

# TORTIOUS INTERFERENCE: HOW IT IS ENGULFING COMMERCIAL LAW, WHY THIS IS NOT ENTIRELY BAD, AND A PRUDENTIAL RESPONSE

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*Woody's case*<sup>1</sup> gets close to the heart of the matter. Woody sold a country club he owned to the Tamers and George, taking back a nonrecourse note from them. He remained personally liable on a mortgage on the club he had given to a bank several years earlier. Two years after they bought the club, the Tamers and George stopped payment on Woody's note, leaving Woody without funds to pay the mortgage held by the bank. The bank threatened to foreclose. The bank might have sold the club at an auction at a distress price, which would have left Woody personally liable for any balance due on his mortgage. Trapped, Woody agreed to sign the club over to the bank in return for a release from his mortgage. The bank then restructured the Tamers' and George's debt, allowing them to retain their equity in the club. We can imagine Woody's feelings when

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1. *Woody v. Tamer*, 405 N.W.2d 213 (Mich. 1987).

he heard rumors that a bank officer had conspired with the Tamers and George to squeeze him out of the club. Such rumors must have seemed credible to him. The Tamers and George default had caused his default, and they had less equity in the club than he had, but in the end they had lost nothing while he had lost everything.

What advice would you have given to Woody had he asked you whether it was worth suing the bank or the Tamers and George? A contract action might have seemed unpromising. Woody had no recourse against the Tamers and George in contract; they could not be held personally liable on default for their note was nonrecourse. Woody might have sued the bank in contract for breach of the duty of good faith by alleging that the bank had conspired to bring about his default.<sup>2</sup> But uncertainty about the scope of the duty of good faith combined with uncertainty over whether the conspiracy could be proven would make such a lawsuit risky. And the damages should Woody have won, his lost equity, may have seemed too small to justify the gamble.

Rather than pursue a contract action against the bank, Woody sued everyone for interference with business relations.<sup>3</sup> He sued the Tamers and George for interference with his contract and business relationship with the bank, claiming they intentionally withheld payment on the note to induce him to default on his mortgage with the bank. And he sued the bank for interference with his contract with the Tamers and George, claiming that a bank officer had induced them to withhold payment on the note. He sought punitive and mental anguish damages as well as his lost equity. While Woody initially lost on a motion for summary judgment at the trial level, the court of appeals reversed and remanded all of Woody's claims for trial by jury.

*Woody's case* is likely to provoke mixed responses. If you believe Woody's allegations, then you might say that justice was done. But the case is also deeply unsettling. It seems mad to hold a nonrecourse borrower personally liable on default in tort. And it seems perverse to convert a breach of contract claim for bad faith against the bank into a tort claim. More generally, *Woody's case* raises the spectre that an interference claim might prevail in the purest of contract cases—where the relationships between the plaintiff and the two other parties (all tortious interference suits are three-cornered affairs) are on a contractual footing and the plaintiff suffers no physical loss. Finally, and perhaps most unsettlingly for commercial lawyers, is the thought that the parties' fates were placed in the hands of jurors who were not constrained to abide by the parties' formal agreements. Often a plaintiff in Woody's position will not even have to persuade a jury once he gets past a motion for summary judgment. Defendants are likely to settle rather than face a jury trial with a sympathetic plaintiff and the risk of substantial mental anguish and punitive damages.

However unsettling *Woody's case* may be to a commercial lawyer, there

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2. Woody could have grounded this claim on cases that hold it a breach of the duty of good faith to interfere with the other party's performance of his contract. *See* *Shear v. National Rifle Ass'n*, 606 F.2d 1251 (D.C. Cir. 1979). *See generally* E.A. FARNSWORTH, *CONTRACTS* 593 (2d ed. 1990).

3. Throughout this article I will refer to the tort in the singular. The RESTATEMENT (SECOND) OF TORTS separates interference with contract and interference with business relations. §§ 766, 766B (1964). However, many states do not. *See infra* note 28. As will become apparent, my view of the tort makes it difficult to separate it in two.

is nothing odd about the outcome under the law of tortious interference. Under the dominant view, the elements of the tort are a knowing and improper interference in the contracts or business relations of another.<sup>4</sup> The only element arguably missing in *Woody's case* is impropriety, and the appeals court concluded that whether the defendants had acted improperly could be decided only after a trial.<sup>5</sup> This conclusion cannot be gainsaid. The issue of impropriety can be very fact-intensive; under the *Restatement (Second) of Torts*, it turns on the nature of the actor's conduct, his motives, his action's proximity to the harm, and the parties' relationship.<sup>6</sup> Further, the defendant's conduct can be deemed improper if it is unethical in the sense that it violates "generally accepted standards of common morality"<sup>7</sup> or "recognized standards of business ethics and business customs and practices...[and] concepts of fair play."<sup>8</sup> And, according to the *Restatement (Second) of Torts*, the issue of impropriety is for a jury to decide if the question is novel and close.<sup>9</sup> If the bank and the borrowers had conspired against Woody, as he alleged, a jury might well deem their actions to be unethical.

Eventually, I will tell you why I think Woody's interference claims should have been dismissed on the motion for summary judgment. First I will tell you why his claims deserve to be taken seriously. American scholarship on the interference tort suggests that *Woody's case* is either an aberration or an illustration of the fundamental sickness of the tort. One of two strands of scholarship on the tort, most of it done from an economic perspective, focuses on the case where a stranger induces someone to breach a clear cut contract obligation.<sup>10</sup> An interference claim in such a case is a surrogate for what would be an equally valid contract claim against the counter-party. From this point of view, *Woody's case* is an aberration for Woody used the interference claims to get around limitations of contract law. Part I challenges the view that *Woody's case* is an aberration by showing that it is far from unique. Plaintiffs often use interference claims, as in *Woody's case*, to protect interests that might not be protected by contract law.

The other strand of scholarship on the tort argues that the tort should be pruned back to what the authors believe are its appropriately modest common law roots.<sup>11</sup> *Woody's case* might seem a likely "poster-child" for this point of

4. RESTATEMENT (SECOND) OF TORTS §§ 766, 766A, 766B.

5. 405 N.W.2d at 218.

6. RESTATEMENT (SECOND) OF TORTS § 767(a), (b), (f), (g).

7. *Association Group Life, Inc. v. Catholic War Veterans*, 293 A.2d 408, 415 (N.J. Super. Ct.), modified on other grounds, 293 A.2d 382 (N.J. 1971) (quoting *Sustick v. Slatina*, 137 A.2d 54, 60 (N.J. Super. Ct. 1957)).

8. RESTATEMENT (SECOND) OF TORTS, § 767 cmt. j.

9. *Id.* cmt. l.

10. See Lillian R. BeVier, *Reconsidering Inducement*, 76 VA. L. REV. 877 (1990); Richard A. Epstein, *Inducement of Breach of Contract as a Problem of Ostensible Ownership*, 16 J. LEGAL STUD. 1 (1987); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 222-25 (1987).

11. Dan B. Dobbs, *Tortious Interference with Contractual Relationships*, 34 ARK. L. REV. 335 (1980); 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); Gary Myers, *The Differing Treatment of Efficiency and Competition in Antitrust and Tortious Interference Law*, 77 MINN. L. REV. 1097 (1993); Harvey S. Perlman, *Interferences with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. CHI. L. REV. 61 (1982); Francis B. Sayre, *Inducing Breach of Contract*, 36 HARV. L. REV. 663 (1923).

view. Part II takes on the historical and structural arguments for a more modest tort. Dan Dobbs' excellent 1980 article gives you the flavor of the historical argument against the modern tort. He traces the tort to "narrow and specific" cases involving the beating of servants<sup>12</sup> and observes that once the tort was extended beyond this "narrow paradigm" there was "no obvious stopping place,"<sup>13</sup> leading to the "rather strange" modern principle.<sup>14</sup> Richard Epstein makes a structural argument. He claims that the tort is "a neglected stepchild in the recent conceptual efforts to unify tort theory,"<sup>15</sup> and finds a place for the tort by cropping it down to inducement of breach, which Epstein likens to the taking of property.

I argue that the modern tort is respectably derived from the work of Oliver Wendell Holmes, Jr., and Sir Frederick Pollock. Holmes and Pollock were among the first legal scholars to construct a general theory of tort law. They were also unusual for their day in their willingness to account for the common law using what some now call prudential or policy arguments<sup>16</sup> and ethos-based arguments (i.e., appeals to the moral sensibilities of the community).<sup>17</sup> The interference tort is most immediately rooted in an important aspect of Holmes' and Pollock's general theory of torts, what came to be called the theory of prima facie tort, which holds that any intentional infliction of harm is tortious unless the defendant can justify his action on policy or ethical grounds. This history directly undercuts Epstein's structural argument. The modern tort is at the core of one possible theory of tort law that

12. Dobbs, *supra* note 11, at 338-39.

13. *Id.* at 340.

14. *Id.* at 343.

15. Epstein, *supra* note 10, at 1-2.

16. I take the concept of prudential argument, which means an argument based on the costs and benefits of a rule, from Philip Bobbitt. Bobbitt's CONSTITUTIONAL INTERPRETATION (1991) and the work of Dennis Patterson, which shows ways in which Bobbitt's theory may be relevant to other areas of law. See Dennis Patterson, *Conscience and the Constitution*, 93 COLUM. L. REV. 270 (1993) (reviewing CONSTITUTIONAL INTERPRETATION, *supra*) and Dennis Patterson, *The Pseudo-Debate over Default Rules in Contract Law*, 3 S. CAL. INTERDISCIPLINARY L.J. 235 (1993). Bobbitt's work is very helpful to framing the issues discussed in this article. One point I take from him is that the law should be understood as a practice that establishes the truth or falsity of claims by the use of a limited set of forms, or "modalities," of argument. The forms that most obviously pertain to the common law are doctrinal argument (which Bobbitt defines as "applying rules generated by precedent") and prudential argument. BOBBITT, *supra*, at 13.

There is also in the common law something akin to what Bobbitt calls structural argument, which involves inferring rules from the relationship among common law doctrines. According to Bobbitt, structural argument under the Constitution entails "inferring rules from the relationships that the Constitution mandates among the structures it sets up." *Id.* at 12. The "structures" in the Constitution are institutional organisms—e.g., the states, the federal government, and the branches of the federal government—that the Constitution creates or that it assumes exist. The "structures" in the common law are bodies of doctrine. An argument William Powers, Jr. makes in *Border Wars*, 72 TEX. L. REV. 1209, 1224 (1994), for why "the negligence paradigm takes a back seat" to contract takes the form of what I would call a structural argument in the common law. The argument is that contract law (like property law) sets its own limits and so ought to take priority over the negligence paradigm of reasonableness, which is not self-limiting.

17. This form of argument is unlike what Philip Bobbitt defines as ethical argument in constitutional law, which is deriving rules from moral commitments that are reflected in the Constitution itself, more specifically the concept of enumerated (and so limited) governmental powers. The term "ethos-based argument" is from Sanford Levinson—it rests on "the idea of an 'ethos' that exemplifies the deep structural norms of a given culture." J.M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 TEX. L. REV. 1771, 1785 (1994).

is at least as coherent as Epstein's theory and that has a better historical pedigree. I think this history also undercuts historical arguments such as Dobbs makes. The modern form of the tort is not the product of the "unconscious"<sup>18</sup> extension by judges of modest doctrines of liability such as the tort of seduction. It is grounded, instead, on the striking proposition that tort law ought to be open for the redress of any injury, and in particular any intentionally inflicted injury.

This is not to say that Holmes and Pollock would applaud the result in *Woody's case*. They believed that judges had to apply general principles of liability, like the theory of prima facie tort, circumspectly. Holmes warned that determining the proper limits of tort liability under such open-ended principles demanded "not only the highest powers of a judge and a training which the practice of law does not insure, but also a freedom from prepossessions which is very hard to attain."<sup>19</sup> They would be appalled by the modern tendency to turn the the issue of impropriety over to a jury in novel and difficult interference cases, like *Woody's case*. As you shall see, this allocation of power to a jury is justified neither by the history of the interference tort nor by the general structure of tort law.<sup>20</sup> Holmes and Pollock would be surprised by cases like *Woody's case* for another reason. They never addressed the possibility that their broad theory of liability might displace settled principles of contract law—I believe because they thought of contract and tort law as governing essentially different categories of cases.<sup>21</sup>

Part III proposes a method for limiting the application of the interference tort while preserving its theoretical openness. Judges would embed their analysis of the impropriety of the defendant's conduct in other bodies of law that regulate the conduct or relationships of the three parties whose interests are intimately involved in any interference case—the plaintiff, the defendant, and the counter-party whose relationship or contract with the plaintiff was the subject of the defendant's interference. More concretely, I would allow an interference claim in a case that lies deeply in the shadow of another body of law only if the plaintiff can demonstrate that there is some unusual interest or factor present in his case that the other body of law does not address. This approach is consistent with the everyday practice of judges, for I believe they reject interference claims if they perceive a case as fitting within a different legal cubbyhole. In *Woody's case*, the consequence is that I would reject the interference claims because I think that contract law is capable of providing an adequate check on the bank's misconduct (if the bank officer did what Woody alleged) through the doctrine of good faith. The major effect of opening the door to an interference claim is to strengthen the argument for allowing a contract claim for breach of the duty of good faith.

My defense of the interference tort is open to the strong objection that it demands too much of judges, particularly trial judges. I do not have a sure answer to this objection. In my limited experience, judges tend to be ill-disposed towards interference claims in what they perceive as run-of-the-mill

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18. Sayre, *supra* note 11, at 702.

19. Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 9 (1894).

20. See *infra* notes 312–30 and accompanying text.

21. See *infra* notes 283–89 and accompanying text.

contract or commercial litigation.<sup>22</sup> Part I could have been written to highlight the majority of cases where interference claims were denied on a motion for summary judgment, rather than the significant minority of cases where they survived such a motion. The rate of “false positives”—the percentage of cases in which an interference claim prevailed when most would agree it should not have—may be relatively small, even under current law. Making the changes I propose in interference law could lower that rate and would bring the law more in accord with what I believe is the actual practice.

## I. THE MODERN LAW OF TORTIOUS INTERFERENCE

Much scholarship on the interference tort focuses on the case in which a plaintiff brings a claim against a stranger for interference with a clear-cut contract right. The arguments for the tort are relatively straightforward in such a case, though they are contestible even here.<sup>23</sup> The arguments start from the premise that the plaintiff has a legally protected interest, and so they only need to justify protecting that interest through a right that is good against the interferor as well as against the counter-party. Thus, Richard Epstein justifies the tort of interference with contract with a pastiche of doctrinal, philosophical, and economic arguments that all proceed from the observation that the tort is akin to torts that protect property rights from takings, e.g., conversion, trespass to goods, and dispossession of land.<sup>24</sup> William Landes and Richard Posner make an economic argument for a tort of interference with contract by analogizing the problem it addresses to that of joint tortfeasors. They claim that it is efficient for a party to have a right against the interferor as well as the counter-party to a contract because the counter-party may be insolvent or the interferor may be a lower-cost avoider than the counter-party.<sup>25</sup> The premise is that a determination already has been made that the plaintiff is not the best loss avoider—i.e., that she ought to have an action against someone for her loss. And Lillian BeVier makes an economic argument for the tort that proceeds from the observation that contract remedies sometimes under-protect contract rights.<sup>26</sup> Each of these arguments for the tort assumes that the interest the plaintiff claims in an interference case merits legal protection; the only issues are from whom and to what extent.<sup>27</sup>

These analyses of the interference tort do not account for its most interesting features. They address only one aspect of the tort—interference with contract and not interference with business relations. This separation of the tort is unnatural doctrinally. In the many states that accept the tort in its most

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22. The best evidence I have for this proposition is a survey of Texas wrongful termination cases. Over the period from 1990 to 1995 a plaintiff prevailed in only one of 26 reported cases with such a claim. See Mark P. Gergen, *A Grudging Defense of the Role of the Collateral Torts in Wrongful Termination Litigation*, 74 TEX. L. REV. 1693, 1728 (1996).

23. See Perlman, *supra* note 11, which ably makes the argument that ordinary inducement of breach should not be tortious.

24. Epstein, *supra* note 10, at 2.

25. LANDES & POSNER, *supra* note 10, at 222–25.

26. BeVier, *supra* note 10.

27. BeVier's argument implicitly raises difficult legal questions. To ground the argument for the tort on supposed flaws in contract law raises questions about whether and why tort law should override damage limitations in contract law. BeVier does not recognize these questions because her sole criterion for assessing a rule is its efficiency. Even on this score, her analysis is very incomplete. See *infra* note 345.

expansive form, it is formulated as a single tort that protects any concrete economic expectancy<sup>28</sup> from any intentional and improper or unprivileged interference.<sup>29</sup> Interference with business relations is different only in the greater scope of privilege, and in particular in the allowance of a privilege of competition.<sup>30</sup> A few states (and other common law nations) do treat interference with contract and interference with business relations as separate torts,<sup>31</sup> but that is not the dominant view in this nation.

Nor do these analyses account for the frequent use of interference claims

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28. *Trimed, Inc. v. Sherwood Medical Co.*, 977 F.2d 885, 889 (4th Cir. 1992) (Maryland law protects economic expectancies); *Gross v. Lowder Realty Better Homes & Gardens*, 494 So. 2d 590, 596-97 (Ala. 1986) (changing Alabama law to merge the two torts and arguing that this is the dominant approach); *United Bilt Homes, Inc. v. Sampson*, 832 S.W.2d 502, 504 (Ark. 1992) (protects "business expectancies"); *Pacific Gas & Elec. Co. v. Bear Stearns & Co.*, 791 P.2d 587 (Cal. 1990) (protects "prospective economic advantage"); *Nichols v. Tri-State Brick & Tile Co.*, 608 So. 2d 324, 328 (Miss. 1992) (protects "prospective business advantage"); *Daniels v. Dean*, 833 P.2d 1078, 1084 (Mont. 1992) (protects "business relations"); *Aylett v. Universal Frozen Foods Co.*, 861 P.2d 375, 379 (Or. App. 1993) (protects "proposed relationship"); *Commodore v. University Mechanical Contractors, Inc.*, 839 P.2d 314, 322 (Wash. 1992) (protects "business expectancy").

29. *Wheel Masters, Inc. v. Jiffy Metal Prods. Co.*, 955 F.2d 1126, 1130 (7th Cir. 1992) (Illinois makes tortious unjustified interference); *Trimed, Inc. v. Sherwood Medical Co.*, 977 F.2d at 890 (Maryland makes tortious any wrongful action); *Coliniatis v. Dimas*, 848 F. Supp. 462, 470 (S.D.N.Y. 1994) (New York law protects against acts done "either with the sole purpose of harming the plaintiff or by means that are 'dishonest, unfair or in any other way improper'" (quoting *Martin Ice Cream Co. v. Chipwich, Inc.*, 554 F. Supp. 933, 945 (S.D.N.Y. 1983) (emphasis in original)); *United Bilt Homes, Inc. v. Sampson*, 832 S.W.2d at 504 (tort protects from "wrongful and officious intermeddling of a third party" or "unjustified" conduct); *Nichols v. Tri-State Brick & Tile Co.*, 608 So. 2d at 328 (protects against actions done "without right or justifiable cause on the part of defendant (which constitutes malice)") (quoting *Galloway v. Travelers Ins. Co.*, 515 So. 2d 678, 682 (Miss. 1987)); *Daniels v. Dean*, 833 P.2d at 1084 (protects against acts "done with the unlawful purpose of causing damage or loss, without justifiable cause"); *Demetracopoulos v. Wilson*, 640 A.2d 279, 282 (N.H. 1994) (protects against improper interference, which includes filing a report that the defendant knows contains false information or an action by defendant as agent of employer that leads to plaintiff's termination that exceeds the scope of the defendant's charged duties); *Embree Constr. Group, Inc. v. Rafcor, Inc.*, 411 S.E.2d 916, 924 (N.C. 1992) (protects against unjustified interference, adopting *Restatement's* standards of justification); *Aylett v. Universal Frozen Foods Co.*, 861 P.2d at 379-80 (protects against actions done with "improper motive [or] improper means"); *Hilb, Rogal and Hamilton Co. v. DePew*, 440 S.E.2d 918, 921-22 (Va. 1994) (protects against interference by an "improper method," which includes employees breach of covenant not to compete); *Commodore v. University Mechanical Contractors, Inc.*, 839 P.2d at 322 (protects against interference "for an improper purpose or [using] improper means").

30. *Bank of N.Y. v. Berisford Int'l*, 594 N.Y.S.2d 152 (1993) (defense of economic justification does not apply to interference in a contract with a finite term (as opposed to an "at will" contract)) (citing *Guard-Life Corp. v. Parker Hardware Mfg. Corp.*, 406 N.E.2d 445 (N.Y. 1980)).

31. *Windsor Sec., Inc. v. Hartford Life Ins. Co.*, 986 F.2d 655, 661-63 (3d Cir. 1993) (questioning hindrance theory); *Union Sav. Am. Life Ins. Co. v. North Cent. Life Ins. Co.*, 813 F. Supp. 481, 492-93 (S.D. Miss. 1993) (Louisiana does not recognize claim for interference in business relations); *Smith v. Holt, Rinehart & Winston, Inc.*, 242 S.E.2d 548, 549 (S.C. 1978) (holding that there is no cause of action for interference in prospective contract). Cf. *H. Enters. Int'l, Inc. v. General Elec. Capital Corp.*, 833 F. Supp. 1405, 1414 (D. Minn. 1993) (holding that Illinois does not recognize hindrance claim where plaintiff's loss is of business relation; interference in business relation is tortious only if the defendant's action is directed against a third party). Under English law, interference with business relations is tortious only if the defendant's act is independently wrongful or it is part of a conspiracy. See PETER CANE, *TORT LAW AND ECONOMIC INTERESTS* 151-57 (2d ed. 1996). Canadian law had been similar to English law on this point, whether it has changed in recent years is a matter hotly disputed. See Gus Richardson, *Interference with Contractual Relations: Is Torquay Hotel the Law in Canada*, 41 U. TORONTO FAC. L. REV. 1 (1983).

to expand rights or remedies under contract law or other bodies of law. They assume that the plaintiff is using an interference claim to vindicate an interest already recognized as deserving legal protection by some other body of law. This Part canvasses cases in which interference claims are used to expand rights and remedies and suggests one possible typology for such cases. It also uses the cases to make some larger points about the problems that arise because of the open-ended nature of the issue of impropriety and the commitment of that issue to the jury.

### *A. Interference Claims in Contract Litigation*

Plaintiffs bring interference claims against other parties to a contract in two general situations. One is where the defendant's breach of contract interferes with the plaintiff's other contracts or business relations. In these cases, plaintiffs use interference claims to expand remedies for breach to recover damages for mental anguish and sometimes punitive damages.<sup>32</sup> The second situation is where the defendant exercises some right under a contract or performs in a way that is not in breach of the contract but that interferes with the plaintiff's other contracts or business relations. In these cases, plaintiffs use interference claims as a source of right within a contractual relationship.

#### *1. Expanding Remedies for Breach*

Contract law does not impose punitive damages as a sanction for breach.<sup>33</sup> It sometimes allows the recovery of damages for mental anguish, but only if the contract primarily advances personal rather than economic interests.<sup>34</sup> Thus a major benefit to a plaintiff of being able to recast a contract action as a tort is the availability of mental anguish damages and punitive damages (if the defendant's conduct is sufficiently heinous). In most states, damages recoverable on an interference claim include mental anguish suffered by individual plaintiffs,<sup>35</sup> expanded economic damages under the looser tort standard regarding liability for remote losses,<sup>36</sup> and punitive damages if the

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32. Tort and contract have always overlapped to some extent, particularly when a breach of contract causes physical harm to the plaintiff, for tort traditionally protects against physical harm to one's person or property. In recent years, some courts have recognized new tort theories that apply in traditional contract cases. The most significant new tort (measured by the amount of litigation it has generated) is bad faith breach, though in most states where it is recognized it covers only bad faith by an insurer in processing a claim. Mark P. Gergen, *A Cautionary Tale About Contractual Good Faith in Texas*, 72 TEX. L. REV. 1235, 1250 (1994). If the defendant's breach involves sufficiently outrageous conduct on his part and it inflicts emotional distress on the plaintiff, a claim in tort for intentional infliction of emotional distress might also lie. This tort generally requires extreme conduct and severe mental anguish. Gergen, *supra* note 22, at 1700-04.

33. *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 869 P.2d 454 (Cal. 1994) (citing denial of punitive damages in contract as one of the "fundamental differences between contract and tort" that justifies not making breaching party liable in tort for conspiring with interferor).

34. *Valentine v. General Am. Credit, Inc.*, 362 N.W.2d 628, 630-31 (Mich. 1984).

35. *Mooney v. Johnson Cattle Co.*, 634 P.2d 1333, 1338 (Or. 1981), has a good discussion of the broader issue of recovery of "noneconomic" damages under the tort. The case allows recovery of noneconomic damages if "mental distress, injured reputation, or other consequential harm...[are] an injury of a kind that should have been expected as a common and predictable accompaniment of disrupting the type of relationship with which the defendant interfered."

