Contractarians, Community, and the Tort of Interference with Contract

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INTRODUCTION

At the height of the industrial revolution, the English courts decided two cases in successive years that would have a significant impact on the future of contract law. In the first case, *Lumley v. Gye,* the Court of Queens Bench assessed tort damages because the defendant induced a breach of another's contract with the plaintiff. The next year, in *Hadley v. Baxendale,* the Court of Exchequer limited plaintiff's recovery to "foreseeable" damages in a breach of contract claim.

While one was a tort case and the other contract, both cases are easily seen as part of a judicial enterprise of making the law more hospitable to contracting. In *Hadley,* the plaintiff claimed lost profits due to the defendant's delay in transporting a mill shaft. The court rejected the claim because the damages were said to be unforeseeable at the time of contracting. Over the years, commentators have taken *Hadley* as a decision that limited the risks of contracting and thereby promoted the use of contracts.

In *Lumley,* Gye induced an already committed opera singer, Johanna Wagner, to breach her contract with Lumley so Gye could get a contract for her services for himself. Superficially, nothing seems particularly surprising about the decision for Lumley. At an intuitive level, Gye's conduct seems to smack of

2. 9 Ex. 341, 156 Eng. Rep. 145 (1854).
3. See generally Richard Danzig, Hadley v. Baxendale: A Study in the Industrialization of the Law, 4 J. LEGAL STUD. 249 (1975) (analyzing the case in its historical context as a judicial invention which standardized the rules of contract and increased predictability).
conversion or theft and may raise our restitutionary impulses:

4 corrective justice seems to require that Gye pay Lumley the value of the contract rights he apparently "took" from Lumley. From a broader perspective, by protecting Lumley's relationship with Wagner in this way, the court arguably made contract more dependable and therefore a more attractive legal device.

More recently, however, some commentators have implied that Hadley and Lumley are not complementary, but are in

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4. As Fuller and Perdue said in 1936:
The "restitution interest," involving a combination of unjust impoverishment with unjust gain, presents the strongest case for relief. If, following Aristotle, we regard the purpose of justice as the maintenance of an equilibrium of goods among members of society, the restitution interest presents twice as strong a claim to judicial intervention as the reliance interest, since if A not only causes B to lose one unit but appropriates that unit to himself, the resulting discrepancy between A and B is not one unit but two.


As it turns out, Gye did not really "get" Wagner's performance, even though he tried. Thus, the restitutionary impulse we may feel here is itself predicated on the fact that Lumley v. Gye contains only part of the picture (the tort part). In an earlier suit, a different court enjoined Wagner from performing for Gye on the basis of the underlying contract. Lumley v. Wagner, 1 DeG. M. & G. 604, 42 Eng. Rep. 687 (Ch. 1852). That Lumley recovered damages from Gye notwithstanding the injunction against Wagner suggests that, while there may be a restitutionary "feel" in a case like Lumley, restitution—disgorging a defendant's unjust enrichment—is not the basis for the decision.

Two recent commentators confine their analysis to the situation in which the inducer does appear to get the fruits of the earlier contract. See generally Lillian R. BeVier, Reconsidering Inducement, 76 VA. L. REV. 877, 885 (1990); Richard A. Epstein, Inducement of Breach of Contract as a Problem of Ostensible Ownership, 16 J. LEGAL STUD. 1, 19-26 (1987).

5. As noted above, Lumley succeeded in a suit against Wagner to enjoin her from performing for Gye. Lumley, 1 DeF. M. & G. 604, 42 Eng. Rep. 687. Contract damages for the profits lost due to Wagner's broken engagement would have been difficult to establish, and specific performance of a personal service contract would be barred. From what we know from the reporters, the injunction left Lumley with an empty hall and Wagner with an empty calendar.

Characteristically, the suit against Wagner for the injunction and the later suit against Gye for damages had no formal connection with one another. The Lumley v. Gye court mentioned the earlier restraining order but did not suggest that it had been violated. The Lumley v. Gye court saw the issue as whether a person who "interrupts the relation subsisting . . . by procuring the [promisor] to depart from the [promisee's] service . . . commits a wrongful act for which he is responsible at law." 118 Eng. Rep. at 762-53 (1854). Thus, the defendant's destruction of Lumley's relationship, rather than the defendant's actual receipt of an unjust benefit, was the primary focus of the tort decision.
basic, irreconcilable conflict. Largely deploying various forms of economic analysis, in particular the theory known as "efficient breach," their arguments (which display a rigor that attracts followers to the law-and-economics approach) challenge the core of the principle established in Lumley. Simplified, the critics observe that Gye's conduct, while opportunistic and disruptive, brings to our opera singer a better offer, a buyer (Gye) who values her services more than the first (Lumley) did. Therefore, they argue, the promisor (Wagner) should breach, form the second contract, and pay the first promisee contract damages to yield an efficient outcome. The interference tort, they argue, disrupts this ordinary process of finding and exploiting better opportunities. Potential tort liability impedes the flow of information from newcomers to those committed by contract and, in that sense, retards economic development. The tort, they argue, ought to be circumscribed or curtailed.

Much of this fundamental critique proceeds from an extremely abstract, theoretical contract perspective, a perspective that is particularly dependent on economic analysis and associated instrumental reasoning. In contrast to the neoclassical contract law that emerges from actual contract

6. These authors believe that when there is no wrongful conduct other than interrupting a contractual relationship, the tort should be either substantially circumscribed or eliminated altogether. See, e.g., Donald C. Dowling, Jr., A Contract Theory for a Complex Tort: Limiting Interference with Contract Beyond the Unlawful Means Test, 40 U. MIAMI L. REV. 487 (1986); Harvey S. Perlman, Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine, 49 U. CHI. L. REV. 61 (1982); James B. Sales, The Tort of Interference with Contract: An Argument for Requiring a "Valid Existing Contract" to Restrain the Use of Tort Law in Circumventing Contract Remedies, 22 TEX. TECH L. REV. 123 (1991); see also BeVier, supra note 4 (providing an analysis that would curtail the tort in many cases, but arguably not in Lumley itself); David F. Partlett, From Victorian Opera to Rock and Rap: Inducement to Breach of Contract in the Music Industry, 66 TUL. L. REV. 771 (1992) (examining the tort in the context of the entertainment industry); Gary D. Wexler, Note, Intentional Interference with Contract: Market Efficiency and Individual Liberty Considerations, 27 CONN. L. REV. 279 (1994) (summarizing the commentators and taking a position very strongly influenced by efficient breach theory).


cases—messy, often difficult to reconcile, and reflecting both individual and community values—this theoretical perspective imagines contract as a system that is almost exclusively individualistic and has mathematical order. Following the simple logic of Williston's classical contract model, this "contractarian" approach proceeds from the image of two informed individuals, each attempting only to maximize her own welfare through a private transaction. The design of the transaction and its substance are the business of the parties, and nobody else's. And because the parties are thought uniquely qualified to design their transaction, the business of courts must be limited to enforcing the deal as negotiated; judicial second-guessing of the parties' exchange or its terms is condemned.

Critics proceeding from this classical contract paradigm have found the interference cases challenging because they seem inconsistent with "efficient breach," a central component and logical extension of the individualist vision of contract. And because of the inconsistency between the interference cases and efficient breach theory, some scholars have rejected the tort cases while others have attempted to reconcile them with the outcomes their theories generate. Thus far, however, the reconciliation has been, at best, partial. The theory of efficient


10. The term "contractarian" recently has been appended to the kind of analysis that begins with hypothetical, "rational" individuals, asks what they would want in various situations, and then projects legal rules from the answers. See id. at 697-99 (describing the consent theory of contracts). The term would include the "rational bargaining" model advanced by Professors Baird and Jackson in the bankruptcy context, see generally Thomas H. Jackson, Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain, 91 YALE L.J. 857 (1982), and the "relational contract" analysis of Professors Goetz and Scott in contracts, see generally Charles J. Goetz & Robert E. Scott, Principles of Relational Contracts, 67 VA. L. REV. 1089 (1981). Much of the law-and-economics analysis currently on the scene deploys the contractarian model.

This approach to policy analysis goes back to the idea of a social contract, used by political philosophers to derive philosophical principles. See generally MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982).

breach (as articulated by these recent critics, at least) cannot coexist with the broad range of situations to which interference doctrine applies.

This Article asserts that, rather than being in fundamental conflict, Hadley and Lumley represent different, complementary strains of analysis we have historically brought to the law of transactions. If Hadley stands for individualism and the proposition that one is not bound to that which one did not "foresee," Lumley stands for the proposition that a contract effects a union of individual interests that can have value beyond the narrow self-interest of those who entered it. If Hadley stands for the proposition that contract is nobody's business but the parties', Lumley stands for a community's interest in the maintenance of contracts and the relationships they embody.

The Lumley line of cases finds courts preserving important values that find no place in a rigorously individualist paradigm. Trust and associated values of community and sharing, values that may well have broader economic worth, are difficult to embrace if we begin with the model of essentially selfish individuals maximizing their own interests. But the paradigm deployed by recent critics embodies only the individualist strain and proceeds from a vision of contracting that probably never existed in fact. The tort cases are bound to be substantially at odds with an analysis that cannot recognize the community values the decisions may embody.

Like promissory estoppel cases, good-faith cases, and other "problem" cases that "classical" contract has had to embrace in becoming "neoclassic," interference-with-contract cases reflect, I believe, the notions of community that we bring to

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12. The extension of the Hadley individualist strain materialized for a time in the "tacit agreement" cases. Modern cases and the Uniform Commercial Code reject the tacit agreement test. See U.C.C. § 2-715, cmt. 2 (1989).

13. They may even have value to the parties themselves. See generally Scott E. Masten, Equity, Opportunism, and the Design of Contractual Relations, 144 J. INSTITUTIONAL & THEORETICAL ECON. 180 (1988).

14. By "classical" contract, I refer to the contract doctrine developed by Williston, Holmes, and others in the early twentieth century. The doctrine is characterized by a strong emphasis on the individual and a rigorously logical process of decision making. "Classical" contract is idealized in Grant Gilmore, The Death of Contract (1974).

15. I use "neoclassic" contract to refer to the formal contract rules currently represented by the Restatement (Second) of Contracts (1981) and Article 2 of the Uniform Commercial Code.
solving transactional problems. These cases at times recognize relationships that contract doctrine would not and often restrict individuals in situations where the logic of individualist contract reasoning suggests they should be free. These tort cases thus give occasion to reflect on policies that foster community and trust within our broader law governing relationships and to consider the implications of those usually quiet policies for our formal law of contracts.

The interference cases are also an occasion to examine the forms of "contractarian" reasoning that critics have used to condemn the tort cases. Based on the individualist conceptions of classical contract and more modern law and economics, this normative approach to policy appears throughout the literature, the cases, and contemporary political discourse. Contractarian analysis, for example, has been in the center of debates about fundamental assumptions in the law of bankruptcy and corporate governance. Embarking only the individualist part of what our culture brings to transactional problems, contractarian reasoning may be bound to yield distorted recommendations, at least when measured against a broader legal and cultural backdrop.

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16. We find many community values once we go outside the formal contract system and consider the legal mix most lawyers would consider in advising clients about proposed courses of action. The operative rules would then include restitution and large parts of tort law; regulations coming from state and federal legislation, such as consumer protection legislation and labor law; and the ultimate limitation to individualist commitment, bankruptcy.


20. The flaws may well bias analysis in the direction of "social darwinism," the name historians give to a late-nineteenth century idea most closely associated in the United States with Yale Professor William Graham Sumner. John Kenneth Galbraith summarizes the movement and quotes Sumner: "The millionaires are a product of natural selection... They may fairly be regarded..."
analysis may well be more accessible in the interference tort context because the analysis clashes most starkly with these tort cases. Thus, an examination of these cases and the arguments of their critics is an opportunity to highlight substantial flaws in contractarian reasoning itself.

Part I will survey the interference case law to supply a backdrop for the following Parts. Part II will look at recent criticism of the tort and suggest that the "inconsistent" cases show flaws in critics' theories rather than the other way around. Having removed the individualist blinders, we will consider in Part III the values the interference cases may embrace that are not accessible through an individualist paradigm, as well as some implications of those values for the scope of the interference tort. The discussion ultimately will suggest that Lumley is, indeed, best viewed as a close sibling of Hadley and that interference-with-contract case law is best viewed as complementing contract law by promoting sound policy that an individualist conception of contract is structurally incapable of advancing.21

If, as I suggest, we consider these cases as part of the larger law governing contracts, the question the tort cases ultimately raise is whether individualist paradigms should continue to dominate neoclassical contract doctrine or whether, as some have suggested, it is necessary to rethink the whole system in

21. There is nothing new to the proposition that "contract" and "tort" are artificial divisions of a unified reality. Perhaps the most famous exposition of the proposition is Gilmore, supra note 14, at 87-89. See also Robert Braucher, Contracts, in American Law: The Third Century The Law Bicentennial Volume 121 (Bernard Schwarz ed., 1976). What needs continual revisiting is whether current (or recommended) artificial divisions make sense in solving human problems.
order to embrace currently excluded community values.

I. CASE LAW CONCERNING INTERFERENCE WITH CONTRACT

A. INTRODUCTION

In *Texaco, Inc. v. Pennzoil Co.*[^22^], an angry Texas jury[^23^] assessed three billion dollars in punitive damages against a major oil company[^24^]. Texaco's "wrong" had been to interfere in a large, evolving sale of assets between Pennzoil and Getty Oil to get Getty's assets for itself[^25^]. The size of the judgment represents good (and perhaps bad) lawyering, to be sure. But it also may reflect the jury's moral condemnation of Texaco's conduct in this business setting[^26^], a kind of condemnation that began in 1853 with *Lumley v. Gye.*[^27^]

In that seminal case, Johanna Wagner (the promisor) had contracted with Lumley to give operatic performances. Gye induced her to perform for him rather than for Lumley[^28^] and was held liable for damages in tort for interfering with the contract between Lumley and Wagner. *Texaco* and *Lumley* represent a particular kind of interference case in which the defendant does nothing more "wrongful" than induce a breach in order to get the promisor's performance for himself. Tort cases define interference with a fixed contract to be "wrongful" without more. These "core interference" cases are a primary target of

[^23^]: The jurors in the case said, among other things, "We won't tolerate this sort of thing in corporate America" and "We learned quite a bit about the oil business and we were surprised at the loose ethics... The message we wanted to send was that we didn't want to see anyone else do the things that were happening in this case." See STEWART MACAULAY ET AL., *2 CONTRACTS: LAW IN ACTION* 186 (1993).
[^24^]: The Texas appellate court required a remittitur of two billion dollars in punitive damages, or it would order the case remanded. *Texaco*, 729 S.W.2d at 865.
[^25^]: *Texaco* intervened before the Pennzoil-Getty sale closed. Predictably, the central issue in the case turned out to be whether Pennzoil and Getty had a contract, a prerequisite to tort recovery under New York law, at the time of interference. See *infra* notes 128-129 and accompanying text (explaining the role of contract in the finding of tort liability).
[^26^]: The cynic might also explain the verdict as a product of regional and other biases on the part of the jury.
the critics.

But while the tort was fashioned in *Lumley* with a defendant simply attempting to get otherwise committed personal services for himself, courts diversified the tort quite early, expanding it to situations in which the defendant did something we could describe as “wrongful” in the process of disrupting an ongoing relationship. In so diversifying, courts expanded the tort from fixed-term contracts to contracts terminable at will and to relationships not enforceable as contracts under contract law. We could describe *Smith v. Ford Motor Co.* as such a “wrongful act” case. Jack Smith had been employed as president of an incorporated Ford Motor Company franchise. The corporation employed him “at will”—it could fire him for any

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29. As Fuller and Perdue expressed in 1936, when the defendant holds something of the plaintiff’s, the intuitive urge to correct the situation by requiring restitution is strong. *See supra* note 4. It is probably no coincidence that courts have permitted recovery for the plaintiff in interference cases based on the defendant’s profit resulting from the promisor’s breach—essentially a restitutionary measure. *See, e.g.*, National Merchandising Corp. v. Leyden, 348 N.E.2d 771, 774 (Mass. 1976) (awarding plaintiff $27,462, representing approximately ten percent of defendant’s sales tainted by a violation of consent decree); cf. Zippertube Co. v. Teleflex, Inc., 757 F.2d 1401, 1411-12 (3d Cir. 1985) (awarding a percentage of profits derived from breach); Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of Am., 661 F. Supp. 1448, 1478-79 (D. Wyo. 1987) (holding that restitution was available as a remedy for the defendant’s tortious interference with contract); *see also* Sandare Chemical Co., Inc. v. Wako Int’l, Inc., 820 S.W.2d 21, 23 (Tex. Ct. App. 1991) (determining amount of lost profit as a result of tortious interference with contract). *See generally* Annotation, *Recovery Based on Tortfeasor’s Profits in Action for Procuring Breach of Contract*, 5 A.L.R. 4th 1276 (1981).

Two recent commentators limit their focus to the restitutionary situation in which the defendant persuades the promisor to deliver the promised performance to her instead of the promisee. BeVier, *supra* note 4; Epstein, *supra* note 4.

30. *See, e.g.*, Imperial Ice Co. v. Rossiter, 112 P.2d 631, 632 (Cal. 1941) (upholding an action for breach of contract by unlawful means); Downey v. United Weatherproofing Co., 253 S.W.2d 976, 976 (Mo. 1953) (awarding restitution against competitor defendant for compelling plaintiff’s customer to cancel contract); Lamb v. S. Cheney & Sons, 125 N.E. 817, 817 (N.Y. 1920) (holding that a malicious inducement to a third party to withdraw from plaintiff’s contract constituted an actionable tort); Raymond v. Yarrington, 72 S.W. 580, 580 (Tex. 1903) (exploring whether defendant is liable for a third party’s individual breach of contract). *See generally* Annotation, *Liability for Procuring Breach of Contract*, 26 A.L.R. 1227 (1952).

31. *See infra* notes 74-85 and accompanying text (examining these kinds of cases).

32. 221 S.E.2d 282 (N.C. 1976).
reason or no reason. Ford's franchise was similar—Ford could terminate the franchise for any or no reason. When Smith affiliated himself with the Ford Dealer Alliance, a group of Ford dealers potentially antagonistic to Ford, Ford used its termination rights to pressure the local franchise to fire the plaintiff. Smith could not recover on his employment contract because it was terminable at will; and the local franchise would have had no recourse against Ford under contract law if Ford had carried out its threat and ended its franchise. Yet the North Carolina Supreme Court sustained Smith's tort action against Ford for interfering with his continued at-will employment.33

What ties Lumley "core interference" cases and Smith "wrongful act" cases together for the critics is their potential for conflict with contract doctrine. The apparent conflict between this area of tort law and contract law is, perhaps, more obvious in a case like Smith. If there is no right against the promisor for breach of contract, how can there be a right against a third party for interfering with "it"?

Beyond the logical criticism is a serious problem in cases like Smith of limiting the liability principle. The problem stems from the very way an interference claim is articulated.34 Because many forms of activity "interfere" to some extent with others' profitable relationships, the potential for articulating interference claims is vast.35 Once courts recognize tort claims for interfering with relationships that do not amount to enforceable, fixed-term contracts, they must examine the nature of the

33. The at-will cases have triggered some critics' predictable logic: If the franchise could terminate the plaintiff at will, how can it be tortious to induce a termination? That criticism will be challenged below, infra text accompanying notes 74-85. Suffice it to say here that simple logic proceeding from a contract analysis does not explain the cases.

It is worth noting here that Smith is a paradox, at least when juxtaposed with early interference cases. Smith can be read as protecting the plaintiff's right to associate (and perhaps join forces) with his peers, the other dealers. By contrast, the early history of the interference tort finds employers successfully using the tort to prevent similar activity. Several early cases challenged unions on the grounds that union activities interfered with employment contracts between workers and their employers. PETER B. KUTNER & OSBORNE M. REYNOLDS, JR., ADVANCED TORTS, CASES AND MATERIALS 159-61 (1989).

34. Cf. Perlman, supra note 6, at 71-72; Francis B. Sayre, Inducing Breach of Contract, 36 HARV. L. REV. 663, 674-75 (1923).

