

# TORTIOUS INTERFERENCE WITH CONTRACT VERSUS “EFFICIENT” BREACH: THEORY AND EMPIRICAL EVIDENCE

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## ABSTRACT

Tortious interference is bothersome, normatively and positively, to scholars espousing the economic model of “efficient breach” of contract because it penalizes third-party inducements to breach. Scholars nonetheless find innovative second-best arguments to justify the coexistence of tortious interference with “efficient” breach. This article shows normatively why tortious interference would be part of a first-best legal system. Tortious interference provides property protection to contract rights in ways that apparently (absent data to the contrary) lower transaction costs when a third party values a promisor’s performance more than does the promisee. Positively, the law of tortious interference corresponds to the first-best model posited here. Regression analysis of tortious interference cases shows more definitively that the second-best factors proposed by efficient-breach analysts explain little of the case outcomes. Factors identified in the first-best model here do significantly affect case results.

You don’t own me  
I’m not just one of your many toys  
You don’t own me  
Don’t say I can’t go with other boys.

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<sup>1</sup> J. Madara & D. White, composers, You Don’t Own Me (Merjoda Music, Inc., BMI).

[*Journal of Legal Studies*, vol. XXVIII (January 1999)]

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## I. INTRODUCTION

SINCE its inception, interference with contract has been a troublesome tort. Its modern definition came relatively late in the common law, starting with the celebrated *Lumley v. Gye*.<sup>2</sup> What exactly constitutes the tort has long bedeviled commentators adopting a traditional case-synthesis method. Dan Dobbs lamented that the case law amounts to a “sorry state of affairs,”<sup>3</sup> in part reacting to the American Law Institute’s inability to enunciate what exactly was tortious about interference.<sup>4</sup> In addition to the perceived doctrinal confusion, commentators complain that there seems to be no compelling reason for the tort’s existence in the first place.<sup>5</sup>

But for those writing from a more economic perspective, the existence of the tort is more than puzzling; it is positively pernicious. As described below, the interference tort penalizes, and may even nullify, the possibility of “efficient breach” of contract, a fundamental construct described as “[o]ne of the most enlightening insights of law and economics.”<sup>6</sup> It is efficient, goes the argument, to allow Promisor to breach the contract, as long as Promisee is compensated for any loss therefrom: Promisee is by definition no worse off and Promisor is better off. But liability for inducing breach would inhibit efficient breaches. If it is efficient to allow Ms. Promisor to breach her contract with Mr. Promisee and then compensate him, how can it be wrong for Inducer to incite the breach in the first place?<sup>7</sup>

<sup>2</sup> *Lumley v. Gye*, 2 El. & Bl. 216, 118 Eng. Rep. 749 (1853). *Lumley* is sometimes portrayed as a discontinuous change in the common law, but it had numerous antecedents. Note, Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort, 93 Harv. L. Rev. 1510 (1980). See also Charles E. Carpenter, Interference with Contract Relations, 41 Harv. L. Rev. 728–29 (1928).

<sup>3</sup> Dan D. Dobbs, Tortious Interference with Contractual Relationships, 34 Ark. L. Rev. 335, 345 (1980). “The problem with the interference tort lies in the complete absence of any principle that will explain to us what judgments to make and why it is that liability sometimes is and sometimes is not imposed.” *Id.* at 346.

<sup>4</sup>*Id.* at 345–46. For a brief but interesting account of the American Law Institute’s difficulties in defining the tort, see Harvey Perlman, Interference with Contract and Other Expectancies: A Clash of Tort and Contract Theory, 49 U. Chi. L. Rev. 61, 64 nn.15–17 (1982). Elsewhere in the common law, the tort is likewise said to be developing “in an illogical and piecemeal fashion.” Lyn L. Stevens, Interference with Economic Relations—Some Aspects of the Turmoil in the Intentional Torts, 12 Osgoode Hall L. J. 595, 595 (1974).

<sup>5</sup> Dobbs again summarizes the prevailing sentiment: “No real reasons seem to have been given why a third person should be liable for honest persuasion of another.” Dobbs, *supra* note 3, at 344.

<sup>6</sup> Robert Cooter & Thomas Ulen, Law and Economics 290 (1988).

<sup>7</sup> Adopting the factual situation of *Lumley v. Gye*, this article refers to the Promisor and Promisee as female and male, respectively, and, for expositional clarity, to the Inducer as neuter, with the three roles capitalized. According to Perlman, the “core” situation typified by the facts of *Lumley* describes the ordinary tortious interference case. “The most numerous of the tortious interference cases are those in which the disruption is caused by an act directed

In response, economically minded commentators have labored to reconcile the coexistence of the interference tort with efficient breach. To Harvey Perlman, the tort is merely redundant, imposing liability for acts already tortious anyway, such as using fraud or force to induce Promisor to breach her contract.<sup>8</sup> To the extent that no independent tort is committed, cases imposing liability for interference are mistakes, irreconcilable with the basic principle of permitting Promisor to breach at will. Critiques of tortious interference by Lillian BeVier, William Landes and Richard Posner, and Gary Myers are similar in theme to that of Perlman, insofar as they are concerned with tortious interference itself interfering with the law's treatment of contract breaches as efficient.<sup>9</sup> Both BeVier and Landes and Posner do accept, however, that tortious interference can be a useful complement to the efficient-breach model, when various problems (either legal or practical) prevent Promisee-victims of breach from being fully compensated. In that second-best sense, they reconcile the coexistence of efficient breach and the interference tort. Alone among economically inclined legal analysts, Richard Epstein concludes that the tort makes fundamental, first-best sense, although he concedes that, as currently understood, "there is little consensus about the proper definition" of tortious interference.<sup>10</sup>

Section II discusses further these different approaches to tortious interference, particularly as they collide (but perhaps can be reconciled) with the idea of efficient breach. Section III explains from a welfare-economic perspective, however, why the simple economic model of efficient breach is inapplicable to tortious interference in the first place. Further, Section III demonstrates how tortious interference should be seen as part of a larger body of law designed to accord property protection to a particular entitlement, contract rights.

Sections IV and V offer positive analyses, testing the competing welfare models of tortious interference presented in Section III. Section IV notes that the property-based model presented here and the efficient-breach model

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not at the plaintiff [Promisee], but by a third person: the defendant causes the promisor to breach his contract with the plaintiff or causes a third person not to confer a benefit on the plaintiff." Perlman, *supra* note 4, at 106. For further discussion of "core" interference cases, see William J. Woodward, Jr., *Contractarians, Community and the Tort of Interference with Contract*, 80 Minn. L. Rev. 1103, 1109–10, 1126 (1996).

<sup>8</sup> Perlman, *supra* note 4.

<sup>9</sup> Lillian R. BeVier, *Reconsidering Inducement*, 76 Va. L. Rev. 877 (1990); William M. Landes & Richard A. Posner, *Joint and Multiple Tortfeasors: An Economic Analysis*, 9 J. Legal Stud. 517, 552–55 (1980) (app. II); Gary Myers, *The Differing Treatment of Efficiency and Competition in Antitrust and Tortious Interference Law*, 77 Minn. L. Rev. 1097 (1993).

<sup>10</sup> Richard A. Epstein, *Inducement of Breach of Contract as a Problem of Ostensible Ownership*, 16 J. Legal Stud. 1, 3 (1987).

have conflicting implications concerning various aspects of interference law, and uses secondary sources to test those competing implications. Section V then presents, using a random sample of over 130 cases, more rigorous econometric evidence of what determines liability in the tortious-interference cases. The variables included in Section V's statistical model are those identified as relevant by the authors cited above, plus those identified in the property-based model of tortious interference identified here. The statistical model corroborates, albeit imperfectly, the model presented here of courts using tortious interference to provide property protection to Promisees' contract rights.

Although this article focuses on the substantive law of tortious interference, as a by-product it also illustrates why, methodologically, traditional analysis of legal issues may fail to resolve them. The interference tort is now several generations old, yet commentators obviously do not agree on what, essentially, constitutes the basis for liability. Given the thousands of cases, and the dozens of articles and other commentaries on tortious interference, how can analysts still be so uncertain about what the tort is? It is suggested here that resort to quantitative techniques, guided by relatively simple economic principles, can sometimes be useful in dispelling misperceptions created by a more impressionistic and anecdotal review of just a few cases.

## II. ECONOMIC ANALYSES OF TORTIOUS INTERFERENCE

Most recent commentaries on tortious interference examine it in an economic framework.<sup>11</sup> This is unsurprising, given the tort's challenge to the efficient-breach model dominant among economic students of contract law.<sup>12</sup> The efficient-breach model has long dominated economic discussions of contract law.<sup>13</sup> In its simplest form, that model analyzes breach by the Pareto criterion: when Promisor is willing to compensate Promisee for the latter's expectation damages, she should be free to breach and sell to a third

<sup>11</sup> But see Woodward, *supra* note 7, at 1109 (analyzing tortious interference from a communitarian perspective encompassing "a broader legal and cultural backdrop"). Woodward contrasts his approach with the economic approach of the commentators discussed in this section, an approach he calls "contractarian." *Id.* at 1107 n.10.