36. *Rite Aid Corp. v. Lake Shore Investors*, 471 A.2d 735, 739-40 (Md. 1984) (holding that damages are not limited to those in contemplation of the parties but could include all

defendant acted with wanton or reckless disregard for the plaintiff's rights.<sup>37</sup>

Interference claims have enormous potential scope in contract. The elements of a prima facie interference claim—boiled down these are the defendant's foreknowledge of the interference and actual harm—exist in a case of contract breach if the breach caused consequential damage and the defendant knew at the time of the breach that it would have that effect. A list of some of the cases in which interference claims have succeeded gives a sense of their potential scope. A distributor successfully sued its supplier for cancellation of the distributorship claiming that interfered with the distributor's relations with its customers.<sup>38</sup> An insured successfully sued his insurer for nonpayment of insurance proceeds claiming that interfered with the insured's ability to pay his contractor.<sup>39</sup> A borrower successfully sued its lender for failure to release a lien claiming that the lien interfered with the borrower's ability to obtain credit elsewhere and make profitable acquisitions.<sup>40</sup> And it has become almost commonplace to add an interference claim in a suit for breach of a covenant not to compete or for breach of an exclusive dealing arrangement.<sup>41</sup>

The crucial issue in such cases is whether the defendant's conduct in breaching is improper.<sup>42</sup> Courts have struggled with this issue. Some cases will

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damages proximately resulting from the interference); *Baker v. Dennis Brown Realty, Inc.*, 433 A.2d 1271, 1274 (N.H. 1981) (stating that while "the scope of 'foreseeable', and therefore recoverable damages is narrower in a contract case than in tort," speculative damages were not recoverable); *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 406 N.E.2d 445, 453 (N.Y. 1980) (following RESTATEMENT (SECOND) OF TORTS § 774A cmt. c (1964), in holding that "damages, including consequential damages, would be those recognized under the more liberal rules applicable to tort actions"). The Prosser treatise collects older cases that apply the stricter contract standard of liability for remote damages to interference claims. W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS 1003-04 (5th ed. 1984). I know of no recent cases applying this standard.

37. *Europlast, Ltd. v. Oak Switch Sys., Inc.*, 10 F.3d 1266, 1276 (7th Cir. 1993) (applying Illinois law); *Eden United, Inc. v. Short*, 573 N.E.2d 920, 926 (Ind. Ct. App. 1991); *Hardy v. Toler*, 218 S.E.2d 342, 345 (N.C. 1975); *Texaco v. Pennzoil*, 729 S.W.2d 768 (Tex. Ct. App. 1987) (applying New York law). Some states impose punitive damages only if the defendant acted with actual malice, meaning out of spite or ill will to the plaintiff. *Rite Aid Corp. v. Lake Shore Investors*, 471 A.2d at 735, 742; *Clement v. Withers*, 437 S.W.2d 818 (Tex. 1969).

38. *Trimed, Inc. v. Sherwood Medical Co.*, 977 F.2d 885 (4th Cir. 1992) (Maryland law). See also *Nichols v. Tri-State Brick and Tile Co.*, 608 So. 2d 324, 329 (Miss. 1992) (allowing interference claim by buyer of brick slices against supplier where supplier allegedly had intentionally failed to deliver slices as promised to prevent buyer from fulfilling terms of license agreement so that supplier could assume license).

39. *United Bilt Homes, Inc. v. Sampson*, 832 S.W.2d 502 (Ark. 1992).

40. *H. Enters. Int'l v. General Elec. Capital Corp.*, 833 F. Supp. 1405 (D. Minn. 1993). See also *Community Bank of Homestead v. Boone*, 164 B.R. 167 (Bankr. S.D. Fla. 1994), *rev'd*, 52 F.3d 958 (11th Cir. 1995) (upholding interference claim where bank's demand that home owner pay commercial loan to release mortgage based on a "dragnet clause" prevented closing of sale of the home).

41. *Paulson, Inc. v. Bromar, Inc.*, 808 F. Supp. 736, 742 (D. Haw. 1992) (action by exclusive distributor against its agent for taking contract with supplier in breach of a covenant not to compete); *Bonelli v. Volkswagen of Am., Inc.*, 421 N.W.2d 213 (Mich. App. 1988) (action against licensor who allowed use of photograph of U.S. Olympic Hockey Team in breach of exclusivity provision in license with plaintiff); *Bolz v. Myers*, 651 P.2d 606 (Mont. 1982) (breach of covenant not to compete by seller); *Hilb, Rogal & Hamilton Co. v. DePew*, 440 S.E.2d 918 (Va. 1994) (action by employer against employee who solicited former customers in breach of covenant not to compete).

42. An odd Georgia case takes an interestingly different tack. It held that a buyer of a radio station could not be liable for tortious interference with the relationship between the seller and lenders where the buyer breached its contract with the seller because the buyer was not a

hold a breach improper if it was in bad faith,<sup>43</sup> apparently meaning that the defendant must have known that he was not acting within his rights under the contract when he breached. Some cases require that the interference be the intended consequence of the breach.<sup>44</sup> For example, it would be tortious if the defendant breached in order to steal business from the plaintiff.<sup>45</sup> Some cases ground a finding of wrongful interference on actual malice,<sup>46</sup> meaning that the defendant must have acted to harm the plaintiff and not merely to profit himself. The most lenient cases state that any breach of contract is improper, whatever the defendant's motives.<sup>47</sup> This standard would hold a defendant liable even if he did not realize his conduct breached the contract. At the other extreme, some cases hold that a claim that sounds in contract cannot also sound in tort however heinous the defendant's reasons for breaching.<sup>48</sup>

Courts struggle with this issue because the law of interference, and tort law more generally, provides little assistance in setting limits on the tort. Actual

stranger to the contract between the seller and lenders. *Jefferson-Pilot Communications Co. v. Phoenix City Broadcasting, Ltd.*, 421 S.E.2d 295, 298-99 (Ga. App. 1992). This is akin to the argument that an agent cannot be liable for interference with the contract of its principal because it is not a stranger to the contract. See *infra* note 116. The context is quite different, however. In the typical case involving the principal-agent relationship, the suit is brought by the plaintiff for the agent's interference with its contract or relationship with the principal. Here the relationship is one of contract and the suit is brought by the other party to the contract. It is as if a principal sued a defaulting agent for interference with the principal's other contracts.

43. *H. Enters. Int'l v. General Elec. Capital Corp.*, 833 F. Supp. at 1418; *American Petrofina, Inc. v. PPG Indus., Inc.*, 679 S.W.2d 740, 758-59 (Tex. Civ. App. 1984). Cf. *American Nat'l Petroleum Co. v. Transcontinental Gas Pipe Line Corp.*, 798 S.W.2d 274, 279 (Tex. 1990) (holding that a showing that a breach was intentional suffices to make out a claim of impropriety).

44. *Pizza Management, Inc. v. Pizza Hut, Inc.*, 737 F. Supp. 1154, 1161 (D. Kan. 1990); *K & K Management v. Lee*, 557 A.2d 965, 976 (Md. 1989); *Daniels v. Dean*, 833 P.2d 1078, 1084 (Mont. 1992); *Nichols v. Tri-State Brick & Tile Co.*, 608 So. 2d 324, 328 (Miss. 1992).

45. *Nichols v. Tri-State Brick & Tile Co.*, 608 So. 2d at 329. The classic case holding it tortious interference to breach a contract with the purpose of capturing business from the plaintiff is *Knickerbocker Ice Co. v. Gardiner Dairy Co.*, 69 A. 405, 409 (Md. 1908).

46. *American Original Corp. v. Legend, Inc.*, 689 F. Supp. 372, 381 (D. Del. 1988) (holding that breach of contract did not constitute tortious interference because motives for repudiating the contract were economic); *Community Bank of Homestead v. Boone*, 164 B.R. 167, 170 (Bankr. S.D. Fla. 1994), *rev'd*, 52 F.3d 958 (11th Cir. 1995).

47. *Trimed, Inc. v. Sherwood Medical Co.*, 977 F.2d 885, 890 (4th Cir. 1992) (holding that action need only be wrongful to be tortious, and implying that simple breach of contract is wrongful); *United Bilt Homes, Inc. v. Sampson*, 52 832 S.W.2d 502, 504 (Ark. 1992) (stating that it is irrelevant why defendant breached; it is sufficient that he did breach).

48. *Jensen v. Westberg*, 772 P.2d 228, 234 (Idaho Ct. App. 1988); *Kvenild v. Taylor*, 594 P.2d 972 (Wyo. 1979) (tortious interference by breach is a "hybrid concept unsupported by any authority"). *Prosser and Keeton* seem to take this position for they state, "The defendant's breach of his own contract with the plaintiff is of course not a basis for the tort." *KEETON ET AL.*, *supra* note 36, at 990. But the accompanying note states that an action in tort will sometimes lie for breach because "a promisor's breach may cause the promisee to suffer the loss of other contracts or prospects." *Id.* at n.24. The inference seems to be that breach will not give rise to an action for interference where the lost expectancy is on the breached contract itself. That point seems well-established. See *K & K Management v. Lee*, 557 A.2d at 974 ("If D interferes with D's own contract with P, D does not, on that ground alone, commit tortious interference."). Plaintiffs have attempted to recover against the breaching promisor on a theory of conspiracy involving the third party interferor with mixed success. Compare *Applied Equip. Corp. v. Litton Saudi Arabia, Ltd.*, 869 P.2d 454 (Cal. 1994) (holding that party to contract may not be liable for conspiring with interferor in his breach); with *Luke v. DuPree*, 24 S.E. 13, 16-17 (Ga. 1924) and *Fox v. Deese*, 362 S.E.2d 699, 708 (Va. 1987). The majority and dissenting opinions in *Applied Equipment Corp.* provide excellent analyses of the issue and the precedent.

malice was dispensed with as an element of the interference tort early on.<sup>49</sup> On the question of whether the defendant must have acted with the purpose of harming the plaintiff in his other business, Prosser's observation in 1941 in the first edition of his treatise still holds true today—it is a “difficult question, on which there is little agreement” and which even the *Restatement of Torts* “leaves...in a highly uncertain state, to say the least.”<sup>50</sup> Prosser's next observation goes to the heart of the matter: “[T]he question is not so much one of prima facie liability as of the defendant's privilege.”<sup>51</sup> This is a crucial step, for if the defendant had no settled right to act as he did (and how could he when his action is in breach of a contract), then the issue of the impropriety of his conduct is up in the air for a judge or jury to decide based on the prudential and ethos-based concerns set forth in the *Restatement*.

Even less support can be found in interference doctrine for the requirements that a breach must be in bad faith or knowing to be actionable interference. Interference law does not require that a defendant have known that his conduct was wrongful for it to be tortious interference. Such a requirement could be grafted upon one supposed root of the doctrine in case law allowing an action by one who suffers economic injury from conduct of the defendant that was wrongful against others (e.g., the defendant shot at the plaintiff's customers).<sup>52</sup> But the cases that created the modern tort rejected a requirement of independent wrongfulness. Indeed, the most striking feature of the tort was that it applied to otherwise lawful actions—such as strikes.

Perhaps a requirement that a breach be knowing to be improper could be justified by analogy to the rule regarding misuse of process. Filing a legal claim is tortious interference only if the party who filed the claim knew that it was meritless.<sup>53</sup> But the analogy is not very convincing. This rule grounds on

49. Malice was explicitly defined to encompass more than ill will in *Bowen v. Hall*, 6 Q.B.Div. 333, 56 L.J.Q.B. 305 (1881), which is discussed in *infra* notes 163–67. The most significant case in the United States is *Plant v. Woods*, 176 Mass. 492 (1900), which adopts Holmes' concept of justification. It is discussed in *infra* notes 233–40. In Holmes' theory, malice was relevant because an action done for purely malicious reasons was not easily justified since it was done for no good reason. See *infra* note 197. See also *Lucke v. Clothing Cutters*, 26 A. 505, 509 (Md.1893) (ruling that malice was not an element of the tort, following Brett's reasoning in *Bowen v. Hall*).

50. WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 995 & n.44 (1st ed. 1941). The *Restatement (First) of Torts* is perhaps a little clearer on this than Prosser intimates. It states: “The essential thing is the purpose to cause the result. If the actor does not have this purpose, his conduct does not subject him to liability under this rule even if it has the unintended effect of deterring the third person from dealing with the other.” *RESTATEMENT (FIRST) OF TORTS* § 766 cmt. d (1939). This seems clear enough, but the comment adds “It is sufficient that he designs this result whether because he desires it as an end in itself or because he regards it as a necessary, even if regrettable, means to some other end.” *Id.* The *Restatement (Second)* (authored by Prosser) starts at the opposite point from the *Restatement (First)*. “The rule applies, in other words, to an interference that is incidental to the actor's independent purpose and desire but known to him to be a necessary consequence of his action.” *RESTATEMENT (SECOND) OF TORTS* § 766 cmt. j (1964). But cautions: “The fact that this interference with the other's contract was not desired and was purely incidental in character is, however, a factor to be considered in determining whether the interference is improper.” *Id.*

51. PROSSER, *supra* note 50, at 996.

52. See *infra* note 158. Sometimes “independently unlawful” is said rather than “independently wrongful.” I use the term wrongful because I think it more clearly encompasses violations of tort law as well as of criminal law.

53. *RESTATEMENT (SECOND) OF TORTS* § 773; *Coal Processing Equip. v. Campbell*, 578 F. Supp. 445, 464–65 (S.D. Ohio 1984), *aff'd*, 716 F.2d 902 (6th Cir. 1983), *cert. denied*, 465 U.S. 1066 (1984). Cf. *Westfield Dev. Co. v. Rifle Inv. Assoc.*, 786 P.2d 1112,

policies that are derived from the law on abuse of process. The argument is that the policies that justify limiting abuse of process to claims filed in bad faith equally justify limiting tortious interference claims when the underlying conduct is abuse of process. What the analogy does suggest is that we might similarly derive policies from the law of contract to justify limiting the tort. But, at least at first blush, it is difficult to derive from contract law a principle singling out "bad faith" breaches, for under contract law the promisor's motive for breaching is supposed to be irrelevant to his liability.

Neither does interference doctrine support a simple rule that a claim that sounds in contract can never be an interference claim. The silence of the *Restatement (Second) of Torts* on this issue is revealing. Often interference by breach takes the form of hindrance in the ability of the plaintiff to perform his contracts or maintain his own business relations. The *Restatement* provisions dealing with hindrance give one example,<sup>54</sup> a case in which a defendant damages a highway the plaintiff is obligated to repair.<sup>55</sup> It is an odd example. A construction company is far more likely to be hindered in its performance by a supplier or subcontractor who does not fulfill their contract than by a stranger. Prosser (the comment's author) may have selected the unusual case, consciously or subconsciously, because the more usual case makes the tort action seem too close to contract. In the more usual case, a contract (albeit two different contracts) is the ground for finding both a protected interest on the part of the plaintiff and wrongful conduct on the part of the defendant. Still, once we concede that a stranger who interferes with the construction company's performance of its contract commits a wrong, it is difficult to conclude that a party who has promised to assist the construction company is any less blameworthy when it interferes.<sup>56</sup>

The difference between Prosser's example and the more usual case lies not in the blameworthiness of the defendant's conduct. The difference lies instead in the fact that in the more usual case the plaintiff also has a contract claim against the defendant who interferes by breaching his contract. If we look elsewhere in tort law, the existence of a concurrent contract claim might seem to be irrelevant to the tort claim, for that is the rule in the areas of products liability, negligence, or fraud.<sup>57</sup> But those cases are different because those torts have fairly well-defined doctrinal boundaries. The interference tort is open-ended. Surely the existence of a contract action is relevant in some way to the broad-based prudential and ethical inquiry that is supposed to go into

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1117 (Colo. 1990) (stating that "the policy of encouraging free access to the courts which is the basis of an absolute privilege is outweighed by the intentional and improper interference with contract by means of litigation not brought in good faith").

54. RESTATEMENT (SECOND) OF TORTS § 766A (dealing with hindrance of contract). See also *id.* § 766B (b) (dealing with hindrance of business relations).

55. *Id.* at cmt. g.

56. Cf. *Buxbom v. Smith*, 145 P.2d 305 (Cal. 1944) (reasoning that breach of contract rendered action wrongful and so tortious under interference doctrine). We might distinguish the stranger and the supplier on the ground that the former actively interferes while the latter might interfere passively by not performing its contract. A distinction is sometimes drawn in the law of negligence between misfeasance and non-feasance. RESTATEMENT (SECOND) OF TORTS § 323, caveat and comment on caveat. But it is clear that tortious interference may be passive, since a defendant's refusal to deal with a third party in order to induce that party to breach a contract with the plaintiff may be tortious interference. *Id.* § 766 cmt. l.

57. *Pizza Management, Inc. v. Pizza Hut, Inc.*, 737 F. Supp. 1154, 1162 (D. Kan. 1990) (applying Kansas law).

determining the impropriety of the defendant's conduct. For example, a court might reason that the plaintiff's interests are adequately protected by contract law.<sup>58</sup> Or a court might decline to allow a tort action in "run of the mill" cases of contract breach on ethical or prudential grounds to protect people's expectations that contract law will apply. I want to drop the argument here for this is where the analysis in Part III starts.

## 2. *Implying Duties*

In *Woody's case*, an interference claim was used to hold a nonrecourse borrower personally liable for the lender's consequential damages on nonpayment.<sup>59</sup> In effect, the interference claim was used to get around a contractual limitation of remedy. An interference claim has also been used to avoid defenses to a contract action, like the statute of frauds, when a promisor's failure to perform a contract subject to a defense interferes with the promisee's other contracts or relations.<sup>60</sup> These cases are unlike those just discussed because the plaintiff has no claim for breach of contract against the defendant. One might say that the interference claim is being used to establish a right rather than to expand a remedy (though *Woody's case* shows the slipperiness of this distinction).

Often an interference claim is used in a way that is analogous to a claim in contract for breach of the duty of good faith.<sup>61</sup> *Woody's* interference claim against the bank could have been cast as claim for breach of the duty of good

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58. *Jensen v. Westberg*, 772 P.2d 228, 234 (Idaho Ct. App. 1988), denied an interference claim for the reason that contract law adequately serves the interests of promisees and society in having a promise kept. The court made this argument even though on the facts of the case contract law undercompensated the plaintiff's loss. The defendant had refused to approve the sale of property by the plaintiff who suffered a loss when the property later fell significantly in value because of a change in tax law. This loss was held to be insufficiently foreseeable at the time of contracting to be recoverable in contract. *Id.* at 233-34.

59. *Woody v. Tamer*, 405 N.W.2d 213, 220 (Mich App. 1987).

60. *Winternitz v. Summit Hills*, 532 A.2d 1089 (Md. App. 1987), cert. denied, 538 A.2d 778 (Md. 1988) (interference claim by tenant against landlord who breached oral agreement to renew lease and to permit lessee to assign lease).

61. Cases presenting problems similar to those discussed in the text include *Ad-Vantage Tel. Directory Consultants, Inc. v. GTE Directories Corp.*, 849 F.2d 1336, 1348-50 (11th Cir. 1987) (holding that jury could find publisher of yellow pages acted improperly in directly billing clients of plaintiff that was remiss in paying for ad space and upholding trial court's rejection of requested instructions that conduct was justified if publisher actually had or reasonably believed it had right to bill clients directly under contract); *Northside Mercury Sales & Serv. v. Ford Motor Co.*, 871 F.2d 758, 760-62 (8th Cir. 1989) (holding that jury properly found manufacturer liable for tortious interference for 17-day delay in approving agreement to lease dealership for five years where manufacturer subsequently approved two year lease with same party based on informal representations that approval would be within one week); *Thompson Trading v. Allied Breweries Overseas Trading Ltd.*, 748 F. Supp. 936 (D.R.I. 1990) (holding that brewer might be liable for tortious interference for refusing to consent to assignment of distribution rights though brewer had no duty under contract to consent to assignment because contractual right to withhold consent does not negate tortious interference claim); *Ervin v. Amoco Oil Co.*, 885 P.2d 246 (Colo. App. 1994) (upholding claims of breach of duty of good faith and interference with relations where oil company was allegedly to have calculated the rent charged to independent service stations to put them at a competitive disadvantage with stations owned by the company); *Association Group Life, Inc. v. Catholic War Veterans*, 293 A.2d 408, 415 (N.J. Super. Ct. App. Div. 1971), modified on other grounds, 293 A.2d 382 (N.J. 1971) (stating that "Any determination that defendants did not technically breach their contracts with plaintiff is not necessarily determinative of the absence of liability in tort...the tort question is whether it was fair dealing also to design and execute a plan to appropriate for itself AGL's expectancy....").

faith.<sup>62</sup> This overlap is not surprising for the doctrine of good faith is a mechanism for implying obligation in contract, and it is particularly concerned with checking opportunistic behavior.<sup>63</sup> This Part analyzes three cases where an interference claim does the job of a bad faith claim. There are striking similarities in these cases. All three reject contract claims, and in particular, claims of breach of the duty of good faith. As in *Woody's case*, in two of the three cases the judges compartmentalize the analysis of the contract and tort theories. It is as if the judges thought that each body of law existed as a world unto itself and that the collision of these worlds was unremarkable.<sup>64</sup> The cases suggest two fundamental differences between contract law and interference law. The jury has a much larger role under interference law in defining the parties' duties.<sup>65</sup> And duties emanate from public concerns of policy and fairness rather than from private agreements. The consequence in these cases is that the interference claim survived while the bad faith claim failed.<sup>66</sup>

In the first case, a bank foreclosed on a mortgage that was in default though the bank allegedly knew that the borrower had negotiated a sale of the property that would enable him to repay the loan.<sup>67</sup> Borrowers in other cases have sought to challenge allegedly unjustified foreclosures using the contract theory of good faith, but these arguments usually fail. So, too, in this case. The court reasoned that since the "right to foreclose was an express term of the contract...the implied duty of good faith and fair dealing has no application to

62. *In re Scallywags, Inc.*, 84 B.R. 303 (Bankr. D. Mass. 1988), is similar to *Woody's case*. It held that a landlord could be liable for tortious interference with a tenant's prospective contract with a buyer of his business when the landlord convinced the buyer to lease the premises rather than buy the business. This drove the tenant into bankruptcy.

63. See Gergen, *supra* note 32, at 1271-74.

64. An argument that the tort claim might be barred because the case was governed by contract law is summarily rejected by the majority in one of the cases, *Aylett v. Universal Frozen Foods Co.*, 861 P.2d 375, 379 n.1 (Or. App. 1993). The defendant had argued that a claim in tort for breach of contract required a special relationship between the parties, relying on a case involving a claim of negligence: *Georgetown Realty v. The Home Ins. Co.*, 831 P.2d 7 (Or. 1992). The court concluded that requirement applied only to claims of negligent performance, and noted that normally "conduct that does not constitute a breach of contract may nonetheless be tortious, and some conduct may be both a breach of contract and tortious." *Aylett*, 861 P.2d at 378 n.1. A dissent in a second case, *Uptown Heights Assoc. Ltd. Partnership v. Seafirst Corp.*, 873 P.2d 438, 449-50 (Or. App. 1993), argued that conduct that is not in breach of contract is privileged and therefore cannot be tortious whatever the actor's motive.

65. This is consistent with the RESTATEMENT (SECOND) OF TORTS §767, cmt. 1 (1964). Cases clearly holding the issue of propriety to be for the jury include: *Fineman v. Armstrong World Indus.*, 980 F.2d 171 (3d Cir. 1992); *Association Group Life, Inc. v. Catholic War Veterans*, 293 A.2d 408, 415-16 (N.J. Super. Ct. App. Div. 1971), *modified on other grounds*, 293 A.2d 382 (N.J. 1971); *American Marble Corp. v. Crawford*, 351 S.E.2d 848, 850 (N.C. App. 1987). Occasional modern cases take the issue of propriety out of the hands of the jury even though the case does not fall under an established privilege. See, e.g., *Midland Am. Sales-Weintraub, Inc. v. Osram Sylvania, Inc.*, 874 F. Supp. 164, 167 (N.D. Ohio 1995) (holding that under Ohio law "while a resolution of each of the factors outlined in the *Restatement* may require some factual inquiry, the ultimate question of whether an interference is improper, and can, thus, support a claim for intentional interference is a question of law"); *Maynard v. Caballero*, 752 S.W.2d 719, 721 (Tex. Ct. App. 1988) (holding that attorney recommendation of what turned out to be a losing trial strategy to counsel of co-defendant of his client is privileged as a matter of law).

66. Also, as in *Woody's case*, all three cases were decided at the summary judgment stage—we do not know how the claim for tortious interference eventually came out.

67. *Uptown Heights Assoc. Ltd. Partnership v. Seafirst Corp.*, 873 P.2d 438, 443 (Or. App. 1994).

its exercise.”<sup>68</sup> The court also rejected a claim in tort for bad faith breach because there was no evidence of willful misconduct.<sup>69</sup> But the interference claim survived summary judgment. Under Oregon law an action is improper if the defendant uses wrongful means or if he acts with an improper motive.<sup>70</sup> The bank had not used wrongful means since it had the right to foreclose. But the court held that the bank would have acted with an improper motive if it “acted without a proper business purpose and with the improper objective of harming plaintiffs.”<sup>71</sup> At a minimum this reasoning condemns the malicious exercise of a contractual right to harm the plaintiff,<sup>72</sup> which would have a huge impact on commercial litigation. For example, franchisees who complain of wrongful termination often allege malice in arguing breach of the duty of good faith, with little success to this point.<sup>73</sup> This decision would allow such claims to go to a jury on an interference theory if malice was pled.<sup>74</sup>

In the second case, the plaintiff, a potato seller, alleged that the defendant wrongfully declined to release a right of first refusal the defendant held on the plaintiff’s potatoes. The plaintiff claimed the release was withheld to retaliate against a competitor of the defendant’s who wanted to purchase the potatoes.<sup>75</sup> The ostensible reason for the refusal was the plaintiff’s failure to supply a written copy of the offer. The court applied the definition of good faith in the Uniform Commercial Code (UCC), recognizing that good faith required observance of reasonable norms of commercial behavior. But it took a strict view of industry practice in applying this standard. The plaintiff argued that it was industry practice to release a right of first refusal upon oral notification of an offer. The court held that this evidence did not suffice to find a breach of the duty since the plaintiff had no offer in hand but merely a proposal to deal.<sup>76</sup> The court allowed the interference claim, reasoning that if the defendant acted as it did to retaliate against a competitor, its motives were improper.<sup>77</sup> Taken as a whole the case stands for the odd proposition that exercise of rights under a contract may be improper and thus tortious interference, though it is neither in breach of the contract nor inconsistent with “reasonable commercial standards of fair dealing.”<sup>78</sup>

The last case is the most remarkable. The plaintiff provided credit life insurance to mortgage banks and reinsured that risk with the defendant, which

68. *Id.* at 440.

