavior would violate her sense of ethics. But there are those who behave as if undeterred by any sense of ethics, and in some businesses the gains from bad faith breach may outweigh reputational harm. A business might choose to meet all claims with some resistance in order to identify those cases in which promisees appear unlikely to pursue their claims. Claimants who persist will then be paid ("We're very sorry about the snafu with regard to your claim"); those who are scared away by the stonewalling will not be paid. For example, an insurance company might find it profitable to meet all claims by denying coverage and then relenting only in those cases where claimants appear likely to hire lawyers or otherwise persist.

At times the law has experimented with ways to counterbalance this unsettling incentive to breach in bad faith. In one established category of cases, insurance cases, bad faith breachers face liability that goes beyond compensation. The first cases of bad faith breach involved liability insurers who breached their obligations to make reasonable efforts to settle claims brought by third parties against their insureds.¹³⁵ The typical case involved a claim against the insured that greatly exceeded the policy limit. In such a case, the insured would be interested in settling as close as possible to the policy limit, while the insurer, who controlled the defense, would have little to lose if the case didn't settle since the insurer would not be responsible for any amount beyond the policy limit. Failure by the insurer to make reasonable efforts to settle came to be regarded as a *tortious* bad faith breach of contract.¹³⁶ The bad faith insurance tort later expanded to include cases in which the insurer breached its obligation to make payments directly to its insured.¹³⁷

135. See *Communale v. Traders & Gen. Ins. Co.*, 328 P.2d 198 (Cal. 1958); FARNSWORTH, *supra* note 5, at 876-77.

136. See *Crisci v. Security Insurance Co.*, 426 P.2d 173 (Cal. 1967).

137. See *Vernon Fire & Cas. Ins. Co. v. Sharp*, 349 N.E.2d 173 (Ind. 1976); *Gruenberg v. Aetna Ins. Co.*, 510 P.2d 1032 (Cal. 1973); *White v. Unigard Mut. Ins. Co.*, 730 P.2d 1014 (Idaho 1986). In some jurisdictions the tort of bad faith refusal to settle was made available not only to insureds (who are in privity with the insurer), but to third party claimants, on the theory that there was a private right of action under statutes governing the settlement practices of insurers. See *Royal Globe Ins. Co. v. Superior Court*, 592 P.2d 329 (Cal. 1979), *overruled by Moradi-Shalal v. Fireman's Fund Ins. Cos.*, 758 P.2d 58 (Cal.

The broad rationales articulated in these cases had nothing in particular to do with insurance contracts: the breach of the implied covenant of good faith and fair dealing was said to be a tort¹³⁸ or, broader still, tort liability was said to be necessary in bad faith breach cases in order to provide a remedy for every wrong.¹³⁹ These generalizations would exert pressure to expand bad faith breach beyond the insurance context, but courts also gave narrower rationales for this doctrine of bad faith breach in the specific area of insurance contracts. The relationship between the insurer and the insured was said to be a special one.¹⁴⁰ Typically the insurer enjoys a relative advantage in bargaining power,¹⁴¹ the insurance contract is one of adhesion,¹⁴² the plaintiff/insured is under extreme financial distress at the time of the alleged bad faith breach,¹⁴³ and the insured contracts for peace of mind rather than commercial advantage.¹⁴⁴ The insurance contract was seen as deserving of special scrutiny because it was a matter of public policy or public interest, some evidence of which is found in the statutory and regulatory schemes that govern the industry.¹⁴⁵

In 1984 the California Supreme Court began an expansion of the tort of bad faith breach, which would be aborted eleven years later. The California experiment sheds light on the intractable problem of identifying this category

1988).

138. *Crisci*, 426 P.2d at 178.

139. *Id.*

140. *See, e.g., White*, 730 P.2d at 1019 (holding that "special relationship . . . exists between insurer and insured"); *Battista v. Lebanon Trotting Ass'n*, 538 F.2d 111, 118 (6th Cir. 1976); *Crisci*, 426 P.2d at 178; John Monaghan, Note, *Extending the Bad Faith Tort Doctrine to General Commercial Contracts*, 65 B.U. L. REV. 355, 358-63 (1985).

141. *See Craft v. Economy Fire & Cas. Co.*, 572 F.2d 565, 569 (7th Cir. 1978); *Battista*, 538 F.2d at 118.

142. *D'Ambrosio v. Pennsylvania Nat'l Mut. Cas. Ins. Co.*, 396 A.2d 780, 785 (Pa. Super. Ct. 1978), *aff'd*, 431 A.2d 966 (Pa. 1981); *Battista*, 538 F.2d at 118.

143. *Grand Sheet Metal Prod. Co. v. Protection Mut. Ins. Co.*, 375 A.2d 428, 430 (Conn. Super. Ct. 1977); *Battista*, 538 F.2d at 118.

144. *Seaman's Direct Buying Serv., Inc. v. Standard Oil Co.*, 181 Cal. Rptr. 126, 136 (Cal. Dist. Ct. App. 1982), *vacated*, 686 P.2d 1158 (Cal. 1984), *overruled by Freeman & Mills, Inc. v. Belcher Oil Co.*, 900 P.2d 669 (Cal. 1995); *see also White*, 730 P.2d at 1019 (noting that the "unique 'personal' (non-commercial) nature of insurance contracts" justifies imposing the duty of good faith and fair dealing) (citation omitted).