<sup>12</sup> "The core criticism comes primarily from an economic policy perspective on contract law. The economic criticism asserts that the tort of interference with contract conflicts in core cases with economic efficiency—specifically, with the theory of "efficient breach"—and therefore must be either eliminated or circumscribed." *Id.* at 1137–38 (citations omitted).

<sup>13</sup> See, generally, Richard Craswell, Efficiency, Renegotiation, and the Theory of Efficient Breach, 61 S. Cal. L. Rev. 629 (1988).

person.<sup>14</sup> That person must, by definition, value Promisor's performance more than Promisee will lose: Promisor will not agree to any breach unless she is paid more than she will have to pay the Promisee for her breach. Compensated for his losses, Promisee is no worse off, while Promisor and the third party are better off, making the contract Pareto superior (efficient) all around. An efficient legal system, that is, would have a rule allowing Promisor to "breach now, pay later."

This efficient-breach model is not just normative but positive. Its partisans maintain both that this is the way the law should be and that the efficiency of the rule has led the law, in fact, to allow Promisees to breach now and pay later.<sup>15</sup> The ordinary remedy for breach of contract is damages after the fact: "The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else," in Oliver Wendell Holmes's celebrated words.<sup>16</sup> That the common law has settled on after-the-fact damages as the remedy for breach also illustrates the more general claim that, as a positive matter, the common law tends to be efficient overall.<sup>17</sup>

Normatively, the interference tort is an affront to the efficient-breach model: "The theory of efficient breach . . . cannot coexist with the broad range of situations to which [the] interference doctrine applies."<sup>18</sup> Potential liability for tortious interference inhibits and may even destroy the Pareto

<sup>14</sup> Expectation damages as the remedy for contract breach implement the efficient-breach model. "The recent literature on damages as a contract remedy has confirmed the superiority, from an efficiency standpoint, of expectation over other damages measures." Thomas S. Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 Mich. L. Rev. 341, 362 (1984). For further discussion of appropriate damages, see, for example, Lewis A. Kornhauser, *An Introduction to the Economic Analysis of Contract Remedies*, 57 U. Colo. L. Rev. 683, 710 (1986) ("[T]he rule of expectation damages performs quite well in terms of efficiency when parties are risk-neutral"); Samuel A. Rea, Jr., *Damages for Buyer Breach*, 6 Int'l Rev. L. & Econ. 77, 85 (1986) ("When a buyer breaches, the appropriate measure of damages is lost profits") For a dissenting view, both normative and positive, see Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. Legal Stud. 1 (1989). Those who believe that specific performance is the preferred contract remedy perform disagree that expectation damages are efficient. For example, Anthony Kronman, *Specific Performance*, 45 U. Chi. L. Rev. 351 (1978); Alan Schwartz, *The Case for Specific Performance*, 89 Yale L. J. 271 (1979); Ulen, *supra*.

<sup>15</sup> "In addition to being the most widely used contract remedy, expectation has attracted the favorable attention of economists because it is the only measure of contract damages that induces breach only where breach is more efficient than is performance." Ulen, *supra* note 14, at 360. See also Friedmann, *supra* note 14; Woodward, *supra* note 7, at 1140–55.

<sup>16</sup> Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 462 (1897). Woodward, *supra* note 7, at 1138, traces the notion of efficient breach to this "now-famous descriptive statement by Holmes."

<sup>17</sup> For example, Richard A. Posner, *Economic Analysis of Law* 569–71 (5th ed. 1998).

<sup>18</sup> Woodward, *supra* note 7, at 1107–8.

improvements generated by a rule of efficient breach, taxing the movement of resources from lower- to higher-valued uses. Positively, the interference tort is just as offensive to efficient-breach partisans. The nineteenth-century rise of the inducement tort in England and in America was a common-law, not statutory, phenomenon. The advent of the tort in the United States was likewise a common-law development. If the common law were efficient, judges would not invent a cause of action that penalizes efficient breach—but they have.

In short, because the notion of efficient breach is the crux of mainstream economic analysis of contracts, a cause of action for tortious interference is perplexing to many. As BeVier poses the problem, “Can efficient breach theory accommodate the inducement tort or is there an irreducible inconsistency? This is the essence of the inducement puzzle.”<sup>19</sup> In response, analysts adopting an economic perspective have striven to reconcile the model of efficient breach with the interference tort. Several solutions to the riddle have been offered, allowing analysts to claim that tortious interference does not itself interfere with efficient breach—indeed, that the tort actually ensures breaches will be efficient.

#### A. *Perlman*

Harvey Perlman suggests that much of tortious-interference law is simply a mistake, to the extent that it nullifies efficient breaches of contract.<sup>20</sup> Those mistaken cases are said to be the minority, however. To understand the majority of the cases, Perlman advocates “shifting the focus in interference cases from the fact of interference to the nature of the interfering act. Two distinct categories of interference cases then emerge: those in which the defendant’s act of interference is independently unlawful, and those in which the defendant’s behavior is otherwise lawful.”<sup>21</sup> Perlman says that liability for interference typically is imposed for acts already tortious in themselves; therefore the interference tort does not deter contract breaches that truly are efficient. Perlman cites many cases in which independently tortious acts (for example, fraud, assault, battery) have occurred as part of an inducement. Other commentators also note that contractual interference frequently involves otherwise tortious acts.<sup>22</sup>

<sup>19</sup> BeVier, *supra* note 9, at 897.

<sup>20</sup> Perlman, *supra* note 4, at 65–69, 79–91.

<sup>21</sup> *Id.* at 62; see also *id.* at 69.

<sup>22</sup> For example, Dan D. Dobbs, *Remedies* 458 (1973): “The interferences that are treated in this section usually involve some tort.” But see Carpenter, *supra* note 2, at 730, 736 (most states do not require a separate tort for tortious interference). As explained in Section V below, the sample of cases analyzed here reveals many entailing physical force (threatened and/or used) to induce Promisor to breach her contract.

But Perlman's reconciliation of tortious interference with efficient breach presents obvious difficulties. "Explaining" a large number of cases (albeit a minority) as mistakes offers no explanation at all, as has been pointed out elsewhere.<sup>23</sup> Moreover, given existing remedies for breach of contract and for torts like fraud, assault, and battery, why would nineteenth-century judges create a new tort for inducing contract breach? The majority of interference cases may not be mistakes, but they are still redundant, already actionable without creation of a new tort. Since Perlman believes that many of the interference cases are mistaken obstacles to efficient breach, the interference tort entails only costs with no benefits. The interference tort thus must be judged inefficient on Perlman's own terms.<sup>24</sup>

### B. *BeVier*

Like Perlman, Lillian BeVier would reconcile tortious interference with the concept of efficient breach of contract. But whereas Perlman's model focused on independently tortious acts, BeVier's derives from problems in contract-law remedies for breach that leave promisees undercompensated. In some cases, availability of market substitutes makes Promisee's mitigation of damages from breach costless. In fact, BeVier says, the efficient-breach model depends on there being costless replication of Promisor's performance, that is, a thick market for substitute performance. In those cases, tortious-interference liability is undesirable as it interferes with the movement of resources to higher-valued uses.<sup>25</sup> However, for other ("more complex") contracts, this assumption of virtually costless substitutes available to Promisee may not hold, BeVier says. These more complex contracts do not fit into the efficient-breach paradigm and, she believes, account for many of the cases imposing liability for tortious interference.

Complexity arises in "informational" and "relational" cases. In the first

<sup>23</sup> "Perlman could not, however, explain the expansion of the tort to contractually-based economic losses not caused by tortious or otherwise wrongful acts. Indeed, he argued that this expansion was both positively inexplicable and normatively indefensible." BeVier, *supra* note 9, at 888. See, generally, George J. Stigler, Supplementary Note on Economic Theories of Regulation, in his *Citizen and the State* 140 (1975): "[A]n explanation of a policy in terms of error or confusion is no explanation at all—anything and everything is compatible with that explanation."

<sup>24</sup> Perlman, *supra* note 4, at 75, claims that allowing Promisee to sue Inducer for damages from both the contract breach and the unlawfully tortious means of inducement saves on litigation costs. This is an empirical claim for which no evidence is presented. The issue of litigation costs is discussed further in Section III below.