69. *Id.* at 441–42.

70. *Id.* at 443.

71. *Id.*

72. It seems there was no allegation of malice. A dissent quotes the allegation as “[t]he defendants’ motive in such interference was to injure the contractual relations and make the sale for their own benefit, to the detriment of plaintiffs.” *Id.* at 449. This might suggest that the majority thought a predatory motive was improper. Oregon precedent on improper motive involves the advisor’s privilege. An advisor may recommend a breach of contract unless she acts with an improper motive “against the best interests of the principal or...solely for [her] own benefit.” *Welch v. Bancorp Management Advisors, Inc.*, 675 P.2d 172 (Or. 1983), *modified*, 679 P.2d 866 (Or. 1984).

73. *Corenswet, Inc. v. Amana Refrigeration, Inc.*, 594 F.2d 129 (5th Cir. 1979).

74. Interference claims have prevailed in some cases involving distributorship or franchise terminations. *See, e.g.*, *Machine Maintenance & Equip. Co. v. Cooper Indus.*, 661 F. Supp. 1112 (E.D. Mo. 1987).

75. *Aylett v. Universal Frozen Foods Co.*, 861 P.2d 375, 379–80 (Or. App. 1993).

76. *Id.* at 377–78.

77. *Id.* at 379–80.

78. U.C.C. § 2–103(1)(b).

eventually took over the plaintiff's business with the initiating mortgage banks by offering them a better rate.<sup>79</sup> The court rejected several contract claims against the reinsurer. The plaintiff had argued that the reinsurer's conduct breached an express term of the contract that "they shall not contract with any of the creditor accounts whose credit insurance is reinsured" under the agreement.<sup>80</sup> The court found no violation of this term because the defendant had merely "contacted" the creditors and had not taken over the specific accounts for which it provided reinsurance.<sup>81</sup> It rejected the plaintiff's argument that the no-compete clause should be read more expansively because that was the parties' understanding, concluding that the clause was unambiguous and so had to be read literally. The court also rejected a good faith argument, reasoning "that implied covenant does not extend to performance of actions outside the scope of the written agreement."<sup>82</sup> Thus all the contract claims failed because the court applied strict rules of interpretation.

Not so on the interference claim. The court observed that the interference claim turned on the issue of justification (some states state the issue of impropriety as one of justification), and it concluded that it was bound to remand that claim because under Alabama law the issue of justification was for the trier of fact to decide based on the basket of factors listed in the *Restatement (Second) of Torts*.<sup>83</sup> Under those factors, the reinsurer's conduct could be deemed tortious if it violated ethical codes for business or trade practice<sup>84</sup> or if the private and social costs of the conduct outweighed the benefits.<sup>85</sup>

### B. Interference Claims in Other Litigation

Interference claims can be used to get around limitations in bodies of law other than contract. For example, plaintiffs who have been defamed have had some success with interference claims when their claim was barred under the

79. *Union Sav. Am. Life Ins. Co. v. North Cent. Life Ins. Co.*, 813 F. Supp. 481 (S.D. Miss. 1993).

80. *Id.* at 486 n.4.

81. *Id.* at 486-89.

82. *Id.* at 490.

83. 813 F. Supp. at 492. The *Restatement* may not require submitting this particular issue to the jury. The RESTATEMENT (SECOND) OF TORTS takes the position that when reasonable minds might differ on the question of whether interference was improper the issue is for the jury "to obtain its common feel for the state of community mores." § 767 cmt. 1 (1964). However, the *Restatement* also recognizes that sometimes the law may crystallize so that conduct may be deemed proper (or not) as a matter of law. *Id.* One of these crystallized privileges is for competition—a competitor may vie for business so long as it does not interfere with existing contracts. *Id.* § 768 & cmt. a. The reinsurer's conduct would seem to be within the scope of this privilege, for the insurer did not have contracts with the initiating banks that guaranteed it future business. Though other cases hold that the privilege is not absolute, and that hard competition between parties to a contract might be deemed tortious interference. *Ervin v. Amoco Oil Co.*, 885 P.2d 246, 254 (Colo. App. 1994).

84. RESTATEMENT (SECOND) OF TORTS § 767 cmt. d. *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 393 A.2d 1175 (Pa. 1978), is similar. It held that associates who took clients upon leaving a law firm had acted improperly, even though there was no covenant not to compete and the associates had been careful not to do anything to attract away clients while still at the firm. In holding the associates' conduct improper, the court put significant emphasis on provisions in the *Code of Professional Responsibility* that restrict solicitation by lawyers.

85. This is the combination of three factors: the interest of the plaintiff with which the defendant interferes, the interest sought to be advanced by the defendant, and the social interest in protecting the defendant's freedom of action and the plaintiff's contractual interest. RESTATEMENT (SECOND) OF TORTS § 767(c), (d), (e).

law of defamation.<sup>86</sup> Interference claims have been used by creditors of insolvent corporations to recover against shareholders or officers of the corporation.<sup>87</sup> Claims against corporate shareholders and officers also raise issues discussed in the next part, for they encroach on the law governing the relationship between the corporation and the plaintiff. These cases are relevant here, too, because the interference claim can displace rules in corporate law that govern the liability of shareholders and officers to corporate creditors or investors.<sup>88</sup> Interference claims have been used by beneficiaries of a contract to recover against a breaching party when they have no action as a third party beneficiary under contract law.<sup>89</sup> And interference claims have been used as a surrogate for malicious prosecution and abuse of process when some element of those torts was absent.<sup>90</sup>

Disputes among creditors or between creditors and debtors have bred a fair number of interference claims.<sup>91</sup> What I call the case of the waylaid beans

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86. *Van Horn v. Van Horn*, 56 N.J.L.R. (27 Vroom.) 318 (1893) (allowing an interference claim where defamation claim was barred by statute of limitations); *Roy v. Coyne*, 630 N.E.2d 1024 (Ill. App. 1994) (allowing an interference claim for criticism of plaintiff's product where a slander claim was barred by "innocent construction rule" and privilege of fair comment); *Dwyer v. Sabine Mining Co.*, 890 S.W.2d 140 (Tex. Ct. App. 1994) (allowing interference claim that alleged defamation that harmed plaintiff's business relations though defamation claim was barred by one-year statute of limitations).

87. *Embree Constr. Group, Inc. v. Rafcor, Inc.*, 411 S.E.2d 916, 925 (N.C. 1992) (holding that officers and directors of corporation might be liable to contractor with whom corporation did business if they induced corporation not to draw funds on bank loan to limit their personal liability as guarantors since such an action was not done "in good faith and for the best interests of their corporation"); *G.D. Searle & Co. v. Medicare Communications, Inc.*, 843 F. Supp. 895, 912 (S.D.N.Y. 1994) (holds that shareholders might be liable to corporate creditor if they diverted funds to themselves causing corporation to default if the creditor could "prove that compensation clearly in excess of normal salary and benefits was paid out by Medicare under the direction of one or both of the individual defendants"); *Yarbrough v. Federal Land Bank Assoc. of Jackson*, 616 So. 2d 1327 (La. App. 1993) (holding that lessee might have claim against president of solvent bank if president acted contrary to bank's interest in causing it to breach lease).

88. *See, e.g., Gibraltar Sav. v. LDBrinkman Corp.*, 860 F.2d 1275 (5th Cir. 1988) (holding that corporate holding company and its principal shareholder may be liable for interference with creditor's contract with corporation though they could not be held liable on the theory of corporate "alter ego").

89. *Inn Chu Trading Co., Ltd. v. Sara Lee Corp.*, 810 F. Supp. 501, 504 n.6, 506 (S.D.N.Y. 1992) (holding that majority investor in licensee has claim for interference against parent of its licensor for initiating breach of license agreement though it would not have an action as third party beneficiary under that agreement).

90. *Glubka v. Long*, 837 P.2d 553 (Or. App. 1992) (holding that a chiropractor might press an interference claim against the state accident insurance fund and the attorney general on grounds of allegedly false allegations of insurance fraud where malicious prosecution would not yet lie because plaintiff had not yet prevailed in defense of state's action against him but also suggesting that action might be stayed); *Lyon v. May*, 424 S.E.2d 655, 659 (N.C. App. 1993) (holding that insured might have interference claim against lessor who demanded proceeds from insurer and then sued to attach insurance proceeds though abuse of process claim would not lie because lessor did not bring attachment proceeding with an ulterior motive).

91. Interference claims have been brought by creditors against other creditors, *Hold-Trade Int'l, Inc. v. Adams Bank & Trust*, 9 F.3d 1360 (8th Cir. 1993); *Wheel Masters, Inc. v. Jiffy Metal Prods. Co.*, 955 F.2d 1126, 1130-31 (7th Cir. 1992) (upholding judgment on interference claim for prospective purchaser of tools and dies against third party possessor of materials for wrongfully asserting lien to retain materials despite offer to pay amount of lien); *First Wyo. Bank v. Mudge*, 748 P.2d 713 (Wyo. 1988) (upholding interference claim by seller of corporation where bank took and eventually enforced security interest in corporate assets knowing that this was in breach of buyer's covenant to seller not to encumber corporate assets); by debtors against creditors, *see Pedi Bares, Inc. v. First Nat'l Bank of Neodesha*, 575 P.2d

illustrates the issues that arise when the interference tort encroaches on an area of commerce that is subject to detailed statutory regulation. The case shows the difficulties with two opposite and simplistic approaches that try to take account of another body of law in an interference case. One approach is to hold conduct privileged only if it comes within some definite right, privilege, or immunity under the other body of law. The other approach is to hold the other body of law preempts an interference claim if a case falls within its shadow.

A buyer pre-paid a seller for beans.<sup>92</sup> It was the seller's policy to fill pre-paid orders first, but when the seller informed its bank that a loss on a forward contract had rendered it insolvent, the bank instructed the seller to deliver its last remaining beans to another buyer who would pay cash. The cash received on this sale reduced the seller's operational loan balance to the bank. The buyer sued the bank under several provisions of the UCC and for interference with contract. The UCC claims were dismissed. The strongest UCC claim was under a provision that protects buyers from third parties who injure their interests in a good,<sup>93</sup> but that provision requires that the goods be identified to the contract, and the beans were not so identified. The interference claim turned on two questions.<sup>94</sup> First, did the UCC preempt the common law claim? The court of appeals held that it did not, relying on a general provision in the UCC preserving common law remedies that are not clearly preempted.<sup>95</sup> Second, was the bank's action unjustified? The court of appeals sent this question back to the trial court with the advice that the bank's action would be justified if the bank could show that it had a superior security interest in the beans.

It might seem that the approach of the court to the issue of justification offers a promising way to integrate the tort with the UCC. If the bank had a superior interest in the beans under the statute, then its action would be privileged; otherwise not. A fair number of cases have taken a similar tack in other contexts, holding conduct privileged if the defendant can point to a sheltering right, privilege, or immunity under some other body of law.<sup>96</sup>

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507 (Kan. 1978) (upholding interference claim by debtor against bank where debtor alleged that bank harmed its relations with its customers by sending customers whose accounts were current dunning letters); *State Nat'l Bank of El Paso v. Farah Mfg. Co.*, 678 S.W.2d 661, 688-91 (Tex. Ct. App. 1984) (upholding judgment on interference claim for debtor against bank based on finding that officers appointed by bank mismanaged assets of debtor); and by creditors against debtors, see *Gibraltar Sav. v. LDBrinkman Corp.*, 860 F.2d 1275, 1298 (5th Cir. 1988) (upholding verdict on interference claim for bank against officers of debtor who stripped corporation of assets and diverted funds).

92. *Hold-Trade Int'l, Inc. v. Adams Bank & Trust*, 9 F.3d 1360 (8th Cir. 1993).

93. U.C.C. § 2-722.

94. The bankruptcy judge and the district judge had tried to reject the interference claim on grounds that avoided the thorny issue whether the bank had acted improperly. The bankruptcy judge reasoned that the buyer had no protected interest in the goods if they were not identified to the contract. The district court reasoned that the buyer could not establish causation if the beans were not identified to the contract since the seller had no obligation to deliver the beans to the buyer in any event. The court of appeals properly rejected both arguments. Interference protects commercial expectancies; it does not require that they take the form of property or even contract rights.

95. U.C.C. § 1-103.

96. *Martin v. Montezuma-Cortez Sch. Dist.* RE-1, 841 P.2d 237 (Colo. 1992) (holding that statute that makes strikes by public employees legal also shields them from interference claim); *Savage v. Pacific Gas & Elec. Co.*, 26 Cal. Rptr. 2d 305, 314-15 (Cal. App. 1993) (holding that principles derived from law of defamation should also control issue of justification in interference action, so action would lie only for false statement); *Village Supermarket, Inc. v.*

The case of the waylaid beans can be used to illustrate some difficulties with this approach. First, it is likely that even if the bank had a priority interest in the beans, it exceeded its rights under Article 9 by telling the seller how to dispose of the beans when the seller had not yet defaulted on its loan with the bank.<sup>97</sup> Under standard interference doctrine, use of wrongful means may render an action improper. Further it is not clear that even if the bank had a superior interest and the right to act as it did that its action necessarily would be privileged under standard interference doctrine.<sup>98</sup> A bad motive, such as malice, may render an otherwise righteous act tortious.

Putting these problems to the side, the implication that the bank's actions might be tortious if it could *not* demonstrate a superior interest in the beans is quite problematic. Consider the consequence if the buyer is found to have a superior interest under the statute.<sup>99</sup> The buyer might then have a claim for interference, but it is hardly self-evident that the tort remedy should supplement the statutory remedies afforded creditors. One difference is that to allow the interference claim would expose the bank to liability for punitive or mental anguish damages.<sup>100</sup>

Or it might prove to be uncertain whether the bank had a superior interest under the UCC or whether it had the right to act as it did.<sup>101</sup> Resolving this uncertainty under the aegis of an interference claim has troubling implications. New arguments based on the concerns of policy and fairness that determine the propriety of an action under interference doctrine would become relevant. And factual and even legal questions might be submitted to a jury where they otherwise would not be. This phenomenon is illustrated by the cases discussed earlier that submit a claim alleging underhanded behavior in performance of a contract to a jury under an interference theory while simultaneously holding that there was insufficient grounds to go to the jury on

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Mayfair Supermarkets, Inc., 634 A.2d 1381 (N.J. Super. Ct. 1993) (holding that Noerr-Pennington doctrine bars interference claim arising from competitor's participation in zoning proceedings).

97. The bank could act only after the seller was in default, U.C.C. § 9-501, and then its right would be to take possession of and sell the beans, U.C.C. §§ 9-503, 9-504.

98. *See, e.g., State Nat'l Bank v. Farah Mfg. Co.*, 678 S.W.2d 661, 689 (Tex. Ct. App. 1984) ("A justifiable business interest does not grant absolute privilege to interfere with a contractual relationship between others."). The interference torts have been used to fill in gaps in statutes when the defendant's action literally complies with the statute but violates its purpose. *See Kjesbo v. Ricks*, 517 N.W.2d 585 (Minn. 1994) (holding that use of strawman to convey title, while in technical compliance with statute giving former owner right of first refusal, was improper so that former owner's exercise of right was tortious interference).

99. U.C.C. § 9-307(1) gives a buyer of goods priority over other security interests when it buys in the ordinary course of business (i.e., from inventory).

100. U.C.C. § 9-507 gives a secured party with priority a remedy against another secured party who wrongfully disposes of goods. Punitive damages do not lie under this statute. *Texas Nat'l Bank v. Karnes*, 717 S.W.2d 901 (Tex. 1986). However, they often are recovered against a creditor who wrongfully disposes of goods because an action also lies for conversion. *See generally BARKLEY CLARK, THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE* ¶ 4.12[3] (1993).

101. Legal uncertainty might exist under § 9-307(1), which gives the buyer priority, because the buyer had not taken possession of the beans or because the beans had not been identified to the contract. *See JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE* 1165 n.2 (3d ed. 1988) (discussing point at which completed sale occurs so rights under § 9-307(1) attach). Factual uncertainty might exist regarding the identification of the beans to the contract or whether the bank had taken adequate measures to record its interest so that it would have priority.

the contract theory of breach of the duty of good faith and fair dealing.<sup>102</sup> Further, the interference lens colors in gaps in the statutory scheme of rights and remedies with a principle of liability for intentionally inflicted economic harm. The normal background principle in debtor-creditor disputes is that parties have only those rights and remedies found in the statute or their agreement.<sup>103</sup>

Such problems make it tempting to reject the interference claim by the bean buyer against the bank on the ground of preemption. The issue of preemption arises most clearly when a statute explicitly preempts common law claims in its field.<sup>104</sup> Preemption may also be implicit. Some cases reject interference claims by reasoning that a cause of action that fails on other grounds plead by the plaintiff cannot be made good by recasting the claim as tortious interference.<sup>105</sup> The premise seems to be that a statute or common law cause of action casts a shadow in which an interference claim may not survive. A similar principle defeats most claims under the doctrine of prima facie tort in New York.<sup>106</sup>

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102. See *supra* notes 67–85 and accompanying text. See also *South Cent. Livestock Dealers, Inc. v. Security State Bank of Hedley*, 551 F.2d 1346, 1351 (5th Cir. 1977) (holding that uncertainty about whether bank's offset of funds debtor held for third parties was wrongful under state law meant that interference claim was viable).

103. The existence and strength of this principle is demonstrated by the excited commentary on the issue whether, as a debtor remedy, courts may properly deny a creditor who violates Article 9 in taking or disposing of property the right to pursue the debtor for a deficiency. Article 9 provides no such remedy. See JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* § 25–19 (3d ed. 1988).

104. *Retherford v. AT&T Communications*, 844 P.2d 949, 961–74 (Utah 1992), offers a lengthy though wooden analysis of the issue whether a statute that purports to provide an exclusive remedy preempts common law actions. The case involved claims against co-workers and the employer on several theories based on allegations of retaliation for complaints about sexual harassment. The court adopted an “indispensible element test,” which asks “whether the statutory scheme supplies an indispensable element of the tort claim.” *Id.* at 963. The test seems to be whether the plaintiff logically must plead some element of the statutory cause of action (or otherwise rely on the statute) to make out the tort claim. Thus, the court held the plaintiff's interference claim not to be barred by the Utah Anti-Discrimination Act (“UADA”), though the precise act she alleged was that her fellow workers harassed her to retaliate for complaining about sexual harassment, which was conduct regulated by the UADA, because an interference claim would lie for actions other than that covered by the statute. *Id.* at 967. However, the court went on to hold the interference claim barred by § 301 of the Labor Management Relations Act (“LMRA”), codified at 29 U.S.C.A. § 185 (1994), reasoning that the validity of the implied contract with which her co-workers allegedly interfered turned on the issue of whether an employee subject to a collective bargaining agreement could claim rights greater than the unit under a theory of implied contract, which was a matter of federal law. *Retherford v. AT&T Communications*, 844 P.2d at 970. On the latter point, compare *Commodore v. University Mechanical Contractors, Inc.*, 839 P.2d 314, 322–23 (Wash. 1992), which holds that the LMRA does not preempt an interference claim because it may be grounded on a theory of interference with relations that does not require interpretation of the collective bargaining agreement to determine if it was breached. This reasoning follows Stephanie R. Marcus, Note, *The Need for a New Approach to Federal Preemption of Union Members' State Law Claims*, 99 *YALE L.J.* 209 (1989).

105. *Hassan v. Independent Practice Assoc.*, 698 F. Supp. 679 (E.D. Mich. 1988) (holding that interference claim cannot survive rejection of antitrust claims); *Willcox v. Boeing Military Airplane Co.*, 1989 U.S. Dist. LEXIS 11034 (D. Kan. Aug. 23, 1989) (holding that interference claim cannot survive rejection of employment discrimination claims).

106. *Freihof v. Hearst Corp.*, 480 N.E.2d 349, 355 (N.Y. 1985) (“Where relief has been afforded under traditional tort concepts, prima facie tort may not be invoked as a basis to sustain a pleading which otherwise fails to state a cause of action in conventional tort.”); *Springer v. Viking Press*, 457 N.Y.S.2d 246 (App. Div. 1982) (rejecting prima facie tort claim because of

The preemption argument is problematic in this simplistic form. In the case of the waylaid beans, there can be no argument of explicit preemption for UCC § 1-103 preserves common law rights unless they are “displaced by the particular provisions of this Act.” Thus the UCC does not preempt tort claims for conversion in creditor disputes. If we were to concede that the UCC implicitly preempts interference claims in some creditor disputes, difficult boundary drawing problems would remain. The argument that this particular case falls within the zone where an interference claim should not alter or supplement statutory rights and remedies is fairly compelling since most aspects of the relationships between the three relevant parties—the buyer, seller, and bank—are governed by the UCC. But even in such a case we might conclude that the UCC does not preempt interference claims for certain types of conduct, such as a threat by the bank that coerced the seller to breach its contract to deliver the beans to the buyer.

In other cases, the relationships between the relevant parties will not be governed by the UCC in such a pervasive manner. A prominent example is a case allowing an interference claim by a seller of stock in a corporation against a bank that took a security interest in the inventory and equipment of the corporation from the buyer in violation of a covenant made by the buyer to the seller that it would not so encumber the assets.<sup>107</sup> One secured credit treatise objects that “the court mangled UCC § 9-201, which clearly gives secured creditors priority over unsecured creditors.”<sup>108</sup> But significant aspects of the relevant relationships—the purchase agreement for the stock and a security agreement putting the stock in escrow—are not subject to Article 9. It is not self-evident that the seller’s failure to obtain a security interest under Article 9 should divest it of other common law protections of its interest. Indeed, the court described the case as “a classic case of the tort of intentional interference with a contractual relation. In simplistic terms, it consisted of inducing the buyer to break his purchase contract terms in order to offer a new loan security priority to the bank.”<sup>109</sup> From this perspective, a holding of preemption would seem to allow the Article 9 tail to wag the interference dog since the fact that the tort-feasor’s ill gotten gain happened to take the form of an Article 9 security interest would result in preemption of a commonplace interference claim.

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overlap with defamation though that claim did not lie because fictional character that allegedly defamed plaintiff was too dissimilar); *Belsky v. Lowenthal*, 405 N.Y.S.2d 62 (App. Div. 1978) (rejecting prima facie tort claim because of overlap with malicious prosecution though that claim did not lie because while defendant may have failed suit without just cause and maliciously it did not interfere with the plaintiff’s person or property); *Susskind v. Ipcos Hosp. Supply Corp.*, 373 N.Y.S.2d 627 (App. Div. 1975) (rejecting prima facie tort claim because of overlap with tortious interference with business relations though that claim did not lie because defendant did not act wrongfully or maliciously). *Burns Jackson Miller Summit & Spitzer v. Lindner*, 451 N.E.2d 459, 468 (N.Y. 1983) (“there is no recovery in prima facie tort unless malevolence is the sole motive for defendant’s otherwise lawful act”). *Ullmann v. Norma Kamali, Inc.*, 616 N.Y.S.2d 583 (App. Div. 1994) (holding that doctrine of prima facie tort may not be used to circumvent employment at will rule). *ATI, Inc. v. Ruder & Finn*, 368 N.E.2d 1230, 1233 (N.Y. 1977) (“Underlying the question of excuse or justification, it has been noted, is the question of whether the public’s gain outweighs the harm to another.”).

107. *First Wyo. Bank v. Mudge*, 748 P.2d 713 (Wyo. 1988).

108. CLARK, *supra* note 100, at ¶ 3.14[7].

109. 748 P.2d at 717.

### C. Disrupting Rights of the Counter Party

These days employees who sue for wrongful termination or employment discrimination often add an interference claim against a co-worker or superior or sometimes an owner or even a customer of the firm that fired them. Such claims have met with mixed success. Sometimes judges rebuff these claims out of hand<sup>110</sup> and often judges set an evidentiary burden that is difficult for a plaintiff to meet.<sup>111</sup> But in a fair number of cases such claims have been submitted to a jury,<sup>112</sup> and in a few reported cases such claims have prevailed at trial and been upheld on appeal.<sup>113</sup> In a similar vein, enterprising plaintiffs who

110. *Willcox v. Boeing Military Airplane Co.*, 1989 U.S. Dist. LEXIS 11034 (D.Kan. Aug. 23, 1989) (rejecting plaintiff's attempt to give "two hats to a single cause of action").

111. *Otterbacher v. Northwestern Univ.*, 838 F. Supp. 1256, 1261 (N.D. Ill. 1993) (rejecting hindrance claim and holding that supervisor must act "solely for his or her own personal interest, and totally unrelated to or antagonistic to the interest of the employer"); *Cromley v. Board of Educ.*, 699 F. Supp. 1283 (N.D. Ill. 1988) (holding that supervisor must act in own interest or to harm plaintiff and against the interests of the employer); *Ramsbottom v. First Penn. Bank*, 718 F. Supp. 405 (D.N.J. 1989) (holding that plaintiff must show that supervisors were acting outside the scope of their employment); *Gram v. Liberty Mut. Ins. Co.*, 429 N.E.2d 21, 24-25 (Mass. 1981) (holding that officer is liable for interfering with employment only if actual malice can be shown or reasonably inferred).