35. Many claims could be cast as interference claims. One could claim that copyright infringement was an interference with the cash flow the copyright represents. One could also frame an auto accident case as interference with one's prospects for future income.
plaintiff’s interest and of the defendant’s conduct and ponder the related question of how to limit the scope of liability.\footnote{Dean Perlman supplies excellent insight into the problems that economic-loss cases like \textit{Smith} present to the tort system. Perlman, \textit{supra} note 6, at 70-76. In distinguishing economic loss from tort cases involving physical damage, he wrote:}

Some critics have solved the hard problem of practical tort limits by logical derivation from the contract system: If Smith had no enforceable contract rights against his employer (they argue), how could he have tort rights against someone who interfered with his nonright to continued employment?\footnote{In contrast to cases like \textit{Smith}, the issue raised in “core” cases like \textit{Lumley} and \textit{Texaco} is not the appropriate limits to the liability principle but the soundness of the liability principle itself. Far more intensely and rigorously than in the past, modern commentators focus directly on this core question: Why does the law recognize an interference-with-contract claim even in enforceable contract cases? Absent some independent basis for liability, what exactly is “wrongful” about interfering with a contract?} In Part III, I will suggest that the logical criticism is inadequate; moreover, if, as I assert, contract law merely serves an administrative function of limiting this area of tort liability, sound policy suggests including at-will and other cases the critics would exclude.\footnote{The related question, “What got that Texas jury so mad?” is more a cultural than a legal question. The Texas court hypothesized: From the evidence, the jury could have concluded that Texaco deliberately seized upon an opportunity to wrest an immensely valuable contract from a less affluent competitor, by using its vast wealth to induce the Museum, Gordon Getty, and Getty Oil to breach an existing contract. The evidence shows that the wrongful conduct came not from servants or mid-level employees but from top level management. Apparently the jury believed that the conduct of Texaco’s top level management was less than the public was entitled}\footnote{36. Epstein, \textit{supra} note 4, at 23; Perlman, \textit{supra} note 6, at 90-91. 38. See infra text accompanying notes 274-284. 39. The related question, “What got that Texas jury so mad?” is more a cultural than a legal question. The Texas court hypothesized: From the evidence, the jury could have concluded that Texaco deliberately seized upon an opportunity to wrest an immensely valuable contract from a less affluent competitor, by using its vast wealth to induce the Museum, Gordon Getty, and Getty Oil to breach an existing contract. The evidence shows that the wrongful conduct came not from servants or mid-level employees but from top level management. Apparently the jury believed that the conduct of Texaco’s top level management was less than the public was entitled}
Here again, contemporary commentators enlisted contract ideas in their enterprise. But they abstracted from real contract law—that confusing, complex mix of individualist and collective values—a simple, highly individualistic contract model (efficient breach theory) and projected from that model a core criticism of the wisdom of Lumley and the apparently strong jury revulsion in Texaco. In Part III, I will suggest that both the method of these critics and the substance of their criticism miss the mark.

Before turning to the critics' arguments, it is necessary to briefly describe the target of their criticism, the case law. Beyond setting the stage for the discussion to follow, a description of the tort’s features will attest to the strength of the values that may underlie liability. It will also demonstrate the difficulties that emerge when this tort is juxtaposed with the individualist conception of contract that critics rely on when addressing this area of tort law.

B. Salient Features of the Interference Tort

1. Intent, Privilege, and Competition

From the beginning, interference with contract has been an intentional tort, and the basis for liability explained as the “wrongful” activity of the defendant in interfering with the contract. While “malice” is often used in the cases, it does not mean ill will or actual maliciousness. Clearly, this is true even to expect from persons of such stature. There is no evidence that Texaco interfered with the contract to injure Pennzoil, but the jury could reasonably conclude from the evidence at trial that Texaco cared little if such injury resulted from its interference.


Whatever the jurors' real reasons, the fact that they were moved to assess three billion dollars in punitive damages must be accounted for in developing a view on the normative question whether the law should affix liability to the offending conduct.

40. Part III infra will develop the argument that values of an expanded community affected by two-party contracting are what underlie these tort cases.


In Lumley. In Smith v. Ford Motor Co., the plaintiff did not show that Ford bore ill will toward him; in that case, "malice" was the functional equivalent of "without justification." Courts do not require ill will toward the plaintiff in most cases, and therefore we cannot explain Lumley as embodying a simple policy of penalizing a defendant for truly malicious behavior.

Bound up with the intent issue are the defenses to the tort articulated under the infinitely adaptable terms "privilege" and

43. In Lumley, the term served as a rhetorical device. In the process of expanding the claim beyond master-servant relationships to contracts generally, Judge Crompton wrote:

[I]t must now be considered clear law that a person who wrongfully and maliciously or, which is the same thing, with notice, interrupts the relation subsisting between master and servant by procuring the servant to depart from the master's service . . . commits a wrongful act for which he is responsible at law.


Given that these cases arise in tort, and that the cases imply it is "wrong" to interfere with certain business relationships, a showing of true "malice" will be relevant to claimed punitive damages and, of course, will help advance a plaintiff's cause in any event before a jury. Moreover, many cases seem to suggest that malice in the ill-will sense is a material factor in actually finding liability.

Professor Dobbs, among others, suggests that it is conceptually wrong to differentiate between wrongful and nonwrongful acts on the basis of motivation alone. Dan B. Dobbs, Tortious Interference with Contractual Relationships, 34 Ark. L. Rev. 335, 347-50 (1981). Dean Perlman rejoins that the law differentiates on the basis of motivation all the time. Perlman, supra note 6, at 94-99.

Given these cases arise in tort, and that the cases imply it is "wrong" to interfere with certain business relationships, a showing of true "malice" will be relevant to claimed punitive damages and, of course, will help advance a plaintiff's cause in any event before a jury. Moreover, many cases seem to suggest that malice in the ill-will sense is a material factor in actually finding liability.

44. 221 S.E.2d 282 (N.C. 1976). See supra text at note 32 (describing the facts of Smith).

45. KEETON ET AL., supra note 41, § 129 at 982-89.


Intent does, however, play a role in imposing liability because knowledge of the plaintiff's relationship and a defendant's act that will disrupt the relationship are essential to establishing liability. RESTATEMENT (SECOND) OF TORTS § 766 (1977). Comment I to the section provides: "To be subject to liability under the rule stated in this Section, the actor must have knowledge of the contract with which he is interfering and of the fact that he is interfering with the performance of the contract. Id. § 766 cmt. I (emphasis added).

Comment j provides: "The rule stated in this Section is applicable if the actor acts for the primary purpose of interfering with the performance of the contract, and also if he desires to interfere, even though he acts for some other purpose in addition." Id. § 766 cmt. j (emphasis added). Intent plays a complicated role, however, because, as will be discussed in the next section, a defendant can knowingly interfere with a contract and escape liability if a court later finds the interference "justified" or "privileged." This complication makes intent a useless tool in many cases for distinguishing actionable conduct from that which will be permitted.
justification." One can interfere in another's relationship if one has "privilege" to do so. The lack of clear standards for liability and for placing the burdens of proof open this area to severe criticism. *Plessinger v. Castleman & Haskell* illustrates the malleability of "privilege."

In *Plessinger*, plaintiff was an older lawyer and the defendant was a law-firm client that wanted younger lawyers to handle its files. This prompted the law firm to reduce the plaintiff's pay and eventually ask him to leave the firm. After he left, the plaintiff sued the client for interference with his employment with the law firm. The court concluded that the plaintiff stated a claim for relief, notwithstanding the defendant's argument that it had an unfettered privilege to pick its own lawyer. Discussing that aspect of the case, the court said:

The Court believes that the California Supreme Court would not recognize a client's unlimited right to select among associates employed by a contracted law firm where the selection criteria involves discrimination against a member of a protected class. To hold otherwise would allow law firm clients to demand that law firms not assign cases to women, racial minorities or members of any other protected class, even where the client intends to cause a breach or disruption of the business relationship between the associate and the employing law firm. Important though the attorney-client privilege may be, it should not be available to shield interference with another's civil rights.

Cases like *Plessinger* and *Smith* are targets for criticism because they are said to make it difficult to predict with any accuracy the conduct that is subject to liability. The American Law Institute has been unable to distill the desired crisp rules from the cases; the "black letter" of the *Restatement (Second) of Torts* contains seven factors to be considered in judging the propriety of the defendant's interference. The

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47. There is disagreement whether plaintiff states a prima facie case subject to the defense's proof of privilege or justification, or whether the absence of privilege or justification is part of the plaintiff's proof. *Keeton et al.*, *supra* note 41, at 983-84.
50. *Id.* at 451. A strong theme of age discrimination obviously underlies these facts, see *id.* at 450-51, yet the case did not focus on civil rights, and the plaintiff never sued the law firm for illegally discriminating against him.
52. *Restatement (Second) of Torts* § 767 (1977). It provides:
   In determining whether an actor's conduct in intentionally
multiple, relatively vague factors make predicting the outcome of litigation very difficult. Commentators, searching for rules that make clear the limits of business behavior, have responded by recommending drastically scaling back the tort or at least limiting it in all situations to enforceable, fixed-term contracts. The perceived vagueness of the liability principle is not new; its resistance to this recurrent criticism suggests that the tort may embody strong underlying values. Perhaps the vague standards reflect a lack of consensus on the values that are being embraced as well.

Many interference cases involve a third party “competing” with the promisee for the promisor’s performance. Thus, competition is a persistent “privilege” issue. This should be obvious because, in a sense, a competitor always “interferes” with its competitors’ business relationships.

While leaving the contours of privilege and justification fuzzy, the cases seem to have crystallized clear rules on this recurrent issue. Broadly, the cases seem to agree that the

interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:
(a) the nature of the actor’s conduct,
(b) the actor’s motive,
(c) the interests of the other with which the actor’s conduct interferes,
(d) the interests sought to be advanced by the actor,
(e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
(f) the proximity or remoteness of the actor’s conduct to the interference and
(g) the relations between the parties.

Id.

53. Professor Perlman would restrict the tort largely to situations in which the defendant’s conduct was “independently unlawful,” that is, actionable under some theory other than interference with contract, such as fraud or antitrust law. Perlman, supra note 6, at 97-129. Little would be left of the tort as an independent basis of liability under this formulation.

54. Professor Epstein justifies the tort in Lumley core cases but would permit no tort action for contracts that are imperfect or terminable at will. He writes, “It is only where the promisor is in breach that the promisee can be said to have lost a property right.” Epstein, supra note 4, at 21-25.

55. See Sayre, supra note 34, at 674-75 (discussing the lack of agreement on the specific meaning of the individual elements of tort actions).

defendant's competition with the promisee will not justify interfering with an enforceable, fixed-term contract, whereas it may justify interference with contracts terminable at will or with less established or less firm business relationships.

Obviously, contract law is playing a role in sorting cases that raise the defense of competition. And, as one would imagine, competition is also a central component of the arguments that challenge core cases like *Lumley:* free enterprise and efficiency, say critics, demand that we not penalize a defendant merely for bringing the promisor a better deal.

New York and other states have embraced this competition analysis and discriminate in their liability rules between fixed-term contracts and contracts that are terminable at will. In *Terry v. Dairymen's League Cooperative Ass'n,* the court expressed this distinction:

The fact that the contract is terminable at will greatly broadens the scope of the defendant's privilege [to compete with the plaintiff]. The privilege in such a case is substantially the same as the privilege of inducing third persons not to enter into new business relations with the plaintiff. . . . On the other hand, the furthering of one's business interests does not ordinarily justify the inducing of the breach of a contract for a definite term. Thus, for example, one may not with

57. Wilkinson v. Powe, 1 N.W.2d 539 (Mich. 1942), illustrates the role competition plays in the cases. In Wilkinson, the plaintiff had contracts with farmers to haul their milk to the defendants' creamery. *Id.* at 540. Defendants wanted the hauling work. To get that work (after an unsuccessful negotiation), the defendants put the plaintiff to the expense of modifying its trucks, and finally refused to take milk from the farmers except in defendants' own trucks. *Id.* at 541. The farmers then broke their hauling contracts with Wilkinson. The defendants argued that, as buyers, they had the privilege to take or refuse milk from whomever they chose, and therefore their conduct in refusing milk except on their own trucks could not be wrongful. Given Wilkinson's contracts with the farmers, the court found that the decision to go to defendants' own trucks was "done to accomplish an unlawful purpose, i.e., to bring about a breach of contract." *Id.* at 543.

58. See *RESTATEMENT (SECOND) OF TORTS* § 768(2) & cmt. h (1977) (distinguishing a competitor's ability to interfere with existing contracts as a whole versus contracts terminable at will); KEETON ET AL., supra note 41, § 129, at 978, § 129, at 987-88, § 130, at 1012-13 (describing intentional interference as a basis for liability and the common law notion of competition allowing some degree of interference); Perlman, *supra* note 6, at 106-08 (giving a historical accounting of cases involving claims of interference with contract between competitors).

59. Perlman, *supra* note 6, at 78-79 (quoting a member of the American Law Institute stating that "some would find it astounding that the whole competitive order of American industry is prima facie illegal"); Dowling, *supra* note 6, at 488, 506-10.

60. 157 N.Y.S.2d 71 (1956).
impunity seek to gain new customers by inducing them to breach their existing contracts with others but, in the free play of competition, one may seek to win for himself the patronage of the customers of others, by inducing them to discontinue their existing business relations, provided that they are terminable at will.\textsuperscript{61}

Judicial statements in \textit{Terry} and similar cases make it easy to understand why competition would be a defense in some interference cases. What is puzzling, particularly to recent critics, is why competition is not a defense in \textit{all} cases, including fixed-term contract cases.

A tentative answer requires a closer examination of the several critiques of the tort, the focus of Part II. Suffice it to observe at this point that decision-makers have accorded more weight to preexisting contracts than to a policy of competition; and their willingness to recognize the tort and wrestle with the competition defense in non-fixed-term contract settings\textsuperscript{62} suggests, again, strong values\textsuperscript{63} accorded to preexisting relationships that seem in tension with a policy of unrestrained, vigorous competition.

\section*{2. The Problem of Causation}

Viewing the tort through the lens of an individualist contract model generates causation problems, and those

\begin{itemize}
\item \textsuperscript{61} Id. at 78-79 (citations omitted).
\item \textsuperscript{62} Where the excuse of competition is not present, New York permits a plaintiff to bring an interference action even with respect to an at-will contract. In Coleman & Morris v. Pisciotta, the court stated that interference with contract is actionable if the motives of the actor were solely to produce damage or the means used were unfair or dishonest. 107 N.Y.S.2d 715, 716 (1951). \textit{See also} Guard-Life Corp. v. S. Parker Hardware Mfg. Corp., 406 N.E.2d 445, 446 (N.Y. 1980); A.S. Rampell, Inc. v. Hyster Co., 144 N.E.2d 371, 375 (N.Y. 1957).
\item \textsuperscript{63} The statement in the text may be something of an understatement. The very difficulty of adjudicating in this context itself suggests that strong values underlie findings of liability; the course of least resistance for courts would have been to stand on the status quo rather than to expand liability. \textit{But cf.} Dobbs, \textit{supra} note 43, at 335-44.

Courts are probably more aware than commentators that distinguishing competition that is "fair" from that which is "unfair" is not an easy job that can be done with litmus-test rules. There is likely to be widespread disagreement within our culture about appropriate competitive limits. Moreover, courts no doubt know that tinkering with competitive norms has a perceived effect on the vigor of competition itself: business people will be less aggressive competitively if competition can give rise to tort liability. Together, these factors suggest strongly that the easy decision would have been to reject these interference claims that so implicate our competitive system. That courts have not done so attests not to their caving in to plaintiffs but to a powerful impulse to protect ongoing business relationships from some forms of outside competitive pressure.
problems also have attracted commentators.\textsuperscript{64} The promisor's exit from the underlying agreement is the necessary event that triggers the tort suit against the third party. Without the termination of the relationship with the promisor, there is no tort of interference with contract.\textsuperscript{65} But, if the promisor's actions are a necessary ingredient to the tort claim, and if we view the "harm" as the loss of the promisee's bargain, isn't the promisor the primary cause of that loss? Put another way, why doesn't the promisor's act of breach sever the causal connection between the inducer's act and the promisee's harm?\textsuperscript{66}

Our view of the underlying relationship generates this causation problem. An analysis driven by an individualist contract paradigm would view a contract as embodying only reciprocal individual rights to the monetary equivalent of the

\textsuperscript{64} See generally 2 HARPER ET AL., supra note 41, § 6.8; Epstein, supra note 4, at 26-28 (discussing issues of causal intervention and their relationship to inducement of breach of contract).

\textsuperscript{65} In the process of attempting to induce a breach, a defendant might, of course, commit some other tort against the plaintiff, such as defamation. See, e.g., Hester v. Barnett, 723 S.W.2d 544, 559, 564 (Mo. Ct. App. 1987) (allowing a plaintiff to proceed with a cause of action, relying on defamation as a basis).

\textsuperscript{66} "Looked at from the traditional tort perspective, the chain of causation appears to consist of missing links." Epstein, supra note 4, at 7. More than a century earlier, Judge Colerege identified the same problem in two passages of his dissent in \textit{Lumley}:

[T]here would be . . . a manifest absurdity in attempting to trace up the act of a free agent breaking a contract to all the advisers who may have influenced his mind, more or less honestly, more or less powerfully, and to make them responsible civilly for the consequences of what after all is his own act, and for the whole of the hurtful consequences of which the law makes him directly and fully responsible, that I believe it will never be contended seriously.


According to all legal analogies, the bona fides of him who, by a conscious wilful act, directly injures me will not relieve him from the obligation to compensate me in damages for my loss. Again, where several persons happen to persuade to the same effect, and in the result the party persuaded acts upon the advice, how is it to be determined against whom the action may be brought, whether they are to be sued jointly or severally, in what proportions damages are to [be] recovered? Again, if, instead of limiting our recourse to the agent, actual or constructive, we will go back to the person who immediately persuades or procures him one step, why are we to stop there? The first mover, and the malicious mover too, may be removed several steps backward from the party actually induced to break the contract: why are we not to trace him out? Morally he may be the most guilty . . . if we go the first step, we can shew no good reason for not going fifty.

\textit{Id.} at 762.
bargained-for performances. If one starts there, then the "harm" caused by the third party has been the loss of that monetary equivalent. Since it is the promisor that didn't pay it, she certainly seems a more direct source of that harm than is the inducer, and causation becomes a problem.

One can maintain an individualist perspective and avoid the causation obstacle by recognizing that contract damages and actual performance are not the same either qualitatively or quantitatively. The interferer has caused quantifiable harm by "causing" an expectation of actual performance to change to a monetary claim for damages. The defendant has certainly caused that harm, and the tort system implicitly seems to recognize it. The tort's persistence in the face of this causation problem, announced first in Lumley itself, suggests perhaps a widespread recognition that a contract performance and a right to contract damages are not the same thing, however one reads Holmes.

Causation problems also disappear if we break free of the constraints of the individualist paradigm and consider the association between the promisor and promisee as a "relationship" that consists of more than the reciprocal rights to the

67. Cf. Oliver W. Holmes, The Path of the Law, 10 HARV. L. REV. 457, 462 (1897) ("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."). Viewing contract as a right to the promisor's performance would translate into a right to specific performance for breach of contract, a remedy permitted in comparatively few cases under contract law.

68. Related to the causation issue is an aspect of promisor autonomy: saddling the inducer with liability could suggest that the induced promisor had less autonomy than we would like. See Dobbs, supra note 43, at 358 (stating that a reasonable assessment of accountability will put blame on the person who makes a decision).

69. Professor BeVier's critical analysis approves of the tort in situations where full performance would be most unlikely to be reproduced by a contract damage award. See BeVier, supra note 4, at 926-27.

70. See Lumley, 118 Eng. Rep. at 761 (discussing the "absurdity" of tracing the causation of a broken contract).

71. See Holmes, supra note 67, at 462 (stating that contract is not a right to specific performance). The efficient breach theory, likely proceeding from Holmes's statement, implies (by assuming away both transaction costs and all harm not recognized by contract doctrine) that actual performance and expectation damages are the same thing. See infra text accompanying notes 137-144 (discussing the efficient breach theory). It would be hard to ascribe such a view to Holmes.
other's actual performance. Viewed in this way, the third party has interfered with a relationship that has value independently of and beyond the actual performances the parties expected from one another under their contract. Causation is direct and simple because the plaintiff's relationship with the promisor is not coextensive with "contract." The wide acceptance of liability for third-party interference with contracts suggests that, in this context at least, courts may well regard the relationship as socially valuable in its own right, valuable (to the parties and perhaps to others) beyond the rights to damages for breach that the individual parties have against one another.  

72. Leon Green identified the interest as a "relational interest" in a classic series of articles in the 1930s. See generally Leon Green, Relational Interests (pts. 1-4), 29 ILL. L. REV. 460 (1934) (discussing family relations); 29 ILL. L. REV. 1041 (1935) (discussing trade relations); 30 ILL. L. REV. 1 (1935) (discussing commercial relations); 30 ILL. L. REV. 314 (1935) (discussing professional and political relations).