<sup>25</sup> BeVier, *supra* note 9, at 898: "Thus, in contractual settings where there are market substitutes for Promisor's performance, the prospect of inducement liability may systematically deter efficient behavior by the contracting parties and thus impede flow of resources to their higher valuing users."

situation, the Promisee has generated valuable contract-specific information *before* entering into the contract. For example, company A, searching to take over some company B, generates B-specific information concerning things like the value of B's assets. In the second situation, Promisee makes investments *after* conclusion of the contract that are specific to Promisor's performance under the contract. "Promisee will build a physical plant specified [*sic*] to the contract's idiosyncratic requirements, for example, or she will develop a marketing organization specially adapted to the performance of the particular contract."<sup>26</sup>

Thus, informational and relational aspects of complex contracts are similar, entailing specific investments by Promisee to maximize the value of the contract with Promisor. BeVier claims tortious interference is explained by the rules of remedy for breach when contracts are more complex. She says that informational and relational investments often go uncompensated under the ordinary rule of expectation damages, partly because the "amount of Promisee's expectation damages will be highly uncertain . . . [and] their determination will generate substantial error costs."<sup>27</sup>

More important, the inducement tort permits the law to "differentiate freeriders from those who truly do value Promisor's performance more than do Promisees"<sup>28</sup> That is, only those who are not free riding on Promisees' investments can be efficient breachers, and the interference tort distinguishes truly efficient breach (when Inducer is the higher-valuing user) from breach that is not efficient. Specific performance would solve these remedial (compensation) problems, but it is largely unavailable. The next-best solution, therefore, becomes Promisee's cause of action for tortious interference, which complements (undercompensatory) contract remedies from Promisor with additional tort recoveries from Inducer. Not to force Inducer to pay Promisee would undercompensate Promisee and also invite Inducer to free ride on the investments made by Promisees in locating valuable contracts (or contracting partners).

BeVier's approach elicits several objections, however. First, it is not clear that the sorts of investments BeVier discusses really are systematically undercompensated by legal rules of contract damages.<sup>29</sup> Second, solving a

<sup>26</sup> *Id.* at 909.

<sup>27</sup> *Id.* at 910.

<sup>28</sup> *Id.* at 920.

<sup>29</sup> As Gregory Crespi has discussed, for example, courts' actual awards for contract damages may obviate any undercompensation for precontractual informational investments. Gregory Crespi, *Recovering Precontractual Expenditures as an Element of Reliance Damages*, 49 SMU L. Rev. 44 (1995). See also William P. Rogerson, *Efficient Reliance and Damage Measures for Breach of Contract*, 15 Rand J. Econ. 39 (1984) (discussing implications of different contract remedies for levels of specific investment of the sort considered by



deficiency in contract remedial law by creating a new cause of action in tort law hardly seems necessary: “To the extent that undercompensation interferes with the objectives of contract doctrine, a reform applicable to all breaches seems a more appropriate response.”<sup>30</sup> Finally, it is not self-evident that the problem BeVier describes really requires any legal cause of action. Promisees faced with undercompensatory rules for informational and relational investments have many ways to protect themselves, such as the inclusion of a clause that will allow recoupment of Promisee’s relational investments (contract terms akin to “no-shop” and “lock-up” clauses in corporate takeover agreements).

In any event, the basis for liability in the BeVier model is either (a) the presence of specific (“informational” or “relational”) investments not fully compensable at law or, to generalize, (b) some other legal impediment to the recovery of Promisee’s full loss from breach, plus (c) the unavailability of first-best specific performance to guarantee that all losses are compensated. BeVier offers reasons different from those offered by Perlman that, normatively, an action for interference makes sense. Like Perlman’s, however, her analysis is driven by reconciling the interference tort with the fundamental model of efficient contract breach.

### C. *Landes and Posner*

William Landes and Richard Posner offered the first economic analysis of tortious interference, explaining why an optimal legal system based on efficient breach might still institute a tort of contractual interference.<sup>31</sup> The tort could ensure recovery by Promisee-plaintiffs who otherwise would not recover from Promisor-breachers, for example, “where there is a substantial danger that the contract breacher will be judgment-proof,” or “the sum involved [is] too small to warrant suit.”<sup>32</sup> Like BeVier, then, Landes and Posner are concerned about the adequacy of contract damages compensating Promisee (and so fulfilling the conditions of efficient breach). Unlike BeVier, though, to Landes and Posner, the relevant obstacles to full compensation are not legal but practical, like Promisor insolvency or the costs of the suit relative to the amounts involved.<sup>33</sup> Landes and Posner find (in an

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BeVier). To the extent that restitution rather than expectation damages is the measure of the remedial award, there may be no undercompensation either, as explained further below.

<sup>30</sup> Perlman, *supra* note 4, at 89.

<sup>31</sup> Landes & Posner, *supra* note 9.

<sup>32</sup> *Id.* at 554.

<sup>33</sup> Landes and Posner posit another factor explaining tortious interference: as between Promisor and Inducer, Inducer may be the lower-cost avoider of an undesirable (inefficient) breach of contract. This category is empirically challenging: in many instances, it is difficult to tell which party is the lower-cost avoider. Moreover, this second Landes-Posner criterion

“admittedly unsystematic” sample) that at least one of their two factors is present in over 85 percent of the cases sampled.

#### D. Myers

Another economically minded analyst, Gary Myers, objects to tortious interference as penalizing those who would compete for Promisor’s performance. “In the case of existing contracts, tort law gives controlling weight to the interest in contract stability; a third party who interferes with this type of arrangement is liable in tort absent a countervailing privilege. Competition is *not* a defense.”<sup>34</sup> In that sense, neither antitrust law nor the efficient-breach model can coexist with the interference tort, which Myers would severely curtail if not abolish. Myers objects especially that “courts often apply the rule to contracts that are either voidable or terminable at will,” putting tortious interference in “doctrinal conflict” with the efficient-breach model.<sup>35</sup> The argument that tortious interference will punish even inducement to end a contract terminable at will is an important claim, one that figures also in others’ commentaries.

#### E. Epstein

All the authors summarized above accept the primacy of the efficient-breach model. The articles by Perlman, BeVier, and Landes and Posner perceive ways to reconcile tortious interference with the efficient-breach model, although their models differ from one another as to what explains liability for tortious interference. Myers, too, accepts the fundamental importance of efficient breach but apparently sees no way to reconcile the interference tort with it.

Alone among economically minded commentators, Richard Epstein has not found contractual interference undesirable, nor does he try to reconcile it with the notion of efficient breach in a second-best world (for example, one where contract remedies are inadequate or independent torts are committed). He says, instead, that tortious interference makes first-best sense, once a contract is viewed as establishing in Promisee a property right to

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apparently overlaps considerably with the independently tortious acts studied by Perlman. “The largest group of cases where the inducer is the cheaper cost avoider involve slander and other forms of misrepresentation,” that is, independently tortious acts. Landes & Posner, *supra* note 9, at 554. Another large group of lower-avoidance-cost cases concern union activity, which, as indicated in the cases in the sample analyzed in Section V, often involve independent torts (assault, battery) as well.

<sup>34</sup> Myers, *supra* note 9, at 1100 (emphasis in original).

<sup>35</sup> For example, *id.* at 1100, 1118–20.

Promisor's performance. Interference with contract then is just a form of taking. While efficient-breach advocates might see tortious interference as a remedial rule to correct gaps in contract law or punish independent torts, Epstein says interference is essentially a property-based cause of action: "[I]nducement of breach of contract is used to fill the gaps in the law of trespass or conversion . . . [,] to fill the void that the more traditional notions of property may not reach."<sup>36</sup>

In one sense, Epstein's model is just definitional. Inducement liability is de facto creation of property, as others had pointed out.<sup>37</sup> Nor does Epstein claim novelty in explaining the interference tort in property terms. Indeed, the notion is generations old, and judges reaffirm it regularly.<sup>38</sup> Epstein's contribution was to show the parallels between interference law and the property-based concept of "ostensible ownership." Just as a nonowner bailee can pass good title to an innocent buyer unaware of bailor's ownership, so predictably would the law allow Promisor to pass title to her performance to an innocent third party. But a third-party Inducer who knowingly interferes with a contract will be penalized, just as the purchaser who

<sup>36</sup> Epstein, *supra* note 10, at 19–20. Epstein does not deny that there may be instances of interference involving torts of the sort central to Perlman's model. *Id.* at 20. But liability for these torts is "relatively unproblematic," resting on a legal basis entirely separate from the interference with contract.