112. *Coliniati v. Dimas*, 848 F. Supp. 462, 470 (S.D.N.Y. 1994) (New York law) (upholding on motion for summary judgment claim against law firm for allegedly defamatory report that led to firing of at-will employee); *Agugliaro v. Brooks Bros.*, 802 F. Supp. 956 (S.D.N.Y. 1992) (upholding on motion for summary judgment at-will employees claim against coworkers); *Boyle v. Boston Found., Inc.*, 788 F. Supp. 726 (D. Mass. 1992) (upholding claim against co-worker for harassment that made work more difficult); *Devlin v. WSI Corp.*, 833 F. Supp. 69 (D. Mass. 1993) (upholding claim against parent corporation); *Plessinger v. Castleman & Haskell*, 838 F. Supp. 448 (N.D. Cal. 1993) (upholding on motion for summary judgment associate's claim against firm's client also based on age discrimination); *Labus v. Navistar Int'l Transp. Corp.*, 740 F. Supp. 1053 (D.N.J. 1990); *Soltani v. Smith*, 812 F. Supp. 1280 (D.N.H. 1993) (upholding interference claim against state treasurer and deputy treasurer for allegedly causing termination of plaintiff in retaliation for statements); *Kozlowsky v. Westminster Nat'l Bank*, 6 Cal. App. 3d 593 (Ct. App. 1970); *Costello v. Insurance Servicing & Adjusting Co.*, 629 So. 2d 1008 (Fla. App. 1993) (reversing summary judgment for city agent which allegedly caused termination of plaintiff; agent not protected by privilege because its authority was over administration of worker's compensation and not firing decisions); *Georgia Power v. Busbin*, 250 S.E.2d 442 (Ga. 1978); *Mittelman v. Witous*, 552 N.E.2d 973 (Ill. 1989); *Vajda v. Arthur Anderson & Co.*, 624 N.E.2d 1343 (Ill. App. 1993) (reversing summary judgment for partner of firm where employee alleged that partner caused his termination out of a personal vendetta); *Gram v. Liberty Mut. Ins. Co.*, 429 N.E.2d 21 (Mass. 1981); *Patillo v. Equitable Life Assurance Soc'y of the U.S.*, 502 N.W.2d 696 (Mich. App. 1992) (upholding on motion for summary judgment claim against office manager for interference in at-will employment); *Morgan v. Union County Bd. of Chosen Freeholders*, 633 A.2d 985 (N.J. Super. Ct. App. Div. 1993) (reversing summary judgment for county board in suit by director of county department claiming construction termination on grounds of political affiliation on interference claim but rejecting other constitutional and tort claims); *Giordano v. Aerolift, Inc.*, 818 P.2d 950 (Or. App. 1991); *Trepanier v. Getting Organized, Inc.*, 583 A.2d 583 (Vt. 1990). Some cases involve claims of interference in the relations of an independent service provider with his customers or suppliers. *See, e.g.*, *Greenberg v. Mount Sinai Med. Ctr.*, 629 So. 2d 252 (Fla. 1993) (reversing motion for summary judgment on claim by former chair of surgery department that successor tried to divert patients away from him and impaired access to surgery facilities).

113. *Sorrells v. Garfinckel's*, 565 A.2d 285 (D.C. App. 1989) (upholding judgment against supervisor for maliciously denying salesperson opportunities to sell); *Creel v. Davis*, 544 So. 2d 145 (Ala. 1989) (upholding judgment against physician employed by sister-corporation of corporation that employed plaintiff for advising termination despite absence of proof of malice); *Girsberger v. Kresz*, 633 N.E.2d 781 (Ill. App. 1993) (upholding judgment and award of punitive damages against officer/shareholder of employer who sought discharge in bad faith and made defamatory statements); *Draghetti v. Chmielweski*, 626 N.E.2d 862 (Mass. 1994)

have been frustrated in an effort to negotiate a contract have sued the agent or owner of the party with whom they sought to deal on grounds of interference.<sup>114</sup> The strategy of suing an agent or owner of the counter-party to a contract for interference also has been used when the counter-party breaches its contract but is immune from suit for some reason. The earliest cases of this stripe involve claims against agents and owners of corporations for inducing a corporation to breach its contract when the corporation had dissolved.<sup>115</sup>

We have seen how interference claims might disrupt rules in contract law that regulate the relationship between the plaintiff and the defendant when the act of interference is also (or is arguably) a breach of contract between the two. In the case of the waylaid beans, the interference claim threatened to disrupt rules of commercial law that regulated the rights and obligations of the defendant/interferer *vis à vis* the assets of the counter-party. The wrongful termination cases and the other cases illustrate that interference claims might also undercut rules governing the relationship between the counter-party and the interferer.<sup>116</sup>

The point is clearest in the wrongful termination cases. The reality is that a supervisor or fellow worker who is alleged to have caused the plaintiff's firing is likely to be judgment proof. Thus, an interference claim will have value mostly because the employer is expected to pay off the claim to protect its workers. The employer as principal may be directly liable on a theory of respondeat superior.<sup>117</sup> Even absent such a direct action the principal may be indirectly affected. It may be obligated to defend and indemnify its agent on legal or practical grounds. And *ex ante*, a principal may be harmed by its agents' reluctance to participate in the breach of a contract or in the termination of a relationship when they face the specter of individual liability. This reasoning suggests that a court might deny an interference claim against a supervisor who is alleged to have caused the firing of an underling for personal reasons on the ground that the claim falls in the penumbra of the employment at will rule. A few cases adopt essentially this reasoning, denying interference

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(upholding judgment against police chief for defamation and interference with office's employment relation where chief used improper means and had improper motive).

114. *Printing Mart Morristown v. Sharp Electcs., Corp.*, 563 A.2d 31 (N.J. 1989).

115. *Shapoff v. Scull*, 222 Cal. App.3d 1457 (Ct. App. 1990); *Remy Beverages, Inc. v. Myer*, 56 N.Y.S.2d 828, 830-31 (Sup. Ct.), *aff'd*, 269 A.D. 1013 (App. Div. 1945).

116. I assume that the issue is framed as whether the agent or owner's action was privileged. Some cases reject interference claims against agents and owners on a different ground: that an agent or owner is not a stranger to a contract involving his principal or his firm and so he cannot "interfere" with the principal or firm's contracts or relations. *Holloway v. Skinner*, 898 S.W.2d 793, 796 (Tex. 1995). This reasoning produces roughly the same result as a test of impropriety in suits against agents because the standard for separating an agent from his principal—the question is posed as whether he acted outside his authority or against the interests of his principal—is similar to the standard defining when an agent's action is improper. Though this reasoning might not immunize an agent in complicated corporate structures where the agent may not work directly for the firm that fires the plaintiff. *See Creel v. Davis*, 544 So. 2d 145 (Ala. 1989) (allowing interference claim because the agent worked for sister corporation of plaintiff's employer). This reasoning also may produce a different result in suits against owners because it immunizes an owner based on his share interest in the firm, rather than his motives for acting. *See, e.g., Deauville Corp. v. Federated Dep't Stores*, 756 F.2d 1183, 1196-97 (5th Cir. 1985) (holding that a parent corporation cannot be liable for interference with business relations of a wholly owned subsidiary).

117. *Yaindl v. Ingersoll-Rand Co.*, 422 A.2d 611 (Pa. Super. Ct. 1980). *Cf. Eserhut v. Heister*, 762 P.2d 6, 9-10 (Wash. Ct. App. 1988) (rejecting claim against employer on a theory of respondeat superior).

claims against supervisors to preserve the power of the employer under the employment at will rule.<sup>118</sup>

At first blush the concern that an interference claim might disrupt the right of a counter-party might seem to fly in the face of traditional interference doctrine. Often rights, privileges, powers, or immunities<sup>119</sup> of the counter-party in his relationship with the plaintiff will not shield an interferor from liability. Under contract law, a counter-party may breach his contract with liability only for the plaintiff's economic damages. But this principle does not shield an interferor from liability for mental anguish and sometimes punitive damages. If the interference is with a relationship that is not secured by contract, the counter-party has the power to freely terminate the relationship. But a third party may still be liable for interference. And defenses that shield a counter-party from liability for breach of contract, like the statute of frauds, do not shield an interferor.<sup>120</sup>

But the *Restatement (Second) of Torts* does not treat the interests of the counter-party as irrelevant to the determination of the propriety of interference. It states that in determining the propriety of interference "the significant relationship may be between any two of the three parties."<sup>121</sup> The privilege that is usually relevant in the wrongful termination cases—the privilege of a person, like an agent, who is charged with a welfare of another to interfere with the other's contracts or relations—is explicitly grounded on the interests of the counter-party (the principal).<sup>122</sup> Thus, a court could erect a high barrier to an interference claim against agents of a firm to protect the firm's interest in autonomy in making firing decisions. It is only a short step to add that a court might protect the employer to preserve the employer's power under the employment at will rule.

The legal relationship between the counter-party and the plaintiff is

118. *Wampler v. Palmerton*, 439 P.2d 601, 606 (Or. 1968) (justifying privilege for corporate officers by right of corporation to terminate contracts and business relationships). Cf. *Holloway v. Skinner*, 898 S.W.2d at 796 (reasoning that any act within the scope of the agent's authority should be privileged, for it should be for the principal to decide if the act was in the principal's interest) (Hecht, J., concurring).

119. Wesley Hohfeld used prominent interference cases to help make his case that it would improve legal analysis to distinguish between rights, privileges, powers, and immunities. Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917). Such terminology is helpful because not all rules which a party might cite to cloak himself from liability are "rights" in the Hohfeldian sense. For example, I am more comfortable describing the employment at will rule as conferring a power on the employer to end a legal relation rather than as conferring a right on the employer.

120. *Clement v. Withers*, 437 S.W.2d 818, 821 (Tex. 1969) (holding that unenforceability of contract under the statute of frauds does not bar an interference claim). There is authority rejecting a claim of interference with a contract that is unenforceable on grounds of public policy. For example, it is not tortious to interfere with a covenant not to compete that is an unreasonable restraint on trade. *Juliette Fowler Homes, Inc. v. Welch Assocs., Inc.*, 793 S.W.2d 660, 664 (Tex. 1990). The case of a contract that is unenforceable under the statute of frauds and the case of a contract that is void as against public policy have been distinguished on the ground that one involves a voidable contract while the other involves a void contract. *NCH Corp. v. Share Corp.*, 757 F.2d 1540, 1543 (5th Cir. 1985). A better argument is that the social interest in competition that underpins the prohibition of unreasonable covenants not to compete equally justifies protecting people who do business with the former employee in breach of a void covenant. It is less clear that the reasons that justify the requirement of a writing for enforcement of a contract also justify immunizing a person who induces the breach of an unwritten contract.

121. RESTATEMENT (SECOND) OF TORTS § 767 cmt. i (1964).

122. *Id.* § 770 cmt. e.

recognized as of dominant importance in another case. A lawyer brings an interference claim against an insurer alleging that it conducted settlement negotiations with her client behind her back, and induced her client to discharge her in order to make a settlement offer more attractive to the client.<sup>123</sup> At first blush this may seem to be a straightforward case of interference. A buyer who tells a seller not to pay his broker so that they could save the commission is liable for tortious interference.<sup>124</sup> Thus, shouldn't an insurer be liable when it cuts a lawyer out of a settlement? But unique rules govern the lawyer-client relation. A client has an inalienable power to discharge his attorney and settle his cause of action.<sup>125</sup> (A lawyer may get some protection from opportunistic discharge by negotiating for an equitable lien on the proceeds of a cause of action.<sup>126</sup> And even if the lawyer fails to get a lien she might be able to sue in contract or in restitution for the value of the work she has done if she is discharged without cause.<sup>127</sup>) Courts disagree about what behavior by an insurer in cutting a plaintiff's lawyer out of a fee rises to the level of a tort. A few reject the claim entirely,<sup>128</sup> some require that the insurer have lied to or coerced the claimant,<sup>129</sup> some require that the insurer have acted with the purpose of harming the lawyer, while some might hold the insurer's conduct tortious if it acted to profit itself.<sup>130</sup> This is not the place to evaluate the relative merit of these approaches. My point is that all but the broadest theories of liability impose restrictions that go well beyond the elements of the prima facie interference case. These restrictions ground on the power of the claimant to settle his claim without his lawyer's consent, or, if you will, the social interests that underpin that power.

The legal relationship between the counter-party and the interferor may be relevant for a quite different reason. In some cases, whether the counter-party has a cause of action against the interferor for the conduct which harmed the plaintiff will affect the analysis of an interference claim. For example, this issue arises when the defendant/interferor breaches its contract or violates some other duty it owes the counter-party in a way that harms the plaintiff. A real estate broker sues a breaching buyer for tortious interference because the breach deprives the broker of his commission from the seller. Or an assignee of a franchise sues the franchisor for breaching its obligation under the franchise

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123. *Sharrow v. State Farm Mut. Auto. Ins. Co.*, 511 A.2d 492 (Md. 1986).

124. *Clements v. Withers*, 437 S.W.2d 818 (Tex. 1969).

125. *Todd v. Superior Court*, 184 P. 684 (Cal. 1919).

126. EARL WOOD, *FEE CONTRACTS FOR LAWYERS* 39-46 (1936).

127. *Id.* at 203-11.

128. *Walsh v. O'Neill*, 215 N.E.2d 915 (Mass. 1966); *Orr v. Mutual Benefit Health & Accident Ass'n*, 207 S.W.2d 511 (Mo. Ct. App. 1947).

129. *Volz v. Liberty Mut. Ins. Co.*, 498 F.2d 659 (5th Cir. 1974) (interpreting Alabama law); *Herman v. Prudence Mut. Casualty Co.*, 244 N.E.2d 809 (Ill. 1969); *Krause v. Hartford Accident & Indem. Co.*, 49 N.W.2d 41 (Mich. 1951).

130. *Sharrow v. State Farm Mut. Ins. Co.*, 511 A.2d 492 (Md. 1986) (insurer is liable for interference if it initiated negotiations and sought dismissal of attorney for its own benefit); *Edwards v. Travelers Insur.*, 563 F.2d 105 (6th Cir. 1977) (interpreting Tennessee law); *Employers Liab. Assurance Corp. v. Freeman*, 229 F.2d 547 (10th Cir. 1955) (interpreting Oklahoma law); *State Farm Fire Ins. v. Gregory*, 184 F.2d 447 (4th Cir. 1950) (interpreting South Carolina law); *Bennett v. Sinclair Navigation Co.*, 33 F. Supp. 14 (E.D. Penn. 1940); *State Farm Mut. Ins. Co. v. St. Joseph's Hosp.*, 489 P.2d 837 (Ariz. 1971); *Weiss v. Marcus*, 51 Cal. App. 3d 590 (Cal. Ct. App. 1975); *Herron v. State Farm Mut. Ins. Co.*, 363 P.2d 310 (Cal. 1961); *Lurie v. New Amsterdam Casualty Co.*, 1 N.E.2d 472 (N.Y. 1936); *Ross v. Woyan*, 439 N.E.2d 428 (Ohio Ct. App. 1980); *Keels v. Powell*, 34 S.E.2d 482 (S.C. 1945).

agreement to consent to a reasonable assignment.<sup>131</sup> These claims are akin to third party beneficiary claims in contract. But the issues in these cases are sufficiently different from those presented in the typical third party beneficiary cases that the insufficiency of the claim under that body of doctrine ought not count much against the interference claim.<sup>132</sup> The question should be instead whether the interests of the plaintiff are sufficiently distinct from those of the counter-party that the mechanisms of contract law that protect the counter-party's interest may underprotect the plaintiff's interests.

## II. A HISTORY OF THE INTERFERENCE TORT

Some will conclude that the cases in Part I demonstrate a basic flaw in the interference tort, believing that a doctrine that has the potential to displace so much of the law regulating commercial relations must be drawn too broadly. This criticism raises prudential questions that I will address in Part III by showing how embedding the analysis of interference claims in other bodies of law might preserve the openness of the tort while channeling analysis in a way that makes it more orderly and predictable.

This Part addresses some related criticisms of the tort. One criticism is that the modern tort has outgrown its roots and should be pruned back. The other criticism is that the tort is "not, and cannot be, described by law"<sup>133</sup> because it is too indeterminate. I answer both criticisms with a historical argument.<sup>134</sup> I will show that what really underpins the interference tort is Oliver Wendell Holmes, Jr., and Sir Frederick Pollock's theory of prima facie tort, which holds that any intentional infliction of harm is tortious unless the act can be justified.

This history of the tort is novel. Typically the tort is traced to three other roots in the law. One theory attributes the tort to the recognition of a property-like interest in contract in the late nineteenth century.<sup>135</sup> A second theory traces the tort to cases that extended the scope of liability for tortious conduct to encompass economic harm intentionally inflicted on third parties.<sup>136</sup> A third theory traces the tort to the tort of seduction of servants.<sup>137</sup> These other

131. *Noller v. GMC Truck & Coach Div.*, 760 P.2d 688 (Kan. Ct. App. 1988) (remanding interference claim by prospective purchaser of franchise against franchisor/manufacturer for refusing approval of the sale).

132. In the paradigmatic third party beneficiary case the plaintiff is demanding substantive performance from the promisor and the promisee has disappeared or is indifferent to whether the promisor performs. In the hypothetical, the promisor (the franchisor) prevents the promisee (its franchisee) from performing its contract with the plaintiff.

133. Dobbs, *supra* note 11, at 346.

134. There is an irony in my historical defense of the tort. If I am right, the tort sprang from the view that the law should be shaped by prudential and ethical concerns rather than an obedience to precedent. But perhaps the history is relevant to the ultimate questions of policy, too. In tallying the good and the bad that can be done with open-ended principles of liability, we ought to consider to what effect they have been used in the past, as well as how they might be used in the future.

135. Note, *Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort*, 93 HARV. L. REV. 1510 (1980); Dowling, *supra* note 11, at 493-501.

136. RESTATEMENT (SECOND) OF TORTS § 766 cmt. c, § 766B cmt. b (1964). Perlman, *supra* note 11, at 69-78, grounds his argument on the liability-limiting features of tort law. See *infra* note 292.

137. Sayre, *supra* note 11; Dowling, *supra* note 11, at 493-501. KAREN ORREN, BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED

theories play a part in the history of the tort, but they were understood as competing theories at the time, and they lost (at least in this country). Mine is the winner's history.

### A. *The Early Cases and Treatises*

The usual starting point in the history of the interference tort is *Lumley v. Gye*.<sup>138</sup> Lumley sued Gye for inducing Wagner to breach her contract to perform at Lumley's theatre. Three of the four theories that are said to be the root of the interference tort appear in the arguments of the counsel and the judges. Gye's counsel opened his argument with the observation that Lumley's claim was unprecedented.<sup>139</sup> He added that for tort to lie "the plaintiff must have a property in the thing taken away,"<sup>140</sup> which he said Lumley did not. Lumley's counsel sought to ground the claim on a general principle found in Comyns' digest<sup>141</sup> regarding the action on the case that "in all cases, where a man has a temporal loss, or damage by the wrong of another, he may have an action upon the case, to be repaired in damages."<sup>142</sup> He also offered the court

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STATES 105-08, 122-35 (1991), adds interesting detail to this story. She argues that tort of enticement was the template for the judicial effort to protect the master's control of the workplace from interference by organized employees. She grounds the argument on *Walker v. Cronin*, 107 Mass. 555 (1871), and *Carew v. Rutherford*, 106 Mass. 1 (1870), but misreads those cases because she does not appreciate the significance of the reference to the general principle in Comyns. JOHN COMYNS, A DIGEST OF THE LAWS OF ENGLAND 272 (5th ed. 1822). See *infra* notes 156-62 and accompanying text. Orren notes that there was an earlier enticement case in Massachusetts. *Boston Glass Manufactory v. Binney*, 4 Pick. (Mass.) 425 (1827) (holding that it was a tort to enter into contracts to hire competitor's employees on termination of their contract). Orren's theory runs into insurmountable difficulty with the secondary boycott cases, for in those cases unions exerted pressure on employers without inducing servants to withhold work. Orren basically views these cases as dishonest. So she comments on "the tendency to drag in the ghost of the enticement tort by a side door," ORREN, *supra*, at 142, and that "judges extended the enticement tort to meet unprecedented circumstances as far as it would reach, but finally they did have to legislate." *Id.* at 144. The case she cites—*Barr v. Essex Trades Council*, 53 Eq. 8 Dick. Ch. 101, 110 (1894), actually grounds on the principle that "the injury done intentionally and without legal excuse, or maliciously, is the gist of the civil remedy." That is, it grounds on the general theory of tort.

138. 2 E.&B. 216, 22 L.J.Q.B. 463 (1853). What one considers the "pre-history" of the tort depends on what one considers its roots. ORREN, *supra* note 137, cites an earlier enticement case in Massachusetts not involving seduction of a servant. *Boston Glass Manufactory v. Binney*, 4 Pick. (Mass.) 425 (1827). Dowling, *supra* note 11, cites a New York case allowing a landlord to sue a third party who induced a tenant to abandon a lease by threatening the tenant. *Aldridge v. Stuyvesant*, 1 Hall 210 (N.Y. Sup. Ct. 1828). The *Restatement (Second) of Torts* cites early English cases involving claims that force, fraud, or illegal means were used to drive away the plaintiff's customers. RESTATEMENT (SECOND) OF TORTS § 766B cmt. b (1964) (citing *Garrett v. Taylor*, Cro.Jac. 567, 79 Eng. Rep. 485 (1621) (threatening customers with vexatious suits)); *Tarleton v. McGawley*, Peake N.P. 205, 170 Eng. Rep. 153 (1793) (shooting at customers); *Keeble v. Hickeringill*, 11 East 574, 103 Eng. Rep. 127 (1706).

139. Counsel for Gye argued that "[W]ith the single exception of cases arising out of the relation of master and servant, there is no authority to be found either in the English or American courts or in the civil law, which will support an action founded on a breach of contract against any other person than the contracting party." 2 E.&B. 216, 22 L.J.Q.B. at 465.

140. *Id.* at 466.

141. JOHN COMYNS, A DIGEST OF THE LAWS OF ENGLAND 272 (5th ed. 1822).

142. 2 E.&B. 216, 22 L.J.Q.B. at 467. The statement seems to be from COMYNS, *supra* note 137. Comyns is not authority for the Holmes-Pollock position (they never claimed it was) for the digest took the position that an action on the case would not lie "for an act not prohibited by law." *Id.* at 274. Though their position could have been grounded on a then current view of the action on the case. Ames said of the action on the case: "This statute is a perennial fountain of justice to be drawn upon so long as...instances may be pointed out in which the common law

the more limited theory of seduction of a servant.<sup>143</sup>

Three judges held for Lumley, one on a theory of seduction<sup>144</sup> (though with a sympathetic nod to the general principle),<sup>145</sup> a second on the theory that there was a property-like interest in the contract,<sup>146</sup> and a third on the general principle from Comyns<sup>147</sup> plus the seduction theory.<sup>148</sup>

Coleridge dissented. Much of the dissent is a devastating critique of the seduction theory.<sup>149</sup> He made several notable points in addressing the general principle from Comyns. He argued that a man is not liable in tort for a loss brought about by the intervening voluntary act of another, and so Gye should not be liable to Lumley since Wagner chose to breach voluntarily.<sup>150</sup> This argument, which we now perceive as an issue of intervening cause,<sup>151</sup> looms large in the early history of the tort, as you shall see. More relevant today is his argument from precedent. Coleridge argued that the lack of precedent weighed strongly against allowing an action in tort for inducement of breach because "there has been frequently occasion for the action."<sup>152</sup> This argument is an interesting response to the argument that common law courts had in the past allowed novel claims under the action on the case to deal with novel problems and so might create an action for inducement of breach. Coleridge's point is that while novel problems may merit novel solutions, familiar problems do not. Coleridge closed with a slippery slope argument. He predicted that the action for inducement of breach would not be limited to cases of malice or bad faith.<sup>153</sup>

*Lumley v. Gye* stood alone in English law for twenty-eight years until 1881. A dissent by Coleridge's son in the second English interference case—

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courts have failed to give a remedy for damage inflicted upon one person by the reprehensible act of another, and the continued absence of a remedy would shock the moral sense of the community." James B. Ames, *Law and Morals*, 22 HARV. L. REV. 97, 105 (1908). The statute Ames refers to is § 24 of the second Statute of Westminster, which was enacted in 1285 in the reign of Edward I. St. Westminster 2, 13 Ed. I., c 24. Ames' reference to the statute may be incorrect. Theodore Plucknett observes that "[t]here seems to be no foundation for the belief that the action of the case has any connection with the *Consimili casu* clause of the Statute of Westminster II." THEODORE PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 353 (4th ed. 1948).

143. 2 E.&B. 216, 22 L.J.Q.B. at 467.

144. Judge Crompton declined to decide whether the seduction tort was an anomaly or a "branch of a wider rule," *Id.* at 469, and held that the relationship was sufficiently like that of a master and servant to be within the tort and that it was irrelevant that Wagner had not yet started service. *Id.* at 469-71.

145. *Id.* at 471.

146. Judge Erle grounded his decision on the principle "that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong; as in violations of a right to property..." *Id.* at 472. He also argued that procuring breach of a contract to deliver goods is no different from procuring "abstraction of goods after delivery." *Id.*

147. *Id.* at 473-75 (Wightman, J.).

148. *Id.* at 475-76.

149. *Id.* at 480-85.

150. *Id.* 477-78. Coleridge's distinction of the seduction torts is jarring to modern sensibilities. He argued that a wife or a servant was not "a free agent or separate person," unlike Wagner. *Id.* at 478.

151. See H.L.A. HART & A.M. HONORE, *CAUSATION IN THE LAW* 129 (1959) ("The general principle of the traditional doctrine is that, the free, deliberate and informed act or omission of a human being, intended to produce the consequence which is in fact produced, negatives causal connection.")