Richard Epstein, who did not criticize the tort on the basis of efficient breach, eased the causation problem by calling the right of the promisee "property" owned by the promisee. Epstein, supra note 4, at 27. For Epstein, the defendant's act of interfering with that property was analogous to acts interfering with more common forms of property, such as real estate and chattels. Id. The tort then is like trespass and conversion, both of which are complete when the property interest is invaded by the defendant. See id.

Professor Epstein's thesis that this tort is analogous to trespass and conversion means that, like those torts, there should be no requirement of an actual act of inducement by the third party in Lumley-type cases, only receipt of the performance owed to plaintiff and notice that the earlier contract exists. He recognizes that precedent does not support him in dispensing with the requirement of inducement in these cases. Id. at 28 n.70. Interestingly, a major thrust of Leon Green's 1930s articles was that courts' use of "property" when analyzing interference cases should be abandoned because of its capacity to confuse. Green, supra, at 29 ILL. L. REV. 461-62.

73. The difficulties in the tort cases that come from the complexity of establishing cause in fact—of actually proving that the defendant "caused" the plaintiff an injury—also attest to the strength of the tort's animating values. Showing "cause" here means showing that, but for the interference, the promisor would have performed and the plaintiff would have received benefits under the contract. This sometimes presents the plaintiff with conceptually difficult proof problems. Often, for example, the underlying contract will contain conditions that have not occurred at the time of the interference and breach. Brokerage and lawyer contracts are common examples. See, e.g., Herron v. State Farm Mut. Ins. Co., 363 P.2d 310, 311 (en banc) (Cal. 1961) (describing action by attorney against an insurance company for intentional interference with contractual relations); Richette v. Solomon, 187 A.2d 910, 923 (Pa. 1963) (awarding damages for interference with a lawyer-client relationship).
3. Voidable, At-Will, and Non-Contracts

A third problem area which is related closely to the causation issues discussed above involves cases that sustain a tort remedy where no remedy under contract law would lie. The contract-driven critique rests, ultimately, on logic: If the other party to the relationship could walk away from the plaintiff-promisee without incurring liability, how can it be tortious for a defendant to induce the walking away? The cases that go beyond "contract" offend our senses of symmetry and system integrity; where those values seem to be in the ascendancy, the tendency of commentators is, once again, to define the outer limits of tort liability through the contract system.74

The range of situations where these cases thwart contract logic is broad. Courts have held, for example, that the promisor's statute of frauds defense to the underlying contract, or defects in other formal requisites under contract law, will not block a tort suit against the interferer.75 In this kind of case, the parties' actual intent cannot figure into the analysis76 because the contracting parties did not consciously choose

74. Dean Perlman, for example, wrote:

Rules regulating third-party interference should advance whatever policy contract law pursues in withholding enforcement of an agreement. ... If the efficiency principles of contract law suggest that a third party using lawful means should not be liable for inducing breach of enforceable promises, then a fortiori, the same rule should apply to unenforceable expectancies.


75. See, e.g., Musselman Bros., Inc. v. Dial-Huff & Assoc., 826 S.W.2d 838, 840 (Ky. Ct. App. 1992); Clements v. Withers, 437 S.W.2d 818, 820-21 (Tex. 1969); F.D. Hill & Co. v. Wallerich, 407 P.2d 956, 959 (Wash. 1965). Lack of "mutuality" or similar invalidity also does not always block an action. See, e.g., Jackson v. O'Neill, 317 P.2d 440, 443 (Kan. 1957) (stating lack of mutuality is not a defense for preventing consummation of a contract); Cook v. MFA Livestock Ass'n, 700 S.W.2d 526, 528-29 (Mo. Ct. App. 1985) (stating there is no requirement for a valid contract to maintain an action for interference with contract); Aalfo Co. v. Kinney, 144 A. 715, 716-17 (N.J. 1929) (finding even when a contract is unenforceable, third parties may not maliciously prevent performance). See generally, James O. Pearson, Jr., Annotation, Liability for Interference with Invalid or Unenforceable Contract, 96 A.L.R. 3d 1294 (1980) (providing material on both sides of the debate over whether liability should attach to interference with contract).

76. See Guard-Life Corp. v. S. Parker Hardware Mfg., 406 N.E.2d 445, 454 (N.Y. 1980) (dissenting opinion) (emphasizing the distinction between voidable and terminable at-will contracts regarding interference from third parties).
unenforceability.\textsuperscript{77}

The proximity of contract law in this instance generates a debate about whether we should supplement the contract system with a tort remedy or whether we should maintain the integrity of the rules within the contract system by limiting tort recovery. Thus, some recent commentators have condemned these cases as undercutting restrictions on recovery set within the contract system,\textsuperscript{78} while others have taken the opposite tack by suggesting that the absence of a remedy within the contract system is a strong reason for supporting liability in these kinds of cases.\textsuperscript{79}

More controversial and more common are at-will contract cases in which the parties agree that either of them can end the relationship without the other's consent. Ordinary employment is also often at-will and, as \textit{Smith v. Ford Motor Co.} shows,\textsuperscript{80} courts have used tort law to give plaintiffs recoveries when the contract system would have failed them.\textsuperscript{81} Because the parties,  

\begin{itemize}
\item \textsuperscript{77} If one of the parties were conscious of the bar to enforceability and the other were not, a doctrine such as estoppel might well limit later use of the bar against the other party. \textit{Cf.} E. ALLAN FARNsworth, CONTRACTS § 6.12 (2d ed. 1990) (discussing contract enforcement by estoppel based upon a party's reliance).
\item \textsuperscript{78} \textit{See supra} note 75 and accompanying text; \textit{cf.} Epstein, \textit{supra} note 4, at 23 (arguing that "if a party is free to leave, for whatever reason, then a third party is free to induce him to depart"). Professor BeVier confined her analysis to situations involving enforceable contracts. \textit{See BeVier, supra} note 4, at 884 (discussing "inducers with notice of . . . enforceable contracts"). \textit{See generally Dobbs, supra} note 43 (arguing that the tort, when applied even to fixed-term enforceable contracts, was overbroad).
\item \textsuperscript{79} \textit{See John Danforth, Tortious Interference with Contract: A Reassertion of Society's Interest in Commercial Stability of Contractual Integrity, 81 COLUM. L. REV. 1491, 1493 (1981) (proposing a reformulation of the interference with contract tort, based upon the importance of contracts to commercial stability); Dowling, supra} note 6, at 513 (advocating broader liability based on the distinction between interference with contract and interference with business relations).
\item \textsuperscript{80} 221 S.E.2d 282 (N.C. 1976). For a description of \textit{Smith}, \textit{see supra} text accompanying notes 32-33.
\item \textsuperscript{81} \textit{Smith}, 221 S.E.2d at 296 (holding that an employee can successfully state a cause of action against a third party for malicious interference with his at-will employment contract even though the employer did not breach the contract). Cases that give recoveries to at-will employees against their employers for retaliatory discharges are just as controversial. \textit{See, e.g.,} Tameny v. Atlantic Richfield Co., 610 P.2d 1330, 1336-37 (Cal. 1980) (holding that an at-will employee who was discharged because he refused to fix gasoline prices illegally can maintain a wrongful discharge tort action against his employer). For two strongly contrasting views of at-will employees' use of tort law, compare Richard A. Epstein, \textit{In Defense of the Contract at Will}, 51 U. CHI. L. REV. 947, 954 (1984) (arguing that courts should "bear a heavy burden of justification
in theory, have "chosen" to permit one another to end the relationship unilaterally, some critics argue that interference liability in the at-will context undercuts not only formal contract law but the intent of the contracting parties as well.\textsuperscript{83} The actual range of liability for interfering with at-will contracts is considerably circumscribed because, as discussed above, the law recognizes in these cases a broad privilege of competition.\textsuperscript{84} Thus, a defendant will incur no liability for persuading an at-will employee to work for her instead of his current employer.\textsuperscript{85} Yet while current law limits the range of cases by recognizing the privilege to compete, extending liability to any at-will case logically conflicts with an analysis that begins with individualist notions of contract law. That the courts have rejected this logic and extended liability anyway suggests, I believe, that they see more in the underlying relationships than "contract rights."

Having taken this brief tour of the legal terrain, we are ready to consider what the critics have to say about it.

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82. Professors Epstein and Linzer disagree fundamentally on whether employee choice is involved in the employment contract, which is the predominant at-will contract. See Linzer, \textit{supra} note 81, at 409-15 (attacking Epstein's argument that at-will contracts benefit employees by arguing that employees do not have a strong bargaining position).

83. \textit{E.g.}, Epstein, \textit{supra} note 4, at 22-23 (arguing that allowing any action against a third party for inducing contract termination handicaps competitive markets and ignores the mutual rights of the parties in at-will contracts).

84. \textit{Keeton et al.}, \textit{supra} note 41, at 987-88.

II. THE CRITICAL CHALLENGES AND THEIR IMPLICATIONS FOR CONTRACTS

Much of the recent scholarship on the tort of interference with contract has taken a normative tone and advocates either limiting or eliminating the tort. The criticism proceeds on a number of fronts. A central feature is its tendency either to emphasize or de-emphasize the underlying relationship (contractual or otherwise) between the original parties.

A number of critics challenge the entire field of “interference” liability that includes not only the Lumley-type cases but also cases like Smith\(^86\) and Plessinger.\(^87\) They find the range of liability intolerably broad and make recommendations for limiting liability in various ways.

Some of these critics would limit liability by concentrating on the conduct of the intentional tortfeasor.\(^88\) They tend to reject liability if a defendant has “merely” interfered with a contract (because there is no “bad” conduct) but recognize it in “wrongful act” cases like Smith.\(^89\) These critics either suggest or imply that the contractual or other relationship between the original parties is comparatively unimportant and should have less significance than it currently has within the case law.

In contrast with critiques that would move the focus away from the contract or relationship between the parties, another form of “vagueness” criticism puts contract law at the center of its critique. This critique implies that contract law has been insufficiently recognized in the cases. Most of these critics would limit the tort to cases in which there were “valid, enforceable

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89. See Dobbs, supra note 43, at 365-66 (arguing that liability should exist when the defendant commits a tort, independent of interference analysis); Perlman, supra note 6, at 97-129 (contending that the interference tort should be limited to cases in which the defendant’s acts are independently unlawful). Professor BeVier focuses her analysis on the “inducement tort,” which is found in situations in which the interferer obtained the performance that was promised to the plaintiff. Within that subset of cases (which does not include cases such as Smith), she believes that the traditional tort doctrine, which applies to all contracts, is overbroad and that ideally it should be narrowed to permit liability in a smaller group of the inducement cases. BeVier, supra note 4, at 929-36.
contracts." They tend to recognize liability for "merely" interfering with a valid, enforceable contract but probably reject it in an at-will case like Smith. By far the most provocative critiques have been those that directly challenge the "core" principle established in Lumley itself. Some of the critics focus only on the "core" cases, while others attack the Lumley principle in the context of formulating a "wrongful act" approach. These critics assert that there should be no liability (or severely restricted liability) for merely interfering with an enforceable contract.

What these various critiques share is their tendency to undervalue the relationship (contractual or otherwise) between the original parties and to overvalue the importance of contract law. Either way, an individualist vision drives much of the analysis, and this vision tends to equate the real value for policy purposes of the underlying relationship with the legal status contract law confers.

If, as I believe, the interference cases reflect the community strain in our culture that is in tension with (or may contradict) our individualist strain, these criticisms are bound to miss the mark.

But there is a larger point that I believe is demonstrated by the inconsistency between interference-with-contract cases and an individualist critique of them: the contractarian analysis will always miss the mark because it proceeds from a limited and artificial vision of our culture, a vision that is historically,

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90. One critic, however, argues the opposite. On the basis of an adequate contract remedy in the enforceable contract case, he would permit the tort when a contract does not exist but restrict the tort when there is a valid enforceable contract. See Dowling, supra note 6, at 510-19; see also infra text accompanying note 147 (explaining Dowling's argument).

91. See, e.g., Danforth, supra note 79, at 1515-17 (stating that extending liability to include interference with at-will contracts is a fundamental error); Epstein, supra note 4, at 21-24 (arguing that there should be no liability in at-will cases).

92. See generally Dobbs, supra note 43 (arguing that there is no sound basis for a universal rule of liability); Perlman, supra note 6, at 97-129 (arguing that inducement tort is overbroad); cf Partlett, supra note 6, at 790-835 (exploring inducement to breach of contract tort and arguing that it should be confined to protecting contractual relationships).
legally, and politically unreal. As a result, I suggest that normative recommendations proceeding from this rigorously individualist perspective will not reliably point in the right directions and will often point in wrong ones.

We will begin by examining the "wrongful act" critiques that tend to undervalue the parties' existing relationship, and proceed from there to examine the critiques that would use formal contract law to draw boundaries for the tort. Then we will consider those "core" critiques suggesting that contract policy requires a curtailment or rejection of Lumley.

A. "WRONGFUL ACT" CRITIQUES: SUBORDINATING THE REALITY OF THE RELATIONSHIP

Whatever their ultimate policy recommendations, the most fundamental problem that has moved critics to protest is a want of clarity in the values being advanced by the tort and a related lack of clear lines separating actionable and nonactionable situations. Under the Restatement, interference with contract is actionable if it is "improper." This vagueness in the standard for liability tends to send cases to the jury in more situations than critics think desirable.

A 1979 Alaska case reveals some of these basic problems.
RCA (the plaintiff's promisor) contracted with Alyeska (the eventual defendant) to construct and maintain a communications system along the Alaska pipeline. In turn, RCA contracted with plaintiff Aurora to give RCA transportation services necessary to perform the Alyeska-RCA communications contract. The Alyeska-RCA contract gave Alyeska the unilateral right to modify the communications contract; the RCA-Aurora contract gave RCA the right to terminate the transportation contract if it were in its "best interest" to do so. When Alyeska took over the transportation function in the Alyeska-RCA communications contract, RCA terminated Aurora's transportation services.  

Aurora and Alyeska had not been strangers, however. They had been parties to an earlier contract that ended badly, which furnished Alyeska (Aurora alleged) with a motive for retaliation against Aurora.  

Thus, when Alyeska changed its contract with RCA to make Aurora's services unnecessary, Aurora responded by suing Alyeska for interference with the RCA-Aurora contract.  

Alyeska challenged an adverse jury verdict claiming it had a legal right to take over the transportation services and, therefore, that the exercise of this right could not be tortious. The Alaska Supreme Court rejected these arguments and sustained a damage verdict. Because there had been ample facts for a jury to conclude that retaliation had been the dominant reason for taking away Aurora's business, whatever privilege the Alyeska contract otherwise conferred was gone.

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100. *Alyeska*, 604 P.2d at 1092-93.  
101. Aurora had brought suit on that contract, and Alyeska paid Aurora the sum claimed due shortly after the suit began. *Id.*  
102. *Id.* The defendants made similar arguments in Smith v. Ford Motor Co., 221 S.E.2d 282 (N.C. 1976) and Plessinger v. Castleman & Haskell, 838 F. Supp. 448 (N.D. Cal. 1993). Ford argued that, because it had a right to terminate its franchise with its dealer corporation, it could not be tortious to threaten an exercise of that right in order to pressure the dealership to terminate the plaintiff. *Smith*, 221 S.E.2d at 285. In *Plessinger*, defendant Allstate argued that it had an unfettered right to choose its lawyer; accordingly, its pressuring the law firm to supply a younger lawyer could not be tortious. *Plessinger*, 838 F. Supp. at 450-51.  
103. *Alyeska*, 604 P.2d at 1098-99. Because of a jury error in computing damages, however, the court directed the trial court to order a remittitur or, if Aurora did not agree with the amount, a new trial. *Id.*  
104. *Alyeska Pipeline Serv. Co. v. Aurora Air Serv., Inc.*, 604 P.2d 1090, 1093-94 (Alaska 1979). The court noted that Alyeska had to exercise its rights under its contract with RCA in "good faith" and that there was enough evidence
What has troubled critics about this kind of case is the fact-sensitive nature of the ultimate liability question that we reach through the rubric of “privilege.” The Alaska court rejected Alyeska’s claim to absolute “privilege” and, instead, said it was a jury question whether Alyeska had operated in “good faith” under its contract with RCA. Because the result in Alyeska thus seems to turn on fact-sensitive motive, Professor Dobbs condemned the case.

At a doctrinal level, this vagueness problem is endemic to the way we now conceptualize liability for interference with contract. The law has long recognized that the defendant’s own interests, whether contractual or otherwise, often justify interference with another’s contract—that is, not all interferences should be actionable. But once courts begin recognizing privileges within infinitely varied business settings, the result is a case-by-case process that, if “restated,” inevitably produces fuzzy doctrine.

There are very limited solutions to this problem. One could solve the predictability problem with alternative regimes of no privileges or no liability. Commentators have been drawn to the latter solution, but have sought to preserve the cases that seem justifiable in their result. This has prompted them to pin liability on the “wrongfulness” of the tortfeasor’s act. “Mere” interference with another’s contract, in itself, would not be for a jury to conclude that it had not. Id. at 1094.

This, of course, makes the case somewhat similar to more traditional contract cases, which limit discretion within a contract to that exercised in “good faith.” Indeed, the proposition is sufficiently well established that we find it in many places in the Uniform Commercial Code. See, e.g., U.C.C. § 1-201(19) (defining good faith); § 1-203 (imposing obligation of good faith in performing every contract within the Act); § 2-103(1)(b) (defining good faith for a merchant); § 2-305(2) (requiring fixed price to be established in good faith); § 2-306 (requiring output to be determined in good faith). Alyeska, 604 P.2d at 1093.


106. See, e.g., Hopper v. Lennen & Mitchell, Inc., 52 F. Supp. 319, 326-28 (S.D. Cal. 1943) (recognizing that there are situations in which the defendant can justify interference), rev’d on other grounds, 146 F.2d 364 (9th Cir. 1944).

107. The Restatement (Second) of Torts § 767 attempts to define “improper.” See supra note 52 (quoting Restatement’s seven factors for determining whether interference is improper). Nonetheless, these seven factors hardly supply a formula for accurately forecasting liability in most cases. See supra note 98 (quoting Keeton’s opinion that the criteria fail to establish predictable outcomes).
"wrongful" in most cases. Thus, it would not be interference with contract that is the "wrong"—it would be sex discrimination, or age discrimination, or some other undesirable conduct. Under Dean Perlman's formulation, courts would deploy an "unlawful means" test. Similarly, Professor Dobbs identified at least six categories of cases for imposing liability.

If a desire for certainty motivates the reformulations, one wonders whether varying sets of "wrongful act" categories would help matters much. The classifications proposed by commentators are not entirely based on preexisting torts or statutory offenses; the categories would be soft-edged, would evolve over time through case law, and would be open to interpretation.

109. Professor Dobbs would permit an action for "mere" interference where the plaintiff's contract was one for which she could obtain specific performance. See Dobbs, supra note 43, at 373-76 (stating that the equity courts could perceive a contract to buy property not merely as a contract in which property would be transferred in the future, but to some extent as vesting a present interest in the buyer); cf. BeVier, supra note 4, at 929-31 (proposing reformulation of the inducement puzzle because the inducement tort is overbroad).

110. Dean Perlman wrote:

[A cohesive] doctrine can be developed best by shifting the focus in interference cases from the fact of interference to the nature of the interfering act. Two distinct categories of interference cases then emerge: those in which the defendant's act of interference is independently unlawful, and those in which the defendant's behavior is otherwise lawful. . . . I propose an unlawful means test that restricts tort liability to those cases in which the defendant's act is independently wrongful.

Perlman, supra note 6, at 62. While a major thrust of Dean Perlman's analysis is the incompatibility of the tort with the efficient breach theory, his point of departure was the infinite variety of fact situations in which interference was possible and the resulting vagueness of the standard for liability. See Perlman, supra note 6, at 61-62, 128-29.

111. Some of the categories contain more than one item. For example, his second category is "[n]on-tortious misconduct: duress, undue influence and breach of fiduciary duty." Dobbs, supra note 43, at 366.

112. Beyond eliminating liability in the cases in which there were no "unlawful means" employed, Dean Perlman believed that his test would better direct attention to the defendant's conduct in those unlawful means cases where he thought there should be liability. See, e.g., Perlman, supra note 6, at 118. The cases already consider the defendant's conduct, however, through the vocabulary of "wrongfulness" and "privelege." It is questionable whether there would be much gain in clarity under a different formulation.