145. *Vernon Fire & Cas. Ins. Co. v. Sharp*, 349 N.E.2d 173 (Ind. 1976).

of wrongful breach. In *Seaman's Direct Buying Service v. Standard Oil Co.*,¹⁴⁶ the California Supreme Court, somewhat tentatively extended the tort of bad faith breach beyond the insurance context. The court, wary of finding "that breach of the covenant [of good faith and fair dealing] always gives rise to an action in tort,"¹⁴⁷ cast its holding narrowly. It found "that a party to a contract may incur tort remedies when, in addition to breaching the contract, it seeks to shield itself from liability by denying, in bad faith and without probable cause, that the contract exists."¹⁴⁸ In a further characterization of this new species of tortious behavior, the court said that tort remedies could be imposed where

a contracting party seek[s] to avoid all liability on a meritorious contract claim by adopting a "stonewall" position ("see you in court") without probable cause and with no belief in the existence of a defense. Such conduct goes beyond the mere breach of contract. It offends accepted notions of business ethics.¹⁴⁹

This decision by the California court attracted a great deal of critical attention.¹⁵⁰ It appeared to many that tortious bad faith breach of the implied covenant of good faith and fair dealing, familiar in the insurance context, was about to expand to include commercial contracts generally, "thereby eliminating the line between breach of contract and tort."¹⁵¹ Four years later, the California court retreated from *Seaman's* without overruling it. In *Foley v. Interactive Data Corp.*,¹⁵² the court refused to extend the tort of bad faith breach to the employment context. If an employer wrongfully discharged an employee, the appropriate remedy was to be found in the law of

146. 686 P.2d 1158, 1167 (Cal. 1984), *overruled by Freeman & Mills, Inc. v. Belcher Oil Co.*, 900 P.2d 669 (Cal. 1995).

147. *Id.* at 1166.

148. *Id.* at 1167.

149. *Id.* (citation omitted).

150. For citations to some of the voluminous commentary on the *Seaman's* case, see *Freeman & Mills, Inc. v. Belcher Oil Co.*, 900 P.2d 669, 678-79 (1995), which overruled *Seaman's Direct Buying Serv. v. Standard Oil Co.*, 686 P.2d 1158, 1167 (Cal. 1984); FARNSWORTH, *supra* note 5, at 878 n.35; Kerry L. Macintosh, *Gilmore Spoke Too Soon: Contract Rises from the Ashes of the Bad Faith Tort*, 27 LOY. L.A. L. REV. 483, 493-94 (1994).

151. Macintosh, *supra* note 150, at 494.

152. 765 P.2d 373 (Cal. 1988).

contracts.¹⁵³ After *Foley*, it was not clear whether the *Seaman's* tort was predicated on a "special relationship" somehow analogous to the relationship between insurer and insured,¹⁵⁴ whether there was a broader but still narrowly and somewhat arbitrarily defined tort of bad faith denial of the existence of a contract,¹⁵⁵ or whether the tort should be understood to embrace bad faith denials of contract liability as well.¹⁵⁶

This uncertainty was put to rest in 1995 in *Freeman & Mills, Inc. v. Belcher Oil Co.*,¹⁵⁷ which overruled *Seaman's* "in favor of a general rule precluding tort recovery for noninsurance contract breach, at least in the absence of violation of 'an independent duty arising from principles of tort law' other than the bad faith denial of the existence of, or liability under, the breached contract."¹⁵⁸ So ended the eleven-year attempt to distinguish the bad faith breach in terms of contract outcomes. The California experience sheds light on this category of wrongful breach that otherwise moves below the surface of contract doctrine.

Why is it that we are willing to attach liability to the bad faith breach of an insurance contract but are unwilling to do so generally? Certain characteristics of the insurance contract make it particularly susceptible to the abuse of bad faith breach. At the same time, due to the highly regulated nature of the insurance business, the category of insurance

153. *Id.* at 401. Other jurisdictions saw a similar waxing and waning of bad faith breach. The tort of bad faith breach, recognized in the insurance context in *White v. Unigard Mutual Insurance Co.*, 730 P.2d 1014 (Idaho 1986), was held not to apply in the commercial lending context. *Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank*, 804 P.2d 900 (Idaho 1991); *see also* *Nicholson v. United Pac. Ins. Co.*, 710 P.2d 1342 (Mont. 1985) (recognizing bad faith breach); *Story v. City of Bozeman*, 791 P.2d 767, 775 (Mont. 1990) (holding that "the *Nicholson* tort remedy is excessive"); *Davey v. Nesson*, 830 P.2d 92, 96 (Mont. 1992) (describing the aspect of *Nicholson* that held "that a person breaches the implied covenant of good faith and fair dealing by acting 'arbitrarily, capriciously, or unreasonably,'" as having been overruled in *Story*).

154. *See* *Okun v. Morton*, 250 Cal. Rptr. 220, 232-33 (Cal. Ct. App. 1988).

155. *See* *DuBarry Int'l, Inc. v. Southwest Forest Indus., Inc.*, 282 Cal. Rptr. 181 (Cal. Ct. App. 1991); *see also* *Oki America, Inc. v. Microtech Int'l, Inc.*, 872 F.2d 312, 315 (9th Cir. 1989) (Kozinski, J., concurring) ("It is impossible to draw a principled distinction between a tortious denial of a contract's existence and a permissible denial of liability under the terms of the contract.")

156. *See* *Multiplex Ins. Agency, Inc. v. California Life Ins. Co.*, 235 Cal. Rptr. 12 (Cal. Ct. App. 1987).

157. 900 P.2d 669 (Cal. 1995).

158. *Id.* at 679-80 (citations omitted).

contracts has clear boundaries, giving us a high degree of confidence that special rules can be applied to it without spilling over to other categories.

The insurance contract is particularly susceptible to abuse because the insured has already performed when a claim is made or a case is to be settled. If the insurer can escape liability, the insured will suffer a forfeiture. This is also true in the typical lending transaction, where the lender performs first and the borrower repays the loan over time. The lender will also suffer forfeiture if the borrower escapes liability. But the typical lender is well positioned to defend its contract rights because that is part of its business and because it is likely to have shifted enforcement costs to the borrower by contractual provisions for attorneys' fees. The incentive for the insurer to breach is also significantly magnified by the lottery-like nature of the insurance contract: when it comes time to pay on a particular ticket, the difference between the value of the performances exchanged under the contract is enormous.