<sup>37</sup> See Perlman, *supra* note 4, at 66 (Interference cases "appear to view economic relationships as comparable to property rights"); BeVier, *supra* note 9, at 878 ("[I]nducement liability implements a property conception of Promisee's contract rights"). See generally Note, An Analysis of the Formation of Property Rights Underlying Tortious Interference with Contracts and Other Economic Relations, 50 U. Chi. L. Rev. 1116 (1983); Note, *supra* note 2. In 1928, Carpenter, *supra* note 2, at 733 (citations omitted), wrote that tortious interference gives the Promisee "an interest as respects third persons in having the contract right which he has against the promisor free from invasions by third persons. . . . This right against third persons is a right against everyone, a right *in rem*. Authorities have been wont to call it a property right." In *De Long Corp. v. Morrison-Knudsen Co.*, 20 A.2d 104 (N.Y. 1963), *aff'd*, 200 N.E.2d 557 (1964), the court wrote, "[I]njury to a contract right is an injury to a property interest. This would seem to be a matter of rather elementary legal equivalence." But Dobbs comments, "To the earlier common law, at least, the 'elementary legal equivalence' would be virtually unthinkable, and if thinkable, heretical, as is indicated by the vast difference in the forms of action that protected property (from an early date) and those that protected promises (only centuries later)." Dobbs, *supra* note 22, at 459 n.4.

<sup>38</sup> For example, *Tubular Rivet & Stud Co. v. Exeter Boot & Shoe Co.*, 159 F. 824, 829 (1st Cir. 1908): "[W]here there is either a binding contract for employment for a specific time or a valid contract for the sale and delivery of goods, or other valid executory contract, the interference of a third party lays a direct basis for a suit, precisely as with any other direct blow knowingly struck against any property interest which the law protects." *R & W Hat Shop, Inc. v. Sculley*, 118 A. 55, 58 (Conn. 1922): "[T]he contract relation gave to each a property right in the contracts, and any intentional interference with the rights of either by a third party was an interference with his rights of property."

knows the chattel is not the bailee's to sell must return it and will be unable to recoup the money he paid.<sup>39</sup>

But in noting these parallels in the law, Epstein effectively sidestepped the more fundamental issue: the relation between the inducement tort and the concept of efficient breach. BeVier complains that Epstein "subtly escaped confrontation" with this principal normative issue; he discusses efficient breach, "albeit somewhat brusquely," but seems "untroubled" by how anomalous his property-based model appears when viewed from a contract standpoint.<sup>40</sup> BeVier complains as well of Epstein's positive analysis, that is, of his claims that by and large the law does operate as he claims. Much of the positive analysis is "hastily sketched," and many issues remain unpursued: "Whatever the validity of his normative judgments, their undefended deployment at key points tends to undermine the persuasiveness of his descriptive claims."<sup>41</sup>

#### F. Summary

No consensus on the tortious-interference conundrum has been reached. The analyses discussed in this section do essentially agree that the law of interference is in apparent disarray.<sup>42</sup> And, somewhat contradictorily, some of the authors assert that the cases reflect in some measure what his or her model of what the law, normatively, should be.<sup>43</sup> But while the respective authors frequently note areas of disagreement among themselves,<sup>44</sup> none of-

<sup>39</sup> "Epstein's contribution was to give appropriate emphasis to the fact that, in doctrinal terms, the most fruitful analogies for the inducement tort were to be found in property law, in particular, 'in the torts governing the taking of property.'" BeVier, *supra* note 9, at 887.

<sup>40</sup> *Id.* at 894, 896.

<sup>41</sup> *Id.* at 897.

<sup>42</sup> The cases reveal "an absence of coherent doctrine." Perlman, *supra* note 4, at 61. The inducement tort is "a puzzle," an "amorphous and increasingly sprawling body of law" made up of a "disparate, seemingly incoherent set of cases." BeVier, *supra* note 9, at 872, 882, 884. "[T]ortious interference law suffers from considerable doctrinal confusion." Myers, *supra* note 9, at 1099. When one reviews the elements of the tort, "the anomalies of inducement of breach become quickly apparent." Epstein, *supra* note 10, at 3.

<sup>43</sup> "Even with the doctrinal confusion, explicit adoption of the unlawful means test would alter the outcomes in only a small number of cases. . . . The surprising degree to which the actual outcomes of decided cases is consistent with the analysis offered here gives some confidence that it describes the intuitive judgments of appellate courts." Perlman, *supra* note 4, at 129. "[W]hen the 'inducements' that characterize both returns-to-information and relational cases are present, liability will almost certainly be imposed." BeVier, *supra* note 9, at 931-32. But see *id.* at 933 (Courts are less successful at avoiding imposition of liability when appropriate inducement facts are not present). Ironically, in the only analysis that attempts to measure quantitatively how well the cases fit the model offered, Landes and Posner are very circumspect about the strength of their findings. Landes & Posner, *supra* note 9, at 554-55.

<sup>44</sup> For example, BeVier, *supra* note 9, at 885, claims that Inducers' liability for interference "has not turned on whether their conduct in inducing the breach and receiving the bene-

fers any systematic method for deciding who is right. Each presents a point of view that is at best unproven.

Most fundamentally, however, whether an efficient legal system would include an action for tortious interference with contract, given the arguments made for the efficient-breach model, remains unresolved. Is interference an altogether undesirable obstacle to efficient breach, as Myers maintains? Or should Promisees have property protection that trumps any notion of efficient breach, as Epstein argues? Or are the two causes of action actually complementary, for the different reasons given by Perlman, BeVier, or Landes and Posner?

### III. ‘EFFICIENT’ BREACH VERSUS TORTIOUS INTERFERENCE

From a contract-based, efficient-breach standpoint, tortious interference is inherently objectionable, at least in a first-best world (one without independent torts and in which Promisees are fully compensated). Yet, as explained in this section, it is unclear why the majority of economics-minded commentators think that the efficient-breach model is applicable to the typical interference case in the first place. There are important differences between the prototype efficient-breach and tortious-interference cases. These distinctions explain why an efficient legal system might well include the tort of contract interference. They also explain of what the tort would consist.

#### A. *The Two-Party Efficient-Breach Model*

The simplest contract breach case involves a two-party contract with nonperformance by Promisor but no third-party inducement. Assume it will cost Johanna Wagner \$40 (wardrobe, transportation) to sing for Lumley; following negotiation, she accepts Lumley’s offer of \$45 to sing (for a profit of \$5). He in turn expects revenues of \$55 from having her sing (for a profit of \$10), but of course he does not tell her that, lest she demand more. Unexpectedly and exogenously, her costs of performance rise to \$60, making Promisor Wagner unwilling to perform at \$45. She chooses to buy out of the deal by paying off Promisee Lumley at some price. At what price? It could be something approximating Promisee’s expected gain (\$10) from Promisor’s performance: “expectation damages.”<sup>45</sup> Wagner would

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fits was otherwise tortious or wrongful”—just the reverse of Perlman’s claim. See also BeVier’s disagreements with Epstein in notes 40–41 and accompanying text, *supra*.

<sup>45</sup> Among possible monetary remedies, “only expectation damages, by internalizing the full cost of his actions to the potential breacher [Promisor], acts simultaneously to discourage inefficient breach and to promote efficient breach.” Nicholas Mercurio & Steven G. Medema, *Economics and the Law: From Posner to Post-modernism* 78 (1997).

rather pay Lumley \$10 than lose \$15 by performing. Following Holmes, that is the efficient-breach solution: if it is cheaper for Promisor to pay off Promisee (leaving him no worse off) than to render performance, Promisor should be permitted to breach.

However, imposition of expectation damages can only be efficient ex post, when the parties have not contractually specified their property rights in the event of breach. If the parties explicitly agree ex ante that Promisor will not have the right to pay expectation damages in lieu of performance, opting instead for specific performance, the economic model of contract dictates that the parties' bargained-for choice of remedy prevail. What the parties have chosen is Pareto optimal; not to enforce the bargained-for (paid-for) choice of remedy by definition leaves one party worse off.<sup>46</sup>

Ex ante, that is, there is no one efficient point of exchange but an infinite number of points, any one of which the parties in a particular situation might have chosen (bargained to).<sup>47</sup> When the parties specify their property rights, optimality demands that those specified rights be enforced. But in a Coasean world, actual outcomes do not depend on definition of rights, either ex ante by contract or ex post by law. As long as there is costless recontracting once Promisor's costs of performance change, the ultimate outcome (performance or nonperformance) is the same, regardless of the initial allocation of property rights by the parties themselves and the ultimate respect or disrespect of that allocation by the law.<sup>48</sup> If specific performance is ordered against Wagner, she will still offer up to \$15 to Lumley not to perform, which exceeds his expected gain from having her sing.

The allocation of rights is important, however, when subsequent transaction costs prevent recontracting.<sup>49</sup> Assume that the parties have not specified their property rights in the event that Wagner later finds her cost of performance prohibitive. The two-party efficient-breach model claims it is better

<sup>46</sup> "Whatever the legal rule, the parties will always negotiate to their most preferred remedy, and will always adjust the price to the level appropriate to that remedy." Craswell, *supra* note 13, at 632. The real problem in this respect has been the law's unwillingness to validate parties' contractual provision for specific performance. For example, *J. Weingarten, Inc. v. Northgate Mall, Inc.*, 404 So.2d 896 (La. 1981).