113. Moreover, a categorizing approach might actually cause a loss in predictability by yielding a case law that was less articulate in explaining results than the current standard. Instead of articulating the underlying basis for condoning or condemning the defendant's conduct, the judicial enterprise in the cases actually litigated would be to explain why a case fit a particular category.
But more to the point of the argument here, the tension between the vagueness in Alyeska's "good faith" analysis and the commentators' search for something more certain resembles the tension between fuzzy limitations on individual autonomy, such as neoclassical contract's "promissory estoppel," and classical contract's individual autonomy-based rules such as "consideration." The duty of "good faith" thrust upon Alyeska is (as is most of tort) a limitation on individual freedom engendered by the community strain in our culture. From the perspective of community, it seems quite unremarkable to expect a large corporation not to alter its own contracts for the purpose of injuring another business in a very predictable way.

The problem of predictability that comes with fuzzy "good faith" is not much different from the uncertainty that businesses live with in their relations with one another every day. Rigorous individualist classical contract doctrine purported to offer businesses the certainty that some thought desirable. In the process, that rigid structure obscured judicial decision-making. Neoclassical contract has displaced some autonomy-based rules with ideas that are inconsistent with the individualist paradigm.

"Good faith"—the turning point in Alyeska—is widely recognized as being required in all contracts. Good faith, like promissory estoppel and unconscionability, is part of the "antimatter" of classical contract. The good faith concept (whether within a contract or outside of it) reflects notions of community and social value that the individualist paradigm 

114. Grant Gilmore's idealized version of this battle appears in Gilmore, supra note 14, at 55-66 (describing the argument over the theory of contract between Holmes/Williston and Cardozo/Corbin).
115. The Legal Realists first made these points in the 1930s; Karl Llewellyn attempted to dismantle the rigid paradigm in the Uniform Commercial Code because it was unsuited to modern commercial transactions. At the policy-projecting level, contractarian analysis suffers from problems similar to those that limited the law of sales before Llewellyn reconceptualized it.
118. I would include in the "antimatter" category the many concepts within contract law, partly based on equitable notions, that limit a promisor's "rights" in the absence of explicit agreement. The debate between Judges Cardozo and McLaughlin about "substantial performance" in Jacob & Youngs v. Kent, 129 N.E. 889 (N.Y. 1921), is a classic illustration of the "antimatter" and "matter" we find throughout modern contract law.
does not readily capture. And while imposing a duty of "good faith" that extends to a third party differs from imposing it with respect to one's contracting partner, Alyeska is much less remarkable when viewed in the context of all of modern contract law, not simply its individualistic elements.

"Wrongful act" reformulations also implicitly reject another aspect of community, the importance of the relationship between the plaintiff and the other party. What arguably distinguishes this tort from other bases for liability is a preexisting relationship between the plaintiff and her original promisor which is disrupted by the defendant. In rejecting the relationship as a relevant factor, the "wrongful act" critics have eliminated an arguably core element of the tort and downplayed or denied the value of the continuing relationship (beyond its contract damages value) both to the plaintiff and to society. In Part III, I suggest that the tort's case law development reflects (as does the Restatement's formulation) a recognition of the importance and value of preserving ongoing relationships and that we would do better as a policy matter to recognize, value, and nurture ongoing relationships than to deny their importance.

119. Among other things, the perennial tort problem of deciding to whom a duty of "good faith" runs is absent in the two-party setting.

120. We can, of course, view the loss of the relationship as simply the quantum of damages for the defendant's wrongful act. See Dobbs, supra note 43, at 365 (stating that the most obvious case for imposing liability for interference is the case where the defendant commits acts which constitute a tort so that the interference becomes one item of damages, but not itself ground for action). That the tort has made the existence of a relationship an element of the claim itself is, I believe, a reflection of community values.

121. As developed below, a central postulate of many critics is that contract damages will make the injured plaintiff "whole," and therefore there is no need to assess tort damages against the outsider. As most with business experience will recognize, this assumption is sufficiently unrealistic as to be false. Cf. Lynn M. LoPucki, The Unsecured Creditor's Bargain, 80 Va. L. Rev. 1887, 1893 n.16 (1994) (asserting that economists derive conclusions based on unrealistic assumptions, and then attempt to transfer those conclusions from the world in which the model operates to the world in which we live). But see Wexler, supra note 6, at 279 ("Except for litigation expenses, ABC is as satisfied [with expectation damages] as it would be if X fully performed its obligations under the contract."). But as I argue below, even if we could make contract damages far more accurate in delivering "full compensation," there would remain policy reasons to condemn through the tort system defendants who disrupt ongoing relationships.
B. FORMAL CONTRACT LAW CRITIQUES: ELEVATING IDEALIZED CONTRACT DOCTRINE

A second line of criticism assaults the tort because courts find liability in some situations where contract law would not provide a remedy. This criticism puts formal contract law at the center of the analysis for purposes of corralling tort liability.

As discussed earlier, many cases extend protection to at-will and to unenforceable contracts, and some courts have affixed liability where there is no contract at all. The logical critique is that if the plaintiff's interest is not enforceable as a contract right against the promisor, then it should not form the foundation for the tort of interference with contract. This approach obviously elevates the legal status of the relationship as a relevant criterion of liability by drawing a sharp line between relationships that have crystallized into "enforceable contracts" and those that have not.

This criticism refuses to credit the value courts have recognized in relationships that have not crystallized into contracts. By putting contract law in the center, the critiques elevate an individualist perspective over one that may be more reflective of community. That contract law should dominate or preempt tort law is surely not self-evident.

122. Thus, recent commentators advocate limiting the tort to contracts that are not terminable at will, see Grothe, supra note 75, at 461 (arguing that a beginning point to analyze a tortious interference claim is determining whether an interest which should be protected exists); Gary Myers, The Differing Treatment of Efficiency and Competition in Antitrust and Tortious Interference Law, 77 MINN. L. REV. 1097, 1141 (1993) (claiming that tortious interference law should permit a competitor to interfere with at-will and avoidable contracts, unless the competitor employs means that are otherwise unlawful), and to contracts that are enforceable under contract law. Danforth, supra note 79, at 1515-17 (claiming that interference with prospective contracts does not threaten a societal interest in the formal integrity of contract, and should not be treated as a mere variant of interference with existing contracts); see also, Sales, supra note 6, at 148-49; cf. Perlman, supra note 6, at 91.

123. The "contract law" that the critics envision is, I believe, the individualist, supposedly predictable part contained in classical contract law, not the fuzzy amalgam that is modern contract.

124. Some might assert that, because contract law simply enforces voluntary agreements between and among individuals, it is value neutral and therefore should be preferred to tort law, which rests on public policy formulated by judges. I would urge, on the contrary, that contract law generally, and certainly classical contract law and critiques that use its individualist methodology, reflect individualist policies that are as value-loaded as any others. See generally Clare Dalton, An Essay in the Deconstruction of Contract Doctrine, 94
One reason for restricting the tort to enforceable contracts is the apparent belief\(^{125}\) that contract rules are more easily determined in advance and more easily administered in litigation.\(^{126}\) This reflects an idealized version of classical contract law embodied by offer, acceptance, consideration, and a readily determinable "moment" of contract formation. This ideal and the reality of business are often quite distant.\(^{127}\)

History's biggest interference-with-contract case was \textit{Texaco, Inc. v. Pennzoil Co.},\(^{128}\) and at its center was a legal question right out of a first-year contracts course. Texaco interrupted the developing Pennzoil-Getty relationship before "the contract" was formally closed; applicable New York law required a valid, enforceable contract between Getty and Pennzoil for interference liability.\(^{129}\) That pivotal prerequisite of New York tort liability—whether "a contract" had formed in the context of this complex negotiation (a contract, not a tort law, question)—went to a Texas jury. In this context one would need a fortune teller to reliably forecast the decision on contract formation by an unknown jury in an unknown jurisdiction months or years in advance. In this typical context, the predictive utility of contract law could be less than tort's more general standard of "wrongfulness."\(^{130}\)

\textbf{Yale L.J. 997 (1985).}

125. Reasons for restricting the tort to "enforceable contracts" vary. As I will discuss below, some analysts believe that economic efficiency should circumscribe the tort and that efficiency demands that the tort not apply to most cases outside the enforceable contract realm. \textit{See, e.g.}, Perlman, \textit{supra} note 6, at 91. Professor Epstein believes that "contract" is a species of "property," which the tort exists to protect. If there is no contract, there is no "property," and therefore there should be no tort. Epstein, \textit{supra} note 4, at 24; \textit{see also supra} note 72 and accompanying text.

126. One expression is that "[t]he more stable, predictable and principled remedies of contract, rather than the unprincipled and unpredictable doctrine of tort, should furnish the basis for defining the parameters of liability." Sales, \textit{supra} note 6, at 148-49.

127. Neoclassical contract doctrine, with its vision of an instant of contract formation, does not work well in the context of an evolving relationship where the parties have left the legal status of their relationship with one another ambiguous. This is one of the points made by Ian Macneil and others looking for a reconceptualization of contract law. Arguably, the tort cases recognizing liability for interrupting relationships that are not "contracts" reflect the fact that relationships develop; they do not burst into existence with the big bang of offer and acceptance.


129. \textit{Id.} at 788.

130. If the question that the lawyers focused on was "Would it be (or was it) wrong for Texaco to break up the emerging business relationship between
A second reason given for restricting the tort to fixed-term contracts is that business competition will be adversely affected if we do not.\footnote{See Perlman, supra note 6, at 93; cf. Epstein, supra note 4, at 21-22 (arguing that allowing any action against the third party for inducing contract termination, instead of breach, would place a major crimp in the operation of competitive market).} This reason is most easily seen as a corollary to the more basic proposition that the tort threatens "legitimate" business activity in all cases and requires scaling back across the board. We turn now to this "core" criticism.

C. CORE CRITICISM OF THE INTERFERENCE TORT

Vagueness in the standard for liability has prompted some commentators to reformulate the liability question in terms of the defendant's "wrongful" conduct. But this reformulation creates a serious difficulty. Once one accounts for the "bad conduct" cases (however defined), there remain cases such as \textit{Texaco, Inc. v. Pennzoil Co.} or even \textit{Lumley v. Gye} where all the defendant has done is knowingly interfered with another's preexisting contract. Under the \textit{Restatement} formulation, supported by nearly a century and a half of case law, it is "wrongful," without more,\footnote{KEETON ET AL., supra note 41, at 978.} to interfere with a contract involving others.\footnote{RESTATEMENT (SECOND) OF TORTS § 766 (1977).} These are "core" cases not explained by any tort or contract principle other than interference with contract. Provocative accounts have come from critics who have challenged these core interference situations, where the case for conduct-based liability is far less evident than in others.

1. The Law-and-Economics Critique

The core criticism comes primarily from an economic policy perspective on contract law. The economic criticism asserts that the tort of interference with contract conflicts in core cases with economic efficiency\footnote{Professor Dobbs bases his criticism not primarily on economic freedom but on the vagueness of the tort's contours and on the problems such vagueness fosters. Nonetheless, he found the conflict of the tort with efficient breach}—specifically, with the theory of "efficient competition."
breach”—and therefore must be either eliminated\textsuperscript{135} or circumscribed.\textsuperscript{136} To appreciate the apparently fundamental challenge this tort presents to the law-and-economics theory of efficient breach, we must briefly survey the efficient breach theory itself.

\textbf{a. Efficient Breach Theory}

We could probably trace the "efficient breach" idea to the now-famous descriptive statement by Holmes that "[t]he 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."\textsuperscript{137} In the 1970s it was recast into normative form by Richard Posner and others who use economic theory to fuel public policy.\textsuperscript{138} In its normative form, the idea is that if a party bound by contract finds a second offer for her performance favorable enough to allow her to pay her promisee damages on the first contract and still have value left over, the law should encourage her to breach the contract for economic efficiency's sake. Since the original promisor and the new promisee will be better off and the injured party will be made "whole," the resulting economic status quo will be better than what preceded it.\textsuperscript{139}

\textsuperscript{135} See, e.g., Perlman, supra note 6, at 128-29 (suggesting interference tort should not be applied to otherwise lawful acts).

\textsuperscript{136} See, e.g., BeVier, supra note 4, at 924-36 (arguing inducement tort should be refined); Epstein, supra note 4, at 21-24 (positing inducement tort only be applied to actionable breach of contract).

\textsuperscript{137} Holmes, supra note 67, at 462. Holmes was not the first to advance this proposition; it appears as early as the seventeenth century. In Bromage v. Gennings, 1 Rolle 368 (1617), Lord Coke complained about chancery courts awarding specific performance in contract cases. According to Holdsworth, Coke "contended that a decree for specific performance was always unjust to the defendant because 'it deprived him of his election either to pay damages or to fulfil his promise.'" I WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 461 (7th ed. 1956) (quoting Bromage).


\textsuperscript{139} Richard Posner distinguishes between Pareto superiority (no one is worse off and at least one person is better off) and the Kaldor-Hicks criterion (someone is better off by more than others are worse off). The difference is that
As a common example, suppose Buyer and Seller have a contract to exchange grain at a price of $90 in one month's time. At performance time, suppose the grain is worth $100 on the market, but, in the meantime, Seller has found another buyer who will pay $110 for the grain. If Seller substitutes the second buyer for the first, it can pay the first buyer $10 in expectation damages and still be ahead by $10. In a now-famous passage, Judge (then Professor) Posner supported expectation damages in this context by stating "if damages are limited to the loss of that profit, there will be an incentive to commit a breach. But there should be."

A central objective of the efficient breach analysis is that of moving resources to their highest value. Consequently, in the example above, it is supposedly "efficient" for the second buyer to get the grain because she values it more than the first buyer. If the first buyer ends up as well off following the breach and the breacher is better off having breached and resold, we have net economic gain. Because the pie has grown larger through this second transaction, Posner argues we ought to encourage it. The encouragement comes from instrumental policy makers who should fine-tune the contract damages system to provide the actor—here the promisor—with optimal incentives to be efficient. Contract damages, in this view, function primarily as a disincentive for the promisor rather than as compensation for the promisee.

The efficient breach analysis offers one explanation of expectation damages and has prompted much criticism in

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Pareto superiority would require the winners actually to compensate the losers, whereas Kaldor-Hicks does not. "The Kaldor-Hicks concept is also and suggestively called potential Pareto superiority: The winners could compensate the losers, whether or not they actually do." POSNER, supra note 138, at 14.

140. See, e.g., id. at 119 (working through a similar example). As Professor Macneil points out, the example is internally inconsistent because it assumes perfect information and perfect markets, and these assumptions conflict with a postulated buyer who will buy at a higher than market price. Ian R. Macneil, Efficient Breach of Contract: Circles in the Sky, 68 VA. L. REV. 947, 950-51 (1982).

141. POSNER, supra note 138, at 119.

In some quarters, the efficient breach idea is treated as an axiom in the broadside challenges to the tort of interference with contract: because the case law conflicts with efficient breach analysis, the case law must be in error.\textsuperscript{144}

b. Theory Versus Case Law

Commentators who take efficient breach as their benchmark urge that core interference holdings conflict with efficiency goals and therefore generate undesirable outcomes. Generally, they argue that tort liability in this context distorts the otherwise optimal incentives contract damages give to contracting parties, causing them to act more inefficiently than they would without the tort. The critics diverge, however, when they specify how the tort operates on actors' incentive systems and, therefore, what should be done. This split among critics is not unusual and underscores a major weakness in the contractarian enterprise.

The more obvious efficient breach assault maintains that the interference tort discourages otherwise efficient breaches.\textsuperscript{145} In this analysis, the prospect of tort liability distorts the third party's decision by creating a disincentive to bring better offers to the already committed promisor. Hence, the tort will block many lucrative deals that the promisor should substitute for her present commitment. According to this view, the tort is bad because it inefficiently discourages the economically optimum number of breaches.\textsuperscript{146} Put another way, there will not be

\textsuperscript{143} See, e.g., Daniel Friedmann, \textit{The Efficient Breach Fallacy}, 18 J. LEG. STUD. 1, 18-23 (1989); Linzer, supra note 7, at 131-38; see also Macneil, supra note 140, at 950-54. One critique that comes from the law-and-economics literature itself is that the efficient breach theory conflicts with the Coase Theorem, which asserts that in the absence of transaction costs, efficient outcomes will result no matter what rules are used. ROBERT SCOTT & DOUGLAS LESLIE, \textit{CONTRACT LAW AND THEORY} 90-95 (2d ed. 1993). Macneil made the powerful point early in the debate that the "breach first, talk later" regime of efficient breach may well carry far higher transaction costs than, for example, a regime of specific performance, which would require talking first. Macneil, supra note 140, at 154-60.

\textsuperscript{144} See Grothe, supra note ?, at 467-74; Perlman, supra note 6, at 128-29.

\textsuperscript{145} See Perlman, supra note 6, at 82-87.

\textsuperscript{146} Of course, in this context the tort directly deters only the third party, not the promisor, and only when the third party "induces" or "procures" the breach. See International Union United Auto., Aircraft and Agric. Implement Workers of Am. v. Russell, 556 U.S. 634, 639 (1958) (acknowledging inducement by threat); Imperial Ice Co. v. Rossier, 112 P.2d 631, 632 (Cal. 1941) (recognizing that an action will lie for inducing breach of contract by resorting to means
enough breaches; too many contracting parties will stay together.

A little less obvious but equally logical is the opposite critique: the tort is inefficient because it encourages too many breaches. Here, the argument runs, the prospect of tort liability alters the incentives operating on the original promisor. By adding another potential defendant if the contract falls apart, the tort causes the original promisor to surmise she might breach without paying any damages. This reduces her incentives not to breach, even where it is "inefficient" to do so. This view condemns the tort on efficiency grounds because there will be an inefficiently high number of breaches; too few contracting parties will stay together.

No one has performed the empirical study that would tell us what, if anything, the existence of the interference tort

in themselves unlawful); Allen v. Powell, 56 Cal. Rptr. 715, 718 (Cal. Ct. App. 1967) (noting that defendant must actively induce breach); Wolf v. Perry, 339 P.2d 679, 681 (N.M. 1959) (ruling that a third party will only be liable if she has knowledge of the breached contract); BeVier, supra note 4, at 926-36; Epstein, supra note 4, at 21-24.

Even if the committed promisor seeks out the third party, the prospect of tort liability probably will affect the negotiation. Any third party aware of the billion-dollar punitive damage award in Texaco will be circumspect about dealing with the promisor, who may have already committed its resources elsewhere by contract. See, e.g., Peter Waldman, Cautious Talks: Texaco-Pennzoil Case Makes Firms Careful About Merger Moves, WALL ST. J., Apr. 15, 1986, at A3 (describing reaction in the business community to Texaco); cf Perlman, supra note 6, at 78-79 (arguing third party should not be held liable if actions are otherwise lawful). If the parties ultimately reach agreement despite the possibility of tort liability, that risk will, theoretically, be reflected in the deal's pricing.

147. See Dowling, supra note 6, at 488.

148. It is unclear as an empirical matter whether the interference tort prompts anybody to do much of anything. Empirical studies suggest that the law has but marginal influence on the business behavior of business people and that other factors such as loss of business reputation are far more important. See generally Stewart Macaulay, Non-Contractual Relations in Business: A Preliminary Study, 28 AM. SOC. REV. 55 (1963) (pioneering the argument). In the bankruptcy area, empirical work has suggested that the law is not nearly as influential on the behavior of those subject to it as legal academics might wish. See generally THERESA A. SULLIVAN ET AL., AS WE FORGIVE OUR DEBTORS (1989) (discussing incentive in American bankruptcy law); Jean Braucher, Lawyers and Consumer Bankruptcy: One Code, Many Cultures, 67 AM. BANKR. L J. 501 (1993) (discussing different responses to bankruptcy law); Lynn M. LoPucki, A Systems Approach to Comparing U.S. and Canadian Reorganization of Financially Distressed Companies, 35 HARV. INT'L L.J. 267 (1994) (comparing bankruptcy law in the United States to bankruptcy law in Canada).
motivates contracting parties to do. One way or another, however, the critics urge that the tort produces inefficient results and therefore should yield to the efficient breach theory.

c. Case Law Versus Theory

Whatever the "correct" forecast for an actor's reaction to third-party tort liability, these "core" critics use the efficient breach theory as their point of departure. A different way to consider the conflict between the interference-with-contract case law and the efficient breach theory is to take the case law as a starting point and examine the efficient breach theory in light of it. If we start with the cases, a corresponding "core" attack would maintain that the existence of a long line of interference-with-contract cases "proves" that efficient breach theory is simply wrong. A more modest critique suggests the efficient breach theory is correct in theory but wrong as commentators apply it. This section will focus briefly on the problems implicit in the efficient breach theory, and then consider the theory itself in light of the interference tort.

In the efficient breach theory, damages payable under the contract system are central because they are thought to supply the promisor with the correct incentives in deciding whether to breach. In measuring the costs and benefits of the new offer, the breacher is said to require an incentive that will cause him to breach whenever he can make the promisee as well off and himself or the new buyer better off. In the simple example above, it was "efficient" for the promisor to breach and sell grain

149. As the split among these critics illustrates, the Achilles' heel in incentive-based analysis is the need for the critic to forecast people's behavioral response to changes in the law. The predictive dichotomy described in the text underscores that incentive-based criticism ultimately and critically rests on the experience of the commentator rather than something less subjective.