None of this is generally true in the wrongful discharge cases. The employer is not generally withholding payment for benefits received (back pay). Rather the employer is denying the employee's mere expectation. Moreover, the termination of employment leads to the termination of a roughly equivalent exchange. If the employer were to escape liability, the employee would not suffer a forfeiture, and the benefits denied the employee through termination are roughly equivalent to the benefits denied the employer. The California court seemed to have these differences in mind when it wrote in *Foley* that

there is less inherent relevant tension between the interests of employers and employees than exists between that of insurers and insureds. Thus the need to place disincentives on an employer's conduct in addition to those already imposed by law simply does not rise to the same level as that created by the conflicting interests at stake in the insurance context.¹⁵⁹

There is no reason to think that the court in *Foley* was trying to justify stonewalling or bad faith behavior in the employment context. It was giving reasons why obnoxious behavior that may also exist in the employment context is much more likely to be a problem in the insurance context.

159. *Foley v. Interactive Data Corp.*, 765 P.2d 373, 396 (Cal. 1988).

This is only half of the explanation for limiting bad faith breach to insurance contracts. To say that the problem is severe in the insurance context does not explain the refusal to address the problem that exists generally.

What is the cost that we are willing to bear in a category of cases where the incentive for abuse is high, but that we are not willing to bear generally? It has to do with the difficulty of distinguishing the bad faith breach or denial of liability from the good faith dispute. Rooting out bad faith breach generally would require the often futile attempt to ascertain the mental states of breaching parties. We might be willing to engage in such an inquiry if there were no other remedy for an aggrieved party. But the aggrieved party is not without any remedy; the law of contract provides one, less than adequate though it may be. Separating the bad faith breach from the good faith insistence on judicial resolution of a dispute would be a costly undertaking and one that would likely lead to an unsatisfactory number of false results.

As one California appellate court put it while wrestling with the status of the *Seaman's* tort in the aftermath of *Foley*: if the tort were extended to contracts generally, "then any party attempting to defend a disputed contract claim would risk, at the very least, exposure to the imposition of tort damages and an expensive and time-consuming expansion of the litigation into an inquiry as to the motives and state of mind of the breaching party."¹⁶⁰ A rule of liability for bad faith breach would be costly because the behavior upon which liability would depend is so difficult to identify. The law of contracts does provide a remedy—compensatory damages—in these cases. Is it so important to add extra penalties for bad faith behavior that we are willing to risk penalizing those who dispute contract claims in good faith?

It is on this point that the general bad faith breach cases foundered within the realm of contract. But failing to provide additional penalties for bad faith breach is a far cry from determining that contract law should be regarded as seeking to encourage or even to remain neutral with respect to bad faith breach.

The pressure to do something about bad faith breach

160. *DuBarry Int'l, Inc. v. Southwest Forest Industries, Inc.*, 282 Cal. Rptr. 181 (Cal. Ct. App. 1991).

can also be seen in the efforts, mostly unsuccessful, to win punitive damages in contract cases involving outrageous behavior.¹⁶¹ Some courts have stretched to find independent tortious behavior in bad faith breach cases in order to get around the ban on punitive damages.¹⁶² This has sometimes taken the form of finding a duty in the public-service character of the promisor's business, the breach of which is tortious.¹⁶³ The bad faith insurance cases are an outgrowth of this approach. Some courts have allowed punitive damages by finding that a bad faith breach involves some sort of fraudulent behavior, even though the behavior falls short of what would be required for tort liability.¹⁶⁴

It is clear that the law of contracts, while not having found a satisfactory way of penalizing or deterring bad faith breach, does not have an affirmative policy of neutrality with respect to it. Contract law would punish bad faith breach if only it could find a way to identify it. We will see below that there is a subset of the bad faith breach cases that the law is able to identify. This set of cases is at the heart of a significant group of tortious interference cases: the take-the-money-and-run cases, which the courts treat under the broad heading of mere interference or interference that is not independently wrongful. Not every bad faith breach reveals itself as such through the actions of a third party interferer. In the take-the-money-and-run cases, however, the presence of the interferer brings the bad faith

161. See *J.J. White, Inc. v. Metropolitan Merchandise Mart*, 107 A.2d 892 (Del. Super. Ct. 1954); *Den v. Den*, 222 A.2d 647 (D.C. 1966); FARNSWORTH, *supra* note 5, § 12.8.

162. See Timothy J. Sullivan, *Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change*, 61 MINN. L. REV. 207, 236-40 (1977). Sometimes the "independent tort" amounts to little more than refusing to perform after accepting the other party's performance. See *Excel Handbag Co. v. Edison Bros. Stores*, 630 F.2d 379, 384-85 (5th Cir. 1980).

163. See *Brown v. Coates*, 253 F.2d 36 (D.C. Cir. 1958) (finding that real estate broker is a quasi-fiduciary); *Fort Smith & W. R. Co. v. Ford*, 126 P. 745 (Okla. 1912) (pertaining to a railroad).

164. See *Wright v. Public Sav. Life Ins.*, 204 S.E.2d 57 (S.C. 1974); *Wellborn v. Dixon*, 49 S.E. 232 (S.C. 1904). Prior to the mid-nineteenth century, juries were given relatively free reign to determine damages and one imagines that bad faith behavior on the part of breachers was taken into account in the jury room. A side effect of the creation of rules by judges to control damage awards was the creation of a safe harbor for bad faith breach. It is not surprising that the classic rules limiting damages—the limitations of avoidability, foreseeability and certainty—can all function somewhat flexibly, allowing higher damage awards in the case of bad faith breachers.

character of the breach to the surface.

III. LINKING IMPROPER INTERFERENCE AND WRONGFUL BREACH

Now that we have become aware of the distinction between those breaches that are wrongful and those that are not, the problem of the impropriety of mere interference appears in a different light. The cases of mere interference, which the courts have tended to lump together, can be divided into those that involve interference leading to a wrongful breach and those that involve interference that leads to a breach that the breaching party is free to make. Most of the cases of liability for mere interference involve wrongful breaches—and all of the compelling cases do.