152. 2 E.&B. 216, 22 L.J.Q.B. at 479.

153. *Id.* at 479-80.

*Bowen v. Hall*<sup>154</sup>—cited the uniqueness of the case and the belief of many in the legal community that it was wrongly decided as reasons to reconsider the decision.<sup>155</sup> But we are getting ahead of the story.

Histories of the tort usually overlook the seminal American interference case, an 1871 decision, *Walker v. Cronin*,<sup>156</sup> in which the Supreme Judicial Court of Massachusetts allowed an action for malicious enticement of employees. The decision is a template for the modern tort and its rationale anticipates Holmes' and Pollock's general theory of tort. Damages were allowed for the enticement of prospective employees and at-will employees as well as employees who were under contract for fixed terms.<sup>157</sup> Thus, the case is authority that interference with business relations is tortious as well as interference with contract. There is no mention in the opinion of the seduction theory. The court rejected the position that the interest protected was property-like. The opinion characterized the plaintiff's interest as a privilege that was distinct from property<sup>158</sup> and it reasoned that there need not be "a violation of some definite legal right of the plaintiff" for cases that so hold involve defendants who have a greater right.<sup>159</sup> Instead the ground of decision was Comyns' general principal that "[i]n all cases, where a man has a temporal loss, or damage by the wrong of another, he may have an action upon the case to be repaired in damages." There is also a crucial addition to this principle: "The intentional causing of such loss to another, without justifiable cause, and with the malicious purpose to inflict it, is of itself a wrong."<sup>160</sup> This adds the elements of intent and justification and the corollary that malice negates justification. The court also cited cases that allowed an action in tort against a defendant who frightened off wild fowl from the plaintiff's decoy by firing a gun in the air and against a defendant who frightened off the plaintiff's customers by shooting at them.<sup>161</sup> The second of these cases is among those cited as the fourth theoretical ground for the tort—it allows an action for otherwise tortious conduct on behalf of a third party who suffered economic harm, an interest that is not usually protected in tort law, because the act was done to inflict the harm. But the two cases are cited to support the broader point that "where a violent or *malicious* act is done to a man's...way of getting

154. 6 Q.B.Div. 333, 56 L.J.Q.B. 305 (1881).

155. *Id.* at 342.

156. 107 Mass. 555 (1871). *Carew v. Rutherford*, 106 Mass. 1 (1870), also merits note. The case involves claims of extortion and conspiracy based on an allegation that a Journeymen's Association extorted the plaintiff to pay \$500 by threatening to induce craftsmen to leave work. The court analogized the defendant's conduct to wrongful interference by discharging gun or threatening baseless litigation to scare customers. *Id.* at 10–11. It also observed that "as new methods of doing injury to others are invented in modern times the same principles must be applied to them." *Id.* at 11. *Carew v. Rutherford* is not generally cited as an interference case, though Holmes cited it with *Walker v. Cronin* as showing Massachusetts's acceptance of the principle of prima facie tort.

157. 107 Mass. at 565–66.

158. *Id.* at 563.

159. *Id.* Malice rendered the defendant's actions tortious. "[M]alicious acts without the justification of any right, that is, acts of a stranger, resulting in like loss or damage might be actionable...although not of vested legal right." *Id.* at 564.

160. *Id.* at 562. The second statement is not from Comyns' digest, unless it is a creative gloss on Comyns' treatment of malicious misfeasance, where the digest placed cases involving seduction of servants and wives. COMYNS, *supra* note 137.

161. *Id.* at 562–63. The cases are *Keeble v. Hickeringill*, which was reported in a note to *Carrington v. Taylor*, 11 East 571, 574, and *Tarleton v. McGawley*, Peake N.P. 205, 170 Eng. Rep. 153 (1793).

a livelihood; there an action lies in all cases."<sup>162</sup> While violent acts will usually be tortious against someone, malicious acts will not necessarily. This suggests that the court in *Walker v. Cronin* did not think that it was extending the class of persons protected from conduct that was already deemed wrongful with respect to others.

The reasoning in *Bowen v. Hall*,<sup>163</sup> the second English interference case, echoes that in *Walker v. Cronin*. *Bowen v. Hall* involved a claim for the enticement of a brick maker who was under a five year exclusive contract with the plaintiff. The majority opinion by Brett explicitly abandoned the seduction rationale in *Lumley v. Gye* because the brick maker could not be deemed the plaintiff's servant.<sup>164</sup> The sole ground for the decision was the principle that "wherever a man does an act, which in law and in fact is a wrongful act, and such as an act may, as a natural and probable consequence of it, produce an injury to another, and which in the particular case does produce such an injury, an action on the case will lie."<sup>165</sup> This formulation begs the question of what makes an act wrongful "in law and in fact." The critical proposition followed: "[I]f the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefitting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and in fact a wrong act, and therefore a wrongful act...."<sup>166</sup> Brett echoed *Walker v. Cronin* in holding the malicious infliction of a harm tortious on general principles, though he went further in explicitly sweeping selfishness into the concept of malice.<sup>167</sup> True malice is taking pleasure in the suffering of another; selfishness is preferring one's own interests.

While these three seminal cases seem rooted in a principle akin to that of prima facie tort, but for Holmes' and Pollock's later work interference doctrine may well have been grafted onto different roots that conform with one of the other theories of the tort. During the late 19th Century, tort theory was a muddle of rights and wrongs that made it logical to think of the interference torts either as protecting a property right or as extending the category of persons who could sue for behavior that was already deemed wrongful. A right could take the form either of an interest in the plaintiff that the law protected or a privilege of the defendant's to act. A wrong was the commission by a defendant of an act that the law forbade.

Addison, who published the first English treatise on torts in 1860, defined tort as an injury combined with a wrongful act.<sup>168</sup> A wrongful act was either the violation of a right of the plaintiff—such as trespass<sup>169</sup>—or a breach

162. 107 Mass. at 563 (emphasis added).

163. 6 Q.B.Div. 333, 56 L.J.Q.B. 305 (1881).

164. *Id.* at 337.

165. *Id.* The opinion goes on: "This is the proposition to be deduced from *Ashby v. White*." The reference to *Ashby v. White*, Ld. Raym. 938, 1 Sm. L.C. 8th ed. 264, is interesting for it involved a claim for infringement of the right to vote. The action lay in case and not in trespass because the interest was incorporeal. See FREDERICK POLLOCK, THE LAW OF TORTS 334 n.(i) (8th ed. 1908). This reference suggests that Brett did not consider that it was the property-like character of the interest that made it worthy of protection. *Ashby v. White* also is often cited as illustrative of the capacity of tort to cover novel wrongs.

166. *Bowen v. Hall*, 6 Q.B.Div. 333, 56 L.J.Q.B. at 338.

167. Coleridge's dissent argued that malice (defined as selfishness) ought not make an otherwise lawful action unlawful. *Id.* at 343-44.

168. G.C. ADDISON, LAW OF TORTS 1-2 (3d ed. 1870).

169. *Id.* at 8.

of a duty by the defendant—such as negligence,<sup>170</sup> or malicious infliction of harm.<sup>171</sup> (The latter view, that there was a general duty not to maliciously inflict harm, seems to have been unique to Addison. Other writers with a theory of tort that was grounded on concepts of right or wrong took the position that an act that did not otherwise violate a right or constitute a wrong was not rendered tortious by the fact that it was done maliciously.) Addison explained *Lumley v. Gye* both as a violation of a right<sup>172</sup> and as a breach of the duty to not maliciously inflict harm.<sup>173</sup> On the issue of interference with relations, Addison posited a privilege (which he treated as equivalent to a right) to pursue one's occupation and explained that "fair competition" is never tortious because there is a countervailing right of competition.<sup>174</sup> Addison's conception of rights and wrongs was static. He did not discuss their basis or how they might change.

The leading American treatise,<sup>175</sup> *Cooley on Torts* (published in 1880), described torts as a system of rights,<sup>176</sup> though Cooley had a fluid (if viscous) concept of common law rights. He stated that the common law consists "in the established usages of the people, by which their respective rights are recognized and limited," but that "it also embraces the principles which underlie the usages" on which judges drew in deciding new cases.<sup>177</sup> Cooley's right-based approach to torts led him to condemn the principle that malice could make an act that was otherwise within a man's rights tortious.<sup>178</sup> Thus he rejected the idea that it might be tortious "if a man sets up a trade, not with a view to his own profit, but solely to injure one already in the trade."<sup>179</sup> He accepted the principle that inducement of breach of contract was tortious because it

170. *Id.* at 14.

171. *Id.* at 26.

172. *Id.* at 8.

173. *Id.* at 27.

174. *Id.* at 10–12.

175. The first American treatise on torts, by Hilliard (the first edition was published in 1859), is structured around the writs. The discussion of the general nature of tort law centers on the action for trespass on the case, which was the general writ. Hilliard grounds tort law on the principle that "The liability to make reparation for an injury is said to rest upon an *original moral duty*, enjoined upon every person so to conduct himself or exercise his own rights as not to injure another. And it is held, that, an injury being shown, the burden of proof is on the defendant to justify the act." FRANCIS M. HILLIARD, *THE LAW OF REMEDIES FOR TORTS* 72 (3d. ed. 1866) (emphasis in the original). I do not read this as an endorsement of a principle akin to that of prima facie tort. Hilliard recognizes that "one party may often be *injured* or *damaged* by the act of another, without having a right of action for such injury." And while he cites the "familiar cases...of seduction [and] competition in business," he does not explain those cases. *Id.* at 75–76 n.(b). Hilliard's real concern at this point is to explain why an action might lie for a violation of a right in the absence of actual damages.

176. "It is the conjunction of damage and wrong that creates a tort, and there is no tort if either damage or wrong is wanting. Here the word wrong is used in the sense of something amiss; something which for any reason the party ought not do or to permit." THOMAS M. COOLEY, *A TREATISE ON THE LAW OF TORTS* 62 (1880). An example in the note to the first sentence drives home the centrality of rights: "As one has no right to a gratuity by will, he can maintain no action against another who, by falsehood or otherwise, induces the revocation of a will in his favor." *Id.* at n.2.

177. *Id.* at 14. Cooley's statement about how those principles were derived could have been written by Ronald Dworkin. The principles are those "which so harmonize with them [the usages] that the courts are justified in accepting them as a basis for judicial action, and as forming with the usages a consistent body of law." *Id.* at 14–15.

178. *Id.* at 81, 688–94.

179. *Id.* at 691 n.4 (quoting *Auburn & Cato Plank Road Co. v. Douglass*, 9 N.Y. 444, 450).

interfered with a right, and argued that interference with relations could not be tortious unless the act was independently wrongful.<sup>180</sup>

Wigmore took a position similar to Cooley's in a pair of articles published in 1887,<sup>181</sup> and argued that *Walker v. Cronin* was incorrect.<sup>182</sup> Other treatises from the period with less well-developed theories of tort explained interference either on a rights-based theory that found a property-like interest contract<sup>183</sup> or as an instance of the wrong of seduction.<sup>184</sup>

### B. Holmes and Pollock

Now Holmes and Pollock enter the story. Over the period from 1873 to 1894, in articles and the book, *The Common Law*, Holmes<sup>185</sup> developed a theory of torts that by the end cast interference in its modern mold.<sup>186</sup> Pollock published a treatise on torts in 1887 that propounded a general duty "to abstain from willful injury," and explained *Lumley v. Gye* and *Bowen v. Hall* as instances of that general duty.<sup>187</sup>

Holmes' and Pollock's general theory of torts brought the element of harm to the forefront and organized tort law around the character of the defendant's action in three categories: intent, negligence, and liability without fault.<sup>188</sup> Both asserted the general principle "that the intentional infliction of temporal damage...is actionable if it is done without just cause."<sup>189</sup> Both grounded tortious interference on this principle.<sup>190</sup> Both said that malice could render an otherwise lawful act tortious. Pollock also knifed the "property-in-contract" theory. He noted caustically that the theory "would confuse every accustomed boundary between real and personal rights, dominion and obligation,"<sup>191</sup> and that the right in *Lumley v. Gye* was unlike one in property

180. *Id.* at 278-82.

181. John H. Wigmore, *The Boycott and Kindred Practices as Ground for Damages*, 21 AMER. L. REV. 509 (1887) [hereinafter Wigmore, *The Boycott and Kindred Practices*]; John H. Wigmore, *Interference with Social Relations*, 21 AMER. L. REV. 764 (1887). Wigmore was the first writer I know of to ground interference with relations on cases that involved the use of fraud or violent means to scare off customers. Wigmore, *The Boycott and Kindred Practices*, *supra*, at 515-21.

182. Wigmore, *The Boycott and Kindred Practices*, *supra* note 181, at 519-20.

183. SIR FRANCIS TAYLOR PIGGOTT, PRINCIPLES OF THE LAW OF TORTS 368 (1885).

184. JOEL PRENTISS BISHOP, COMMENTARIES ON THE NON-CONTRACT LAW 155-58 (1889).

185. OLIVER W. HOLMES, THE COMMON LAW (1881).

186. The most significant article is *Privilege, Malice, and Intent* by Holmes, *supra* note 19. One can see signs of Holmes working towards the theory stated in the later article in two unsigned essays published in the American Law Review—*The Theory of Torts*, 7 AM. L. REV. 652 (1873); *Trespass and Negligence*, 14 AM. L. REV. 1 (1880).

187. FREDERICK POLLOCK, THE LAW OF TORTS 5, 7 (1st ed. 1887) (grouping "seduction, enticing away servants" under "personal wrongs" which involve "deliberate injury"). Citations are to the American edition.

188. *Id.* at 6-9; Holmes, *supra* note 19, at 1-2; Holmes, *The Theory of Torts*, *supra* note 186, at 653.

189. Holmes, *supra* note 19, at 3. Pollock states the proposition obliquely in his first edition. See POLLOCK, *supra* note 187, at 21-22. He is more forthright in later editions when he can cite Holmes and Lord Bowen's opinion in *Mogul Steamship*. FREDERICK POLLOCK, THE LAW OF TORTS 22-24 (8th ed. 1907).

190. Holmes, *supra* note 19, at 3. Cf. *Aikens v. Wisconsin*, 195 U.S. 194, 204 (1904).

191. POLLOCK, *supra* note 187, at 351. The first point echoes Langdell's and Austin's criticism of *Lumley v. Gye*. See Christopher C. Langdell, *A Brief Survey of Equity Jurisdiction*, 1 HARV. L. REV. 55, 57 (1887) (citation omitted).

because special damages and malice were the gist of the action.<sup>192</sup>

Holmes and Pollock differed on some issues. They had different answers to Coleridge's argument in *Lumley v. Gye* that the interferor ought not be liable for the counter-party's breach on the general principle that one person is not liable for the wrong of another. Holmes conceded the validity of the principle, but reasoned that it did not apply when the defendant acted with the purpose of bringing about the wrong.<sup>193</sup> Pollock took the position that it was merely a problem of causation and that a man might be held liable for any "natural and probable" consequences of his actions even if there were human intermediaries.<sup>194</sup> Pollock's position is more in accord with modern tort law.<sup>195</sup> Indeed, the case Holmes uses to illustrate his point—that a man who sells a gun is not liable for assaults committed with it<sup>196</sup>—might come out differently today if a plaintiff could show that the gun seller knew his wares would be used in a crime.

Holmes also supplied the final, crucial element of the modern law of interference—a theory of justification. In *Privilege, Malice, and Intent*,<sup>197</sup>

192. POLLOCK, *supra* note 187, at 352–53. Wigmore, *The Boycott and Kindred Practices*, *supra* note 181, at 511, also argued that the interest was non property-like. He described the interest as relational: "The loss for which such a one seeks redress may be thus defined: loss of the benefit of this relation through interference on the part of the defendant with the other party to the relation; and upon the nature of the interference and of the relation depends the liability of the defendant." Leon Green, *Relational Interests*, 29 ILL. L. REV. 460, 460–62 (1934), bemoans the mistaken classification of the protected interest as property and laments that Wigmore is the lone voice recognizing their relational character.

193. Holmes, *supra* note 19, at 10–12. Holmes expressed the point thusly: "in order to take away the protection of his right to rely upon lawful conduct [of another], you must show that he intended to bring about consequences to which the unlawful act was necessary. Ordinarily, this is the same as saying that he must have intended the unlawful act." *Id.* at 11.

194. POLLOCK, *supra* note 187, 353–54.

195. W. PAGE KEETON ET AL., *supra* note 48, at 996.

196. Holmes, *supra* note 19, at 10.

197. Morton Horowitz, *Holmes in American Legal Thought*, in THE LEGACY OF OLIVER WENDELL HOLMES, JR., 31, 55–64 (Robert Gordon ed., 1992), argues that Holmes' position in the essay that malice might render an otherwise privileged act tortious "represented a complete about-face" from Holmes' position in *The Common Law* that liability depended on external standards and that malice was irrelevant. *Id.* at 58. Horowitz suggests Holmes adopted this as a middle ground between relying on custom as a source of legal norms and judicial legislation. *Id.* at 61. The views expressed by Holmes in the Third and Fourth lectures in *The Common Law* may not be inconsistent with those expressed in *Privilege, Malice, and Intent*. Whether they are inconsistent depends on how one interprets an ambiguity in *The Common Law*—one can read Holmes either as arguing that a defendant's state of mind was irrelevant to the determination of liability or as arguing that the evilness (that is the immorality) of his state of mind was irrelevant to his legal liability. The ambiguity appears in the very way Holmes states his question at the start of the Fourth lecture: "the difficulty will be to prove that actual wickedness of the kind described by the several words just mentioned [fraud, malice, and intent] is not an element in the civil wrongs." HOLMES, *supra* note 185, at 130. Is the "wickedness" the defendant's state of mind or the immorality of his conduct? Some later passages suggest Holmes' argument is that the law consists of "an external or objective standard," *Id.* at 136, while others suggest his argument is that the goal of tort law is to regulate harmful conduct rather than to impose a moral standard of behavior. See especially *id.* at 161–62. The latter position is consistent with *Privilege, Malice, and Intent*, for Holmes argued in that essay that malice rendered an act tortious not because of its immorality, but rather because a malicious act likely did no good that could outweigh the harm. Holmes, *supra* note 19, at 5–6. There is a glimmer of this reasoning in *The Common Law*, it involves a question of some interest today: when might supervisors (a school board) be liable for conspiring to cause the firing of an employee (a teacher)? Holmes said evidence of malice might be crucial in this case, but for prudential reasons rather than reasons of morality. "Policy, it might be said, forbids going behind their judgment, but actual evil motives

Holmes argued that the issue of justification was finally one of policy: "[I]n all such cases the ground of decision is policy; and the advantages to the community, on the one side and the other, are the only matters really entitled to be weighed."<sup>198</sup> Holmes' position is nuanced. He called for candor in resolving "legislative questions"<sup>199</sup> about justification, and for activist judges trained in and outside the law<sup>200</sup> who understand that the law "has become a conscious reaction upon itself of organized society knowingly seeking to determine its own destinies."<sup>201</sup> But he did not take the position that judges had a free hand in the matter. On some issues he argued that a privilege to knowingly harm another is and ought to be absolute—his example is the right of a man to make changes on his land—because a rule that conditioned this right on motive would be dangerous in the hands of a jury and would create harmful uncertainty.<sup>202</sup> Holmes denied the relevance of morality—he said that malice could render an otherwise privileged act tortious in cases where the interests were closely balanced because malice negated the value in the defendant's act. His example was the privilege for giving advice.<sup>203</sup> In slighting morality, Holmes disagreed with Pollock.<sup>204</sup> But his position seems not to be thoroughly utilitarian in the sense that every principle had to be grounded in the calculus of efficiency rather than social mores or the law. For example, Holmes accepted the principle that a man is not liable for a wrong brought about by the intervening unlawful act of another for no other reason than that such a principle "seems to be pretty well established, in this country at least."<sup>205</sup> This right (Holmes used this term)<sup>206</sup> gave way only if the defendant intended to bring about the unlawful act, and so for Holmes, intent to bring about the breach was an

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coupled with the absence of grounds withdraw this protection, because policy, although it does not require them to take the risk of being right, does require that they should judge honestly on the merits." *Id.* at 143. Much has been written on Holmes' views of the relevance of morality to the law. I find persuasive Frederic Kellogg's argument that Holmes' view was not that moral concerns did not (or even that they ought not) influence the law, but rather that it was important to keep legal concepts separate from moral concepts—particularly when they used common terminology—to avoid importing "external dogma" into the law. FREDERIC KELLOGG, *THE FORMATIVE ESSAYS OF JUSTICE HOLMES 58-67* (1984).

198. Holmes, *supra* note 19, at 9.

199. *Id.* at 3.

200. "To measure them justly needs not only the highest powers of a judge and a training which the practice of law does not insure...." *Id.* at 9.

201. *Id.*

202. "Were it otherwise, and were the doctrine carried out to its logical conclusion, an expensive warehouse might be pulled down on the finding of a jury that it was maintained maliciously, and thus a large amount of labor might be wasted and lost. Even if the law stopped short of such an extreme, still, as the motives with which the building was maintained might change, the question would be left always in the air." *Id.* at 4.

203. *Id.* at 6-7.

204. Pollock took the position that torts with a requirement of intent had "a very strong ethical element." POLLOCK, *supra* note 187, at 9. And that "[e]ither there is a deliberate injury, or there is something like the self-seeking indulgence of passion, in contempt of other men's rights and dignity.... Thus the legal wrongs are such as to be also the object of strong moral condemnation." *Id.* at 7. In a later book, Pollock steps even further from Holmes in arguing that common law reasoning, and in particular reasoning in the trade dispute cases, might be grounded on natural law. FREDERICK POLLOCK, *EXPANSION OF THE COMMON LAW 131-32* (1904). He described natural law as "a living embodiment of the collective reason of civilized mankind...." *Id.* at 128.

205. Holmes, *supra* note 19, at 10.

206. *Id.*

element of tortious interference with contract.<sup>207</sup>

*C. The Holmes-Pollock Position Prevails in the United States but Not in England*

*1. England*

It took two generations for Holmes' formulation of the interference tort to become widely accepted in the United States. England took a different path. England for a while seemed to move towards Pollock's position. The first important case after the publication of his treatise, *Mogul Steamship Co. v. McGregor*,<sup>208</sup> held that aggressive competition for the homebound trade from China was not tortious. Most of the judges on the court accepted the general principle that an action might lie in tort for the intentional infliction of harm if it was not justified, but they reasoned that competition was lawful so long as it did not involve inducement of breach of contract and was not motivated by true malice.<sup>209</sup>

The next case involved a claim that craftsmen societies had punished the plaintiff for refusing to comply with their rules by inducing suppliers to cut off supplies and members to stop working for the plaintiff.<sup>210</sup> The claim prevailed though it was for interference with business relations and not contract and though the defendants had acted to advance their own interests. *Mogul Steamship* was distinguished on the dubious grounds that damages had not been proven in that case<sup>211</sup> and that it had not involved an allegation of conspiracy.<sup>212</sup> The real difference may have been that one case involved hard competition by businesses and the other pressure by a trade union.<sup>213</sup> Much of interference law during this period is twisted because of its formation in the

207. *Id.* at 11-12.

208. 23 Q.B.D. 598 (1889), *aff'd* [1892] A.C. 25. The defendants were members of a combination of shippers formed to control homeward trade from China. The plaintiffs had tried to join but were not admitted. The defendants threatened to fire agents who assisted the plaintiffs, sent ships to compete with the plaintiff's ships, and lowered their rates below cost.

209. Lord Watson reasoned that plaintiffs must show either that the object of the agreement was unlawful or that illegal methods were resorted to, *id.* at 41-42, and he observed that competition is lawful, *id.* at 42. Lord Bramwell argued that the court was incapable of determining whether the defendant's action were bad for the public so it should not condemn them. *Id.* at 45-46. He also observed that there was no claim of violence, fraud, tort or breach of contract nor of "any act the ultimate object of which was to injure the plaintiffs, having its origin in malice or ill-will to them." *Id.* at 44. Lord Morris reasoned that competition was lawful unless there was inducement to breach of existing contract. *Id.* at 49-50. Lord Field held that "Not every act causing damage to another in his trade, nor even every intentional act of such damage, which is actionable.... Of course it is otherwise...if the acts complained of are in themselves violent or purely malicious, or have for their ultimate object injury to another from ill-will to him." *Id.* at 52. He also observed that a lawful object "negatives the presumption of malice which arises when the purposeful infliction of injury upon another cannot be attributed to any legitimate cause." *Id.* at 57. Lord Hanner reasoned that there was no tort since the defendants acted with lawful object and lawful means, but he added that it would be a different case if true malice could be shown. *Id.* at 59.

210. *Temperton v. Russell*, [1893] 1 Q.B. 715.

211. *Id.* at 727-30 (Lord Esher).

212. *Id.* at 730-32 (Lopes, L.J.)