<sup>47</sup> More technically, there are an infinite number of efficient points along the contract curve of the familiar Edgeworth Box. For the familiar graphical demonstration, see *Mercuro & Medema, supra* note 45, at 27–31.

<sup>48</sup> See generally *Cooter & Ulen, supra* note 6, at 293–96; Charles J. Goetz & Robert Scott, *Liquidated Damages, Penalties, and the Just Compensation Principle: Some Notes on an Enforcement Model of Efficient Breach*, 77 *Colum. L. Rev.* 554 (1977).

<sup>49</sup> When the parties can costlessly choose their remedies ex ante, "then the Coase theorem tells us that the content of the law will be irrelevant. . . . For the legal rule to have any broader impact, the assumption of costless transactions must be relaxed." Craswell, *supra* note 13, at 632 (citations omitted).

to allow a Promisor facing unanticipated higher costs of performance to breach, precisely because she would not perform anyway. If her loss for performance is greater than Promisee's expected gain, she would buy out of the contract (if it provided for specific performance) or would prefer to pay Promisee damages and breach (if the efficient-breach remedy of "breach now, pay later" applied). In the face of costly negotiation, then, a rule of breach now, pay later thus allows the inevitable to occur without negotiation costs. As Posner summarizes, "To compel completion of the contract (or costly negotiations to discharge the promisor) would . . . result in a waste of resources," so the law "does not compel completion but confines the victim to simple damages."<sup>50</sup>

A rule of breach now, pay later has implications for other aspects of contracts, for example, incentives to rely and to search for better deals.<sup>51</sup> But the transaction-cost argument remains the most fundamental claim in favor of efficient breach. Nevertheless, there are one assumption and two conditions implicit in the claims of lower transaction costs under the efficient-breach model.

To return to the earlier example, it is assumed that Promisor chooses not to perform because the revenues to her (Wagner's \$45) fall short of her new costs of performance (\$60). On that assumption, a breach being efficient still requires that (a) Promisor be willing costlessly to pay Promisee, and (b) Promisor and Promisee agree on what Promisee's expected gains—Lumley's \$10—were. If either condition goes unfulfilled, litigation and/or negotiation after the fact must follow. Then, whether the breach truly is efficient will depend on whether it was cheaper to litigate and/or negotiate after the fact (the efficient-breach model) or to negotiate out of the contract before the fact.

Neither of the two conditions noted will necessarily hold in a given situation.<sup>52</sup> As concerns the first, forcing Promisee to sue Promisor at Promisee's cost means Promisor can extort a settlement agreement for something lower than Promisee's true expectation damages.<sup>53</sup> The postbreach opportunism

<sup>50</sup> Posner, *supra* note 17, at 132.

<sup>51</sup> For example, Peter A. Diamond & Eric Maskin, An Equilibrium Analysis of Search and Breach of Contract, I: Steady States, 10 *Bell J. Econ.* 282 (1979); Rogerson, *supra* note 29. For a good summary of the relevant margins along which remedies should be evaluated, see Cooter & Ulen, *supra* note 6, at 296–316.

<sup>52</sup> As Woodward observes, advocates of the efficient-breach model "have not refined the efficient breach paradigm to require the breacher, at the time of the breach, to visit the promisee and hand over expectation damages—in cash." Woodward, *supra* note 7, at 1145.

<sup>53</sup> Arthur Leff, Injury, Ignorance, and Spite—the Dynamics of Coercive Action, 80 *Yale L. J.* 1, 9 (1970). Insurers' bad-faith refusal to make payment for valid claims has led to the creation of new case and statute law in most states. Note, Damage Measures for Bad Faith Breach of Contract: An Economic Analysis, 39 *Stan. L. Rev.* 161 (1986).

works both ways: Promisee and Promisor never agreed what Promisee's losses would be in the event of breach (absent any liquidated damages clause), so Promisee may credibly threaten suit for a greater amount than he actually has lost. And as concerns the second condition, even with both parties acting in good faith they predictably will not agree on the exact amount of Promisee's expected gains. Ordinarily, Lumley will not have told Wagner what he expected to gain at the time of contract formation—quite the contrary.

In short, when the parties define their own remedies, efficient law will enforce the parties' bargain following breach. In the event remedies are not specified by the parties, however, there is no necessary reason to think that allowing Promisors to breach now and pay later (so-called efficient breach) is truly the efficient outcome. That depends on the relative costs of resolving disputes by negotiation before the intended breach (should Promisor have to buy out of her promised performance?) versus litigation and/or negotiation after breach (should Promisor be allowed to breach now and pay later, as the efficient-breach model dictates?). The issue is an empirical one, about which many commentators have offered opinions but about which no empirical evidence has been presented.<sup>54</sup>

### B. *The "Efficient"-Breach Model with Third-Party Inducement*

Inducement is not an issue in the two-party efficient-breach model. To what extent is the two-party model of breach applicable, once a third-party inducer arrives? Suppose that, instead of Wagner's out-of-pocket costs of performance rising exogenously to \$60, her opportunity costs of performance rise because a third party, Gye, offers Wagner \$60 to perform. Singing for Lumley will cost her \$15 (the difference between Lumley's \$45 and Gye's \$60). Under a rule of efficient breach, she can sing for Gye, compensate Lumley for his lost expectation of \$10, and pocket an additional \$5.

If Promisor performs instead for Inducer, breaching against the initial Promisee, this may look superficially like the same efficient-breach scenario just discussed—costs are costs, seemingly, be they out-of-pocket or opportunity costs. The same outcome ensues: regardless of which sort of cost has risen to \$60, a rule of "breach now, pay later" will result in Wagner's per-

<sup>54</sup> Compare Posner, *supra* note 17, at 131 (Negotiating ex ante "is just another example of bilateral monopoly; transaction costs will be high even though (in a sense, because) there are only two parties"), with Cooter & Ulen, *supra* note 6, at 321 ("[T]he costs to the parties of resolving their dispute for example, of determining what the innocent party's expectation interest is would seem to be lower than they would be for a court"). Basing arguments about optimal contract law on undemonstrated empirical claims is not restricted to law and economics scholars. For example, Ian R. Macneil, Efficient Breach of Contract: Circles in the Sky, 68 Va. L. Rev. 947, 954–60 (1982).



forming for Gye. The implicit assumption that there is no difference between the two- and the three-party situation underlies the reconciliations of tortious interference and efficient breach attempted by the various authors discussed in Section II.

But in fact, the second situation is very different economically. In the two-party model, Promisee expected an augmentation in his welfare from Promisor's performing. When she fails to perform, Promisee is compensated for the augmentation anticipated as if Promisor had performed. In economic parlance, the lost value to Promisee was "use value," that is, the welfare increment from the Promisee's actual use of Promisor's goods and services. But a tradable commodity has an additional component, "exchange value," as long as it can be transferred to others. My car may yield me much use value but be worth even more to someone else than in its use to me; if so, I will sell it. Likewise, a right to Promisor's performance may have not just use value but exchange value. Someone else may value that performance more than Promisee. The act of contracting by Promisor and Promisee creates an asset—that is, a *chose in action*—that may be more valuable to others than to its present possessor.<sup>55</sup>

Exchange value is of little relevance in the two-person efficient breach. First, there is by definition no third person in the model who manifests any interest in Promisor's performance, and thus with whom Promisor or Promisee might exchange. The highest-valuing user of Promisor's performance, Promisee, already owns the right to use it. And second, there is nothing attractive to exchange anyway. Promisee holds a right to Promisor's performance at the agreed-on price, a price that she now finds insufficient to elicit her performance because the costs of performance (wardrobe, transportation) exceed her gains from performing. Because Promisor is not going to perform regardless—there is no call for specific performance in the efficient-breach model—all Promisee can transfer is a right to negotiate with Promisor (or sue her) over the payment to be received for her nonperformance.

The three-party inducement model is different from the two-party construct. By definition, Inducer values Promisor's performance more than Promisee does—Gye will pay more than Lumley will to have Wagner sing. The higher value that Inducer attaches to Promisor's performance means that her contracted-for performance has exchange value to Promisee—\$15 to Lumley, rather than the \$10 in use value if Wagner performs—as long as Promisee has a property right to her performance. Costs of performance

<sup>55</sup> "The Blackstonian model considered a contract for sale of goods, for example, as creating in each party a *chose in action*, that is, a right to possess an object not presently in possession." Note, *supra* note 2, at 1512.

have not changed, and so Promisor remains willing to perform for Promisee. She would, of course, prefer to have the exchange value and make a new deal with Inducer—Wagner will get \$60 from Gye rather than \$45 from Lumley—as long as Promisor has a property right to her own performance.<sup>56</sup> The efficient-breach rule awards that right to Promisor; she can breach and herself sell (transfer) the right to her performance to a third party. Tortious interference awards the property right to Promisee. A third party who does not buy the right to Promisor's performance from Promisee will be liable for tortious inducement.