A. *No Adequate Damages*

One of the prototypical fact patterns in cases of liability for mere interference involves interference that leads to a breach for which there is no adequate remedy in damages. *Lumley v. Gye*¹⁶⁵ was such a case. It is an intuitively appealing case for liability because the plaintiff's contract right was one that the law (in the broad sense that includes both law and equity) sought to enforce as a property right. The attempt to so enforce the right failed, but that had to do with the tools at equity's disposal and was not a judgment about the rightfulness or wrongfulness of the breaching party's behavior. *Lumley v. Gye* came to be understood as a case about interference with any contract, but it might have been better understood as a case about interference that caused a breach that was wrongful.

Allowing liability for tortious interference with contract in cases where the aggrieved party would not have had an adequate damage remedy against the breaching party does not implicate the concerns of the critics of the tort. As long as a contract right is protected by a liability rule, the would-be breaching party is free to breach and pay damages. The will of the breaching party is disregarded when we assign blame to a third party who induces the breaching party to do what she was supposed to be free to choose herself. This

165. 118 Eng. Rep. 749, 2 El. & Bl. 216 (Q.B. 1853).

sort of problem vanishes in the no-adequate-damages cases because the breaching party is not free to breach in the first place. There is nothing counterintuitive about holding someone liable who intentionally induces such a breach.

There is also nothing troubling from an economic perspective about tort liability in the no-adequate-damages cases. Whether the termination of the contract between A and B would be efficient or not, the law of contracts would place the right to compel performance in the hands of A if it could: the route to an efficient outcome, whether through termination or performance, would be decided by negotiation with A. Contract law means to deny B the right to breach if A so chooses. If A does give up her right to compel performance, then A will have no contract claim against B and no tort claim against T. Tortious interference in these cases sets up no added obstacles to the efficient result.

Two difficulties confront anyone who would identify no-adequate-damages cases among the tortious interference cases. First, because the adequacy of damages was irrelevant to the approach that the judges understood themselves to be taking in these cases, significant facts relating to the issue are often undeveloped. Second, there has been a substantial change during this century in the criteria for determining whether damages are or are not adequate as a prerequisite to the availability of specific performance: "The tendency is . . . to liberalize the granting of specific performance and injunction by enlarging the classes of cases in which damages are regarded as an inadequate remedy."¹⁶⁶ In particular, long-term contracts whose quantity term depends on some variable such as the output or requirements of a firm have become the prototype of the specifically enforceable contract.¹⁶⁷ Many of the reported better deal cases are cases that might not have been regarded as involving no-adequate-damages at the time of their decision.¹⁶⁸ In spite of this, I regard these cases as support for the notion that something like an awareness of the inadequacy of damages is at work in the intuitions of the judges when they found liability. It was, after all, a sense that long-term output and requirements contracts

166. FARNSWORTH, *supra* note 5, at 858 (footnote omitted).

167. See U.C.C. § 2-716 cmt. 2 (1995).

168. See, e.g., *Gold Medal Farms, Inc. v. Rutland County Co-Operative Creamery, Inc.*, 195 N.Y.S.2d 179 (N.Y. App. Div. 1959).

could not be adequately enforced with damage awards that led to the expansion of the availability of specific performance. It is not hard to imagine that the same pressure made itself felt in the tortious interference cases of the day.

Lumley v. Gye is the premiere example of a no-adequate-damages, tortious interference case. There are countless others. *Gonzales v. Reichenthaler*¹⁶⁹ and *Gold Medal Farms, Inc. v. Rutland County Co-Operative Creamery, Inc.*,¹⁷⁰ were cited by the New York Court of Appeals in *Guard-Life*¹⁷¹ for the proposition that tortious interference with contract did not require wrongfulness on the part of the interferer. *Gonzales* involved the leasing of a game called the "Kentucky Derby" by the plaintiff, the proprietor of a Coney Island establishment. The game "consisted of a mechanism by which miniature horses were driven along a miniature race course by the operation of machinery controlled by the patrons of the game."¹⁷² The manufacturer/lessor agreed not to operate, sell or lease the game to anyone in competition with the plaintiff. The plaintiff succeeded in an action for tortious interference brought against a competing operator who had induced the manufacturer to breach its contract with the plaintiff. The plaintiff would have had a right to an injunction against the manufacturer to prevent it from breaching its covenant not to compete. The plaintiff's right was protected by a property rule. The manufacturer's breach was therefor wrongful, and the interference that led to the breach was improper for that reason, not because it was mere interference.

The contract at issue in *Gold Medal Farms, Inc. v. Rutland County Co-Operative Creamery, Inc.*¹⁷³ was an output contract (an agreement by the seller to sell its entire output to the buyer) that was repudiated by the seller with six months remaining on the contract. Under Article 2 of the UCC, which would govern the contract today, specific performance is generally available for such a breach.¹⁷⁴ Damages are regarded as inadequate for the breach of

169. 135 N.E. 938 (N.Y. 1922) (mem.).

170. 195 N.Y.S.2d 179.

171. *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 406 N.E.2d 445, (N.Y. 1980)

172. *Gonzales v. Kentucky Derby Co.*, 197 A.D. 277, 278 (1921), *aff'd sub nom.*, *Gonzales v. Reichenthaler*, 135 N.E. 938 (1922) (mem.).

173. 195 N.Y.S.2d 179.

174. *See* U.C.C. § 2-716 cmt. 2 (1995).

requirement and output contracts because the difficulty of finding a replacement market or source is generally one of the reasons for choosing this form of contract and because the determination of future damages requires information as to future quantities and prices—one or both of which is often unknown at the time of breach. *Gold Medal Farms* is another example of a breach which, under the law of contracts, the breaching parties would not be free to make. The aggrieved party's right is protected by a property rule, not a liability rule; once again interference that leads to such a wrongful breach is improper for that reason, not because it was mere interference.