213. WOLFGANG FRIEDMAN, *LAW AND SOCIAL CHANGE IN CONTEMPORARY BRITAIN* 113 (1951) (*Temperton* "shows how difficult it was for the judiciary to apply the principles of freedom of trade so eloquently and categorically formulated for business competition to similar action taken by organised labour against employers.").

crucible of labor disputes.<sup>214</sup>

These issues came to a head in the most famous English case of the era, *Allen v. Flood*.<sup>215</sup> A representative of ironworkers told employers that his men would walk off the job if the employers did not discharge shipwrights who were employed at will and who had done ironwork on a ship for another firm. A claim against the ironworker's representative prevailed in the court of appeals.<sup>216</sup> Most of the judges summoned to advise the House of Lords on the case recommended a decision for the plaintiff, some on grounds that echoed Pollock<sup>217</sup> others on the ground that the plaintiffs had a right to pursue their livelihood.<sup>218</sup> The Lords ruled for the defendant six to three. The six decisively rejected Pollock's view, reasoning that *Lumley v. Gye* and *Bowen v. Hall* rested on the fact that the defendant had induced a wrongful act—the breach of a contract—and that an act that did not violate a right could not be rendered tortious because it was done maliciously.<sup>219</sup> Only one Lord, Lord Chancellor Halsbury, adopted Pollock's view, reasoning in dissent that injuring another without just cause or excuse is tortious, and that malice, which includes retaliation for prior competition, vitiates justification.<sup>220</sup>

Several years later a more conservative House of Lords upheld the action when a union ordered its men to stop working and induced customers of an establishment under strike to stop shopping there.<sup>221</sup> Like *Allen v. Flood* the case involved interference with relations, but the precedent was distinguished on the implausible ground that in the later case the defendants had committed the independent wrong of conspiracy.<sup>222</sup> English law on tortious interference

214. HUGH ARMSTRONG CLEGG ET AL., A HISTORY OF BRITISH TRADE UNIONS SINCE 1889: VOL. I: 1889–1910, at 305–28 (1964), places the interference cases in the context of other developments in English affecting unions. The crucial development was not in the law of interference but instead a case making unions liable for the torts of their officers.

215. [1898] A.C. 1.

216. [1895] 2 Q.B. 1.

217. Grantham's opinion is closest. He took the position that harming another without just cause is tortious, and that profiting oneself is not just. *Allen v. Flood*, [1898] A.C. 1, at 51–58. Two other opinions that emphasize malice might either follow Pollock or Addison's view that a malicious act is a wrong. North argued that interfering in man's job to profit oneself is malicious and tortious. *Id.* at 38–44. And Wills argued that the defendant's actions were tortious because they were malicious in the sense that they were done to retaliate for past actions of the plaintiffs. *Id.* at 44–51.

218. See the opinions of Hawkins: *id.* at 11–24; Cave: *id.* at 28–37; and Lawrence: *id.* 58–62.

219. Lord Watson limited *Lumley* and *Bowen* to inducing breach of contract, a wrongful act. *Id.* at 106–09. He objected to Lord Selbourne's effort to interpret *Bowen* as making tortious an otherwise lawful act done with malicious intent, *id.* at 108, and distinguished *Temperton* as a conspiracy case. Lord Herschell criticized *Bowen* for emphasizing malice, and said that the crucial element in *Temperton* was the violation of a right. He reasoned that an action lies for inducing someone to act wrongfully, i.e., breaching their contract, but not for inducing someone not to contract. *Id.* at 120–21. Lord MacNaghten reasoned that an act isn't wrongful simply because it was malicious, there must be a violation of a right. *Id.* 153–54. Lord Shand agreed with this proposition. *Id.* at 168–69. As did Lord Davey. *Id.* at 170–71. Lord James of Hereford ruled that the act itself must be unlawful. *Id.* at 180.

220. *Id.* at 84–85. Ashbourne: *id.* at 109–14; and Morris: *id.* at 154–60, joined Halsbury in dissent but on the different ground that there was a right to pursue one's calling.

221. *Quinn v. Leathem*, [1901] A.C. 495.

222. Lord MacNaghten ruled that interference with prospective relations is actionable in conspiracy. He did not challenge the holding in *Allen v. Flood* that malice does not in itself make an act unlawful. *Id.* at 508–10. Shand accepted this conspiracy theory, *id.* at 512–14, as did Brampton, *id.* at 525, and Lindley, *id.* at 535, 538–39. Lindley tried to explain the precedent

stands in this odd position today—while it recognizes tortious interference with contract an action lies for interference with business relations only if the defendant maliciously conspires with others.<sup>223</sup> The position is odd because conspiracy was not thought to be an independent tort at the time.<sup>224</sup>

## 2. *First Massachusetts and Later, the United States*

Holmes' theory of interference came to be the law in Massachusetts, where he sat on the Supreme Judicial Court from 1882 to 1902. Recall that in 1872, in *Walker v. Cronin*, Massachusetts took a position akin to Holmes' later theory. The next interference case was in 1895. It substantially restricted *Walker v. Cronin* by limiting the tort to interference with contract.<sup>225</sup> Holmes was silent in the case. Holmes' most famous dissent as a state judge was the next year in *Vegeahn v. Guntner*.<sup>226</sup> The issue was the scope of an injunction of picketing in a labor dispute. A trial judge had issued a preliminary injunction that prevented any action by the employees that would harm their employer's trade.<sup>227</sup> Holmes had narrowed the final injunction to bar only threats of personal injury or unlawful harm.<sup>228</sup> The majority reinstated the preliminary injunction, reasoning that even seemingly peaceful picketing involved unlawful intimidation.<sup>229</sup> Holmes challenged this premise but grounded his dissent on the general theory he had set forth two years earlier in *Privilege, Malice, and Intent*. He argued that the case turned on the question of justification "considerations of policy and of social advantage"<sup>230</sup>—and that the privilege of competition should apply as well to laborers seeking to improve their pay by concerted action as to merchants competing for trade.<sup>231</sup> Holmes dissented and

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with the principle that tort lies for any wrongful act causing harm, with the wrong in this case and *Temperton* defined by conspiracy. Earl of Halsbury thought the case was distinguishable from the facts on which *Allen v. Flood* was decided by the majority—though not on the true facts of that case—because that case involved advice rather than a threat and there was no conspiracy. *Id.* at 506–07.

223. R.F.V. HEUSTON & R.A. BUCKLEY, SALMOND AND HEUSTON ON THE LAW OF TORTS 400 (19th ed. 1987) ("[S]o far as a single defendant is concerned there is a chasm between inducing a breach of contract and inducing a person not to enter into a contract. The common law does not protect mere expectancies as distinct from promised advantages.").

224. English treatise writers resisted the importation of conspiracy as essential to interference with relations for two decades. See JOHN W. SALMOND, THE LAW OF TORTS 525 (4th ed. 1916). In 1925, Lord Dundee called this position "the leading heresy." *Sorrell v. Smith*, [1925] A.C. 700, 719, 724. A later observer notes that the malice "test, coupled with that of 'joint action' has served to divorce the law of conspiracy from social reality." FRIEDMAN, *supra* note 213, at 111.

225. *Rice v. Albee*, 164 Mass. 88 (1895), involved a claim that the defendant had induced someone not to enter into a partnership with the plaintiff by disparaging his business and property. The plaintiff had argued interference and his counsel cited Holmes' article *Privilege, Malice, and Intent*. The court ruled irrelevant "cases which relate to malicious interference with an existing business or with existing contracts, or...those which relate to enticing away servants actually employed or under contracts of employment, or the enticing away of a wife or a husband." *Id.* at 91. Holmes was on the court but did not dissent. One of the plaintiff's counsels was "S. Williston." Could "S. Williston" be Samuel Williston, who was then practicing law in Boston? If so, it would be ironic for one of the most rigid contract theorists would be urging an open-ended theory of tort liability that could consume much of contract law.

226. 167 Mass. 92 (1896).

227. *Id.* at 94–95.

228. *Id.* at 95–96.

229. *Id.* at 98–99.

230. *Id.* at 106.

231. *Id.* at 107–08.

again invoked his theory of interference in an 1898 case that held that a servant could not sue a third party for interference with her position.<sup>232</sup>

In 1900, in *Plant v. Woods*,<sup>233</sup> another labor dispute involving a threat of a strike and a boycott by a union, the court adopted Holmes' theory against employers who refused to induce their employees to join the union. Again Holmes dissented. The majority opinion, by Hammond, ruled that acts intentionally done to cause harm without justifiable cause "were malicious and unlawful."<sup>234</sup> The defendants had cited *Allen v. Flood* arguing that an act lawful in itself could not be made unlawful by malice and bad motive.<sup>235</sup> Hammond responded:

[I]n many cases the lawfulness of an act which causes damage to another may depend upon whether the act is for justifiable cause... This principle is of very general application in criminal law, and also is illustrated in many branches of the civil law, as in cases of libel and of procuring a wife to leave her husband.... Indeed the principle is a prominent feature underlying the whole doctrine of privilege, malice, and intent.<sup>236</sup>

Hammond's only authority was Holmes' article *Privilege, Malice, and Intent*, which he cited as "instructive."<sup>237</sup> On the issue of justification, Hammond condemned the defendant's action because it interfered with personal liberty<sup>238</sup> and threatened "tyranny of irresponsible persons over labor."<sup>239</sup> Holmes dissented on the issue of justification but claimed a victory in principle:

[M]uch to my satisfaction, if I may say so, the court has seen fit to adopt the mode of approaching the question which I believe to be the correct one.... The difference between my brethren and me now seems to be a difference of degree.... I agree that the conduct of the defendants is actionable unless justified.<sup>240</sup>

The next year Holmes was able to invoke the principle to uphold a claim by an employee against a third person for causing him to be fired.<sup>241</sup>

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232. *May v. Wood*, 172 Mass. 11 (1898), involved an action by a servant against her master and others who she alleged had caused her master to terminate her by defaming her. Slander would not lie because she didn't set forth defamatory statements. *Id.* at 13. The majority ruled that "there is no occasion to consider the form of declaration in actions for enticing servants away from masters, such as *Walker v. Cronin*. There is, so far as we are aware, no form of declaration for enticing masters away from servants." *Id.* at 14. Holmes argued: "I regard it as settled in this Commonwealth...that an action will lie for depriving a man of custom, that is, of possible contracts, as well when the result is effected by persuasion as when it is accomplished by fraud or force, if the harm is inflicted simply from malevolence and without some justifiable cause, such as competition in trade." *Id.* at 14. He said of *Rice v. Albee* that "whether the decision be right or wrong, the reasoning has always seemed to me inadequate, but that, however that may be, in that case the action was for preventing the making of a contract, nor for causing the breach of one already made." *Id.* at 16.

233. 176 Mass. 492 (1900).

234. *Id.* at 498.

235. *Id.* at 499.

236. *Id.* at 499-500.

237. *Id.*

238. *Id.* at 502.

239. *Id.* at 503.

240. *Id.* at 504.

241. *Moran v. Dunphy*, 177 Mass. 485 (1901). Holmes wrote for the court: "The first count of the declaration in this case substantially follows the form held bad in *May v. Wood*...and *Rice v. Albee*, and the plaintiff's argument is directed to getting those cases overruled." *Id.* at 486. Holmes limited those cases to a pleading requirement that the substance

Cases from other American states in the decades around the turn of the century disagreed about the scope of the interference tort and its theoretical basis. Some states held that interference was tortious only if wrongful means were used.<sup>242</sup> Some recognized interference with contract as a tort but not interference with relations on the theory that there was a property-like interest in a contract.<sup>243</sup> Others adopted a position akin to Holmes' and Pollock's theory, recognizing interference with contract and with relations as a tort if the defendant's act was malicious or otherwise unreasonable.<sup>244</sup>

The Holmes-Pollock theory did not immediately carry the day in the treatises. In England, Salmond directly took on the claim that there was a general theory of tort. He argued that the law of torts "consist[s] of a number of specific rules prohibiting certain kinds of harmful activity, and leaving all the residue outside the sphere of legal responsibility" rather than Pollock's "fundamental general principle that it is wrongful to cause harm to other persons in the absence of some specific ground of justification or excuse."<sup>245</sup> Salmond had a crabbed definition of interference—an action lay only for inducement of breach because it was a violation of a legal right.<sup>246</sup> Burdick had an even more restricted definition: inducement of breach was not a tort because "the right to make contracts...is qualified by a like right in others" unless there was fraud or an independent wrong.<sup>247</sup> Bigelow moved away from Holmes'

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of false statements must be set out. "But in view of the series of decisions by this court from *Walker v. Cronin* [to] *Plant v. Woods*...we cannot admit a doubt that maliciously and without justifiable cause to induce a third person to end his employment of the plaintiff, whether the inducement be false slanders or successful persuasion, is an actionable tort." *Id.* at 487 (citations omitted).

242. *Boyson v. Thorn*, 98 Cal. 578 (1893).

243. *Doremus v. Hennessy*, 52 N.E. 924, 925 (Ill. 1898) (holding that law protects against injury to "any right or privilege or property," *rehearing denied*, 54 N.E. 524, 524 (Ill. 1898) (rejecting motion by defendant based on *Allen v. Flood* on ground that "[h]ere, existing contracts which were a property right in the plaintiff...were broken.... This caused a right to be taken away..."); *Macauley Bros. v. Tierney*, 19 R.I. 255, 258 (1895) ("It is doubtless true, speaking generally, that no one has a right intentionally to do an act with the intent to injure another in his business. Injury, however, in its legal sense, means damage resulting from violation of a legal right."); *Raymond v. Yarrington*, 73 S.W. 800, 803 (Tex. 1903). For a late and strong expression of this view, see M.C. Dransfield, Annotation, *Liability for Procuring Breach of Contract*, 84 A.L.R. 43, 46 (1927). The annotation is extraordinarily good.

244. *Lucke v. Clothing Cutters*, 26 A. 505, 507-09 (Md. 1893); *Huskie v. Griffin*, 74 A. 595 (N.H. 1909) (holding that interference to prevent past employee from obtaining other work is always tortious if it is done by fraud or out of malice and may be tortious if done by persuasion depending on reasonableness of conduct); *Van Horn v. Van Horn*, 56 N.J.L.R. (27 Vroom.) 318, 323 (1893) ("[W]hile a trader may lawfully engage in the sharpest competition...when he oversteps that line and commits an act with the malicious intent of inflicting injury upon his rival's business, his conduct is illegal.... Nor does it matter whether the wrongdoer effects [sic] his object by persuasion or by false representation.").

245. JOHN W. SALMOND, *THE LAW OF TORTS* 9 (3d ed. 1912). I cannot read Salmond today without feeling a sense of irony. The cases he lists to demonstrate this proposition cover most of the topics covered in my commercial torts course: interference with relations, negligent delivery of a telegram, negligent misrepresentation, and economic loss from ordinary negligence claims. *Id.* at 10-11. In later editions of the treatise, Salmond's successor, Stallybras, recanted and adopted Pollock's position on the general theory. See JOHN W. SALMOND, *THE LAW OF TORTS* 15 (10th ed. 1945). Turn about is fair play. Pollock's successor, Landon, recanted and adopted Salmond's position on the general theory. FREDERICK POLLOCK, *THE LAW OF TORTS* 45 (15th ed. 1951).

246. JOHN W. SALMOND, *THE LAW OF TORTS* 500 (3d ed. 1912).

247. FRANCIS M. BURDICK, *THE LAW OF TORTS* 67 (1st ed. 1905). Later editions of Burdick's treatise show gradual acceptance of the tort. The third recognizes interference with contract but not interference with relations. FRANCIS M. BURDICK, *THE LAW OF TORTS* § 69

position. The 1901 edition notes that while earlier editions had stated that malicious interference with relations might be tortious, the "weight of authority is against that doctrine."<sup>248</sup> The Holmes-Pollock position met with a better reception in the law reviews during this period,<sup>249</sup> though there were also articles critical of their position.<sup>250</sup>

It is after 1920 that the Holmes-Pollock theory of interference gradually came to be the dominant view. Some states abandoned the more restrictive forms of the tort to adopt the modern form, most notably California (in one swipe in 1940)<sup>251</sup> and New York (in a series of decisions from the 1920s to the 1950s).<sup>252</sup> The ascendancy of the Holmes-Pollock theory was confirmed by the *Restatement (First) of Torts*.<sup>253</sup> The *Restatement* was begun in 1923 and

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(3d ed. 1913). It criticizes the view that malice could make the exercise of a right wrongful. *Id.* at 86-87. The fourth edition, by Charles K. Burdick, accepts interference with contract and relations and the possibility that malice could make an act tortious. CHARLES K. BURDICK, *THE LAW OF TORTS* 21 *passim* (4th ed. 1926).

248. MELVILLE MADISON BIGELOW, *THE LAW OF TORTS* 116 (7th ed. 1901). Bigelow had grounded the initial claim on *Walker v. Cronin*, which he thought was limited by *Rice v. Albee*.

249. Ames, *supra* note 142 (endorsing general theory that "unless exempted from liability by considerations of enlightened public policy...he who has by his act wilfully caused damage to another should...make either specific reparation or pecuniary compensation"); James B. Ames, *How Far an Act May Be a Tort Because of the Wrongful Motive of the Actor*, 18 HARV. L. REV. 411 (1905) (endorsing position that malevolence may render an otherwise lawful act tortious); Ernest Huffcut, *Interference with Contract Relations*, 37 AMER. L. REV. 273, 292-94 (1898) (endorsing position that intentional infliction of harm is tortious unless it can be justified, and attributing the position to Holmes); Jeremiah Smith, *Crucial Issues in Labor Litigation*, 20 HARV. L. REV. 253, 262-64 (1907).

250. Ernst Freund, *Malice and Unlawful Interference*, 11 HARV. L. REV. 449 (1898).

251. *Imperial Ice Co. v. Rossier*, 112 P.2d 631 (Cal. 1941), followed the *Restatement of Torts*, even to the point of reasoning that malice was relevant because it negated whatever interest the defendant claimed he was acting to protect. This is straight from Holmes. See *supra* note 197. The case involved interference with contract, but the opinion also cited with approval the *Restatement* rules on interference with relations. The first California case to hold that an act that was not otherwise wrongful to be tortious interference was *Buxbom v. Smith*, 145 P.2d 305 (Cal. 1944).

252. The New York cases at first seem beholden to the view that the tort exists either because the defendant interferes with a property-like interest in a contract or because the defendant commits a wrongful act. The reasoning of the first opinions to hold interference with contract tortious—*Lamb v. Cheney & Son*, 125 N.E. 817 (N.Y. 1921); *Campbell v. Gates*, 141 N.E. 914 (N.Y. 1923)—tracks Brett's opinion in *Bowen v. Hall* except that the tort is grounded on the violation of a contract right rather than on the infliction of harm. The first cases on tortious interference with relations required force, fraud, or conspiracy. *Union Car Advertising Co. v. Collier*, 189 N.E. 463, 469 (N.Y. 1934); *Keviczky v. Lorber*, 49 N.E.2d 146, 149 (N.Y. 1943). It was only in the 1950s that liability was broadened to any unjustified interference with relations. *A. S. Rampell, Inc. v. Hyster Co.*, 144 N.E.2d 371 (N.Y. 1957); *Reinforce Inc. v. Birney*, 124 N.E.2d 104 (N.Y. 1954).

253. The first *Restatement* differed from the second in a few respects. The first spoke of one who "purposely" interferes, *RESTATEMENT (FIRST) OF TORTS* § 766 (1939), while the second speaks of one who "intentionally" interferes, *RESTATEMENT (SECOND) OF TORTS* § 766 (1964). The standard "purposely" might be read as requiring that the disruption of the plaintiff's contract or relation have been the goal of the defendant's action, though the comments to the first *Restatement* rejected this view. *RESTATEMENT (FIRST) OF TORTS* § 766 cmt. d ("It is sufficient that he designs this result whether because he desires it as an end in itself or because he regards it as a necessary, even if regrettable, means to some other end.")

In proposing the change, Prosser conceded that the cases were in conflict and that there was no way they could be reconciled. *RESTATEMENT (SECOND) OF TORTS*, at 30-35 (Tentative Draft No. 14, 1969). Prosser's draft met with "overwhelming opposition" when it was presented to the American Law Institute (ALI) in 1969. It was reported by John Wade, who took over after Prosser died, that "[m]uch of the discussion dealt with whether the defendant's

completed in 1939. Work was done in earnest on the interference torts in the late 1930s.<sup>254</sup> The *Restatement* defined any purposeful interference in either a contract or a business relation as tortious absent a privilege.<sup>255</sup> It listed some specific privileges but otherwise privilege was a function of prudential and ethical concerns similar to those found in the *Restatement (Second)*.<sup>256</sup>

While the *Restatement* adopted the Holmes–Pollock formulation of the tort, it did not give them credit, I think perhaps because the authors consciously or subconsciously did not want to associate the tort with the by-then discredited theory of prima facie tort. The published comment in the *Restatement (First)* on the history and rationale of the rule cited only early English cases involving the use of fraud or force to interfere with relations and *Lumley v. Gye*.<sup>257</sup> However, the explanatory notes looked to Holmes as authority, citing the string of Massachusetts cases discussed above as well as *Privilege, Malice, and Intent* on the specific issue of malicious advice by an agent.<sup>258</sup> There was also this perhaps revealing comment about *Lumley v. Gye*: “[T]he cases...tended largely to build on that case as if it were the foundation. But the foundation lies farther back and, under modern notions of law and legal remedies, it supports a general principle as stated in this section.”<sup>259</sup>

Holmes’ basic approach in interference cases was endorsed by Leon Green<sup>260</sup> and William Prosser,<sup>261</sup> two leading tort scholars of the 1930s and 1940s. Prosser cited *Privilege, Malice, and Intent* and Holmes’ dissent in *Vegeahn v. Guntner* in explaining that the “real problem” in interference cases

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interference must have been done ‘purposely’ or whether it was sufficient for it to be done ‘intentionally,’ as it is defined in § 8A. There was no agreement.” RESTATEMENT (SECOND) OF TORTS, at 2 (Council Draft No. 40, 1976).

The first defined nonculpable interference by “privilege,” RESTATEMENT (FIRST) OF TORTS §§ 766, 767, while the second defines culpable interference as “improper,” RESTATEMENT (SECOND) OF TORTS §§ 766, 767. Wade reports that the term “privilege” was thought ill-advised because it seemed an issue of affirmative defense, which rang strange when the privilege was that of competition for business relations. RESTATEMENT (SECOND) OF TORTS, at 2–3 (Council Draft No. 40, 1976). Wade initially sought to substitute “culpable and not justifiable” interference for unprivileged. *Id.* at 3. When that met with resistance as being too complex he tried “justification.” *Id.* at 4, 20. “Wrongfully” was also trotted out. RESTATEMENT (SECOND) OF TORTS (Council Draft No. 41, 1977, note to Council). Wade thought that seemed to put the burden back on the plaintiff. He reports, “Finally, in a telephone discussion with Wex Malone, I hit upon the word ‘improperly.’ It seems to be the neutral word we were look for.” *Id.*

Also the first did not define hindrance of the plaintiff’s performance of his contract as tortious; the second does. RESTATEMENT (SECOND) OF TORTS § 766A.

254. RESTATEMENT (FIRST) OF TORTS § 766. Work on interference with business interests was begun in the fall of 1936 with Harry Shulman as the reporter. The interference sections went through two proposed drafts, Proposed Draft No. 6 and Proposed Draft No. 8. It was presented to the Council in May 1939 as Proposed Final Draft No. 6. The proposed drafts differ from the final draft mostly in having parallel provisions for interference with contract and interference with relations.

255. RESTATEMENT (FIRST) OF TORTS § 766

256. *Id.* § 767.

257. *Id.* § 766 cmt. b.

258. RESTATEMENT (FIRST) OF TORTS, at 26, 42, 57–59 *passim* (Proposed Official Draft No. 8, 1939).

259. *Id.* at 47. The published comments omit the reference to modern notions of law and legal remedies.

260. On Green’s significance in the development of tort law, see G. EDWARD WHITE, *TORT LAW IN AMERICA 75–78* (1980).

261. On Prosser, see WHITE, *supra* note 260, at 139–79.

is "balancing the conflicting interests of the parties, and determining whether the defendant's objective shall prevail at the expense of economic harm to the plaintiff."<sup>262</sup> However, this generative principle often disappears in the ensuing sixty pages as Prosser proceeds to "classify the cases and make more or less definitive statements as to the generally accepted rules";<sup>263</sup> Prosser gets the history wrong.<sup>264</sup>

Green also endorsed the position that in the "more difficult cases" of interference with contract where "the defendant has interests of his own which are entitled to protection," the defendant must "show a privilege, that is, a justification for his interference with the plaintiff's interest" which "focuses inquiry upon defendant's conduct and his conflicting interests and saves all the dialectic confusion involved in the attempt to determine malice, wrongfulness, illegality, unlawfulness, and the like."<sup>265</sup> But Green never credited Holmes' influence on the law of interference,<sup>266</sup> and he drew a sharper divide between interference with contract and interference with relations than did Holmes and Pollock or the *Restatement* and Prosser, suggesting that interference in relations was actionable only if it was motivated by malice or involved force or an otherwise wrongful act.<sup>267</sup>

Ironically, Holmes' and Pollock's general theory of tort, and, in particular, their theory of prima facie tort, fades into a social commentary on the law during this period.<sup>268</sup> In the 1920s, Pound claimed victory for the

262. WILLIAM M. PROSSER, *PROSSER ON TORTS* 975-76 (1st ed. 1941).

263. *Id.* at 976.

264. For example, Prosser identifies as the source of the modern law of tortious interference with relations *Temperton v. Russell*, an English case that was shortly overturned. *Id.* at 1014. See *supra* notes 210-14 and accompanying text.

265. Leon Green, *Relational Interests*, 30 *ILL. L. REV.* 1, 11-12 (1935). One of Green's examples of justified interference still holds, a owner of a firm may induce the discharge of an employee for the good of the firm. *Knapp v. Penfield*, 256 *N.Y.S.* 41 (1932). His other example may not. It is that a buyer who breaches his contract with the seller is not liable to the seller's agent for his commission. *R.J. Caldwell Co. v. Fisk Rubber Co.*, 62 *F.2d* 475 (1st Cir. 1933).

266. Green is weak on history. He takes the position that the tort was adopted by an analogy to seduction and then was extended to other contracts. Green, *supra* note 265, at 8.