Do law professors have the training, experience, or wisdom to make predictions about human behavior? How does our aptitude for this critical job compare with that of lawyers, of judges, or of politicians? As if to underscore the point, Mr. Dowling, a lawyer, predicted a different dynamic than did the academics. Academic freedom may permit academics to be unbiased, but our academic insulation and our tendency to eschew empirical studies may seriously undermine our ability to predict actual human behavior.

Others have advanced comparable observations. Robin West powerfully made a similar point about economic rationality in her critical review of Richard Posner's application of economic analysis to sexual behavior. Robin West, Sex, Reason, and a Taste for the Absurd, 81 GEO. L.J. 2413, 2414-18 (1993).

to the second buyer because the second buyer valued it more than the first and, following the payment of expectation damages, the first buyer suffered no loss. If the first buyer is made as well off following the breach, and the breacher (at least) is better off having breached and resold, we have economic gain. The law, it is said, should encourage individuals within the legal system to create economic gain.

An obviously critical ingredient to the efficiency at the heart of the efficient breach theory is the premise that the remedy for breach of contract offers a complete substitute for the promisor's full performance. For unless the promisee is "indifferent" to the breach, we cannot say for sure that the situation after the breach is economically better than it was before. Thus, if efficient breach theory conflicts with the interference-with-contract case law, the contract remedies system may be the reason.

Many have observed that expectation damages, at least as they are administered by our courts, do not make the plaintiff as well off as full performance would have. Even if the promisor were to pay damages voluntarily, the promisee would probably expend time and energy to get the money. And courts almost always exclude from the realm of compensable contract damages the value of the promisee's disappointment, annoyance, even actual emotional distress. Beyond denying

151. See supra notes 140-41 and accompanying text (illustrating the efficient breach argument).
152. See FOSNER, supra note 138, at 119.
153. This is an implication of the Kaldor-Hicks Compensation Principle, "which posits that a benefit to one individual, even if it carries with it a loss to another, increases society's welfare so long as the benefited party is able to fully compensate the losing party and to remain better off than before." Linzer, supra note 7, at 114 (emphasis added).
154. See supra note 143 (citing critics of efficient breach analysis).
155. If someone has breached, it means that the promisee has not agreed to nonperformance. Under those circumstances, it seems unlikely as an empirical matter that the promisor will pay full expectation damages voluntarily.
156. To maintain that these items are de minimis and therefore to be assumed away is inconsistent with a major premise underlying much economic analysis, that individuals choose for themselves what they value and how much it is worth.
158. It is doubtful that a court would consider expenses, beyond attorneys' fees, incurred while attempting to collect damages from the promisor to be "incidental damages" under the Uniform Commercial Code (§ 2-715). The American rule suggests that the promisee may not collect attorney's fees, but
these losses which probably accompany most breaches,\textsuperscript{169} courts, following \textit{Hadley v. Baxendale}, have limited consequential damages resulting from a breach.\textsuperscript{160} In addition, the demands of proof within the litigation context will limit some of the plaintiff's damages even though the plaintiff may have suffered them.\textsuperscript{161} In short, in our system of expectation dam-

\textsuperscript{159} Beginning with the inadequacy of contract damages, some have urged wider enforcement of "penalty" clauses. They observe that \textit{Hadley} and similar restrictions on damages motivate promisors to set their remedies by agreement, which will reflect the "real" damages the parties envision from a breach of the contract. Cf. Charles J. Goetz & Robert E. Scott, \textit{Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach}, 77 COLUM. L. REV. 554, 556-58 (1977) (describing the operation of penalty provisions). From a different perspective, Professor Alan Schwartz suggests wider enforcement of liquidated damages clauses by using economic analysis to show that contracting parties do not prefer supracompensatory remedies. Alan Schwartz, \textit{The Myth that Promisees Prefer Supracompensatory Remedies: An Analysis of Contracting for Damage Measures}, 100 YALE L.J. 369, 395-403 (1990).


\textsuperscript{161} See, e.g., Anvil Mining Co. v. Humble, 153 U.S. 540, 549 (1894) (limiting breach of contract damages to reasonably certain profits); Western Union Tel. Co. v. Hall, 124 U.S. 444, 456-58 (1888) (limiting breach damages to actual losses); Fireside Marshmallow Co. v. Frank Quinlan Const. Co., 213 F.2d 16, 18-19 (8th Cir. 1952) (ruling that breach damages should not include speculative expected profits); Tull v. Gundersons, Inc., 709 P.2d 940, 943 (Colo. 1985) (refusing to award damages based on mere speculation or conjecture); Swartz v. Steele, 325 N.E.2d 910, 913-14 (Ohio Ct. App. 1974) (ruling that damages must be shown with certainty).
ages, the plaintiff will never be\textsuperscript{162} as well off following the breach as she would have been with full performance.\textsuperscript{163}

Overlapping and exacerbating the restrictions the contract system places on recovery of damages, the inevitability of transaction costs is another problem that undermines the efficient breach idea. If we count reimbursement of the promisee's attorneys' fees and related expenses of collection from an involuntary defendant as necessary to make her truly "indifferent" to the breach, the efficient breach theory runs into problems on its own terms. In a slightly different context, Arthur Leff suggested in the early 1970s that the promisee's legal expenses (which the promisee must bear in our system) would logically guarantee that the promisee would not be made whole following the breach.\textsuperscript{164} Leff suggested that in a world of rational maximizers, a debtor would never pay a debt voluntarily. For in such a hypothetical world devoid of considerations of reputation or long-term business prospects, the breacher could force the plaintiff to spend money to collect the debt, and thus the parties would settle the claim for something less than the amount owed. In the context of efficient breach, this would mean the parties would settle the claim for something less than the already inadequate expectation damages. Proponents have not refined the efficient breach paradigm to require the breacher, at the time of the breach, to visit the promisee and hand over expectation damages—in cash.

\textsuperscript{162} While "full compensation" is not impossible under the contract remedies system, the odds in any real case are so remote that the statement in the text can safely be treated as a working assumption.

\textsuperscript{163} A regime of specific performance would probably solve many of our contract remedies problems. See Linzer, supra note 7, 131-38 (advocating specific performance as breach of contract remedy); Schwartz, The Case for Specific Performance, 89 Yale L.J. 271, 278-96 (1979) (arguing specific performance is the best remedy for breach of contract). Indeed, specific performance is arguably more "efficient" than substitutional relief, see Macneil, supra note 140, at 154-60, but such a regime is inconsistent with the efficient breach hypothesis itself. Efficient breach seeks to give the promisor the unilateral freedom to choose a new deal over the current one; specific performance would bar that and force negotiation with the promisee. As many have suggested, absent transaction costs, the product would get to the person who valued it most under either rule. See Scougall & Leslie, supra note 143, at 94 (noting that both specific performance and efficient breach lend themselves to allocative efficiency); Ronald H. Coase, The Problem of Social Cost, 3 J.L. & Econ. 1, 15 (1960) (suggesting that products naturally tend to be allocated to those who value them most).

\textsuperscript{164} Arthur Leff, Injury, Ignorance, and Spite—The Dynamics of Coercive Collection, 80 Yale L.J. 1, 9 (1970).
No doubt in reaction to this unreal world devoid of transaction costs, and a developing understanding that transaction costs might be all that is important, writers have more recently begun to focus directly on transaction costs of various solutions to legal problems. In this context, Ian Macneil, and more recently Daniel Friedmann, have contended that transaction costs and the ripple effects of the breach are what really matter in an efficiency analysis and that a regime of breach-first probably produces higher transaction costs than does a regime of talk-first or renegotiate-first. Both have suggested that, in efficiency terms, a regime of specific performance—that is, no nonperformance without the promisee's permission—might be better because of lowered transaction costs.

165. Ronald Coase first advanced the proposition that with perfect information and perfect markets, the legal rule does not matter; the parties will bargain to an efficient result under any rule. Coase, supra note 163, at 15. From this proposition, it follows that lowering transaction costs is central to improving the efficiency of legal rules. See SCOTT & LESLIE, supra note 143, at 90-95 (demonstrating ways a party to a contract can negotiate around legal remedies and the most appropriate breach of contract rules).

166. See, e.g., Victor Goldberg, Price Adjustment in Long-Term Contracts, 1985 Wis. L. Rev. 527, 541 (discussing various costs associated with price adjustment dispute resolution); Masten, supra note 13 (applying transaction-cost reasoning to institutional design questions); Thomas Palay, 59 Relational Contracting, Transaction Cost Economics and the Governance of HMO's, TEMP. L.Q. 927, 949 (1986) (applying transaction cost theory to the process of private lawmaking); Oliver Williamson, Transaction Cost Economics: The Governance of Contractual Relations, 22 J.L. & ECON. 233, 234 (1979) (emphasizing the importance of transaction costs to the organization of economic activity).

167. Macneil, supra note 140, at 953.
168. Friedmann, supra note 143, at 6-7.
169. There seem to be two “transaction costs” schools. One follows Oliver Williamson, see authorities cited supra note 166, and focuses on methods of reducing distrust within relationships in order to reduce friction and therefore transaction costs. An excellent example of this is Palay, supra note 166 (studying contractual dispute resolution mechanisms within health maintenance organizations).

Very different from the “reduce distrust” approach is a “rational bargaining model” advanced by Professors Goetz, Scott, Leslie, and others. This model, adopting a technique long used by political philosophers, projects policy decisions from the choices that hypothetical, rational bargainers would make under various circumstances. Such a model is directly concerned with the transaction costs of bargaining and seeks to reduce them by supplying “default rules” that the hypothetical parties would select under given circumstances. These commentators suggest that we have a regime of expectation damages (and other contract rules) because rational contracting parties would write such rules into their deals if we didn’t have them. See SCOTT & LESLIE, supra note 143, at 94-95; BeVier, supra note 4, at 920-28 (using this analysis to support
To these points, one might add that efficient breach theory takes no account of the impact of a breach on third parties, and to be internally consistent, it should. The idea at the bottom of the efficient breach theory is the Kaldor-Hicks Compensation Principle, that is, the world has become a better place because someone is better off by more than others are worse off.\textsuperscript{170} Efficient breach, however, focuses only on the two parties to the contract and not on others who might be adversely affected by a breach.\textsuperscript{171} With many contracts, there are third parties who may lose if a contract is breached but who will have no redress through the legal system.\textsuperscript{172} If, for example, the contract is

\begin{itemize}
\item interference with contract in limited circumstances).
\end{itemize}

So appealing is this form of individualist contract analysis that it has spawned an entire literature of its own and even its own initials ("DRA" for "Default Rules Analysis"). See Feinman, \textit{supra} note 11, at 48-54 (reviewing the body of scholarship on DRA). See generally Symposium, Default Rules and Contractual Consent, 3 S.C. INTERDISC. L.J. 1-444 (1993). As a methodology, it suffers from many of the same weaknesses as its older sibling, efficient breach theory, particularly the central weakness of basing policy on law-professor predictions of human response to legal changes. See \textit{supra} note 149 (addressing the need to predict behavioral responses to changes in the law).

\textsuperscript{170} Linzer, \textit{supra} note 7, at 114 n.12 (quoting Nicholas Kaldor's principle); see also \textit{supra} note 139 (comparing the Kaldor-Hicks concept to pareto superiority).

\textsuperscript{171} The "rational bargaining model," \textit{supra} note 169, also typically limits its focus to the parties to the transaction and others that will be similarly situated. For a contemporary example of the two-party focus within the literature, see generally Schwartz, \textit{supra} note 159 (focusing only on promisor/promisee bargaining).

\textsuperscript{172} This is, of course, the logical implication of the notion of strict privity. Probably the most substantial leap in recognizing third parties affected by others' contracts came in 1859 when the New York Court of Appeals enshrined the third-party beneficiary rule in Lawrence v. Fox, 20 N.Y. 268 (1859). Third-party beneficiary law usually centers on identifying which third parties \textit{ought} to have rights under others' contracts. See generally Anthony Jon Waters, \textit{The Property in the Promise: A Study of the Third Party Beneficiary Rule}, 98 HARV. L. REV. 1111 (1985).

An analogous situation involving no contract but, instead, a longstanding, economically important set of relationships is the shut-down or relocation of a large business with which the local economy has become interdependent. The adverse reaction of many citizens to such decisions is grounded in the third-party effects the "private" decision has on the local economy. The plant relocation decision will take account of the costs and benefits to the firm, including transaction costs of the firm's move and the gains that will result from the move. There will be, however, little accounting for the actual costs borne by employees when they lose their jobs and have to seek others, perhaps through geographical relocation. And while adverse consequences of the move on the "old" community might be offset by positive growth in the "new" community, neither these effects nor the actual costs of the transition from "old"
one to supply a manufacturer with raw materials, and breach causes layoffs of the manufacturer's at-will employees, the employees will suffer losses that they are unlikely to recover through the contract system. Yet unless we can say the total gains from the breach exceed the total losses, we cannot say anything one way or the other about the efficiency of this breach.

Together, these observations make a convincing case that, given the damages and litigation systems we have, the essential premise for the efficient breach theory fails: our costly litigation and damage systems ensure that expectation damages will not make the promisee as well off as performance would have and will limit the extent to which we can compensate all who might, in fact, lose by a breach of contract.

d. Reconciliation

One way to reconcile the efficient breach theory with the tort cases is to take the interference-with-contract case law as a given and assume that the common law is using it to insert into the legal system the incentives to make efficient breach work. The tort, in this view, augments contract remedies to "new" will figure in the calculated costs and benefits of the business's decision to move.

Our political system has obviously recognized these concerns in decisions about military base closings, and the courts have been pressed to recognize them in some instances. For example, when United States Steel closed its Youngstown, Ohio operation, its workers were obviously affected. They managed, at least temporarily, to force the company to consider their interests. See generally Joseph W. Singer, The Reliance Interest in Property, 40 STAN. L. REV. 614 (1988) (discussing the obligations the company owed the employees upon closing the plant).

173. A successful employee claim that she was a third-party beneficiary of an ordinary supply contract is unlikely. A court would probably hold that she was not an "intended beneficiary" of the contract. Cf. In re Fairchild Indus., Inc. & GMF Invs., Inc., 768 F. Supp. 1528, 1534 (N.D. Fla. 1990) (finding that to be a third-party beneficiary, contracting parties must intend to confer benefit and benefit must be a material part of the contract); Martinez v. Socoma Cos., Inc., 521 P.2d 841, 845 (Cal. 1974) (holding that third-party beneficiaries were not entitled to remedies because they were only incidental).

174. See infra text accompanying note 256 (demonstrating the uncompensated losses third-parties may suffer when a contract is broken).

175. This is the apparent approach often taken by Richard Posner, who frequently finds that the law, whatever it may be, is efficient. See generally Jack Balkin, Too Good to Be True: The Positive Economic Theory of Law, 87 COLUM. L. REV. 1447 (reviewing WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987)); Arthur A. Leff, Economic
that, by themselves, do not supply the "correct" incentives to govern the breach decision.\footnote{\textit{\textit{Analysis of Law: Some Realism About Nominalism,}} 60 VA. L. REV. 451 (1974).} But this explanation fails to satisfy. First, this tort-fix to the contract-remedies system operates very partially and sporadically. Second, why should the law modify incentives in such an extremely indirect way?\footnote{In fact, writing before the efficient breach critics of this tort arrived on the scene, Judge Posner explained why the tort of interference with contract was efficient, notwithstanding the efficient breach theory. Richard A. Posner \\& William M. Landes, \textit{Joint and Multiple Tortfeasors: An Economic Analysis,} 9 J. LEGAL STUD. 517, 553-54; \textit{see also supra} note 149 (questioning the academic's ability to predict human behavior).}

i. Partial Reconciliation

Professor Lillian BeVier articulated most directly the fundamental conflict between the tort and efficient breach theory: "Can efficient breach theory accommodate the induce-ment tort or is there an irreducible inconsistency?\footnote{176. In addition, by reducing the number of temptations to breach a fixed contract, the tort may reduce the need to deploy an inadequate damages system in the first place and thereby reduce the incidence of loss to all losers.} She and other critics have reconciled the tort with the efficient breach theory in those situations where they believe it supplements deficiencies in contract remedies.\footnote{177. If an actor within the legal system (a judge, for example) consciously wanted to affect the incentives operating on the promisor's decision to breach, why would she take the roundabout and partial route of applying a tort incentive to a third party instead of to the promisor? If we wanted to increase a promisor's incentives not to breach, it would be considerably more direct and coherent simply to require the promisor to pay more if she breaches a contract. Relaxing some of the restrictions on contract damages or permitting punitive damages in some contract cases are two direct ways to alter the promisor's incentives concerning breach.} In so doing, they have focused on a group of interference cases most pertinent for discussing efficient breach theory: those in which the third party induces a breach in order to get the performance for herself.\footnote{178. BeVier, \textit{supra} note 4, at 897.}
The particular cases on which these critics focus are, indeed, strong cases for legal redress, whatever the theory of justification. Situations where the inducer obtains the plaintiff's performance contain a strong restitutionary allure—the third party seems to have gotten for herself something that "belonged" in some sense to the promisee. The facts in such cases work upon courts to return that which was "taken" to the plaintiff. Lumley v. Gye and many interference cases possess this restitutionary attraction; were it not for the interference tort, the law of restitution might well have developed a remedy in these cases.

Critics who have partially reconciled the tort with the efficient breach theory have found a subgroup of these restitutionary-fact cases that is consistent with the theory. Professor BeVier, for example, argued that the tort made sense in those situations where she found contract damages ordinarily inadequate—cases she labeled "returns for information" and "relational" cases. In the former, the promisee has invested resources into the relationship that she will not recoup through contract damages; the "relational cases" include employ-

maximizer, and restitutionary overtones are missing. Smith v. Ford Motor Co., 221 S.E.2d 282 (N.C. 1976) and Plessinger v. Castlemann & Haskell, 838 F. Supp. 448 (N.D. Cal. 1993), are cases in which the defendant did not get the promisor's performance. One could, as in most situations, assert that economic considerations motivated the defendants' behavior in these cases despite the lack of a direct "payoff" for inducing the breach. But we really do not know the prevalence of either kind of claim because the important data—claims asserted and recognized as valid (and to what extent)—are not collected.

181. Because the case against the interferer and the case against the contract breacher are not formally interrelated, the plaintiff could enjoin the promisor's performance for the interferer and get damages from the interferer. This happened in Lumley v. Gye and its contemporary, Lumley v. Wagner. See supra note 4 and accompanying text. If the plaintiff were to sue both the breacher and the interferer for damages, to the extent the damages claimed were for the same injury evaluated the same way, it seems likely that the plaintiff would get only one recovery. I have found no case in which the collateral source rule or an equivalent has been invoked in an interference case.

182. See Fuller and Perdue, supra note 4, at 56 (discussing restitution's power).


184. A strong restitutionary "pull" has also been present in another classical three-party contract area, the law of third-party beneficiaries. See Waters, supra note 172, at 1206-08.

185. To the same effect is Professor Partlett's thrust. Partlett, supra note 6, at 795-806.

186. BeVier, supra note 4, at 899-908. These are contracts that "involve the acquisition or production by Promisee of contract-specific information" and in
ment, agency, and distributorship contracts. In both kinds of cases, she believes that the tort usefully supplies incentives to better motivate the breach decision.

In both classes of cases Professor BeVier defines, few would argue that contract damages will put the promisee into a position equivalent to full performance. Selecting these cases as supportable, however, leaves the efficient breach theory in conflict with the remaining cases; and it involves the additional, difficult job of sorting claims into or out of these categories. Current tort doctrine is far less complicated.

Interference doctrine, as articulated by the Restatement, applies to all existing contracts and does not require the defendant to obtain for herself the performance originally promised to the plaintiff. The conventional doctrine thus which the "yield from such a contract-specific investment is inextricably dependent on performance of the precise contract in issue, as to which there are accordingly no minimally acceptable substitute performances." Id. at 899. Professor BeVier illustrates her definition with a contract to purchase controlling shares of a company or a contract by the seller not to compete in connection with the sale of the business. Id.