One of the most powerful judicial pronouncements on the appropriateness of liability for mere interference is to be found in the California case, *Imperial Ice Co. v. Rossier*.¹⁷⁵ Justice Traynor said that "[w]hatever interest society has in encouraging free and open competition by means not in themselves unlawful, contractual stability is generally accepted as of greater importance than competitive freedom."¹⁷⁶ *Imperial Ice* involved the sale of an ice business. The seller, who had promised not to compete with the buyer or his successors in interest, was allegedly violating the covenant and selling ice supplied by Rossier and the other defendants in the tort action. The complaint was held to state a cause of action against Rossier for inducing the seller to breach his covenant. What was alleged was clearly the inducing of a breach that the breaching party was not free to make; that is, this sort of covenant is enforced specifically provided that it is enforceable at all.

Cases in which the aggrieved party would not have had an adequate remedy in damages are common among the mere interference cases. Many of the cases deal with output or requirements contracts,¹⁷⁷ contracts for unique personal service,¹⁷⁸ transfers of interests in real property,¹⁷⁹ covenants

175. 112 P.2d 631 (Cal. 1941).

176. *Id.* at 633.

177. See *Westinghouse Elec. & Mfg. Co. v. Diamond State Fibre Co.*, 268 F. 121 (D. Del. 1920).

178. See *American League Baseball Club of New York, Inc. v. Pasquel*, 63 N.Y.S.2d 537 (N.Y. Sup. Ct. 1946) (enjoining defendant from interfering with contracts of baseball players, whether or not contracts enforceable by specific performance); *Wade v. Culp*, 23 N.E.2d 615, 619 (Ind. App. 1939) (affirming liability for inducing inventor to breach promise "to spend [his] entire time in the development of a working model" electric steak grill); *Anderson v. Moskovitz*, 157 N.E. 601, 602 (Mass. 1927) (finding "evidence that it was

not to compete¹⁸⁰ and exclusive agency.¹⁸¹

B. *Take the Money and Run*

Another prototypical fact pattern in the mere interference cases is the take-the-money-and-run case. Here the interference leads to a breach that can be recognized as a bad faith breach. Were a similar breach to occur without interference it might not be recognizable as a bad faith breach, and in any case it would not be treated any differently by contract law even if it could be so recognized. But the difficulty of identifying a bad faith breach is substantially reduced in the take-the-money-and-run cases. In these cases, a third party interferer joins the cast of characters, and what would otherwise have been private mental states of bad faith now play out on the public stage as interactions between the breacher and interferer.

*Hornstein v. Podwitz*¹⁸² is an example of a take-the-money-and-run case. According to the complaint, the plaintiff, a real estate broker, had arranged a sale of real estate from a corporate seller to individual purchasers. The seller and purchasers conspired to conceal from the broker the fact of the sale, to deprive the broker of the commission to which he was entitled and "to distribute themselves a sum of money in lieu of the commissions."¹⁸³ The sale was carried out and the seller "allowed to [the purchasers] a

difficult, if not impossible, for the plaintiff to hire a competent" substitute).

179. See *Winston v. Williams & McKeithan Lumber Co.*, 42 S.E.2d 218 (N.C. 1947) (finding cause of action stated for interference with contract to sell standing timber); *White v. Massee*, 211 N.W. 839 (Iowa 1927) (involving contract for transfer of homestead); *Swaney v. Crawley*, 157 N.W. 910 (Minn. 1916) (involving conveyance of land).

180. See *McNutt Oil & Ref. Co. v. D'Ascoli*, 281 P.2d 966 (Ariz. 1955); *Imperial Ice Co. v. Rossier*, 112 P.2d 631 (Cal. 1941); *Mahoney v. Roberts*, 110 S.W. 225 (Ark. 1908). *Wear-Ever Aluminum, Inc. v. Townecraft Indus., Inc.*, 182 A.2d 387 (N.J. Super. Ct. 1962) is a remarkable case in which a substantial segment of a company's door-to-door sales force, at-will employees, were stolen away by a competitor. The court treats these at-will contracts almost as if they contained no-compete clauses.

181. See *Engine Specialties, Inc. v. Bombardier, Ltd.*, 605 F.2d 1 (1st Cir. 1979) (involving an exclusive dealer), *cert. denied*, 446 U.S. 983, *and cert. denied*, 449 U.S. 890 (1980); *Beekman v. Marsters*, 80 N.E. 817, 818 (Mass. 1907) (involving exclusive agency for hotel bookings; "damage . . . incapable of accurate ascertainment").

182. 173 N.E. 674 (N.Y. 1930).

183. *Id.* at 674-75.

part of the commissions" that were owed to the broker. The complaint was held to contain "all of the essential allegations necessary in a complaint to recover damages for wrongfully inducing a breach of contract."¹⁸⁴

Hornstein was the third case cited by the New York Court of Appeals in *Guard-Life*¹⁸⁵ for the proposition that "persuasion to breach alone, as by an offer of better terms, has been sufficient to impose liability on one who thereby interferes with performance."¹⁸⁶ *Hornstein* can of course be read this broadly by a court with the authority to do so. But the fact that the purchasers in *Hornstein* persuaded the seller by an offer of better terms (alone) is hardly what makes it a compelling case for liability.

This is a compelling case because the interferer and the breacher took the broker's performance without paying for it, and they did so in such a way that the breacher's intention to not perform, to not compensate and to otherwise deny liability on the contract, in bad faith, was evident. If B breaches by refusing to perform a wholly executory contract with A, then B will be liable to A for the value of A's expectation. In a rising market, for example, B would be liable to A for the difference between the market value and the contract price of B's performance; in a flat or falling market B will owe A nothing. It may be that B found some third party willing, for whatever reason, to pay more for B's performance than its market value. If, however, B refuses to perform after B has already received A's performance, then B will be liable to A for more than a mere expectation. B will be liable to A for the entire value to A of B's promised performance. If B refuses to perform and refuses to compensate A for the breach, B will have done more than rob A of an expectation; B will have robbed A of the benefit conferred by A upon B in addition to A's expectation.