267. On interference with relations, Green distinguishes between interference by noncompetitors and by competitors. If a noncompetitor interferes motivated solely by a desire to hurt for reasons of "trade rivalry, jealousy, or revenge," it is tortious. *Id.* at 15-17. Green seems to accept the position that tortious interference by a competitor requires a wrongful act, such as deceit, defamation, physical violence (coming on premises where plaintiff has exclusive license). *Id.* at 22-23. He poses as a difficult case *International News Serv. v. Associated Press*, 248 *U.S.* 215 (1918), which upheld an injunction restraining the defendant from copying and reselling news from the plaintiff's newspapers and boards. It is an unfair competition case. Green, *supra* note 265, at 24-26.

268. While the *Restatement (First) of Torts* adopted the broad form of the interference torts it otherwise is devoid of any acknowledgement that specific tort doctrines may be rooted in broader theories of obligation. Francis Bohlen, the original reporter, set the structure for the *Restatement* around a theory that conceived of the law of torts as composed of duties to respect rights. Interference was grounded in the "right of unimpaired economic and societal condition and opportunity" and the subrights of "the right to performance of a contract free from outside interference" and "the right to economic opportunity" coupled with the duties "to refrain from acts of aggression" meaning "an act the purpose of which is to violate a right." *RESTATEMENT (FIRST) OF TORTS*, at 6, 9 (Tentative Draft No. 1, 1923). Eventually, the *Restatement* came to be structured around traditional doctrine. For example, Volume I covers intentional torts of invasion of personality (Chapter 1), invasions of interest in land (Chapter 7), and invasions of interests in chattels (Chapter 9). Interference is grouped with other torts involving interference with business relations, which is in Volumes III and IV. Whether there was a general principle

theory<sup>269</sup> and Winfield, the leading English torts scholar of the period, wrote extensive defenses of Pollock's theory.<sup>270</sup> But the theory of prima facie tort disappeared as a legal principle, other than in New York<sup>271</sup> (and perhaps a few other states),<sup>272</sup> which adopted the theory in the crystallized form of the doctrine of prima facie tort. The crystallized doctrine proved inert.<sup>273</sup>

Prosser's first edition, which was published in 1941, converted the theory of prima facie tort from a claim of law into a statement about the social forces that drive the law.<sup>274</sup> Prosser dismissed Salmond's view of tort law: "It is by now generally felt that tort law is broader than any named categories, and that some more or less vague general principles run through it..."<sup>275</sup> But he also rejected Pollock's and Holmes' theory, characterizing it as "the bold attempt to reduce the entire law of torts to a single broad principle, that any harm done to another is a wrong, and calls for redress, unless 'justification' for it can be shown."<sup>276</sup> His reason: "[T]he rule does not tell us what the law recognizes as 'harm' to another, or as 'justification' for it."<sup>277</sup> At the same time he exulted in

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of liability that subsumed these specific doctrines emerges as an issue in the *Restatement*, if at all, in Division 11 in Volume IV, which covers "Miscellaneous Rules" and in particular the two sections "Liability for intended consequences," and "Intentional harm to a property interest or the creation of a liability," §§ 870, 871, respectively. But these sections are limited in scope. The first applies only if there is any otherwise tortious act (for example, shooting an insured with the goal of harming his insurer) and the second protects only property-like interests. In an earlier draft, § 871 stated a more general principle: "All intentional harm is a tortious act unless the actor has a privilege." That could not pass Charles Howard's objection: "This section may be overstated. (1) we are taking at its face value the statement of Holmes or Pollock or somebody else and (2) the section is attempting to generalize everything." American Law Institute, Torts (6), Minutes of Conference held in Philadelphia, Nov. 17-19, 1938, discussing Preliminary Draft No. 6, at 45. The notes suggest that the intention of the Reporter (Warren Seavey) had been to deal only with torts to the possession of things, but that he also had a broader point: "What I am doing here is probably contrary to all Mr. Howard's instincts. I am trying to analyze Torts as a subject and not as a cause of action." Seavey then grounded the rule on practices in equity. *Id.* at 47.

269. ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 164-70 (1922). Pound's concern is to move beyond what he considers the relatively primitive principle of liability for intentional harms, which he embeds in notions of fault, to a principle of liability without fault.

270. See, e.g., Percy H. Winfield, *Public Policy and the English Common Law*, 42 HARV. L. REV. 76 (1928); Percy H. Winfield, *The Foundation of Liability in Tort*, 27 COLUM. L. REV. 1 (1927).

271. *Advance Music Corp. v. American Tobacco Co.*, 70 N.E.2d 401, 402 (N.Y. 1946). The case is a border-line trade disparagement case. The defendant aired a program "Your Hit Parade" that purported to play songs in the order of their popularity. The plaintiff alleged that the defendant failed to play its songs and played them in an improper order with the intent of impugning their popularity.

272. It is difficult to tally the states that have recognized the doctrine of prima facie tort because many of the cases that are cited as adopting the doctrine are interference cases. Morris D. Forkosch, *An Analysis of the 'Prima Facie Tort' Cause of Action*, 42 CORNELL L. REV. 465, 479-80 (1957), cites interference cases from Massachusetts, Iowa, Minnesota, New Jersey, and North Carolina as accepting the principle of prima facie tort.

273. An observer of New York law wrote in 1956 that the tort was considered by the courts "merely another rather specifically limited tort rather than as a tool to aid in the analysis of unusual 'intentional conduct' cases." PETER WARD, *THE TORT CAUSE OF ACTION* 19 (1956).

274. Green's position was more subtle. He rejected the concept of prima facie tort as a legal doctrine, but welcomed the underlying concept as a helpful agent that makes legal doctrine more amenable to change and prevents premature crystallization. Leon Green, *Protection of Trade Relations Under Tort Law*, 47 VA. L. REV. 559, 569-72 (1961).

275. WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 4 (1st ed. 1941).

276. *Id.* at 5.

277. *Id.* at 6.

the openness of tort law to social influence. A section captioned "Social Engineering" opens with the blackletter: "The law of torts is concerned primarily with the adjustment of the conflicting interests of individuals to achieve a desirable social result."<sup>278</sup> Harper made a similar move in the first edition of his treatise in 1933, rejecting Pollock and Holmes general theories with the comment "[I]t is [the] social, rather than legalistic basis of tort law that affords the unifying principles."<sup>279</sup> This shift was in tune with the times. It was the era of what G. Edward White has described as mature legal realism, which distrusted legal "universals" and explained law as a product of social forces.<sup>280</sup>

The evolution of the general theory of tort from a principle within the law into an observation about external forces that drive the law is subtle, but it may have had significant ramifications for the development of the law of tortious interference.<sup>281</sup> The tort came to be seen as defining an ordinary legal duty that juries could apply in particular cases. The interference tort should have been thought of instead as a broad principle that judges could consider in deciding whether to extend tort protection to novel areas.<sup>282</sup>

### III. SEEKING DOCTRINAL GUIDANCE ON DIFFICULT QUESTIONS OF POLICY AND ETHICS

It seems inevitable that a tort conceived on the principle of prima facie liability for intentional infliction of harm would come to encroach upon bodies of law, like contract, which have more limited principles of liability. Holmes and Pollock never addressed this possibility in print, I think, because they were more wedded than we are to traditional doctrinal categories. It may have seemed so bizarre to Pollock to recast an action for breach of contract as tortious interference when the breach interfered with the plaintiff's other contracts or relations—in his words, such an action "would confuse every accustomed boundary"<sup>283</sup> in the law—that he did not even conceive of the possibility.

If pressed on the specific question of whether an action for tortious interference would lie against someone who breached a contract when that breach interfered with the plaintiff's other relations, I am sure that Pollock would have said that contract law exclusively defined the obligation for breach of contract. Pollock was more attentive than most others in his day to the

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278. *Id.* at 15. On the issue of the relevance of motive to liability Prosser echoed Holmes—in cases "where the interests involved are more nicely balanced, and the rights and privileges of the parties are not fixed by a definite rule but are interdependent and relative, the defendant's motive or purpose may in itself determine whether he is to be held liable." *Id.* at 31.

279. FOWLER V. HARPER, TORTS v, vi (1933).

280. WHITE, *supra* note 260, at 63–74.

281. Treating the general theory as an observation about the law rather than as a principle of law may make it more difficult for doctrinally-minded judges to craft new theories of obligation to deal with new problems because they lack the doctrinal tools to confront novel problems. Of course, the more common experience in tort law since the 1940s has been of doctrinal change and the expansion of liability. Perhaps the evolution from Holmes' and Pollock's view to that of Green and Harper contributed to this phenomena by helping to delegitimize doctrine.

282. Harper and James argue that this is the best conception of the tort of invasion of privacy. They describe it as "a growth-generating principle for further common law development." FOWLER V. HARPER ET AL., THE LAW OF TORTS 633 & n.3 (2d ed. 1986).

283. POLLOCK, *supra* note 187, at 351.

problem of drawing a boundary between contract law and tort law. This is fitting, for he wrote the leading treatise of his day on contract law. Nevertheless, one finds in his treatise on torts, both a neglect of the potential threat to contract law of a theory of *prima facie* tort and a sense that contract law controls in a case in which there are concurrent contract and tort claims. Pollock devoted the last chapter of his treatise to the relation of contract and tort<sup>284</sup> and it is where he discussed interference.<sup>285</sup> But he never addressed the possibility that breach of a contract might also be tortious interference.<sup>286</sup> Pollock addressed the problem of concurrent contract and tort claims elsewhere in the chapter,<sup>287</sup> concluding that such tort claims were a relic of the past<sup>288</sup> (he was wrong) and arguing that "it seems better to say that wherever there is a contract to do something, the obligation of the contract is the only obligation of the parties with regard to the performance."<sup>289</sup>

One way to protect contract law and other bodies of law from encroachment by the interference tort is to impose internal doctrinal restrictions on the tort. Courts have imposed a variety of restrictions. These include restricting the tort to interference with contract;<sup>290</sup> preserving interference with contract as it is but restricting interference with relations to independently wrongful acts;<sup>291</sup> restricting both interference with contract and interference with relations to independently wrongful acts;<sup>292</sup> not allowing

284. *Id.* ch. XIII.

285. *Id.* at 351-60.

286. The omission is striking when one realizes the structure of Pollock's analysis. His general point is that in a three-cornered relationship with a contract defining the relationship between the parties along one leg, it was possible that a suit in tort might lie in tort between the parties along the other legs—thus a suit might lie by a nonparty against a party for a breach that is also a breach of duty in tort (e.g., a suit by the recipient for error in transmitting a telegram), *id.* at 355-59; by a party against a nonparty for interference; and by a party against a nonparty whose actions also give rise to a suit for breach against a party (e.g., a suit by the passenger on a vessel who is hurt against the owner for negligence in operating the vessel when his contract was with the lessor of the vessel), *id.* at 345-51. The implicit assumption is that a tort action will not lie on the contract leg.

287. *Id.* at 337-42.

288. *Id.* at 340.

289. *Id.* at 341. He left the door ajar, however, to allowing recovery in tort for harms inflicted when the parties had not quite cemented their relationship with a contract. *Id.* at 342-45. This conclusion is debatable. The reasoning seems to be that contract law does not govern a case until a contract is signed. However, a strongly held principle in contract law that people are free to aggressively pursue their own interests until a contract is signed weighs heavily against creating duties in tort to regulate precontractual behavior.

290. See *supra* note 31; Epstein, *supra* note 10, at 20-24 (advocating this position).

291. A recent decision suggests that California may be moving in this direction. See *Della Penna v. Toyota Motor Sales, U.S.A., 902 P.2d 740* (Cal. 1995). Sayre, *supra* note 11, advocates this position.

292. See, e.g., *Community Title Co. v. Roosevelt Fed. Sav. & Loan Ass'n, 796 S.W.2d 369* (Mo. 1990). A variation on this standard holds an action improper if it is wrongful or if it was done out of actual malice. See, e.g., *St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194* (Utah 1991). Perlman, *supra* note 11, at 62, advocates this position.

Perlman's article merits a few comments. Perlman explains the interference torts by working backwards from principles in tort law that limit liability for economic loss. For example, if Gye negligently injured or kidnapped Wagner, then Lumley would have no claim because his loss was purely economic. Perlman reasons that "Faced with this state of the world, it is not surprising that courts intent on bringing some cases of contractually based loss within the scope of liability for tortious acts might devise a cause of action separate from traditional torts that at once would create and limit liability." *Id.* at 76. From this observation he derives a requirement that an act of interference must be independently wrongful, for the function of the torts was merely to expand the class of persons protected from acts that were already held

hindrance claims (i.e., claims that the defendant hindered the plaintiff's performance of a contract);<sup>293</sup> making some privileges absolute;<sup>294</sup> or requiring that the interference be the motive for the defendant's action and not merely a known consequence.<sup>295</sup> Academics have proposed other limitations. These include restricting the tort to interference with contracts that involve unique goods and services;<sup>296</sup> restricting the tort to protect significant investments in "relation-specific" information or assets;<sup>297</sup> and abolishing interference with contract while restricting interference with relations to independently wrongful acts.<sup>298</sup> We might even borrow the English rule requiring conspiracy for interference with relations.<sup>299</sup>

This is not the place to address the individual merits of these restrictions. I address instead the more general arguments that without some such limitation the interference tort is too indeterminate and potentially sweeps too far. This part of the Article responds to those arguments by proposing a method that would preserve the openness of the interference tort while providing a better legal framework for the analysis of the issue of impropriety to limit the tort's encroachment on other bodies of law.

#### A. *Why Other Bodies of Law Should Guide the Analysis of Impropriety*

When the relationships between the three concerned parties—the plaintiff, the defendant, and the counter-party—are governed by another body of law, an inquiry into the substance and values served by that other body of law must loom large in determining whether an interference claim should lie. This point is trivially correct when the other body of law preempts other claims or when there is a constitutional or statutory privilege guarding the defendant's conduct that the judge must respect.<sup>300</sup>

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wrongful with respect to other persons or to society at large. As history this theory is bunk—no one described the problem in this way in the formative years of the tort. Some (like Wigmore) argued that the tort of interference with business relations lay only for independently wrongful acts, but they grounded this on a theory that defined a tort either as a violation of a right (so any knowing inducement of a breach of contract could be tortious) or as a commission of a wrong. See *supra* notes 168–84 and accompanying text.

293. *Windsor Sec., Inc. v. Hartford Life Ins. Co.*, 986 F.2d 655, 661–62 (3d Cir. 1993); *Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, 719 F.2d 1335, 1341 (7th Cir. 1983) (act of interference must be directed at a third party other than a plaintiff); *Price v. Sorrell*, 784 P.2d 614, 616 (Wyo. 1989) (holding that hindrance is not tortious because rendering performance more costly "as an element of proof is too speculative and subject to abuse"); *H. Enters. Int'l v. General Elec. Capital Corp.*, 833 F. Supp. 1405, 1414 (D. Minn. 1993) (Illinois protects interest in a prospective contract only if the action is directed against a third party, and not against the party claiming interference); *Burns Jackson Miller Summit & Spitzer v. Lindner*, 451 N.E.2d 459 (N.Y. 1983).

294. *Moore v. Barge*, 436 S.E.2d 746 (Ga. Ct. App. 1993).

295. *NCC Sunday Inserts, Inc. v. World Color Press, Inc.*, 759 F. Supp. 1004 (S.D.N.Y. 1991).

296. *Dobbs*, *supra* note 11, at 371–76.

297. *BeVier*, *supra* note 10, at 898–915.

298. *Dowling*, *supra* note 11, at 514–18.

299. See *supra* notes 221–24 and accompanying text.

300. Petitioning the government to stop performance of a contract has been held privileged under the First Amendment. See, e.g., *South Dakota v. Kansas City S. Indus.*, 880 F.2d 40, 50 (8th Cir. 1989), *cert. denied*, 493 U.S. 1023 (1990). Threatening to file a suit as a protest to a project has also been held privileged under the First Amendment. See *King v. Levin*, 540 N.E.2d 492 (Ill. Ct. App. 1 Dist. 1989). The defendant in the latter suit later brought a

More interesting are cases where a judge could, if she thought it prudent or just, allow an interference claim though some other body of law also applied to a case. There are two somewhat different sets of reasons why a judge might want to consult another body of law in deciding an interference claim. A judge might believe, as does Ronald Dworkin, that maintaining coherence in the law is itself a value. Dworkin grounds this value on his concept of law as integrity, which he contrasts with the concepts of pragmatism and conventionalism.<sup>301</sup> Under Dworkin's concept of law as integrity, the test of the rightness of a decision is how it "fits" within the entire web of the law (Dworkin would also take account of nonlegal mores). Not only must the judge consult the entire body of law in deciding interference cases to ensure that her decision fits into this web, she must also try to decide a case in a way that respects a popular sense of "local priority," meaning popularly held views of how the law is compartmentalized (e.g., the belief that contract cases are governed by contract law), at least so long as this view tracks "widely held moral principles."<sup>302</sup> Thus, if a case fell deeply in the shadow of another body of law, then a judge would be compelled to deny the interference claim to preserve the priority of that other body of law.

Even a thoroughly pragmatic judge, such as Judge Posner, would want to inquire into another body of law that might govern a case if she had doubts about her judgment or the judgment of her brethren. That inquiry would help her to identify and weigh the relevant values or interests in a case. If she thinks the other body of law gets the case before her wrong, she will still be concerned that allowing the interference claim would have harmful effects because it would create a disturbance of uncertain dimension in that other body of law. These harmful effects include increased dispute resolution costs because of more legal uncertainty, disruption of settled expectations, and, if her decision could be expected to alter behavior or outcomes in cases in which she thinks the primary body of law provides the right incentives or achieves the right outcome, a loss in the values served by the other body of law in those cases. In some cases, she might even conclude that the identification of another body of law governing the case should end the analysis, without any further inquiry. A judge would so conclude if she thinks it sufficiently likely that the other body of law gets the case right that further analysis on her part is not worth the effort. Or after analyzing a case and determining that the other body of law gets the case wrong, she may conclude that it is better to change that body of law than to create a separate tort action.<sup>303</sup>

A relatively straightforward example will illustrate some of the value of embedding the analysis of an interference claim in another body of law that might apply in a case. The plaintiff alleges that the defendant, his ex-employer, filed a civil suit charging the plaintiff with misappropriating trade secrets in

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malicious prosecution against his persecutor, unsuccessfully. *Levin v. King*, 648 N.E.2d 1108 (Ill. Ct. App. 1995).

301. RONALD DWORKIN, *LAW'S EMPIRE* 94-96 (1986).

302. *Id.* at 252.

303. Leon Green thought the doctrine of *prima facie* tort served this last function. Green, *supra* note 274, at 572 ("[I]t also influences the expansion of the traditional doctrines to meet new problems created by environmental changes. It is especially valuable in preventing the premature crystallization of the doctrines protecting trade relations against the harms of appropriation and disparagement and, where such doctrines have been permitted to crystallize prematurely, in bringing pressure upon the courts to render them more flexible.").

order to induce the plaintiff's present employer to fire him. The plaintiff concedes that the misappropriation charge is not entirely groundless (though he challenges its ultimate merit) but he presents credible evidence that the purpose for the misappropriation suit was to punish the plaintiff for leaving a project at a sensitive time by driving him from his new job. No claim will lie for malicious prosecution because the ex-employer's suit had an objectively reasonable basis.<sup>304</sup> No claim will lie for abuse of process because the ex-employer neither made any demands of the plaintiff in filing the misappropriation suit nor took any other action apart from filing the suit.<sup>305</sup>

The plaintiff instead brings an interference claim against his ex-employer.<sup>306</sup> Since the plaintiff alleges a knowing interference in his employment relationship, the case comes down to the issue of the impropriety of his ex-employer's conduct. The *Restatement (Second) of Torts* asks the decision-maker to weigh the competing interests of the parties and of society in deciding the case. Reference to the law on misuse of process helps to identify a significant interest that supports denying the interference claim—the “interest in supporting resort to law”<sup>307</sup>—and it assigns that interest great weight.<sup>308</sup>

Deeper inquiry into the character and history of the relevant doctrinal barriers to the plaintiff's claims for malicious prosecution or abuse of process brings the policy question into sharper focus. This inquiry also provides a basis for evaluating how disruptive allowing the interference claim would be to the law on misuse of process. Abuse of process was developed to cover cases outside the narrow limits of malicious prosecution.<sup>309</sup> Thus, the crucial doctrinal barrier in the case is the requirement under that doctrine that the defendant have taken some action against the plaintiff apart from prosecuting a suit. Courts have maintained this requirement with some rigor.<sup>310</sup> And it is

304. RESTATEMENT (SECOND) OF TORTS § 674(a) (1964).

305. KEETON ET AL., *supra* note 36, at 898 (“Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.”).

306. A similar issue was raised in *Lexecon Inc. v. Milberg, Weiss, Bershad, Hynes, & Lerach*, 845 F. Supp. 1377 (D. Ariz. 1993). *Lexecon* (Daniel R. Fischel) was employed by the defendant in securities litigation. The plaintiffs filed a suit adding *Lexecon* as a defendant, allegedly to decrease Fischel's value as an expert witness. *Lexecon* sued Milberg et al. for malicious prosecution, abuse of process, and interference with contract. The court dismissed the malicious prosecution claim because the suit was not baseless and the abuse of process claim because Milberg et al. had taken no action other than filing the claim. Nevertheless the court allowed the interference claim to go to the jury. *Id.*

307. KEETON ET AL., *supra* note 36, at 871.

308. *Chittenden Trust Co. v. Marshall*, 507 A.2d 965, 969 (Vt. 1986) (“claims of malicious prosecution are not favored in the law”). Green said “[t]here is no other cause of action which is more carefully guarded.” LEON GREEN, JUDGE AND JURY 338 (1930).

309. *Barquis v. Merchants Collection Ass'n of Oakland*, 496 P.2d 817, 824 n.4 (Cal. 1972) (describing abuse of process as a “catchall” tort “to cover improper uses of the judicial machinery that d[o] not fit within the earlier established, but narrowly circumscribed, action of malicious prosecution.”).

310. *Coleman v. Gulf Ins. Group*, 718 P.2d 77 (Cal. 1986) (holding that pressing meritless appeal for purpose of wearing down plaintiffs is not abuse of process because defendant did not use court's process in unauthorized manner); *Mozzochi v. Beck*, 529 A.2d 171 (Conn. 1987) (holding that using cause of action for its intended purpose with improper motive is not tortious); *Royce v. Hoening*, 423 N.W.2d 198 (Iowa 1988) (holding that defendant must seek collateral advantage); *Long v. Long*, 611 A.2d 791 (N.H. 1994) (holding that defendant must use court's process to compel plaintiff to act or forbear from acting).

thought to serve an important function in limiting the tort,<sup>311</sup> perhaps because the requirement is thought to add an objective requirement to the subjective element of bad faith.

These observations weigh heavily against allowing the interference claim, unless the plaintiff's case is distinguishable in some respect from the many cases that hold it not to be tortious to prosecute a suit merely to harass someone. A possible distinction is the character of the harm—the misappropriation suit was filed to deprive the plaintiff of his job. Finally, then, the issue may be formulated as whether this harm is sufficiently unusual and severe to call into question the policy judgment that underlies the general rule. This analysis also helps to identify grounds that could limit the effect of a decision to allow the interference claim. For example, the court could require clear and convincing evidence that the ex-employer's purpose in filing the misappropriation suit was to induce the plaintiff's current employer to fire him.

### *B. The Role of Judge and Jury*

A judge and not a jury should determine what behavior constitutes improper interference in a novel case even if the question is close. A novel case is one in which general rules of propriety or privilege have not crystallized. A close question is one on which the relevant prudential and ethos-based arguments are indecisive so that reasonable persons might disagree whether the claim should lie.

That a judge should decide whether an interference claim should lie seems self-evident in cases, such as the hypothetical involving misuse of process, where the determination of the propriety of the defendant's conduct requires consideration of the substance and the underlying policies of another body of law that would hold the defendant immune despite the injury he inflicted.

Often the other body of law governing the relationship of the parties will impose significant constraints on the role of jury in determining factual issues. This is true of rules in contract law on interpretation and damages. And it is true in our hypothetical case, for juries have a limited role in resolving factual questions under abuse of process and malicious prosecution.<sup>312</sup> When there is a missing factual element in the plaintiff's case under the other body of law, and the resolution of the factual question is committed to a judge, a commitment to respect the interests protected by that body of law might justify taking the issue of the propriety of the defendant's conduct out of the jury's hands and giving it to a judge. Thus, if the laws of the state prohibit the use of evidence of trade practice to imply a term in a contract when that term contradicts an express term of the contract, it seems bizarre to allow a plaintiff to use that same evidence to establish that the defendant's conduct was improper to sustain an interference claim.<sup>313</sup>

These arguments assume that an interference claim falls in the shadow of some other body of law. A good argument exists for having a judge decide

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311. *Miller v. Stern*, 27 N.Y.S.2d 374, 375–76 (N.Y. App. Div. 1941).

312. A judge dominates the decision whether there was a reasonable basis for a claim. GREEN, *supra* note 308, at 341–47.

313. Three cases that permit precisely this are discussed in Part I, *supra* notes 67–85 and accompanying text.

what behavior constitutes improper interference in a novel case that is remote from other bodies of law. In the 1890s, a claim that picketing was tortious interference was novel in this sense. In the 1990s, it might be a claim by an assignee of an interest in a franchise that the franchisor tortiously interfered in the assignment by unreasonably denying consent in breach of its contract with the franchisee.<sup>314</sup>

The argument that a judge should decide the issue of propriety in such cases cannot rest on the simple claim that a jury is not to be trusted with important decisions, for American tort law is committed to the opposite view. The argument within American tort law proceeds on two lines. One line of argument is that the differences between interference claims and negligence claims—negligence is the area of law in which the jury reigns most supreme—justify different allocations of authority to a jury. In cases involving physical or emotional injuries, jurors are competent to evaluate at least half of the interests at stake in a case since such injuries are within the realm of ordinary experience. If the defendant was engaged in an activity in which most people engage, like driving an automobile, then jurors may be competent to evaluate most of the interests at stake in a case. The average juror is less competent to judge the issues at stake in an interference case. In *Woody's case*, for example, the average juror will have little basis on which to evaluate the credibility of Woody's story. One would need to know a fair amount about the law and practice in the area of commercial foreclosures to know whether Woody truly faced a risk of personal liability for the balance of his mortgage on foreclosure despite having substantial equity in the property, and whether a bank officer and the Tamers and George could have planned on this prospect to drive Woody to abandon his equity. The average juror will have even less expertise on the broader interests at stake in the case.