187. Id. at 908.
188. Id. at 916-26. "Inducement liability is the default rule that most parties would choose in returns-to-information and relational settings." Id. at 929.
189. Damage limitations, see supra text beginning at page 1143, and inevitable transaction costs, see supra text beginning at page 1145, will limit expectation damages for victims of breach. It is particularly easy to see that in Professor BeVier's two classes of cases.
190. Professor BeVier maintained that "where there are market substitutes for Promisor's performance, the prospect of inducement liability may systematically deter efficient behavior by the contracting parties and thus impede the flow of resources to higher valuing users." BeVier, supra note 4, at 898.
191. Professor BeVier's reformulation of the problem focuses directly on the "sorting" question, a question of transaction costs:

Because the inducement tort is overbroad, then, the inducement puzzle must be reformulated. The question it raises is whether the systematic costs of its actual or potential inappropriate application exceed the systematic benefits it produces in returns-to-information and relational settings.

Id. at 931.
192. See the seven factors outlined by § 767 of the Restatement at supra note 52. Plessinger involved age discrimination by a nonemployer. See supra note 49 (discussing the facts and issues of the case). Richette v. Solomon, 187 A.2d 910 (Pa. 1963), involved a defendant's direct contact with the plaintiff lawyer's client. Neither case is easily viewed as one in which the defendant obtained for itself the performance promised to the plaintiff. And if these are, instead, "wrongful act" cases, we confront the difficulty of determining precisely why these acts are "wrongful." Unless we limit "wrongful" to legislatively defined
goes much further than would critics like Professor BeVier in condemning defendants that knowingly interfere with contracts. The Restatement doctrine would readily yield a finding of tort liability where a defendant induced a promisor to breach a fungible goods contract with the plaintiff and to sell to him instead.\textsuperscript{193} It would hold the defendant liable for inducing the promisor to breach his contract to sell grain that was worth $100 to plaintiff at a price of $90 and to sell it to defendant at $110 instead. This is the paradigmatic case where the supposedly "efficient" response to the second buyer's offer is a breach of the first contract.\textsuperscript{194} Tort liability on these facts is, indeed, difficult to reconcile with efficient breach theory.\textsuperscript{195}

ii. Full Reconciliation

The interference cases seem to clash with the efficient breach theory in fungible goods cases \textit{if} we assume 1) that contract damages are about motivating promisors and do so in fact, and 2) that the contract system delivers enough in those cases to make the promisee "indifferent" to the breach. Passing over the assumption that damages aim to motivate people and in fact do so,\textsuperscript{196} the proposition that contract damages make a

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  \item activity, the problem of judicial discretion in sorting the cases reemerges. Of course, since no legislature apparently defined the activities involved as "wrongful," critics might argue that the cases were wrongly decided.
  \item 193. Phil Crowley Steel Corp. v. Sharon Steel Corp., 782 F.2d 781 (8th Cir. 1986).
  \item 194. POSNER, \textit{supra} note 138, at 119.
  \item 195. See \textit{supra} text accompanying notes 134-144 (discussing the efficient breach theory criticisms of the tort).
  \item 196. The proposition that contract damages are \textit{about} promisor incentives is certainly open to question. While the efficient breach theory seems dominant today in explaining our system of expectation damages, it is by no means the only theory. In their famous article, Fuller and Perdue advanced the proposition (among others) that expectation damages are a surrogate for fully compensatory reliance damages (which would include lost opportunities). Their focus was on compensating the promisee, not motivating the promisor, and is much more in keeping with what we think we are doing when we make an award of damages. See Fuller & Perdue, \textit{supra} note 4, at 57-58 (discussing factors to form the basis of reliance damages).
  \item Moreover, the proposition that the chance of paying contract damages actually induces behavior is open to question. For at least 60 years scholars have recognized that contract law occupies but a small part of the business landscape and that business reputation, the prospect of repeat business, and similar considerations play at least as large a role among the incentives that motivate business people as does contract law. \textit{Cf.} Karl N. Llewellyn, \textit{What Price Contract?—An Essay in Perspective}, 40 \textit{Yale L.J.} 704, 713 (1931); Stewart
promisee "indifferent" is untrue enough to be called "false," even in a fungible goods setting. The suggestion that people in business are (or should be) "indifferent" as between performance and breach-plus-expectation-damages would surprise many who work in or around business. Without substantial empirical support, I will assert that in their contracting arrangements, business promisees are simply not indifferent as between receiving performance on the one hand and receiving no performance plus today's expectation damages on the other. Moreover, in most cases, a promisor would probably not ordinarily breach if simply offered a better deal for the same performance.

That there are not many reported interference cases in the fungible goods setting does not establish that contract remedies deliver "indifference" to the promisees. In fact, the absence of reported cases tells us nothing as an empirical matter except that the parties did not litigate hard enough to yield a reported decision. The absence of reported decisions does not establish that promisees could find market substitutes, and their


But whatever (if anything) contract law may mean as a force to motivate business people, it seems clear that its remedies do not deliver sufficient relief to meet the requirements that efficient breach theory (which assumes that contract law is a motivator) holds for it.

197. See supra note 121.
198. Even if the market price at delivery and the contract price are the same—and therefore there would be no market differential damages—the promisee would still find inconvenience and dislocation in having to find an alternative source on short notice. This is not "indifference" in an economic sense.
199. I have found no business person who, when posed with a simple efficient breach hypothetical, has expressed "indifference" as between performance and damages calculated under our present system. In my judgment, the point is so obvious as to be scarcely worth an empirical study. Nobody would fund it.

No one who has predicated his or her analysis on efficient breach has supported the "indifference assertion" with empirical data.

200. Cf. Weintraub, supra note 196, at 19 (surveying businesses and suggesting that when the current contract becomes unsatisfactory with respect to price, a party will often approach the other side for a modification).
201. Professor BeVier, who maintained that the tort doctrine was overbroad in extending to "market substitute" cases, cited only one case finding liability in such a situation and no case rejecting it. BeVier, supra note 4, at 933 n.193 (citing Phil Crowley Steel Corp. v. Sharon Steel Corp., 782 F.2d 781 (8th Cir. 1986)).
finding market substitutes would not, in the real world, establish "indifference." Indeed, the absence of reported cases in the fungible goods context could even mean that third-party liability was so clear (given current tort doctrine) that it wasn't worth litigating the liability issue and the parties settled or the defendant capitulated.\textsuperscript{202} Or the absence of reported cases on the liability question could simply mean that litigation wasn't worth the time and trouble when there was further business to transact.\textsuperscript{203}

As an empirical matter, the assumption that contract damages deliver "indifference" in any case is likely false; certainly neither an inference from the efficient breach theory nor the lack of cases establishes the proposition. Common experience suggests the opposite.

If, therefore, we start with an efficient breach hypothesis that the interference tort is augmenting a faulty contract motivational system, then the tort may not be "overbroad"\textsuperscript{204} but may be signaling a faulty contract motivational system in all cases, including fungible goods cases. If contract damages and the interference tort are best understood as parts of a system of

\textsuperscript{202} The more relevant data—claims made by promisees against third parties and disposed of one way or another—are not available in a law library. \textit{Cf.} Weintraub, \textit{supra} note 196, at 3 ("published court opinions are likely to be insufficient guides" in determining actual business litigation practice).

\textsuperscript{203} Empirical work like Professor Weintraub's calls into question the entire enterprise of prescribing contract remedies rules without studying the actual behavior of the persons who will be subject to the rules. 

[L]itigation rarely follows a request to be relieved of contractual commitments. When asked why suits were not more common, the vice president of a company that produced construction materials said that those he did business with were "good old boys" and "you just can't run a business that way." The "materials controller" for a manufacturing company employing 1,100 persons said that in his experience only one suit was ever brought against a supplier, and that suit was settled before trial. The reasons given for not suing when suppliers default were that the firm only dealt with companies that had good reputations and that the cost of cover was never enough over contract price to justify the expense. The executive in charge of procurement of a nationally-known manufacturer said that the company's contracts contained "back billing" provisions under which the cost of items accepted was increased when an order was partially canceled. \textit{Id.} at 20 n.60.

\textsuperscript{204} Professor BeVier comes to the conclusion that the tort is overbroad in extending to fungible goods cases. With respect to "returns-to-information" and "relational" cases, she says that rational bargainers would agree to inducement liability because it would create "appropriate investment incentives" that contract damages do not supply. BeVier, \textit{supra} note 4, at 929.
incentives, the natural question is, “What's wrong with the contract damage system, and why fix it with the interference tort?” As Dean Perlman has observed, “To the extent that undercompensation interferes with the objectives of contract doctrine, a reform applicable to all breaches seems a more appropriate response.”

Having come this far, we will briefly consider the dissonance between the contract remedies system and the assumption of “indifference” that drives efficient breach theory. Doing so will expose what an efficient breach theorist really asserts when advocating new restraints on tort law in the name of efficiency.

2. The Limits of Logic and Empirical Assertion: Efficient Breach and Interference-Tort Implications for Contract Remedies

Because some critics cannot fully reconcile the efficient breach theory with nearly 150 years of case law, they have variously suggested limiting or eliminating the core Lumley principle. A different way to approach reconciliation is through the contract damages system. Because efficient breach theory is critically dependent upon (and the clash with this tort emerges from) the system of damages now in place, we can effect reconciliation of the broad tort case law and efficient breach theory by adjusting the contract damage rules to supply directly what the tort may supply indirectly. If we hypothesize that contract remedies should make the promisee indifferent to breach (and that they can), and that the interference tort signals that they do not, then an obvious final step in the efficient breach analysis is to consider how contract remedies might be brought closer to the “full compensation” principle at the heart of the efficient breach theory. What “reform[s] applicable to all breaches” could substitute for the efficiency-adjusting work that the tort of interference with contract may now perform?

The discussion should make apparent how much important

205. Perlman, supra note 6, at 89.
206. See supra note 196 and accompanying text (criticizing the assumption that contract remedies play a role in motivating contracting parties' behavior).
207. Compare the implicit analysis of the critics, that the contract remedies system should make parties indifferent to breach, that it does, and therefore, that the tort cases are wrong.
208. Perlman, supra note 6, at 89.
empirical information we need in order to develop an adequate replacement for the tort's "incentive supplement." But in the process it will also illustrate that the critics' solution—circuitrse or eliminate the Lumley principle—rests implicitly on the same quantity of unknown empirical information. Thus, while this extension of the efficient breach analysis might frame some shortcomings in contract remedies that require attention, my main purpose is to show the empirical underpinnings of an efficient breach critique that advocates a reduction in tort liability. In extending the analysis from where others more friendly to the efficient breach theory leave off, I hope to add to the efforts of others who have tried, unsuccessfully, to bury the theory once and for all.209

a. "Uncertain" Damages: The Empirical Vacuum

Apart from the transaction costs of recovering expectation damages from an unwilling promisor, a promisee will not be indifferent to a breach because, in the process, she has sustained the inconvenience, annoyance, delay, and disruption of routine that accompany any nonconsensual breach. But a party's odds of forecasting such damages in advance are very low, and a finder-of-fact's chance of accurately quantifying such damages seems very low as well. The contract system's formal limitations on proving such damages are indeed functional: they rest on the need for risk assessment and on limiting jury discretion.210

209. The two most direct attacks are Macneil, supra note 140, at 949-50 and Friedmann, supra note 143, at 2-13.

210. The requirement that damages be proved with "reasonable certainty" is often asserted to foreclose these damages within the contract system. See generally Farnsworth, supra note 77, § 12.15 (discussing uncertainty as a limit on contract damages). Many of these kinds of damage requests have met with skeptical courts in the tort system, too. Doubts about whether the particular plaintiff has actually suffered this kind of injury, and a more general difficulty with converting these injuries into money damages, has prompted skepticism about these damages across the litigation system. There may also be an unstated empirical assumption that such injuries simply do not exist in most cases. See, e.g., Browning v. Norton, 504 S.W.2d 713, 714 (Ky. Ct. App. 1974). My own intuition is that most plaintiffs who are victims of either tort or contract breach suffer these damages to some extent or another.

There are, to be sure, real problems with case-to-case fairness if juries have discretion to award damages as they see fit for these kinds of injuries, and it is difficult to articulate an analytical standard for constraining jury discretion. But if, as an empirical matter, such damages typically accompany a violation of rights, it is as wrong to deny them in all cases as it is to give juries discretion to award them. A statutory provision would seem to have promise in this
But if we could develop rules that permitted such damages and made them quantifiable at the time of contracting and at trial, we could improve the incentive to efficient breach without the attendant risk-assessment and proof problems.

Much of the difficulty in forecasting and quantifying such damages stems from common-law contract's use of vague categories (such as "emotional distress") and case-by-case evaluation. But vague categories and case-by-case assessment are not inevitable. 211 The Uniform Commercial Code, which governs most business contracts, demonstrates that drafters and legislatures need not use soft-edged constructs in supplying rules for contracting parties. Instead of requiring a writing for "large" or "significant" contracts, for instance, the Code's current statute of frauds specifies a $500 cutoff. 212 Closer to the remedial context.

211. A useful analogy is the differing treatment that the United States and Great Britain give to wrongful-death actions. Our typical statutory solution to the problem is to award the statutorily defined beneficiaries the net amount that the deceased would have in her estate at her death. For young decedents, this requires of the trier of fact extraordinary imagination and prescience. But more importantly, the approach starkly introduces race and class stereotypes into the mix. As an empirical matter, plaintiff-beneficiaries of a poor decedent are likely to get less in a wrongful-death action than their wealthy counterparts. The awards probably vary as well by race. See generally Jane Goodman, et al., Money, Sex, and Death: Gender Bias in Wrongful Death Damage Awards, 25 LAW & Soc'Y REV. 263 (1991) (citing empirical studies). And while some would no doubt justify the American results by recourse to probabilities, it is surely a debatable policy question whether we should monetize the injury to others brought about by the death of a loved one by looking at the hypothetical estate a decedent would have accumulated at the end of her life expectancy.

Great Britain follows a completely different approach by awarding a flat, statutory sum (less than $10,000) for wrongful death in cases where the plaintiff was not a dependent of the decedent. Administration of Justice Act, 1982, ch. 53, § 3 (Eng.). See generally P.S. Atiyah, Tort Law and the Alternatives: Some Anglo-American Comparisons, 1987 DUKE L.J. 1002 (discussing distinctions between the British and American tort systems). The English approach solves both the uncertainty and the bias problems of the American method. And if damages for wrongful death are (or should really be) about psychic loss and emotional distress, a flat sum is recognition that they are unquantifiable, yet real.


At this writing, a draft revision of U.C.C. § 2-201 would abolish the statute
situation here is the Code section permitting a seller to retain $500 (or ten percent of the contract price) from a defaulting buyer’s down payment. A provision fixing damages that does not require elaborate prediction at the time of contracting or evidentiary assessment later at trial. Federal statutes often establish statutory damages for situations where we might expect harm but find it difficult to quantify. Such damages are, no doubt, “off” most of the time; but if the interference tort is, in fact, signaling a systemic inadequacy in contract damages, it might be worth considering a statutory “indifference supplement.”

There are many problems with creating a statutory substitute for the “indifference supplement” that the tort of interference with contract may now provide in “nonwrongful act” cases. Would we invoke the rule only in those cases where ordinary contract damages are most inadequate? If so, how might we adequately define those cases? Or would we apply it across the board, leaving the job of filtering out some cases to the burdens of litigation or to the parties’ contrary agreement on remedies? Should the supplement vary with the value of the exchange, or are all promisees equally burdened in now-unrecoverable ways by contract breach? These are empirical questions to which, ideally, one would seek answers prior to making policy. They reveal the extraordinary amount we do not know about the now-unquantifiable harm that likely accompanies every breach of contract. And without much more information, a policy maker attempting to fine-tune the existing contract damages system would rightly be reluctant to act for fear of creating less efficiency rather than more.

Less obviously, a recommendation based on efficient breach that we either eliminate the interference tort or reduce its scope

of frauds for contracts for the sale of goods.

213. U.C.C. § 2-718.
214. This U.C.C. provision applies, of course, only in goods situations and only where the buyer has made a down payment.

A proposed revision to Article 2 would eliminate § 2-718(2)(b) but continue to provide that restitution is subject to offset of enforceable liquidated damages. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, JULY 25-AUG. 5, 1994, DISCUSSION DRAFT, UNIFORM COMMERCIAL CODE REVISED ARTICLE 2, SALES, § 2-718(2). No reason is given for this particular change.

215. Cf. text beginning at supra note 182 and BeVier, supra note 4, at 909 (discussing examples of cases in which ordinary damages would be inadequate).
216. The UCC provision does not show a history of empirical work preceding its enactment in order to arrive at the 10% or $500 cutoff figures.
rests on comparable—and unknown—empirical facts. And it presents the same danger to preexisting efficiency. If, as we have assumed, the tort may contribute to efficiency by supplementing the contract remedies system, limiting or eliminating the tort might yield a drop in system efficiency. If, as we assumed at the outset, the tort must be contributing to efficiency, how much efficiency do we lose if we reduce tort liability? How many promisors or promisees are aware of and affected by the existence of the tort? Are those who are affected prompted to more efficient or less efficient action?217 And if the tort is overbroad, how should we define the appropriate scope for the tort so that the transaction costs of sorting cases do not exceed the costs associated with overbreadth?218

The difficulties in assessing the empirical status quo and in predicting contracting parties’ reactions to rule changes only seem more difficult when we attempt to affirmatively change the present state of public policy. The fact is, we simply don’t know whether a more efficient system would result from some positive change in the contract damages system any more than we know whether a more efficient regime would result from dismantling the complex tort of interference with contract. Ultimately, the recommendation to dismantle the tort rests not on true “efficiency” but on the belief that relegating the problem to an idealized “free market”219 is ultimately better than entrusting it to government officials and the judicial process.220 This trust in the “free market” biases the analysis; this becomes

217. See supra note 149.
218. Cf. BeVier, supra note 4, at 930 (discussing the systemic costs of overbread rules).
219. Lumley’s age underscores the fact that the world of “freedom of contract” that underpins much contemporary contracts discourse existed only in the imagination. Lumley antedated Holmes, Williston, and classical contract doctrine, or (at best) was contemporary with its development.
220. This seems most evident in the work of Professor BeVier on the subject:
To attribute the existence of these [excessive] costs solely or even primarily to the inducement tort’s overbreadth, however, would be a mistake. They are instead more appropriately understood as a function of the profound difficulty of a much more inclusive agenda that courts have set for themselves, namely, that of policing the overall fairness of the competitive process. Having as yet discerned no well-defined criteria for evaluating the fairness of competitive behavior, performing their self-appointed task would produce uncertainty and error costs even if courts did not have a potentially over-inclusive inducement tort as an enforcement mechanism.
BeVier, supra note 4, at 935-36.
apparent when we pursue the implications of efficient breach in the real world of transaction costs.

b. **Transaction Costs and Uncertainty: The Power of Economic Incentives in a Real World**

Transaction costs in breach-of-contract cases are the costs that an injured party must sustain in order to get expectation damages from the other side. Under the American Rule, each side pays her own lawyer. That means the injured party will get expectation damages minus her attorneys’ fees, and (as many in business know) in small cases this would be a negative number. The logic of the efficient breach theory requires “indifference” on the part of the nonbreaching party. Logically, this would require that the breacher pay the nonbreaching party her attorneys’ fees as part of the recovery.

Recognizing that transaction costs must be considered is recognizing that uncertainty will accompany many decisions to walk away from a relationship. When that uncertainty is factored into the efficient breach theory, it uncovers a strong structural bias that virtually guarantees that, as currently formulated, the theory will produce decisions unlikely to be “efficient” except by chance. If we were to follow the logic of efficient breach and award attorneys’ fees to the injured party, the preexisting bias would simply increase. The older literature on the costs of litigation is useful in uncovering these flaws.

Many years ago, Arthur Leff pointed out that the transaction costs involved in collection were not evenly distributed between plaintiffs and defendants but, rather, varied immensely depending on whether the party was a consumer or a business.\(^2\)\(^2\) Businesses have an advantage of mass production in claims processing, and their legal costs of collection make up a proportionately smaller part of their cash flow than do legal costs for typical consumers. Moreover, businesses can spread and pass on their legal costs by including them in the price of what they sell, thereby escaping much of the sting in any event.\(^2\)\(^2\)\(^2\)

Leff suggested that this difference in likely transaction costs


\(^2\)\(^2\)\(^2\) Obviously, too many passed-through legal costs, relative to competitors, could place a business’s product at a competitive disadvantage. Conversely, reducing legal costs will have a positive but indirect effect on a business’s bottom line.
gave businesses a significant advantage when dealing with consumers because the litigation process "hurt" consumers more than it did businesses. In a similar vein, Professor Mark Galanter identified at least nine ways in which "repeat players" (like businesses) in the litigation process obtain strategic advantage over "one shotters" (like consumers). These disparities surely have an effect on the amount of "incentive" that a given quantity of transaction costs will provide to those who make decisions.