In *Hornstein*, the fact that the real estate broker had fully performed, and that the seller and purchasers schemed to deny the broker both performance under the contract and compensation for the breach, makes this a more compelling case than a mere offer of better terms to

184. *Id.* at 675.

185. *Guard-Life Corp. v S. Parker Hardware Mfg. Corp.*, 406 N.E.2d 445 (N.Y. 1980).

186. *Id.* at 450-51 (citations omitted).

the sellers. The better terms offered to the seller arose not from some higher-valued use of resources but from a scheme to take the broker's performance without paying for it. This was not an efficient breach. Once the broker had performed, the seller was no longer free to shop the deal around to others.

The prototypical take-the-money-and-run case has the following elements: T knows that B has a contract with A; T knows that B has received the benefit of A's performance; T knows that if B performed or compensated A, B would not deal with T on the terms that B is willing to deal with T (and conversely that if B deals with T, B will not perform for or compensate A); and T persuades B to breach and deal with T. The breach in a take-the-money-and-run case is a bad faith breach, one that B is not free to make. There is nothing troubling about holding T liable for causing such a wrongful breach. In particular, there is no problem from the standpoint of efficiency with holding T liable. The bad faith breach is never a Pareto-efficient breach.¹⁸⁷ Extending liability for B's breach beyond B to T does not interfere with the incentives that flow from the remedies principles of contract law since B has no business not performing without compensating A.

We have seen above that the law of contracts has not found a satisfactory way to deal with cases of bad faith breach. As a consequence, the law of contracts imposes no additional penalties on the bad faith breacher. That does not mean that the law of tortious interference should follow suit and deny liability for inducing a bad faith breach.

The tortiously-induced bad faith breach cases look quite different from bad faith breach cases that involve no interference. A number of factors combine to make it easier to identify the take-the-money-and-run interference case from the straight bad-faith-breach contract case where much more is likely to turn on B's state of mind: a third-party interferer (T) is present and there is evidence that T

187. A bad faith breach may be Kaldor-Hicks efficient—the gains to B and T may be greater than the loss to A—but it is the more rigorous Pareto criterion that is relevant to efficient breach analysis. Because the basic principle of contract remedies is that the aggrieved party is to be put in the position she would have been in if the contract had been performed, an efficient breach satisfies the Pareto criterion. I am not aware of anyone who has criticized the tort of interference with contract on the grounds that it prevents breaches that would satisfy the Kaldor-Hicks criterion but not the Pareto criterion.

knew of the contract, T knew that A had already performed under it, and T knew that the transaction between T and B was likely to leave A damaged and uncompensated. An analogy can be drawn here to the difference in criminal law between an attempt by an individual to commit a crime that has not yet manifested in any overt act and a conspiracy by two or more individuals to commit a crime, which due to the nature of communication between two or more people, will have manifested itself in some way.¹⁸⁸

Thus it may be that a bad faith breach by B is a wrong, but due to the difficulty of differentiating it from a good faith breach the law of contracts offers no remedy to the aggrieved party beyond compensatory damages. This does not mean, however, that the law of contracts means tacitly to encourage such a breach in the same way that it does an efficient breach. When a bad faith breach is induced by a third party interferer in a way that fits the contours of the take-the-money-and-run interference tort, the existence of corroborating evidence makes us confident that we can recognize B's breach as one that is wrongful. The deal between the seller and the purchasers in *Hornstein*, which was premised on not compensating the broker, provides the kind of evidence that is generally lacking in the typical two-party, bad faith breach. The court has more to work with than a mere "inquiry as to the motives and state of mind of the breaching party."¹⁸⁹ In the same way that T commits a wrong when she induces B to breach where B has no right to breach because A's contract right is meant to be protected by a property rule, so T commits a wrong when she induces B to commit a bad faith breach.

Again, the concerns of the critics of the interference torts are not implicated in these cases. Finding tortious interference in the take-the-money-and-run cases does not interfere with efficient behavior. If A has not yet performed, then B's breach might be efficient. But if A has already performed, then contract law would have B either perform or pay A the full value of B's promised performance. Efficient breach is no longer an option.

The take-the-money-and-run breach is a familiar

188. See GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 218-25 (1978).

189. *DuBarry Int'l, Inc. v. Southwest Forest Industries, Inc.*, 282 Cal. Rptr. 181, 192 (Cal. Ct. App. 1991).

pattern in the cases of interference with contract.¹⁹⁰ The courts often speak about take-the-money-and-run cases as if liability attached to the mere offering of a better deal. The facts of the cases tell quite a different story.

C. Are There Any Real “Mere Interference” Cases?

So what is left? Are there precedents for attaching liability to the offering of a better deal that does not involve a wrongful breach?

1. *Labor Cases*. One of the factors that propelled the development of the interference tort was its usefulness as a weapon against labor.¹⁹¹ Strikes, boycotts and other tactics of organized labor interfered with the contracts of targeted firms. These cases may be viewed as mere interference precedents, but sometimes a narrow characterization is more accurately descriptive than a general one. What moved the courts in these cases was the perceived threat of organized labor to the ordered, capitalist fabric of society.

The interference torts were hardly the ideal venue for

190. See, e.g., *Kennedy v. George Cully Real Estate, Inc.*, 296 So.2d 551 (Fla. Dist. Ct. App. 1974), *cert. denied*, 307 So.2d 183 (Fla. 1975); *Allen v. Powell*, 56 Cal. Rptr. 715 (Cal. Ct. App. 1967); *Johnson v. Gustafson*, 277 N.W. 252 (Minn. 1938).