The second line of argument is structural. Tort law frames categorical issues of liability—i.e., rules that determine whether liability exists in a category of cases—as duty issues for the judge.<sup>315</sup> A rationale for this practice is that such categorical issues of liability involve “a question of policy, involving the ‘weighing of interests,’”<sup>316</sup> which is best committed to a judge.<sup>317</sup> A novel interference claim would seem to present a categorical issue, because the decision-maker must determine “whether the interest of the plaintiff which has suffered invasion was entitled to legal protection at the hands of the defendant,”<sup>318</sup> and that decision often turns on general concerns of policy and fairness.

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314. See *supra* note 132 for an explanation of why this issue is remote from the sort of issues addressed by the contract doctrines on third party beneficiaries.

315. See, e.g., *McAdams v. Dorothy Edwards Realtors, Inc.*, 604 N.E.2d 607, 611 (Ind. 1992) (holding that whether seller's broker could be liable to purchaser for failing to ensure that funds would be used to clear mortgage lien raised “the question of what duty a real estate broker owes a buyer,” which is a question of law). See generally DAVID W. ROBERTSON ET AL., TORTS 161–63 (1989 ed.) (stating that duty/no duty terminology is best used to describe categorical rules of liability that judge may apply without knowing the details of the case).

316. WHITE, *supra* note 260, at 95 (quoting LEON GREEN, RATIONALE OF PROXIMATE CAUSE vi, v (1927)).

317. *Ballard v. Uribe*, 715 P.2d 624, 628 n.6 (Cal. 1986) (explaining that issue of whether liability should attach to a particular category of conduct is a legal question resolved on the basis of broad concerns of policy and fairness).

318. *Moril v. Moril*, 142 A. 337, 339 (N.J. 1928) (quoted in PROSSER, *supra* note 50, at

A significant flaw in this form of the structural argument is that the inquiry under interference doctrine also may be intensely fact-based—the facts must be heard because the defendant's motive, if sufficiently evil, may decide the liability question. The significant role of motive makes it difficult to reject a novel interference claim on the basis of a categorical “no duty” rule that can be applied prior to trial. In addition, the fact that decisions sometimes turn on broad considerations of policy and fairness does not require that they be made by a judge, for American tort law sometimes commits close questions of this nature to the jury.<sup>319</sup>

A stronger version of the structural argument looks to the unusual position of interference doctrine in tort law. Comment *l* to section 767 of the *Restatement (Second) of Torts* justifies committing the issue of the propriety of interference to a jury when the question is close and open<sup>320</sup> by analogizing to the law of negligence.<sup>321</sup> This analogy gets it precisely wrong. While there is a general duty to take reasonable care to avoid causing physical harm to others,<sup>322</sup> there is no general duty under tort law to avoid causing others

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319. See ROBERTSON ET AL., *supra* note 315, at 175–76 (stating that close questions of proximate cause are for the jury).

320. RESTATEMENT (SECOND) OF TORTS § 767 cmt. *l* (1964) (“[W]hen there is room for different views, the determination of whether the interference was improper or not is ordinarily left to the jury, to obtain its common feel for the state of community mores and for the manner in which they would operate upon the facts in question.”).

321. *Id.* The argument from precedent is only a little stronger. Many cases in recent years commit close questions of propriety to a jury. A few of these are discussed in Part I. See *supra* notes 59–85 and accompanying text. Going back further one can find a fair number of cases that state as a rule that the issue of justification is for a jury to decide, but usually in a context where nothing turns on the point. These opinions are merely restating what is taken to be an uncontroversial rule. Things get interesting if we go one step further back to the cases that are said to have originally laid down the rule. One finds in these cases that the court decided the difficult policy questions that go into determining whether conduct is privileged, the jury merely decided whether the facts brought the case within the privilege. Three early cases that often are cited as authority for giving the issue of justification to a jury are collected in a thorough annotation in a 1933 American Law Report: *Liability for Procuring Breach of Contract*, 84 A.L.R. 43, 81 (1933). In the first of these, *Berry v. Donovan*, 74 N.E. 603, 606 (Mass. 1905), the issue was whether a union tortiously interfered with the plaintiff's position as an at-will employee when it induced the employer to fire him to preserve an all-union shop. The court recognized that the central issue in the case was one of policy—did the privilege of competition extend to efforts by labor to preserve a union shop to better compete with their employer—and the court decided that question without even suggesting that it might present a jury issue. In a second case, *Order of Ry. Conductors v. Jones*, 239 P. 882, 883 (Colo. 1925), the court resolved the policy question—that a union may induce an employer to fire a worker to preserve its seniority rules if the worker consented to obey those rules—and left for the jury the factual question whether the worker had consented to the union rules. In the third case, *Carnes v. St. Paul Union Stockyards Co.*, 205 N.W. 630, 632 (Minn. 1925), the court resolved the policy question—that a stockyard association may bar from entry a person it thought engaged in unethical practices that would bring the industry in disrepute—and left for the jury the factual question whether that was the defendants' true reason for barring the plaintiff. There is also authority in early cases that the issue of justification is for the judge. *Conrad v. Schmitz*, 3 N.E.2d 868, 869 (N.Y. 1936) (Finch, J. dissenting on other issue) (“It is said that whether there is justification sufficient to warrant the courts in protecting the rights of the plaintiff rests upon the individual opinion of the judges as to what constitutes ‘just cause, sufficient justification or legal justification.’”). Holmes seemed to think that the issue of privilege was for a judge to decide in a close case. *Holmes, supra* note 19, at 9.

322. See ROBERTSON et al., *supra* note 315, at 195 (“Anglo-American negligence law firmly incorporates the assumption that anyone engaging in any activity that has the potential of causing physical harm to others owes a duty to use reasonable care to avoid causing such harm.”).

economic harm. Economic interests are protected by a web of limited torts. Some of these torts take the form of duties that the law entrusts juries to apply in specific cases (though it is striking that the judge plays a dominant role in policing the application of the torts of defamation,<sup>323</sup> misuse of process,<sup>324</sup> and disparagement<sup>325</sup>), but the interference torts cannot be so construed because the elements of a prima facie interference case are so broad that the "duty" of non-interference would encompass much of the web, including areas where the issue of liability is thought to be open and properly resolved by a judge.

Striking evidence of this fact can be found in the *Restatement (Second) of Torts*. If comment *l* is taken at face value, it would throw to a jury difficult questions of liability that the members of the ALI at the time of the second *Restatement* plainly thought to be legal questions. Consider the area of "injurious falsehood," or what Harper, James, and Gray describe as a "nondefamatory, nondisparaging misrepresentation to a third person."<sup>326</sup> An example of such a case is where the defendant tells the plaintiff's customers that the plaintiff does not have the capacity to serve them. The ALI struggled with such cases, ultimately compromising by adopting a rule that held the defendant who knew of the falsity of his representation liable, while taking no position on the defendant who spoke with reckless disregard for the truth out of malice or a desire to harm the plaintiff.<sup>327</sup> But injurious falsehood cases also are cases of tortious interference,<sup>328</sup> and so if comment *l* is taken at face value, whether a defendant who speaks with reckless disregard for the truth is liable is a question for the jury. This, of course, is nonsense. A charitable interpretation of comment *l* is that it was added in haste (it was added in a late draft)<sup>329</sup> and that its author, John Wade, overlooked a point that he knew well—the interference torts were unlike other torts because "the law in this area has not fully jelled but is still in the formative stage."<sup>330</sup>

### C. The Method Illustrated

*Woody's case* can be used to show how a conscientious judge might handle an interference claim that lies deeply in the shadow of another body of law. I will assume a judge who wants to decide the case in the way that is in the interest of society and that is fairest to the parties. Further, she does not care much about violating expectations that contract law should govern the case.

The judge will find herself beset with doubts that are of a more factual than a philosophical character. If the bank officer really conspired with the

323. The judge determines whether a communication is capable of carrying a defamatory meaning, RESTATEMENT (SECOND) OF TORTS § 614(1) (1977), and whether a privilege exists, *id.* § 619; HARPER ET AL., *supra* note 282, at 248.

324. The judge determines the most important element, whether there was probable cause for a charge. *See supra* note 312 and accompanying text.

325. The judge determines whether the plaintiff's interest is afforded protection and whether the circumstances of a case give rise to a privilege. RESTATEMENT (SECOND) OF TORTS § 652(1)(b), (e).

326. HARPER ET AL. *supra* note 282, § 277a, at 294–99.

327. RESTATEMENT (SECOND) OF TORTS § 623A caveats.

328. *See, e.g.,* Comstock Silversmiths, Inc. v. Carey, 894 S.W.2d 56 (Tex. Ct. App. 1995) (holding defendant liable for tortious interference where it falsely told plaintiff's customers that the plaintiff was dying).

329. RESTATEMENT (SECOND) OF TORTS, at 35 cmt. k (Council Draft No. 41, 1977).

330. *Id.* at 2.

Tamers and George to squeeze Woody out of the club, then there are convincing economic and moral reasons for punishing the defendants by allowing the tort claims. The defendants were alleged to have acted in what an economist would describe as a rent-seeking or opportunistic manner. It is socially desirable to punish such behavior as a deterrent when we know it occurs because resources spent in rent-seeking are a deadweight loss to society and because the prospect of opportunistic behavior may deter otherwise desirable transactions. The moral arguments are more intuitive but no less compelling. For example, one might reason that while Woody accepted exposure to some risk when he took a nonrecourse note on the sale of the club while remaining liable on a mortgage, he would not reasonably have expected that the bank and buyers would conspire to take advantage of his exposure to squeeze him out of the club.

What gives pause is doubt about the truth of Woody's allegation. This doubt obviously calls into question the moral appeal of Woody's claim. The knowledge that similar claims may be brought in future cases where the allegations of opportunistic behavior will be as or more doubtful also casts doubt on the economic argument for allowing the claim. Against the beneficial effects of deterring opportunistic behavior must be set the cost of resolving doubtful claims and whatever harmful effects that the prospect of false claims will have on lending practices. Perhaps the judge can decide the immediate factual issue with a fair degree of confidence. The question about what rule best regulates future behavior is vastly more difficult because it requires predicting how a large and diverse class of people (at a minimum borrowers, lenders, their lawyers, and future judges and juries) will respond to her decision in a wide range of settings (at a minimum in the making and the performance of loans, in settling disputes, and in litigation).

Perhaps there will be cases where an interference claim will provide the opportunity to reconsider another body of law that governs a relationship or activity in its entirety. The interference tort (with its kin—the tort of intentional infliction of emotion distress) has served as a catalyst for significantly changing the law regarding sexual harassment.<sup>331</sup> Early claims for such conduct—brought before tort doctrines of liability crystallized or statutes were enacted—were often brought under the interference and infliction torts. *Woody's case* is not like these cases for there is no reason to think that the rules of contract and commercial law that govern mortgage lending are in need of significant overhaul. This suggests that the judge might proceed on the assumption that the rules that govern commercial lending get it basically right in most cases.

This assumption greatly simplifies the analysis. First, as a threshold matter, the judge would ask whether some element or elements distinguish *Woody's case* from the run-of-the-mill case of loan default. The existence of an unusual element raises the possibility that the rules of commercial lending do not adequately deal with such a case, and it makes it possible to limit the scope of the tort action so it does not greatly disrupt the normal operation of those rules. The allegation of a conspiracy between the Tamers and George and the bank to drive Woody into default surely distinguishes it from the run-of-the-mill case of loan default. It helps, too, that the allegation is supported by an

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331. See Gergen, *supra* note 22, at 1709–10.

unusual objective fact; while the Tamers and George defaulted on their note the bank allowed them to keep the club on the original terms when it stepped into Woody's shoes. It would be a weaker case had Woody claimed that the bank acted maliciously, for while truly malicious acts probably are rare, malice often can be alleged with some plausibility by defaulting borrowers who feel mistreated by lenders.

Once the judge identifies the distinctive elements in a case, she would inquire more deeply into the other body of law to see if it responds directly to the specific concerns raised by the plaintiff. Woody's interference claim against the bank runs aground at this point because the doctrine of good faith in contract law protects Woody if the bank interfered with Woody's ability to repay the mortgage. The argument would have to be that the tort action better responds to the problem of opportunistic behavior than does the contract action. While that argument has some force (for example the greater sanctions in tort may compensate for a low probability of detection) the countervailing arguments in favor of lower but more certain damages are strong enough to commend prudence and preserve the status quo. Readers interested in pursuing the issue in more detail might look at my analysis of the arguments for and against levying emotional and punitive damages on bad faith breach of contract.<sup>332</sup>

Contract law provided an outlet for Woody's claim against the bank. The other body of law might instead be closed to claims such as that made by the plaintiff. For example, this would have been true in *Woody's case* had it arisen in Texas, for the Texas Supreme Court has rejected the doctrine of good faith in contract.<sup>333</sup> Because Texas law is unusual in this respect, the case of the predatory reinsurer, who stole business from its primary insurer,<sup>334</sup> better illustrates how the closure of contract law to a claim might lead to barring a tort claim. Contract law turns a deaf ear to claims that there is an implied covenant not to compete in a contract, both through general rules of interpretation that make it difficult to imply terms in contracts (in the actual case the court rejected the contract claims on these grounds)<sup>335</sup> and through specific rules that are hostile to the implication of covenants not to compete.<sup>336</sup> When I say that contract law is closed to these claims I mean more than that the plaintiff cannot state a claim under contract law. I mean in addition that courts have rejected claims in contract that posed essentially the same concerns as the plaintiff's claim. This is plainly so in the case of the predatory reinsurer, for the harm and the actions complained of are the same as in many contract cases that involve competition between parties.

It is less clear that a Texas court faced with a claim like Woody's should deny the claim because Texas has rejected the doctrine of good faith in contract. Part of the problem is that Texas' views on the duty of good faith are fairly

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332. Gergen, *supra* note 32, at 1249–58.

333. *Id.* at 1259–63.

334. *Union Sav. Am. Life Ins. Co. v. North Cent. Life Ins. Co.*, 813 F. Supp. 481 (S.D. Miss. 1993).

335. *Id.*

336. *Scheck v. Burger King Corp.*, 756 F. Supp. 543, 549 (S.D. Fla. 1991); *Snyder v. Howard Johnson's Motor Lodge, Inc.*, 412 F. Supp. 724, 728 (S.D. Ill. 1976) (both rejecting the idea of an implied covenant not to compete but still remanding to the trial court to determine if openly competing with the other party violates the duty of good faith).

extreme (in many states, Woody would have a claim against the bank for breach of the duty of good faith), and no Texas case on good faith involves facts like *Woody's case*. Still, one could argue that the reasons the Texas Supreme Court gave for rejecting the doctrine of good faith—a concern that it would open up contracts to radical reconstruction by undependable juries and that it would expose parties to punitive damages<sup>337</sup>—apply equally well to Woody's interference claim. Indeed, the arguments are even more forceful with respect to the interference tort, because of the greater role of the jury in tort and the availability of mental anguish and punitive damages. Further, in that Texas case, the court rejected a good faith claim though the defendant acted in an opportunistic way that was only slightly less outrageous than the behavior alleged in *Woody's case*.<sup>338</sup>

Had *Woody's case* arisen in Texas, perhaps interference doctrine would have had a transformative impact on contract law. Reviving the doctrine of good faith, rather than allowing the interference claim, would have provided an outlet for Woody's claim without the spectre of punitive or emotional damages, and with the greater controls on jury determination of factual issues that contract law allows. This middle road should beckon to a judge who has the authority to change the law<sup>339</sup> and who is sympathetic to the plaintiff's claim, but who is unsure about what rule is most desirable. Leon Green thought the doctrine of prima facie tort served a similar purpose "in preventing the premature crystallization" of the law regulating commercial relations, or "where such doctrines have been permitted to crystallize prematurely, in bringing pressure upon courts to render them more flexible."<sup>340</sup> It would not be surprising if the doctrine of tortious interference, a close relation of the theory of prima facie tort, served the same purpose, and while Green was referring to the transformation of other tort doctrines, there is no obvious reason why tort concepts could not also transform contract law.

Embedding interference analysis in another body of law will not always be fatal to the interference claim.<sup>341</sup> Consider *Nesler v. Fisher & Co.*<sup>342</sup> Nesler

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337. See *English v. Fischer*, 660 S.W.2d 521 (Tex. 1983).

338. *Id.* A lender with a term loan at a below-market interest rate took advantage of a clause that required that insurance proceeds be paid to her to collect on the loan upon a fire though the fire did not impair her security.

339. Whether lower state courts and federal courts might refuse to follow otherwise controlling precedent on the contract issue because they think the state supreme court would reverse that precedent when confronted with the appealing tortious interference claim is a difficult question. An answer may lie in the literature and caselaw on the authority of lower state courts and federal courts to anticipate changes in the law.

340. Green, *supra* note 274, at 572.

341. Myers, *supra* note 11, has some valuable insights in an article criticizing how tortious interference law conflicts with the policies behind the antitrust laws. Myers observes that plaintiffs have managed to get to a jury on interference claims in cases where antitrust claims were dismissed on motions for summary judgment because the plaintiff could not demonstrate that the defendant's actions had an anti-competitive impact. *Id.* at 1127–35. His implicit assumption is that the policies that underlie the antitrust laws ought to affect the analysis of interference claims, which is consistent with the approach I advocate. However, Myers' analysis bogs down into a discussion of the intricacies of interference doctrine (such as the aphorism antitrust law protects competition while interference law protects the competitor, *id.* at 1100), and he fails to appreciate the significance of policy analysis in interference law. Once one recognizes that whether interference is improper depends on an analysis of social and private interests, then it seems self-evident that the pro-consumer policies that underlie antitrust law ought to be relevant under interference law. For example, conduct might be held privileged because it improves consumer welfare. The interesting questions are whether conduct that does

was renovating an office building. Pfohl, president of Fisher & Co., which owned competing property, undertook a campaign to harass Nesler when some major tenants in his building indicated they planned to move to Nesler's building. This campaign included filing a meritless lawsuit against the city challenging its decision to move, funding a meritless lawsuit brought against Nesler by a group advocating handicap access, pressuring city inspectors to take action against the project, and spreading rumors that the project would not be completed on time. Nesler could not make out a claim of misuse of process (Pfohl made no demands on Nesler nor did he take any other action apart from prosecuting the suits<sup>343</sup>), nor a claim of defamation (the reports to the city were privileged and the rumors were opinion).

Whatever the merit of the restrictions on these other torts in the great run of cases, Nesler's case seems different. One gets the strong impression that Pfohl, who was a lawyer, did everything he could to bring down Nesler while staying just inside the law. My intuition is that the law ought to check such behavior. This intuition holds up if we inquire into the reasons behind the rules that bar a claim for misuse of process or defamation, and ask whether we can allow Nesler's claim while respecting those reasons. The crucial bar to a claim under the doctrine of misuse of process is the rule that the defendant must have made some demand on the plaintiff, or done some other act outside the legal proceeding, in addition to having brought a suit in bad faith. That bar can be explained as an objective element that reduces the risk that plaintiffs who bring suit for meritorious reasons will be wrongly held liable if a jury mistakenly finds bad faith. Such a rule reduces false positives, but it also increases false negatives. Some bad faith litigation, which is unfair and presumably socially unproductive, escapes sanction. Similar prudential concerns may explain the rule that statements of opinion cannot be defamatory. It is more difficult to judge the accuracy of opinion than it is to judge the accuracy of representations of fact; for similar reasons it is more difficult to judge the good faith of the speaker; and, opinion is likely to be less harmful. But, again, a rule immunizing opinion results in some false negatives—some harmful speech goes unpunished. The unusual facts in Nesler's case—the campaign of meritless litigation and rumor along with the direct evidence that Pfohl wanted to harm Nesler and the concreteness of the harm to Nesler—increases our confidence that Pfohl's conduct is the sort that we want to sanction. These unusual facts also make it possible to punish Pfohl while preserving the limits on the torts for other cases. The trick, of course, is to write an opinion that is clear on what is exceptional in the case that justifies allowing the claim.

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not affect consumer welfare might be held tortious though it does not violate the antitrust laws because it implicates other social and private interests, and whether conduct with an unknown impact on consumer welfare might be held tortious. Myers also errs in advocating overbroad changes in interference doctrine, such as an absolute privilege for competitors to interfere with relations so long as they do not use otherwise unlawful means. *Id.* at 1141. I think Myers stumbles into this error because he fails to appreciate that the pro-consumer policies of the antitrust laws are implicated in only some interference cases, and that other policies or even concerns of fairness may dominate other cases. *Nesler v. Fisher & Co.*, 452 N.W.2d 191 (Iowa 1990), is an example of a case where I would permit an interference claim where Myers' proposed rule would not.

342. 452 N.W.2d 191 (Iowa 1990).

343. See *supra* notes 304–05 and accompanying text for a discussion of this element of misuse of process.

It might be possible to formulate general guidelines to help delineate the proper boundaries of the interference tort, particularly in the setting where an interference claim is brought against the other party to a contract. Perhaps my conclusion in *Woody's case* that a claim of tortious interference ought not take the place of a claim under the contract doctrine of good faith could be generalized. And, my sense after reading many cases involving claims that a breach of contract was also tortious interference is that the weakest claims would be excluded by a rule that requires, at a minimum, that the defendant have breached the contract with the purpose of appropriating the plaintiff's other contracts or relations. We might also carve out a useful place for the interference tort in contract law. The tort makes it possible to protect one party from opportunistic behavior by the other party that inflicts a loss that could not have been foreseen when the contract was made. The rule in *Hadley v. Baxendale*<sup>344</sup> prevents the recovery of such damages in contract, and the many rationales for that rule do not address the possibility that a promisor may act opportunistically if a promisee becomes unexpectedly dependent on the contract. But the history of the tort cautions against such abstract pronouncements. The tort was created in the belief that courts ought to be skeptical of doctrine, and it has run into much trouble in recent years because it crystallized into a doctrine that courts have applied too mechanically.

#### IV. CONCLUSION

I want to end on the canonical case. An impressario, Gye, persuades a singer Wagner (Richard Wagner's niece) to break her contract to perform at Lumley's theatre. In its day, it was a case of first impression, so under modern doctrine whether Gye was liable for tortious interference would turn on prudential and ethos-based considerations. The law of contract governing the relation of Lumley and Wagner surely is relevant to that inquiry. If nothing else contract law identifies relevant social interests—the interest in having contracts performed, but also the interest in having contracts broken when the promisor gets a better offer—and one possible approach to balancing those interests. The work of the economists trying to justify the tort in the canonical case might seem relevant at this point, but I will not tarry over it for it is inconclusive and riddled with problematic factual and behavioral assumptions.<sup>345</sup> That in itself is instructive. Surely a judge does not have the

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344. 9 Ex. 341, 156 Eng. Rep. 145 (1854).

345. The most developed economic analysis of the tort is Lillian R. BeVier, *supra* note 10. Her argument is that contract law systematically undercompensates promisees on breach in two classes of cases—when a promisee expends substantial resources in finding a contract and when a promisee makes a transaction-specific investment in a relationship. *Id.* at 898–915. In the first case, the promisee gets some protection from the remedy of specific performance (contracts that are expensive to find usually involve unique goods), but BeVier argues that the tort action is preferable because allowing a direct action against the interferor better separates free-riding third parties from those who genuinely value the good more and it reduces transaction costs. *Id.* at 916–23. The argument is more straightforward in cases involving significant transaction-specific investments, for the tort action provides more nearly complete compensation for the promisee's loss. *Id.* at 923–26. There are enormous gaps in this analysis. Consider, for example, the issue of whether the existence of a tort action against Gye facilitates renegotiation of Wagner's contract with Lumley. The argument that it does is that it induces Gye to deal directly with Lumley. But the tort action may create perverse incentives. It gives Lumley a property-like interest in Wagner's performance (i.e., if Gye hires Wagner without Lumley's consent he may be liable for punitive damages), which gives Lumley an incentive to overstate the value of Wagner to him.

competence to resolve the problem of the optimal remedies for breach of contract de novo. The prudent course is to assume that contract law gets most cases that fall under it about right, and to ask whether there is a unique factor or interest present in the case that contract law might not adequately address. A closing irony. One judge in *Lumley v. Gye* analyzed the case along these lines. He dissented.<sup>346</sup>

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The problem is similar to that posed by excessive stipulated damage clauses. See Mark P. Gergen, *A Defense of Judicial Reconstruction of Contracts*, 71 IND. L.J. 45 (1995). Or consider the claim that the tort action is preferable because contract law undercompensates plaintiffs who make significant transaction-specific investments. Perhaps it does ex post, but the real question from an efficiency perspective is whether ex ante, a party to a contract who makes a transaction specific investment may obtain sufficient security through contract mechanisms. The answer is of course she can, either through a stipulated damage clause, or through other mechanisms that commit the promisor to her (such as a minimum-take or take-or-pay clause). The claim that the availability of the tort action induces more nearly optimal transaction-specific investments rests on the dubious proposition that people who do not have the foresight to insist upon contractual mechanisms will take solace in the possibility of a tort claim on breach.

346. See *supra* notes 149–53 and accompanying text.