Efficient breach, as usually applied to generate policy positions, takes no account of transaction costs but, instead, projects a fully informed would-be breacher assessing the quality of a competing offer against damages that will make the promisee "indifferent" to the breach. Embedded in the theory is the assumption that a contract for the same performance with a competitor will be a breach and that all parties will know that. In the real world, things are not nearly so predictable.

In many cases, the decision to walk away from a relationship will carry uncertainty about whether the exit will later be held to be a breach of contract or not. The promisor may believe that a contract had not yet formed, or that it is subject to defenses, or that the other party breached first. If we insert any uncertainty into the efficient breach paradigm, we get systematic distortion of the breach decision depending on the nature of the promisor.

Consider as an extreme example a transaction in which Business and Consumer have negotiated something, but it is unclear to both whether walking away from the deal would be a breach of contract. Suppose each side computes the other's expectation damages (if there were a contract breach) to be $10,000 and its own attorneys' fees to be $4,000. Enter Competi-

223. Leff, supra note 164, at 19-24.
224. These include the ability of businesses to plan through drafting the contract, their ability to enjoy economies of scale, to strategically maximize gain over many cases, to litigate for the rules themselves, and other similar advantages. Id. Repeat players included not only businesses in contests with consumers but also prosecutors, finance companies, landlords, and tax and municipal authorities. Id. at 107. See Mark Galanter, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, 9 LAW & SOC'Y REV. 95, 98-103 (1974).
tor with a competing offer. If we assumed that both sides were certain that walking away from the contract would be a breach, each would demand enough from Competitor to pay the $10,000 to their first promisee and have something left over. Transaction costs would not be a factor.\textsuperscript{226}

If we reinsert uncertainty into the situation, however, these two parties will act differently when presented with Competitor’s offer. Consumer’s risk of being sued and sustaining her own $4,000 lawyer bill will cause her to be far more conservative than Business in deciding whether or not to walk away. That $4,000 risk (a hefty down payment on a new car, the cost of a vacation, or a deposit on college tuition) will prompt her to demand more of Competitor and, therefore, to walk away far less often under otherwise comparable circumstances than if the $4,000 meant the same to her budget (or assets or cash flow) as it does to Business.

From the opposite perspective, Business will be more prone to be aggressive about the decision whether to breach. Its attorneys’ fees do not represent as large a portion of its cash flow and, in any event, they could temporarily be passed on to others. Moreover, Business will know that Consumer's lawyer costs of pursuing Business for breach make it unlikely that Consumer will actually seek redress. This will all mean that, in deciding whether or not to walk away when the legal question of “breach” is uncertain, Business will walk away far sooner than will Consumer.

What is important is that the injury to the other contracting party, and the odds that walking away will be held to be a breach, remain constant throughout this example. Efficient breach theory predicts that both parties should walk away at exactly the same price, yet it seems obvious that the breach decision will vary, depending on who is deciding whether to walk.

If this dynamic holds true under the American Rule where each party pays her own lawyer, it obviously would be accentu-
ated under a rule which required the breacher to make the nonbreacher "whole" by paying the injured party's attorneys' fees sustained in pursuing the breach claim. The exposure of the breacher to the other side's attorneys' fees would mean relatively more to Consumer than it would to Business and would chill Consumer's pursuit or defense of all but the most certain claims. Such a fee-shifting rule would not reliably generate Kaldor-Hicks Compensation Rule decisions but, rather, would produce decisions to breach that, on the same facts, would vary dramatically with wealth and institutional makeup. We could not reliably suggest that breach decisions were being made at "optimal" times from a Kaldor-Hicks perspective because the decision-making would be complicated by the realities of wealth, power, and ability to spread risk.

Obviously, the power to induce behavior with economic incentives becomes enormously complex when one factors in wealth and the ability to spread risk. Tax specialists have known this for a long time. My purpose here has only been to illustrate the primitive and systematically distorted character of efficient breach analysis, which assumes certainty about whether walking away is a breach and stick-man uniformity in the hypothetical persons who are to make the breach decision.

Real people are not uniformly burdened by others' breaches of their contracts, are not fully compensated by breach-of-contract damages, and are not uniformly risk averse or risk aggressive in their decision-making, whether it is to breach a contract or to pursue the other side for breach. If real people followed the efficient breach theory, we would probably have a more inefficient economy. Fortunately, the empirical evidence is that real people may not be influenced greatly in their business decisions by the law of contracts. They have probably refuted in practice the actions called for by efficient breach theory.

III. VALUES, COMMUNITY, AND CONTRACTING

A. ECONOMIC ANALYSIS VERSUS DECISION-MAKER PERCEPTION

The assumed validity of both the case law and efficient breach theory transported us in the last Part to the remarkable conclusion that where the defendant has merely interfered with a contract, the law saddles her with liability in order to fine-tune the breach decision of the two people who actually contracted.
A corollary of that analysis is that the law of torts requires the third party to pay damages for what is, by a contracts hypothesis, an entirely innocent act.\textsuperscript{227}

What seems remarkable is the distance between this analysis that makes \textit{Texaco} a tool of the larger economic system and the likely perceptions of the real people who have participated in interference-with-contract decisions. It is absurd to suggest that the jurors in the \textit{Texaco} case thought that by assessing billions in punitive damages against \textit{Texaco}, they were really correcting a faulty incentive system between \textit{Pennzoil} and \textit{Getty}; it seems equally unlikely that the judges who permitted and sustained a punitive damage assessment believed that, either. Indeed, if the actors in the legal process had recognized that they were imposing liability on tort defendants in interference cases merely to correct a faulty incentive system operating on others, chances are the common law in this area would have developed differently.

The reason for the dramatic divergence between theory and reality in this area is that the efficient breach analysis of the interference tort focuses almost exclusively—as typically does contract law\textsuperscript{228}—on the parties to the original contract. Those critics proceeding from efficient breach theory condemned the tort to the extent that it distorted the contracting parties’ incentives. Correspondingly, they approved third-party liability in those instances where they perceived a need to correct incentives of the contracting parties.\textsuperscript{229}

Thus, efficient breach analysts viewed the interference tort through the two-party classical contract paradigm and evaluated it on the basis of whether it advanced or retarded the narrowly defined efficiency goal, defined by the very structure of the analysis as the primary policy objective for consideration. We are bound to find a convoluted analysis if, in fact, the tort advances values other than this kind of efficiency or protects interests other than those of the immediate parties to the

\textsuperscript{227} This interesting proposition is assertable within an economic analysis of liability because that analysis is concerned with expanding economic welfare; at whose expense it is expanded is, to the true-believing contractarian, a decidedly secondary “distributional” concern.

\textsuperscript{228} The expansion of contract doctrine to recognize the interests of third-party beneficiaries is, of course, a major exception to the more typical two-party focus.

\textsuperscript{229} BeVier, \textit{supra} note 4, at 888-93; Partlett, \textit{supra} note 6, at 794-806.
contract.\textsuperscript{230}

This central problem in analyzing the tort in efficient breach terms is an instance of a problem found in individualist contract theory more generally. The contractarian's unrealistically individualist projection of contract law\textsuperscript{231} tends to view contracting parties as riveted on their self-interest with absolutely no regard for the interests of the other party. This focus on individuals within the contract tends to exclude awareness of the contracting parties as a unit or of the interests and activities of nonparties.

Efficient breach principles would, for example, suggest that contracting parties would (should?) constantly be breaching in order to get the ubiquitous "better deal."\textsuperscript{232} Yet the evidence suggests that parties do not breach and go nowhere nearly to the extent that efficient breach ideas would suggest.\textsuperscript{233} The real-world parties' actions may thereby reflect economic (or other) value in relationships that is not captured by efficient breach analysis.

Trust between the parties is one such value. As one of my students remarked, "When you know your supplier, you don't have to count the widgets."\textsuperscript{234} Contract damages in this

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\textsuperscript{230} A more extreme and primitive form of the same reasoning would be the reverse. It would ask whether a rule imposing liability on a manufacturer for a defective consumer product would advance or retard the efficient decisions of the manufacturer and wholesaler who initially contracted to convey the product. Whether a consumer who was injured by a defective product should be compensated for that injury by the maker of the product would be largely beside the point. A rigorous form of strict privity would bar contract liability to the end user under these circumstances and, until MacPherson v. Buick, 111 N.E. 1050 (N.Y. 1916), barred negligence liability as well.

\textsuperscript{231} Neoclassical contract, with its large numbers of exceptions to such classical staples as consideration, offer and acceptance, and "freedom of contract," nonetheless offers us an individualist paradigm into which complex, multivariable problems are force-fit. The complexity of modern contract doctrine and the augmenting systems of restitution and tort are symptoms that the individualist paradigm captures only part (and perhaps only a small part) of the picture. Contractarian reasoning leaves out the exceptions that modern contract law has had to include.

\textsuperscript{232} If we factor in the expense of enforcing claims for breach of contract, the predicted frequency of breach would seem even higher because the rational maximizer would believe she could get away with the breach, at least in smaller cases.

\textsuperscript{233} Macaulay, supra note 148, at 109-10.

\textsuperscript{234} An economist might argue that this is because individuals find other economic value in maintaining a relationship. This added value within relationships is a main focus of the transaction-cost scholars following Oliver
quintessentially fungible goods case certainly would not include a plaintiff's new costs of employing a widget counter.

Other implications of the individualist focus go beyond the parties to the immediate contract. First, when we view the situation as involving only two individuals bound by their promises to one another, we tend not to see the possibility that their relationship may have value to those outside the relationship. A similar perceptual limitation accounts for the obstacles the doctrine of privity erected to contract’s embrace of third-party beneficiary rights and for privity's power to delay tort law's recognition of negligence liability in the product liability context. The two-party focus of the efficient breach analysis limits our legal imagination.

Second, in the particular context of interference liability, the tendency of a two-party analysis to focus on the contracting parties also diverts us from paying attention to the third party who interrupted the relationship and the rightness or wrongness of that tort defendant's actions. Attending to this particular third party would appear to be central in any case where decision makers punish the outsider for merely interfering with a contract. An analysis such as efficient breach that disregards a central consideration used by decision makers within the legal process (here, the quality of the defendant's actions) is bound to yield, at minimum, incomplete (and probably distorted) normative recommendations.

Williamson. See supra note 166 (surveying authorities who adopt a relationship-value analysis).


237. Professor Dobbs considered the “wrongness” of the defendant's conduct in pure interference cases and concluded, partly on the basis of an ethic derived from efficient breach theory that the tort penalizes conduct that is not wrongful. Dobbs, supra note 43, at 360-61; cf. Epstein, supra note 4, at 27 (explaining appropriation by tortfeasor of the promisee's property is inherently “wrongful”). Professor Epstein’s analysis is consistent with a commercial trend to treat contract rights as “property,” but it begs the question to analyze the wrongfulness of the defendant's actions by reference to another legal conclusion (contract rights are “property”) arrived at for different reasons.

238. To assess punitive damages, the decision maker has to consider the character of the defendant’s act. Efficient breach theory defines that solely by reference to the two parties to the contract. As suggested in the last section, efficient breach theory would conclude that the defendant’s act should yield tort liability (if at all) because contract damages are not capable of making the plaintiff indifferent to the promisor’s breach. It would indeed be difficult to assess punitive damages if this were the view one took of the liability question.
At the more general level, efficient breach theory's tendency to disregard third parties reveals a structural flaw in “contractarian” analysis. Like efficient breach, contractarian analysis tends to consider policy questions on the basis of directly affected individuals motivated by a very narrowly defined self-interest. To the extent that contractarian analysis—like efficient breach theory—diverts attention from “outsider” interests and actions regarded as important by conscientious actors within the legal system, that analysis will offer an incomplete explanation of the cases and an inadequate foundation on which to build policy.

A broader analysis of the tort is required, and a useful place to begin is with the norms that decision makers seem to bring to the tort in cases such as *Lumley* or *Texaco*. It is apparent from the punitive damage award in *Texaco* that the decision makers—jury and judges—believed that Texaco’s conduct was wrong and to be condemned. But what lies behind the apparent moral condemnation so vividly announced in that case? What could judge or jury find “wrong” with knowingly extending a better offer to a party already bound by contract and thereby inducing a breakup of the parties to the original contract?

One answer may be bound up with a perennial contract-law problem—whether there is a moral component to promising that goes beyond a requirement of “full” compensation for the promisee. Modern writers from at least Holmes's time on

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239. It is, of course, in the interests of each party to a relationship to trust the other; several transaction-cost economists have suggested that trust has real economic value within relationships. Contractarian analysis, on the other hand, generally starts with individuals who are relative strangers with little care for or trust of one another, asks what they would do under this or that rule, and projects policy recommendations from the answer.

240. An unduly narrow view of the law of property similarly tends to generate policy responses that screen out important third-party interests that we, as a culture, may believe important. *See generally* Singer, *supra* note 172 (discussing the moral justification of property rights to the extent they allow the protection of interests and relationships of non-property owning people).

241. In *Texaco*, the vagaries of a yet-unclosed multi-million dollar deal made the “moment” of contract formation unclear. *Texaco*, Inc. v. Pennzoil Co., 729 S.W.2d 765, 788-89 (Tex. Ct. App. 1987). New York law required a “contract” as a predicate for tort liability, and the jury dutifully found one. *Id.* at 795. One doubts, however, that the jury would have felt any differently about the conduct involved in the case if Texaco had intervened a “moment before” rather than a “moment after” that contract formed.

have debated the question whether it is wrong to breach a contract, even if the legal system will fully compensate the promisee. The contract-law prohibition on punitive damages\(^2\) and its preference for substitutional relief announce the view that the law contains no moral component. But the fact that contract law reflects an amorality\(^3\) does not support the proposition that it should, or that our culture is morally indifferent to contract breach.\(^4\)

In cases like *Lumley* or *Texaco*, we have a contract that the promisor breached for no better reason than to make more money. Whatever one's views on the morality of breaching generally, it would seem less debatable as an empirical matter that Posner's moral imperative—breach if you can sell your goods or services to a sufficiently higher bidder—turns a commonly held moral judgment upside down. The punitive damage award in *Texaco* may well reflect this moral judgment: as initiator and participant in the breach-for-more-money, *Texaco* is at least as culpable as *Getty* for violating common

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243. White v. Benkowski, 165 N.W.2d 74, 77 (Wis. 1967), a staple of many contracts courses, rejected punitive damages in a contract case even where the contract was found to be maliciously breached for harassment purposes.

244. *See generally* Linzer, *supra* note 7 (examining the amoral stance reflected in Restatement (Second) of Contracts).

245. *Id.* *See generally* Linzer *supra* note 81 (demonstrating society's and the legal system's responses to contract breaches by examining employment cases).

246. Richard Posner advocates that the system be structured to motivate the promisor to breach when it is sufficiently profitable for her to do so. Posner, *supra* note 138, at 119. The reason for so structuring the system is so that parties will take advantage of the incentives it provides and create efficient outcomes.

Posner does distinguish what he calls "opportunistic breaches," but he defines the opportunistic breach very narrowly:

It makes a difference in deciding which remedy to grant whether the breach was opportunistic. If a promisor breaks his promise merely to take advantage of the vulnerability of the promisee in a setting (the normal contract setting) where performance is sequential rather than simultaneous, we might as well throw the book at the promisor. An example would be where A pays B in advance for goods and instead of delivering them B uses the money in another venture. Such conduct has no economic justification and ought to be deterred. . . . The promisor broke his promise in order to make money—there can be no other reason in the case of such a breach.

*Id.* at 117. Posner adds, however, that a voluntary breach, such as that described in the text, is "not opportunistic . . . but efficient—which from an economic standpoint [makes it] the same case as that of an involuntary breach."

*Id.* at 118.
Indeed, one might go further and argue from these tort cases that our willingness to punish the intermeddler in the tort setting, where there are no a priori limitations on damages, reveals widely held views about the morality of promise keeping and that current damage restrictions in contract law reflect not a cultural amorality about keeping promises, but limitations on risk felt to be necessary despite a contrary cultural norm. Were contract law to permit punitive damages, one suspects the breacher in Texaco would have suffered a similar fate at the hands of the decision maker.248

The fact that a contract-centered analysis such as efficient breach cannot capture a norm that seems to be at work in interference cases points up a shortcoming of that form of analysis. The occasional recognition of a tort of bad faith breach of contract249 is a comparable symptom of the shortcomings of our individualistic contract analysis. But debunking an inadequate contract-centered analysis doesn't establish the proposition that it is wrong to interfere with a contract. Even if it were empirically determined that most people react with moral revulsion to the actions of a Texaco, it would not necessarily be good morality or good policy that the law reflect that moral revulsion.250

Rather than attempting to explain the interference cases on moral grounds per se, I hope to suggest that there may be good,
empirically verifiable reasons for condemning a Texaco's activity even if its activities were competitively motivated. In advancing these tentative reasons, I also hope to make a broader point: this tort may be protecting interests and furthering policy goals that simply cannot be seen through an analysis grounded in classical or neoclassical contract. We cannot begin to understand the role this tort plays in the law of transactions if we continue to approach it from within the contract-law system.

B. "RELATIONAL" INTERESTS AND THE COSTS OF CONTRACTING

A different analytical framework for considering interests that contract law has difficulty recognizing was offered in 1934 by Leon Green. Green suggested that the tort of interference with contract protected not one party's expectation nor "property" but "relational interests." He argued for explicit recognition of "relational interests"—a category that would include more than "contractual" relationships—as proper subjects for legal protection. The analysis rendered insignificant the causation problems implicit in the tort and more accurately reflected the case law that protected relationships that did not amount to "contracts." What makes Green's 1934 lexicon worth considering in 1995, however, is the intervening development of a "relational" contracts literature and an associated economics literature focused on transaction costs.

251. Green, Part 1, supra note 72, at 460-62 (1934). Part of Green's goal in defining relational interests was to reject the "property" nomenclature often found in the cases. Professor Dobbs suggests that the Legal Realist movement, of which Green was a part, might account for the popularity of the tort. He criticizes as well Pound's "interest analysis" for basing liability on interests which are perceived as valuable but without taking into countervailing societal interests. Dobbs, supra note 43, at 363-64.

252. See supra Part I.B.2. (discussing the problems of causation in interference torts).

253. Since the mid-1970s, the notion of "relational contracts" has come into our contract vocabulary. See generally Ian R. Macneil, The Many Futures of Contract, 47 S. CAL. L. REV. 691 (1974) (suggesting that traditional contract law was too narrow to accommodate the much wider range of relationships with which contract law should be concerned and was also the wrong model under which to adjudicate complex, long-term contractual relationships).

Charles Goetz and Robert Scott have also spawned a relational contracts literature, focusing much of their analysis on contracts where "the parties are incapable of reducing important terms of the arrangement to well-defined obligations." Goetz & Scott, supra note 10, at 1091; see supra note 169 (explaining how Macneil and Goetz's and Scott's analyses differ at a fundamental level in their willingness to frame contract questions in an economics-
If we think of the interference-tort case law as being concerned with protecting various relationships from outside interference by third parties, we find that the tort enhances relational stability. Under contract law, parties to a consensual business or other relationship remain free to breach their obligations or dissolve their relationship, and the contract system will usually decide the effects of the parties' decisions on one another. However, the maintenance or destruction of the relationship lies in the decision of the parties, not that of others; the tort contributes stability by insulating their decisions from outside influences.

But relational stability has a downside: if the tort enhances such stability, it does so by impeding the formation of new relationships by persons bound in the old ones. This is the nub of the efficient breach critique.

We thus return to the fundamental tension reflected in this tort—the relative instability of the efficient breach regime, where parties breach to move resources to those that value them more, versus the relational stability that this tort's deterrent yields. But Green's articulation of the case law allows us to frame this tension in a usefully different form: Why might it be in society's interest for tort law to stabilize relationships more securely than does contract law? The question redirects our attention to the social (as distinguished from party) benefits of more relational stability and may lead us to reasons for condemning the third party who disrupts that stability.

As suggested earlier in connection with criticisms of efficient breach analysis, often there are third parties, otherwise unprotected by the law, who come to rely in meaningful ways on contracts (or other relationships). When a contract is broken, those persons can suffer uncompensated loss, and the incidence


254. This darker side is particularly evident in those cases where businesses brought tort actions against groups attempting to organize tenants or employees. E.g., South Wales Miners' Fed. v. Glamorgan Coal Co., 2 K.B. 545 (1903), aff'd, A.C. 239 (H.L. 1905). One could imagine a fear of interference-with-contract liability impeding the organizing efforts.