191. See *Tortious Interference*, *supra* note 32, at 1533 (“While combinations of businessmen that destroyed the livelihood of nonmembers were tolerated, unions that inflicted similar harm as a means to increase bargaining power rather than as an end were found to have engaged in intimidation and duress.”) (footnotes omitted); see also *Roraback v. Motion Picture Mach. Operators Union*, 168 N.W. 766, 767 (Minn. 1918) (holding that union’s attempt to force theater owner to hire union projectionists was “clearly an invasion of the rights secured to him by the Constitution”); *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 259 (1917) (holding “that the purpose entertained by defendants to bring about a strike at plaintiff’s mine in order to compel plaintiff, through fear of financial loss, to consent to the unionization of the mine as the lesser evil, was an unlawful purpose”); *Curran v. Galen*, 46 N.E. 297, 299 (N.Y. 1897) (holding that union’s agreement with association of employers to only hire union workers is no defense to action by employee against union for procuring employee’s dismissal, “for there would certainly be a compulsion or a fettering of the individual glaringly at variance with that freedom in the pursuit of happiness which is believed to be guaranteed to all by the provisions of the fundamental law of the state”); *Vegeahn v. Guntner*, 167 Mass. 92, 44 N.E. 1077 (1896); *Lucke v. Clothing Cutters’ & Trimmers’ Assembly*, 26 A. 505 (Md. 1893) (holding union’s causing of non-union employee’s discharge actionable, even though discharge did not breach employment contract).

formulating labor policy.¹⁹² The common law courts' hit or miss judgments about the impropriety of strikes and boycotts were eventually superseded by a more carefully considered statutory and regulatory scheme. Federal labor law has largely preempted this area of interference law.¹⁹³ But even if a case involving a labor dispute arose that was not covered by federal law, one would hope that the court would decide the matter directly as a matter of labor law rather than letting it turn on the abstract principle of mere interference. In other words, if a court is going to declare a strike or boycott illegal as a matter of state law, it should identify the labor practice that is unlawful and admit that it is making state labor law. Any such cases would then fit into my scheme as involving interference that is improper apart from mere interference.

2. *Trade Cases.* There are cases that involve what we would classify today as unfair trade practice or anti-trust disputes. Just as we can see in the development of the interference tort shifting conceptions of the legitimacy of organized labor, so we also find attempts to arrive at the outlines of acceptable competitive practices on the side of capital.¹⁹⁴ Some of the cases discussed below tell a mixed story. The opinions discuss general interference, but the facts often suggest that the courts were wrestling with anticompetitive practices which today would belong to the field of anti-trust law.

Knickerbocker Ice Co. v. Gardiner Dairy Co.,¹⁹⁵ decided

192. Typical of the kinds of questions raised in these labor cases are the following:

[W]hat means may lawfully be used by a collection or order of workmen to cause the discharge of other workmen . . . Whether means which would be lawful if used by an individual become unlawful and amount to a conspiracy when used in combination. . . . Whether acts which might lawfully be done simply to further the welfare of those who participate in them become unlawful when inspired by a malevolent design to injure obnoxious workmen.

Carter v. Oster, 112 S.W. 995, 997-98 (Mo. Ct. App. 1908).

193. See, e.g., *Vane v. Nocella*, 494 A.2d 181 (Md. 1985) (holding that National Labor Relations Act preempts tort claim); *California State Council of Carpenters v. Associated Gen. Contractors of Cal., Inc.*, 648 F.2d 527, 540 (1980), *rev'd on other grounds*, 459 U.S. 519 (1983).

194. See, e.g., *Tuttle v. Buck*, 119 N.W. 946 (Minn. 1909); *Knickerbocker Ice Co. v. Gardiner Dairy Co.*, 69 A. 405 (Md. 1908).

195. 69 A. 405 (Md. 1908).

in 1903, is a good example of a case involving anticompetitive practices and interference claims. The Gardiner Dairy Company had a contract to purchase up to twenty tons per day of ice from the Sumwalt Ice & Coal Co. Sumwalt in turn purchased this ice from the Knickerbocker Ice Co., which was apparently the only regional source for such large quantities of ice at the time. Knickerbocker "notified [Sumwalt] that it would refuse to deliver any ice whatever to it, unless it refrained from delivering ice to [Gardiner]."¹⁹⁶ Sumwalt breached its contract with Gardiner, and Gardiner "was compelled to purchase ice directly from [Knickerbocker] at a price considerably greater, and on terms considerably less advantageous to it, than it was enjoying under its contract with the Sumwalt Company."¹⁹⁷ Gardiner sued Knickerbocker for causing the breach, and the Maryland Court of Appeals held that Gardiner had properly stated a claim. In a revealing passage, the court rejected the notion that the tort could be used as a hammer against labor but not against capital:

Why should a labor organization, which has the right to organize and act for the protection and benefit of its members so long as it does not infringe upon the rights of others, be responsible for causing the discharge of one who it believes interferes with the interests of its members by being so employed, while an employer of labor can maliciously and wantonly, or for his own selfish purposes, cripple another employer with impunity? . . . Such distinction, based on the technical ground that the relation of master and servant exists in the one case and not in the other, would be well calculated to impress laborers with the belief that the law discriminates between labor and capital, making the one responsible, but not the other. Trusts and combinations of capital have ruined many while hiding behind means apparently lawful; but if they cannot be reached when it is shown that they have maliciously and wantonly, or for their own selfish purposes, not only prevented others from making contracts, but compelled contractors to break their contracts, then indeed is the law helpless.¹⁹⁸

While the *Knickerbocker* opinion spoke in broad terms about the unlawfulness of breaking a contract and inducing

196. *Id.* at 406.