This does not necessarily mean that the ultimate allocative outcome will differ under the two possible legal rules, tortious interference or efficient breach. Again, the issue is purely Coasean. Regardless whether Inducer negotiates with Promisor for her breach and then with Promisee to make him whole (a rule of breach now, pay later) or directly with Promisee to make him whole and then deals with Promisor (dictated by liability for tortious interference if Inducer does not negotiate *ex ante*) the outcome will be the same, absent transaction costs. Inducer Gye values Promisor Wagner's performance more, and so ultimately she will perform for Inducer. Without transaction costs, the issue whether to allow Promisor to breach now and pay later, as opposed to forcing Inducer to buy out Promisee before the fact, is one of distributive, not allocative, interest. As long as Promisee is ultimately compensated, neither allocation of property rights is superior to (more efficient than) the other—just as was true in the two-party case.

### C. *Choice of Legal Rules When Transaction Costs Matter*

Now let transaction costs be positive. This is the situation when, in a two-party model, efficient-breach theorists claim that the rule of "breach now, pay later" is optimal. As noted above, this claim may or may not be true, depending on the relative magnitudes of litigation and/or negotiation after the fact (if Promisor can breach now and pay later) versus the costs of negotiation before the fact (if Promisor must negotiate before breach). In

<sup>56</sup> Because the debate over tortious interference versus efficient breach is essentially a dispute over who will have that property right, and so the exchange value from Promisor's performance, a necessary condition for the debate over the legal rules in the first place is the transferability of Promisor's performance. If performance cannot be transferred, Promisee performs has no exchange value, and he and Inducer have nothing to negotiate over. But for the most part, contract rights are freely alienable. "Since a contract right is one kind of property, many of the rules governing its transfer are similar to the rules of property law governing alienation of land and chattels. . . . Today, most contract rights are freely transferable." E. Allan Farnsworth, *Contracts* 744, 748 (1982). Such rights have not always been freely alienable, and exceptions persist to this day. See text accompanying notes 72–73 *infra*. But the trend has clearly been toward greater alienability of contract rights. The assignability issue is considered further below.

a third-party inducement situation, it is likewise claimed that transaction costs make efficient breach (breach now, pay later) the optimal rule, and a cause of action for tortious interference thus undesirable.<sup>57</sup> Consider Posner's argument for "efficient" breach (meaning that Promisor owns any surplus from exchange value) and against tortious interference (Promisee owns the exchange value):

[I]n some cases a Promisor is tempted to break her contract simply because her profit from breach would exceed her profit from completion of the contract. If it would also exceed the expected profit to the Promisee from completion of the contract, and if damages are limited to the loss of that profit, there will be an incentive to commit a breach. *But there should be. . . .* The breach is Pareto superior. True, if Promisor had refused to sell to Inducer, Inducer could have gone to Promisee and negotiated an assignment to him of part of Promisee's contract with Promisor. *But this would have introduced an additional step, with additional transaction costs and high ones, because it would be a bilateral-monopoly negotiation.*<sup>58</sup>

But this transaction-cost accounting is incorrect.

### 1. Transaction Costs before Breach

Inducer has a bilateral negotiation to undertake *before* Promisor's breach, regardless of the legal rule. Under efficient breach, Promisor has no incentive to breach and perform for Inducer unless she is compensated out of the gains Inducer expects to realize. Johanna Wagner has no incentive to breach unless Gye pays her more (in the example here, \$60) than Lumley would pay Wagner plus her damages to Lumley (\$45 plus \$10). How much more will have to be negotiated between Wagner and Gye beforehand, if the legal rule allows Wagner to breach now and pay Lumley later.

Alternatively, under a rule of tortious interference, Inducer Gye must negotiate with Promisee Lumley beforehand for Wagner's services, which

<sup>57</sup> The subsequent text in this section discusses only claims that transaction costs are lower under a rule of efficient breach. More modern economic arguments for efficient breach investigate, along several margins other than transaction costs (search, reliance), the incentives created by being able to breach now and pay damages later. As explained below, however, the supposed undesirability of tortious interference has been based solely on the transaction-cost argument. See text accompanying note 58, *infra*. Moreover, inclusion of other margins such as reliance do not necessarily alter the basic argument for or against efficient breach. Posner writes, "The expectation measure of damages focuses on the gain that the victim of the breach anticipated from performance of the contract, the reliance measure on the victim's loss from the breach. If the victim 'relied' by forgoing an equally profitable contract, the two measures merge. If not, the expectation measure may be a better approximation of the victim's real economic loss than the reliance measure, as well as produce better incentives." Posner, *supra* note 17, at 134–35.

<sup>58</sup> *Id.* at 133 (emphasis added). The quotation substitutes the Promisee-Promisor-Inducer nomenclature used in this article for the labels used by Posner.

also will result in some sharing of Gye's gains, this time with Lumley. If Gye offers Lumley anything above \$10 and then pays Wagner the \$45 she was promised by Lumley, Lumley can negotiate for more than the \$10 he expected to gain while Wagner gets only the \$45 she was promised. Contrary to the claim in the passage just quoted—that breaching now and paying later is the efficient rule because it avoids negotiation costs—there is no necessary transaction-cost saving in the one bilateral negotiation (between Gye and Wagner) as opposed to the other (between Gye and Lumley) before the contract is breached. Even in this third-party situation with positive transaction costs, that is, there is nothing necessarily efficient about “efficient” breach.<sup>59</sup>

## 2. Transaction Costs after Breach

However, there is an important difference between alternative legal rules concerning subsequent litigation and/or negotiation costs. In the two-party situation, the efficient-breach model treats breach as if Promisors (*a*) automatically and voluntarily compensate Promisees when there is breach and (*b*) do so at an amount that adequately reimburses Promisees for expectation losses. But, it was noted, these two conditions predictably will not be fulfilled in the typical case. If not, litigation/negotiation costs after the fact (in the “efficient”-breach world) could be just as high as the negotiation costs before the fact that would be required if Promisor were not free to breach now and pay later.

For “efficient” breach in the third-party inducement case, the same two conditions must also hold, although either Promisor or Inducer might be the party voluntarily compensating Promisee for the appropriate amount. But again, there is no reason in principle to think that Inducers and Promisors will do so.<sup>60</sup> In addition, even if Promisor or Inducer is prepared to compensate Promisee after the fact, there may be good-faith disagreement as to what true expectation damages are. Indeed, one would expect agreement on

<sup>59</sup> It might be claimed that a rule of efficient breach avoids negotiation costs at the time of initial contracting between Promisor and Promisee over whether Promisee will have the right to transfer Promisor's obligation to perform, since the rule automatically allows Promisor to breach now and pay later. But this is merely a default rule; Promisor is free to agree to allow her performance to be transferred, or to stipulate damages in the event that she does. The interference tort likewise establishes a default rule; as explained below, Promisor and Promisee can contract out of the specter of tort liability by specifying that the contract is terminable at will. Thus, transaction costs during the first contract under alternative legal rules concerning subsequent breach do not establish any superiority for a rule of breach now, pay later.

<sup>60</sup> In practice, as the 134 sample cases included in Section V indicate, it is almost never true that Inducers or Promisors agree to compensate Promisee for his lost gains. Almost always, Promisors and Inducers are seeking to avoid all liability to Promisee.

that point to be rare; following the breach, it will have to be either negotiated or litigated.

But if tortious interference is the rule, there is no subsequent round of negotiation or litigation necessary. The original negotiation between Promisor and Promisee to form the contract necessarily established the amount Promisor would be paid if she performed (\$45) but not Promisee's expected gains. If Inducer negotiates with Promisee for Promisor's performance, the already-established amount to be paid to Promisor (\$45) still holds; no price terms of the new arrangement concerning Promisor remain to be determined. But if Inducer is free instead to negotiate with Promisor, compensating Promisee later (the "efficient"-breach rule), the question of the amount to be paid Promisee remains to be settled. Absent a liquidated damages clause, Promisee's gain has never been established. Negotiation/litigation will be required subsequently to establish the amount of Promisee's compensation when Promisor breaches.