255. See text supra accompanying notes 170-175.
of such losses can be reduced by making contracts more resistant to outside interference. To take a simple example, suppose a seller employs five workers through at-will employment arrangements to design and build (using the buyer's materials) a product for the buyer. Collectively, these workers will be paid $200,000 for their work, and the seller will deliver the work to the buyer for $220,000, netting a $20,000 profit. Before the work starts, a second seller with a better offer (say $195,000) finds the buyer, and as a result the buyer breaches the first contract. If damages are measured by the contract price less costs saved, the original seller will net her $20,000 profit from the buyer and, in theory, the buyer will still be ahead. Significantly, however, the workers will lose their employment, and the broader community will lose the benefit of the employees' spending power. Both workers and community have been affected by the breach in a very real way but, by hypothesis, they have no remedy.

There are lots of reactions to this sob story; the economist would have at least two. First, inasmuch as the second seller will employ workers to do the same work, there is no net economic loss, simply a shifting of the work from the first seller's workers and locale to the second's. Second, in place of the original workers' old work will be new work, and consequently their losses and those of their community will be minimal. Indeed, in a frictionless world with perfect markets, the first workers and their community would suffer no loss at all because they would instantly be reemployed and new work would instantly replace the old within the community.

The divergence of the real world from the world of perfect markets and zero transaction costs is what throws real loss on the first workers and, indeed, on the local economy in which

256. The two-party problems with this standard efficient breach example are detailed supra in the text accompanying notes 150-169.

257. The community will also lose taxes on the income and spending of the now-broke workers.

258. For purposes of my example, the assumption is that the workers would have worked if the contract had stood and have no rights (other than unemployment benefits or similar public rights) on account of the breach. It seems unlikely that they could prevail on a third-party beneficiary theory. Cf. Martinez v. Socoma, Inc. 521 P.2d 841 (Cal. 1974).

they spend their wages. They will not instantly get new jobs, and the employment lost to the local community will not immediately be replaced by new employment. Even if we assume that the work lost in one place is entirely offset by its reappearance in some other locale, there remain the real costs to real people of moving the work from one place to the next.269

If the overall economic objective is to expand the size of the economic pie, these broader costs must be taken into account in making policy decisions. It is here that efficient breach, classical contract doctrine, and related forms of contractarian analysis reach their limits and may begin to distort policy choices. Their two-party focus tends to exclude any consideration of the effects of a breach on third parties and, indeed, obscures our ability even to recognize—much less quantify—those costs. And even where these costs are recognized, they are trivialized by the terms “transaction costs” or “externalities” and assumed (for purposes of the individualistic analysis) not to exist.

We may, however, get the opposite bias when we return to the real world of judges and juries. In Lumley-type cases, the defendant has disrupted the status quo of contract. A decision maker can probably perceive diffuse but real costs that the disruption has caused, and may not as readily see the more theoretical economic benefits to the public of moving resources to a more highly valued use.262 The moral condemnation that attaches to the defendant’s conduct in these cases might well be connected to our common experience with the costs of disruption and our lack of experience with its benefits.263

260. See Singer, supra note 172, at 614-20 (discussing the United States Steel Company shutdown of its Youngstown, Ohio operation).
261. While much of contemporary economic analysis pays attention to transaction costs, contractarians focus on the transaction costs of the two parties to the contract, not on other costs of change that fall on nonparties. See supra note 169 (discussing different theorist’s focus). While party transaction costs are, indeed, important, they form only part (and perhaps a small part) of the picture.
262. Obviously some of the costs of disruption are those nonrecoverable costs to the injured party that accompany any breach of contract. But, in theory, at least some of those could be captured in a breach suit against the promisor or in compensatory damages against the tort defendant. But punitive damages go beyond compensation of a party to the original contract. The hypothesis advanced in the text is that punitive damages in a Lumley-type interference case may serve to penalize an act that causes a far more generalized harm to a public affected by a disrupted contract.
263. If the tort functions to reduce transaction costs and side effects by reducing outsider-induced breaches, it is at best a crude mechanism for the
Looking at the interference tort from the perspective of the wider community underscores the fact that very little contract analysis—and nearly no economic analysis—takes an expanded view of the winners, losers, and costs involved in forming and ending business relationships. More generally, current contract doctrine itself, with its tendency to focus on the contracting parties and its demand for crisp rules, is conceptually incapable of taking account of the broader range of interests implicated in the premature ending of a contractual relationship. What is worse, the individualist approach that dominates modern contract doctrine and our tendency to use it exclusively to think about business problems may actually inhibit our consideration of these broader societal interests. This seems to have been the case in the bankruptcy and corporate governance literature, where contractarian analysis has tended to exclude any consideration of the effects of business decisions or failure on third parties without preexisting legal task. Contracts will vary in the amount of otherwise uncompensated losses that accompany breach, yet the tort is undiscriminating in its deterrence. While punitive damages will vary with the degree of disruption that the defendant has caused by inducing a breach, the protection of diffuse third-party interests depends on the contract not being interfered with in the first place. For those contemplating interference with a contract, the unpredictable nature of punitive damages will probably deter in a way that is not well calibrated to predicted or actual harm.

On the other hand, the tort operates in this context no more crudely than does efficient breach theory. The public gains that can result from moving resources to better uses will vary with the contract. Neither efficient breach theory nor the interference tort acknowledges that there are both costs and benefits of change, even if the costs of moving a resource to a better use and the economic benefits of doing so are seldom quantifiable.

264. See Markovits, supra note 20.

265. See Northern Del. Indus. Dev. Corp. v. E.W. Bliss Co., 245 A.2d 431, 431-34 (Del. Ch. 1968) (refusing to grant an order to increase the number of workers on a factory renovation project even though the plaintiff would unlikely be fully compensated for delays in construction and the delays would have a large negative impact on the local economy and the factory workers). Cf. ARTHUR ROSETT, CONTRACT LAW AND ITS APPLICATION 348 (5th ed. 1994).

266. There is a similar problem in the contemporary debate about the usefulness of Chapter 11 reorganization. The strict efficiency view would reduce the use of Chapter 11 in the interests of allowing only strong businesses to survive. This view either minimizes or assumes away the costs to third parties, such as employees, of the disruption accompanying dissolution. A different view advocates explicit recognition of these disruptive effects. See generally KAREN GROSS, BREAKING BENCHES: AN ASSESSMENT OF CONTEMPORARY BANKRUPTCY LAW (forthcoming 1996); Karen Gross, Taking Community Interests into Account in Bankruptcy: An Essay, 72 WASH. U. L.Q. 1031 (1994).
That modern contract doctrine cannot easily accommodate interests that may nonetheless be socially or economically important underscores the promise of alternative visions of contract and of the contracting process. The classical contract paradigm posits two individuals entering into a negotiated, "one-shot" deal, driven by their self-interest and having no regard for the interests of others who might be affected by their contracting or their performance under their contract. The paradigm has proved durable and serviceable, but it is an open secret that it is incomplete. Modern contract law accommodates a far broader range of interests than the logic of the classical system permits. Strict privity has long since given way, and strict consideration doctrine has accommodated reliance. Article 2 of the U.C.C. has sufficient deviations from the classical contracts offer-and-acceptance paradigm that the paradigm seems of truly marginal significance. But while classical contract is not "dead," the continued survival of the paradigm may be due not to its inherent qualities so much as to the fact it is extensively supplemented by statutory provisions and restitution and tort law. Yet the paradigm (without the messy complexity or supplementation) remains the bedrock of contractarian analysis.

The interference tort is part of this larger phenomenon. It demonstrates once again that the individualist paradigm furnishes an incomplete picture, and it underscores the continued need to consider more inclusive ways of thinking about the law governing relations among people (most obviously contract law, but also the related law of torts, restitution,

267. The literature is summarized in Ponoroff, supra note 18.
268. This promise is embodied in the work of some. See generally Jay M. Feinman, The Last Promissory Estoppel Article, 61 FORDHAM L. REV. 303 (1992) (proposing that contract law move to a relational analysis); Peter Linzer, Is Consent the Essence of Contract?—Replying to Four Critics, 1988 ANN. SURV. AM. LAW 213 (explaining that dealings throughout contractual relationships are more central than the issue of consent); Macneil, supra note 140 (suggesting that relational models better accommodate long-term contractual situations).
269. Statutory expressions are myriad. See, e.g., U.C.C. §§ 2-210, 2-318 (1990) (recognizing delegation of performance and third-party beneficiaries to warranties, respectively).
270. See, e.g., U.C.C. §§ 2-204, 2-207 (indicating that agreement can be inferred from a variety of actions).
271. Labor law, anti-discrimination law, and consumer protection law all have such statutory protections.
bankruptcy, and even corporations).

The interference tort also points to the continued usefulness of the broad kind of transaction-cost economic analysis, pioneered by Oliver Williamson, in discovering the real economic costs and benefits of contracting.\(^{272}\) While that approach, too, limits its focus to the particular parties to a contract, its analysis of the dynamics of contracting is far richer than the incentive analysis that characterizes much economics-based literature dealing with contract law,\(^{273}\) and its direct engagement of the costs of change is a refreshing counterbalance to an economic analysis that either assumes those costs away or looks at them too narrowly. At a larger scale, our national political judgments often consider the costs of change in assessing policy choices that have economic implications. To the extent that the efficient breach theory and other normative analyses of contract speak to the economically optimal tightness of the contractual bond, a richer analysis of all of the costs of “breach and new contract” would improve prospects for continued development of an economically realistic contract doctrine.

C. “RELATIONAL” INTERESTS AND THE SCOPE OF THE TORT

Viewing the tort as a mechanism to protect relationships rather than the promisee’s expectation interests also frees analysis for direct consideration of the appropriate scope for the tort. Recall that the case law has supported liability for interfering with business relationships embodied in at-will contracts, defective contracts, and sometimes, no contracts at all.\(^{274}\) This expansion of the tort beyond the fixed-term contract is certainly curious if viewed from the perspective of the contract system. Logically, if you don’t have a “contract,” how can someone interfere with “it”? Many commentators\(^{275}\) have criticized the tort’s expansion beyond the fixed-term contract in the absence of independently “wrongful” conduct.\(^{276}\)

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272. See sources cited supra note 166.
274. See supra text accompanying notes 22-36 (surveying relationships in which courts have found interference liability).
275. Because he believed noncontractual business relationships could be valuable and yet the promisee had no remedy in contract, one commentator diverged from the others and argued that the tort should extend to noncontracts but not to contracts. Dowling, supra note 6, at 126-27.
276. Grothe, supra note 74, at 474; Myers, supra note 122, at 1141; Perlman, supra note 6, at 69-97; Sales, supra note 6, at 126-27.
contract-centered criticism emerges as a matter of simple logic:

Rules regulating third party interference should advance whatever policy contract law pursues in withholding enforcement of an agreement. . . . If the efficiency principles of contract law suggest that a third party using lawful means should not be liable for inducing breach of enforceable promises, then a fortiori, the same rule should apply to unenforceable expectancies.277

The problem with the analysis is that it proceeds from classical contract principles and doctrine rather than from a broader perspective.

The question is not whether the plaintiff has an interest, as defined by contract doctrine, that is worth protecting. Rather, the problem is whether to impose liability or compensate the plaintiff when a stranger disrupts a relationship that otherwise would have continued. Implicitly relegating this decision to classical contract doctrine suggests that there cannot be a socially valuable relationship that is not enforceable as a contract. Stated this way, the logical criticism seems untenable, even in business situations.278

The contractarian perspective proceeds, again, from doctrine premised on individualism without regard to broader social interests. In addition, courts have shaped contract liability rules with considerable attention to limiting the promisor's liability lest it exceed the risk supposedly assumed when contracting.279

Focusing on the two parties to the contract may be functional when resolving disputes between those parties; but transporting that focus into a system such as tort, which does not predicate liability upon consent, seems counterintuitive.

We have, by hypothesis, cases where the relationship would

277. Perlman, supra note 6, at 90-91 (emphasis supplied); see Sales, supra note 6, at 148-49 (“The more stable, predictable and principled remedies of contract, rather than the unprincipled and unpredictable doctrine of tort, should furnish the basis for defining the parameters of liability.”).

278. One might argue that because contract law provides sharp “in or out” lines that assist in adjudication, it should be imported to set limits to the interference tort. See Macneil, supra note 253, at 738 (“Sharp in by clear agreement; sharp out by clear performance.”); cf. Sales, supra note 6, at 48-49 (arguing that contract law is more stable than tort law). This proposition is more tenable than that criticized in the text and, depending on one’s point of view with respect to contract law, might be persuasive. I believe (as did Karl Llewellyn and many others) that the “certainty” thought to reside in contract law is largely an illusion. See supra text accompanying notes 114-119.

279. Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1845), is probably the most famous example of a court limiting the promisor’s risks of contracting.
have continued and where the plaintiff suffered real losses because of the interference. The tort question, whether—and under what circumstances—to impose nonconsensual liability, should depend partly on whether we find personal and social value in business and other relationships not embodied in fixed-term contracts, and partly on how we view third-party interference with such relationships. That contract law does not require the other contracting party to compensate the plaintiff when the relationship ends means only that. It does not mean that the plaintiff has suffered no loss, or that there was no personal or social value to the continuation of the relationship, or that it "should" have ended when it did, or that public policy may not support imposing liability on the third party.

Setting aside contract doctrine as supplying the principles for deciding the range of tort liability for interference with relationships permits us more easily to attend to the policy issues that might be implicated in a given interference case. How important was the relationship both to the parties and to others? Were there justifications for the interference? If the defendant had a better offer to make, what justification was there in going to the promisor rather than to the promisee?

280. Part of the plaintiff's proof in any interference case is to show that "but for" the interference the relationship would have continued, or that the interference "caused" the loss. See supra text accompanying notes 64-66. In contracts at will and relationships that have not ripened into contracts, the plaintiff will, in addition, have to show how long the relationship would have continued in order to prove damages (a fixed-term contract takes this factor out of the case). Causation and damages will not likely be susceptible of mathematical proof and can lead to unpredictability in jury verdicts. Criticism of the tort or its expansion on that basis reflects skepticism towards jury discretion. Cf. Dobbs, supra note 43, at 346 (noting that lack of guiding principles in applying interference tort law causes doubt in the legal system).

Challenges to the tort on the basis of the difficulties it presents in forecasting jury decisions are not subject to the same observations as the analysis discussed in the text. But the same challenges would apply as well to many other well-established areas of business law such as intellectual property, antitrust, and, I would argue, contract law itself. If Pennzoil had sued Getty for breach of contract, the same issue at the center of the Texaco tort case (contract formation in the context of a complex negotiation) would have been formally before the jury. It would not have been any more predictable as a contract case.

Like many other areas of law, the tort of interference with contract can raise difficult proof problems. I know of no way to determine when the difficulty and expense of proving a claim justify its elimination; to argue that the uncertainty costs require the tort be curtailed is to make an unwarranted empirical assertion.
Unfortunately, once we reduce the significance of "contract" in defining legally cognizable relationships, we are left with a continuum of relationships with no clear demarcation between "significant" and "insignificant." This makes deciding the appropriate scope of the tort much more difficult because there remains the doctrinal job of defining in some adjudicable form the combination of plaintiff's interest and defendant's conduct that should result in liability. Given the possible variations in both relational value and degrees of interference, it is no surprise that tort law has identified no better criterion than "improper" to describe conduct that will result in liability. Such a vague criterion leaves to overworked courts the difficult job of explaining, case by case, how public policy is served or disserved by a finding of liability.

It is therefore also no surprise that some courts have enlisted contract law to circumscribe the scope of the interference tort. Courts can use contract doctrine to generate crisp answers to the scope of interference liability without having to appeal to public policy for support. Yet because contract law addresses different issues than does the interference tort, its use here is not based on substantive policy. Rather, in this context contract law performs the administrative function of making case-by-case adjudication easier and somewhat more predictable.

If we acknowledge that, as a policy matter, there is no good reason for limiting this tort to fixed-term contracts, and that contract doctrine may be serving only an administrative, line-drawing function in interference cases, two consequences follow. First, it would then make no principled difference whether the line is drawn at "enforceable contract" or "unenforceable contract." For a court could just as easily find a "contract" in an agreement that is subject to promisor defenses or is terminable by the promisor as it can in one that is fully enforceable in all respects. Indeed, with contracts subject to promisor defenses, at least, the line is probably better drawn where most courts

282. The complexity generated by the privilege of competition and more difficult proof of damage in at-will contracts could support, on administrative grounds, rejection of liability across the board if one concluded that the costs of adjudication in these cases outweighed the social benefits of enhanced contractual stability. What is important, however, is to recognize that we would be weighing here the different administrative costs of tort adjudication as a basis for line-drawing, not some principle that has importance only within the contract system.
have drawn it. 283 Given the intentional character of the defendant's disruptive conduct, it is incoherent to have her tort liability depend on contract-law defenses of which the tort defendant was likely ignorant.

Second, recognizing the administrative nature of contract law's rules in this context points up the need for a continued search for tort principles that will better express the social values implicated in protecting existing relationships from outside interference. There may be a better device for screening claims than a contract/no contract dichotomy, but to discover that device we have to recognize the limited role contract law plays in this tort context.

We might draw some final inferences from the tort cases that allow recovery against the defendant in at-will and other situations in which the promisee would not have recovered in contract against the promisor. The existence of these cases suggests that our common-law tort system recognizes social value in business relationships where contract law does not. Rather than conclude that these cases are "wrong" for their apparent conflict with contract principles, we should recognize the obvious point that contract law has never encompassed the entire universe of transactions that have social value. If interference-tort cases reflect social value in relationships where the contract system would deny recovery, it may be fruitful to continue the search for contract principles that better capture the value our society ascribes to a broad range of relationships. It may be that an individualist conception of contract law is best for most cases and that the cases that do not fit can be addressed through the myriad "inconsistent" neoclassical contract rules, through legislation, through restitution, or through tort. 284 Or it may be that those who engage in transactions

283. See supra notes notes 75-79 and accompanying text (surveying instances where courts find that a promisor's defense does not block recovery).

284. An example might be J'Aire Corp. v. Gregory, 598 P.2d 60 (Cal. 1979). There, a restaurant that leased space within an airport successfully recovered against a contractor who negligently performed air conditioning work for the lessor, thereby causing the restaurant to lose sales. Id. at 64. While the case was decided on tort principles, the court could as well have decided it by stretching the contract doctrines governing the rights of third-party beneficiaries. Not surprisingly, under either analysis the central focus is the source of a duty running from the contractor to the tenant. Gary T. Schwartz, Economic Loss in American Tort Law: The Examples of J'Aire and Products Liability, 23 SAN DIEGO L. REV. 37, 41 (1986).
would be better served by an expanded contract law that recognized the real value of some relationships that do not now have legal sanction in contract law. But we cannot even begin to ask such questions if we proceed from within a contractarian framework.

CONCLUSION

As one reflects on the contemporaneous cases of Hadley v. Baxendale and Lumley v. Gye and the long lines of authority and analysis they have spawned, one cannot help but consider their seeming inconsistency as simply reflecting different ways of thinking about and addressing the complexities of human relations and human exchange. Indeed, it seems more likely that these cases are complementary rather than inconsistent and reflect the fact that the classical contract system as conceived then and used by contractualists now is structurally incapable of addressing all the problems involved in the break-up of relationships.

Hadley represents our strong individualist strain. That strain in our culture saw the flowering of classical contract doctrine in the late nineteenth century and of contractual reasoning in the late twentieth. Both have difficulty with those not parties to an agreement, and, when applied to protect broader interests, both generate policy results at odds with prevailing norms. As it became modern, contract law retained its individualistic paradigm but softened it with many well-known doctrines that are at odds with a rigorously individualistic approach. As epitomized by efficient breach theory, contractual reasoning has taken the individualist strain from classical contract law but left nearly all of its twentieth-century development behind.

Still, the largely individualist approach that continues to dominate the modern contract system limits our ability to consider many of the transaction costs and third-party losses flowing from disrupted relationships. The Lumley line of cases may well supplement modern contract law by helping to reduce those costs and losses. Thus, rather than being at odds with contract principles, these tort cases may actually help preserve the individualist contract system as we know it by permitting that system to ignore such losses. Without this tort, we might be harder pressed to find a different conception of the law of contracts.
That the contract system may require supplementation from tort does not necessarily condemn contract; it merely underscores the fact that contract law is a human construct that is neither perfect nor all-inclusive. It is and must be augmented in real life by other areas of law that serve values other than individualism because people and their problems extend beyond the individualist paradigm. Contractarian reasoning is not burdened by messy reality and need not take account of cultural strains that do not fit that paradigm. But that means such reasoning, used normatively, produces policy recommendations that are inevitably incomplete and systematically distorted.

Fortunately, like Hadley, Lumley has stood the test of time. It has been provocative for most of its long history. If Hadley represents our individualist values, Lumley stands for our values of community. Both are cultural artifacts; neither is inherently more valuable than the other. Their long coexistence simply underscores the limits of our understanding of human interaction. We can take some comfort from the fact that our culture has not permitted either precedent to stand alone.