197. *Id.*

198. *Id.* at 407.

another to do such an unlawful act,¹⁹⁹ the facts tell a story of interference that was improper because it involved "monopolistic" or "predatory" practices. Such practices are now regulated by federal and state anti-trust laws.²⁰⁰ To the extent that anti-competitive concerns are driving courts to find liability in interference cases they should say so, basing their judgment of impropriety in violations of statutory, regulatory or common law anti-trust principles.²⁰¹ The Maryland Court of Appeals has recently made a move in this direction, questioning the broadness of the *Knickerbocker* opinion and recharacterizing one of its more recent opinions as holding that "acts of interference committed in violation of a state antitrust statute constituted acts of wrongful or malicious interference."²⁰²

3. *Improper Motive.* The cases that find interference improper because it is accompanied by an improper motive are problematic. An example is *Alyeska Pipeline Service Co. v. Aurora Air Service*,²⁰³ in which a jury verdict against an interferer was upheld because the jury could have found that ill-will was the dominant motive for causing the contract to be terminated.²⁰⁴ On one hand, the improper motive

199. *Id.* at 408.

200. *See, e.g.,* *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) (involving federal law); *Natural Design, Inc. v. Rouse Co.*, 485 A.2d 663 (Md. 1984) (involving claims of violation of state anti-trust laws and malicious interference with business).

201. Professor Lao, evidently concerned that the Supreme Court has "redefined the requirements for establishing [a case of *per se* illegal vertical price fixing] so narrowly as to make it almost impossible to prove in the real world," Lao, *supra* note 24, at 36-37 (footnote omitted), argues for an expansive version of the interference tort. Even if she is right that we would be better off if state courts picked up the anti-trust ball that the feds have dropped, it does not follow that we should have an expansive interference tort that regards mere interference with a contract as improper. If state courts want to make anti-trust law they should do so by identifying the kind of behavior that is illegal, not by hiding behind the abstract principle of mere interference. Courts are often quite open about their trade concerns, but too often they then proceed to state their holdings generally. *See, e.g.,* *Sperry & Hutchinson Co. v. Louis Weber & Co.*, 161 F. 219 (N.D. Ill. 1908).

202. *Alexander & Alexander Inc. v. B. Dixon Evander & Associates, Inc.*, 650 A.2d 260, 270 (Md. 1994) (recharacterizing its holding in *Natural Design, Inc. v. Rouse Co.*, 485 A.2d 663 (Md. 1984)).

203. 604 P.2d 1090 (Alaska 1979).

204. *Id.* at 1094. The holding is remarkable because it allows liability even if a reasonable person in the interferer's shoes acting with no ill-will would have interfered with the contract under similar circumstances—acting, for example,

cases might be seen as posing no substantial threat to the offering of a better deal. In the typical better deal scenario, the one who offers a better deal does so for the purpose of entering into a transaction, without any intention (at least without the dominant intention) of harming the aggrieved contract party. On the other hand, the absence of any objective criteria for determining the presence of ill-will or whether ill-will is the dominant motive makes it difficult to determine whether "improper motive" is actually functioning as a screen for attaching liability to mere interference.

While this is an important issue, it is peripheral to the issue of the impropriety of mere interference. I would join those critics of the interference tort that think that the courts would be better off not attempting to police the defendant's moral states or motives or should at least base liability for improper motivation "only on objective indicia of activity producing social loss."²⁰⁵ If the law does recognize that improper motive makes interference improper, it is at least finding the interference to be improper for a reason other than mere interference.

4. *Liability for Mere Interference.* What is left is a group of cases that really do attach liability to interference where there is nothing improper other than the interference itself. The cases involve no independent wrong such as a crime, tort or violation of a statute or regulation or violation of labor or trade policies. There is no malicious motive or causing of a wrongful breach.²⁰⁶ These cases, of which there are surprisingly few, are inconsistent with the fundamental principles of contract remedies described above and should be overturned.

The dearth of these cases suggests that courts have been wiser in their decisions than the opinions demonstrate. In cases that attach liability for mere interference, judges apparently did not view the cases as I do, but they behaved in large part as if their intuition of the wrongfulness of the breach, when viewed through the lens

out of safety concerns. It is also remarkable because the contract was at-will, specifically providing that it might be terminated.

205. Perlman, *supra* note 20, at 98.

206. See, e.g., *Cumberland Glass Mfg. Co. v. DeWitt*, 87 A. 927 (1913), *aff'd*, 237 U.S. 447 (1915); *Sorenson v. Chevrolet Motor Co.*, 214 N.W. 754 (Minn. 1927).

of interference law, informed their decisions. The cases of interference causing a wrongful breach are what drove the courts to find liability in mere interference cases. The courts articulated a rule that was more general than the intuition that motivated their decisions. The cases that do not fit my approach are the result of courts simply adhering to their overly general rule.

CONCLUSION

Tortious interference with contract has been characterized very broadly by courts to include persuasion to breach a contract by offering a better deal. This broad view of the tort upsets the careful balancing of incentives that is embodied in the rules of contract damages. If contract law means to encourage certain breaches of contract then tort law should not deter those same breaches. If we think that tort law should deter those breaches, then there is no reason to have the contract remedies regime that we have.

As long as we do have the current remedies regime, interference law should be brought into harmony with it. That does not mean that the entire category of behavior that the courts have referred to as mere interference should be treated as privileged. Cutting the tort back that far would mean overruling compelling precedents and would immunize interferers whose interference leads to breaches that the law of contracts regards as wrongful. There is no reason to move that far. Instead, the courts should look through to the character of the underlying breach in the mere interference cases, allowing liability in those cases where the underlying breach is wrongful, and finding no liability otherwise.

The refinement of the definition of the tort that I have proposed divides the better deal cases into two categories: those that involve wrongful breaches and those that do not. The better deal cases that have driven the evolution of the tort in the courts have for the most part involved wrongful breaches: breaches for which the aggrieved contract party would not have had an adequate remedy in damages or breaches that involved bad faith refusal by the breaching party both to perform and to compensate the aggrieved party. The justice and efficiency concerns of the critics of the tort are not implicated by these cases. The cases that

should concern the critics are those in which interference is found tortious even though the breach involves no such wrong. If the courts were to recognize the categories of wrongful breach that I have identified, their characterizations of the tort could be narrowed accordingly. Such a narrowing would not lead to a substantial change in outcomes. It would, however, remove the current threat of liability for inducing breaches of contract that are efficient.