This, then, is the important distinction between tortious interference and "efficient" breach in a third-party inducement situation with real-world transaction costs. Under either rule, there will be negotiation before the breach, either between Inducer and Promisee (tortious interference) or between Inducer and Promisor ("efficient" breach); there is no reason to think that the costs of the former bilateral negotiation exceed those of the latter—or vice versa. But in a regime of tortious interference, the Inducer-Promisee negotiation before the fact is the only transaction cost.<sup>61</sup> With a rule of "efficient" breach, there is still the subsequent problem of Inducer or Promisor compensating Promisee, resolution of which will require a second round of transaction costs (either litigation or negotiation). A rule of "breach now, pay later" by its very terms entails two stages of transaction costs, (a) negotiation before the fact with Promisor over the breach and (b) litigation or negotiation with Promisee over compensation after the fact. A rule of "negotiate now" commanded by tortious interference entails only transaction costs before breach.

Thus, the efficient-breach rule is only efficient if the combined costs of negotiation *ex ante* plus litigation or negotiation *ex post* are less than just the *ex ante* negotiation costs that a rule of tortious interference entails. As with breach in a two-party world, the issue of the optimal legal rule becomes an empirical one, concerning which, admittedly, no data exist. But

<sup>61</sup> Following the statement quoted in the text accompanying note 58, Posner adds, apropos of the interference tort, "On the other hand, litigation costs would be reduced" with the interference tort. Posner, *supra* note 58, at 133. But again, the cost accounting is incorrect. There is no litigation *ex post* required at all in a regime of tortious interference. Only negotiation *ex ante* is necessary.

efficient breach entails transaction costs both before and after breach, while tortious interference would force Inducers to negotiate only once. Certainly there is no reason to think that the transaction costs *ex ante* of Inducer's negotiating with Promisee (with tortious interference) rather than with Promisor ("efficient" breach) are systematically different. But the *ex post* costs of Inducer and Promisee resolving the compensation issue apply only with a legal rule of "efficient" breach. Thus, pending any empirical evidence to the contrary, tortious interference, not "efficient" breach, would seem the superior rule in the inducement context.

#### *D. Property versus Liability Protection of Assets*

By the preceding argument, an economically desirable legal system would (absent empirical data of the sort mentioned) accord Promisee a property right in Promisor's performance when the parties themselves do not specify contractually their respective rights upon Promisor's subsequent breach. The law would treat contractual interference as tortious because it interferes with Promisee's property rights in the contract, regardless of whether there is some defect in the law of contract damages (as BeVier argues) or the commission of some other tort (per Perlman). To understand the predictable legal ramifications of the tort, then, one would view interference as part of the more general rules concerning property, as Epstein has argued (and as courts themselves claim to be doing).

Even if the tort accords property rights over performance to Promisee, however, it remains to be seen how the law would punish interference with those rights. To use the familiar Calabresi-Melamed dichotomy, "entitlements" (assets) may get either property or liability protection,<sup>62</sup> property protection requires negotiation (mutual consent) before any exchange, but with liability protection an entitlement may be taken first (without mutual consent) subject only to a requirement that the taker afterward compensate the owner. Legally, both forms of protection may apply to a given asset in different situations. Fancying your car, I have no right to take it and just pay you the "blue-book" value; I have to negotiate a purchase from you.

<sup>62</sup> Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972). This basic Calabresi-Melamed distinction is usefully applied in various settings. David D. Haddock, Fred S. McChesney, & Menahem Spiegel, *An Ordinary Economic Rationale for Extraordinary Legal Sanctions*, 78 Cal. L. Rev. 1 (1990) (explaining how seemingly disparate legal remedies like punitive damages, injunctions, and the collateral source rule all derive from a single economic model of property protection). See also James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. Rev. 440 (1995); Saul Levmore, *Unifying Remedies: Property Rules, Liability Rules and Startling Rules*, 106 Yale L. J. 2149 (1997).

Should I simply take, I will be required to return the car and will face additional sanctions (fines, jail) as well. However, if while driving my own vehicle I destroy your vehicle in a traffic accident—an event that deprives you of the car just as if I had stolen it—I am required only to pay you the value of the car afterward.

In the situation of inducement to breach a contract, grant of the performance entitlement to Promisee does not automatically imply property protection of the entitlement. Promisee's right to Promisor's performance could be protected by a liability rule. Liability-rule protection of Promisee's entitlement would be similar to reverting to the efficient-breach model, in which Promisor owns the right to breach now, perform for Inducer, and then pay Promisee later. The only difference would be the amount to be paid: with Promisee owning the entitlement, Promisor or Inducer would be liable not just for Promisee's expected profits but also for his lost exchange value. But liability-rule protection of Promisee's entitlement would still require two sets of transaction costs, negotiation between Promisor and Inducer *ex ante* and litigation (or negotiation) between Promisee and Promisor (or Inducer) *ex post*. Thus, for the reasons already discussed, the superior rule requires definition of entitlements in Promisees, with those entitlements protected by property rules, necessitating only one set of negotiation costs.

The interference tort, according property protection to Promisee's entitlement, reflects more general exchange norms. In the absence of unusual transaction (including information) costs, a property-protection rule for assets is typically preferable socially. The gains to property protection, all other things being equal, are many, as described elsewhere.<sup>63</sup> The desirability of property rules is manifest in entitlement owners' general preference for them when they are legally permitted.<sup>64</sup> As long as asset transfers can be negotiated cheaply *ex ante*, there is no need for liability-rule compensation *ex post*.

Liability rules may be optimal when negotiation or other transaction

<sup>63</sup> David D. Haddock & Fred S. McChesney, Bargaining Costs, Bargaining Benefits, and Compulsory Nonbargaining Rules, 7 J. L. Econ. & Org. 334 (1991); Fred S. McChesney, Boxed In: Economists and Benefits from Crime, 13 Int'l Rev. L. & Econ. 225 (1993); Louis Kaplow & Steven Shavell, Property Rules versus Liability Rules: An Economic Analysis, 109 Harv. L. Rev. 713 (1996).

<sup>64</sup> "Claims that compulsory extension of liability rules would be beneficial are at odds with the observation that traders in most thin markets voluntarily choose to bargain." Haddock & McChesney, *supra* note 63, at 336. That is, owners of houses, paintings, sports memorabilia, and so forth—all of which trade in thin markets—either invite potential buyers to make an offer that will then be negotiated over or put their assets up for auction, in effect making potential buyers negotiate among themselves.

costs are relatively high.<sup>65</sup> The number of drivers on the road at any one time typically creates relatively high negotiation costs *ex ante*, should any particular driver wish to negotiate with other drivers about the consequences of any accident. Information costs are especially high: only at extraordinary cost could one even know all the drivers with whom to negotiate *ex ante* over compensation to be paid in the event of an accident. Thus, although the default rule for asset protection will be a property rule, that default will be overridden when the transactional/informational situation makes property rules impractical.

Absent extraordinary transactional/informational costs, there is indeed positive harm to having liability rules. One of the most important costs of liability rules is the incentive they create to “game the system” via contractual bypass. If mere liability rules protect assets, those seeking use or ownership of something owned by another person have an incentive just to “make plaintiff whole” after the fact, rather than negotiate for the asset *ex ante*.<sup>66</sup> Taker-defendants obtain all the gains from trade under a liability rule. Thus, safeguarding the value of asset ownership requires distinguishing situations when potential defendants can game the system by avoiding negotiation, and then “making defendant whole” by stripping defendant of any gains from contractual bypass (even after plaintiff is compensated for his losses) when negotiation was in fact economically feasible.

The potential for contractual bypass is especially great when assets trade in thin markets, that is, markets with no set price (as would be found in thick markets) but rather a rate of exchange negotiated for each transaction.<sup>67</sup> If assets are sold at the going price in a thick market, those exchanges establish the asset’s full value, including necessarily the asset’s exchange value. But the full (including exchange) value of assets traded in thin markets is not so easy to establish, given the paucity of transactions and lack of a single, market-wide price. The uncertainty of full value creates an incentive to game the system when the law requires proof rather than specula-

<sup>65</sup> Ulen, *supra* note 14, at 369, makes the point in the context of property rules (specific performance) versus liability rules (damages) for breach of contract in a two-party setting: “When a contract has been breached, the question of utmost importance to the court should be the level of transaction costs facing the defaulter and innocent party. If those costs are low, then private negotiations are possible and the most efficient relief for the court to order is specific performance. If, however, transaction costs are high, then the court should . . . assess money damages against the breacher.”

<sup>66</sup> For example, Susan Rose-Ackerman, *I’d Rather Be Liable Than You: A Note on Property Rules and Liability Rules*, 6 *Int’l Rev. L. & Econ.* 255 (1986); Haddock, McChesney, & Spiegel, *supra* note 62.

<sup>67</sup> Assets trading in thin markets, that is, have no “going” rate at a given time; the value of each asset—what someone is willing to pay—must be established by individual negotiation.



tion over the value of the asset lost—as long as liability-rule protection applies. Requiring negotiation *ex ante* by installation of property rules is the solution instead.

As concerns contract rights specifically, by necessity those rights will trade in a thin market when Promisor's performance is of interest to an Inducer. If there is a thick market for equivalent performance, Inducer will simply purchase at the going price in the market.<sup>68</sup> (If there were a thick market for performances by opera singers of Johanna Wagner's quality, Gye would have no need to induce her breach and to compensate Lumley; Gye would simply purchase the equivalent performance in the market.) Moreover, transaction costs would be minimal in the typical inducement situation as long as the appropriate legal rule, tortious interference, was in effect. With tortious interference as the law, there would be only one negotiation involving only two persons, Promisee and Inducer. That negotiation might well involve a "bilateral monopoly." But under a rule of efficient breach so do the Promisor-Inducer negotiations, as do the subsequent negotiations between Promisor or Inducer and Promisee, as well.

Likewise, informational problems seem minimal in the typical inducement setting. Even if Inducer did not initially know of the existing contract, Promisor has every incentive to provide that information in order to evoke Inducer's best offer for her performance: Wagner would want Gye to know that singing for him would cost more because she would be liable to Lumley for contract breach. Promisee would inform Inducer of the contract if the inducement were discovered before Promisor's performance.<sup>69</sup> Thus, in a legal system that treated entitlements in Promisors' performance as belonging to Promisees, any actual Inducement would almost certainly be an attempt by Inducer to "game the system," to bypass a contract with Promisee.

In short, an optimal rule of tortious interference rather than "efficient" breach would not just award entitlements to Promisees. A cause of action for interference would provide property, not liability, protection to those en-

<sup>68</sup> To return to a point made above (see text accompanying note 9, *supra*), BeVier writes that many tortious-interference cases will involve "complex" contracts (for example, involving informational and/or relational investments by Promisees); the transactions do not take place in ordinary spot markets at going prices for homogeneous units that allow Promisees to cover in the market for lost performance. But, in fact, *all* interference cases predictably would involve assets trading in thin, not thick, markets. There is no point in tortiously interfering with contracts replicable in spot markets; the same terms that Promisee obtained are available to Inducer. And every thin-market transaction will require informational investments beforehand because the price, quantity, and other terms will have to be specified without market information, thus requiring Promisee to invest in information.

<sup>69</sup> In the sample of 134 cases analyzed in Section V, Inducer clearly had notice of the contract between Promisor and Promisee in 129 cases.

entitlements. Moreover, property protection is the legal default rule for entitlements generally, for good economic reasons. They are especially important when assets (entitlements) trade in thin markets, in which there is no going rate by which an asset's value can be judged. If transaction (including information) costs are particularly high in certain settings, an asset might be covered only by a liability rule. This creates an incentive for defendants to "game the system," however, by inviting argument that negotiation *ex ante* was prohibitively expensive, such that plaintiff should only be made whole but defendant should not have to disgorge its gains from bypassing contract. In the typical interference setting, there is little reason for liability rules to displace property rules. Almost certainly, Inducer will know of Promisor's existing contract. And although only two parties negotiate, that is true under either an efficient-breach or a tortious-interference rule, except that the former rule requires two bilateral-monopoly negotiations, the latter only one.

#### *E. Assignability of Contract Performance Rights*

The foregoing assumes that contract rights (that is, rights to Promisors' performance) are assignable (transferable). In fact, assignability of entitlements is the general default rule in law and the default rule with respect to contract rights specifically. As choses in action, contract rights are normally assignable without Promisors' subsequent consent.<sup>70</sup> Promisor is always free not to create transferable (assignable) contract rights by making the contract terminable at will or by specifically forbidding assignment, overriding the default rule of assignability.<sup>71</sup>

In a few situations, however, exceptions to the legal default rule of assignability may apply even when the contract does not expressly prohibit assignment. Most common are cases when assignment would materially in-

<sup>70</sup> See note 56 *supra*. "[T]he modern view is that contract rights should be freely assignable." J. Murray, Murray on Contracts 799 (1974). See also Howard O. Hunter, *Modern Law of Contracts*, ¶ 21.02 (1993) (citations omitted): "[T]here is the assumption that there is a property interest in something as intangible as a contract 'right' or similar interest and that it is transferable in much the same way as a parcel of real estate or a chattel. Second, there is the assumption that a party to a private agreement can designate another party, a stranger to the agreement, to receive the benefits of the agreement. . . . Third, there is the assumption that a nontransferring party (generally called an obligor) must follow an assignment and perform for a stranger rather than for the party with whom he made the agreement."

<sup>71</sup> Restatement (Second) of Contracts, § 336 (1981); Farnsworth, *supra* note 56, at 764–65. For example, *Davidowitz v. Delta Dental Plan of California*, 946 F.2d 1476, 1478 (9th Cir. 1991) (express nonassignment clause in contract prevents subsequent attempt to assign). Courts may sometimes attach a requirement of reasonableness to the Promisor's (obligor's) ability to prevent assignment because of a nonassignment clause. Hunter, *supra* note 70, ¶ 21.04.

crease the Promisor's duty, impair her chances of obtaining return performance (for example, payment), or otherwise reduce the value of the contract to her.<sup>72</sup> Personal service contracts, for example, have sometimes been held nonassignable on those grounds, although the default rule for these contracts too has increasingly deemed them assignable.<sup>73</sup> Thus, with most contracts, and increasingly even contracts for personal services, Promisor's performance rights can be purchased from Promisee.

But should the law take account of the minority of situations where assignment may not be allowed by a court, even if the contract does not explicitly forbid it?<sup>74</sup> In other words, should the law include an exception to liability for tortious interference if Inducer can show that, as a matter of law (not contract), rights to Promisor's performance could not have been transferred even had negotiation been attempted? If it was obvious *ex ante* that the contract right was not assignable as a matter of law, then the analysis is no different from the case in which the parties include a specific termination-at-will clause in their contract. Promisee has not purchased the right to future exchange value because the law (for whatever reason) does not allow him to own it.<sup>75</sup> Because by law there could be no assignment, neither should there be tortious interference based on failure to negotiate with a Promisee who legally has nothing to negotiate over.

This assumes, however, that the law is clear *ex ante* as to which rights it deems assignable and nonassignable, and that a court will enforce the law when it is clear. If the law is not clear, a third party has an opportunity to claim that it induced breach without negotiation with Promisee because it believed the right not to be assignable.<sup>76</sup> Failure to negotiate, Inducer then

<sup>72</sup> Restatement (Second) of Contracts, § 317 (1981).

<sup>73</sup> Murray, *supra* note 70, at 801. See Larry A. Dimatteo, Depersonalization of Personal Service Contracts: The Search for a Modern Approach to Assignability, 27 Akron L. Rev. 704 (1994).

<sup>74</sup> It should go without saying that a contract that forbids assignment should be enforced and that no cause of action for tortious interference should lie. The Promisee has explicitly left with Promisor the ability to contract with Inducer without liability; any increase in the value of her performance belongs to her by contract. That is, by forbidding assignment, the Promisor explicitly reserved the right to share in any gains from later exchange of her promise to perform.

<sup>75</sup> In the typical situation in which the law deems a contract nonassignable, the likelihood that the assignment would work to Promisor's disadvantage (see text accompanying note 72 *supra*), the Promisor would not have been compensated for the additional risk of her obligation being transferred.

<sup>76</sup> Unquestionably, the law of assignability is not clear in certain domains. "For as long as there have been enforceable contracts for personal services, there have been questions about their assignability." Hunter, *supra* note 70, ¶ 21.04. A recent discussion of personal service contracts finds that the cases demonstrate "no consistent underlying jurisprudence" and are "hopelessly confused." Dimatteo, *supra* note 73, at 408, 438.

would say opportunistically, was not an attempt at contractual bypass, but a mere mistake—when Inducer in fact sought to bypass negotiation with Promisee, regardless of whether the contract was assignable or not. The law's lack of clarity or certainty, that is, would risk allowing Inducers in a minority of situations meretriciously to expropriate ex post the exchange value Promisee had bargained for ex ante.

The courts themselves then would become vehicles for contractual bypass. Especially given the trend toward assignability, the law might well adopt a default rule that when assignability is legally unclear, negotiation with Promisee is always required except when Promisee has explicitly forgone exchange value by agreeing that the contract is terminable at will or otherwise nonassignable. The tort of contract interference would therefore lie when assignability was unclear ex ante, even if ex post the asset might (but then again might not) have been deemed legally unassignable.<sup>77</sup>

A rule that contract rights must always be negotiated rather than taken, even if assignability is uncertain, does more than avoid Inducer's opportunistic use of the courts. More important, such a bright-line rule also mirrors the essential transaction-cost optimality of the interference cause of action. With efficient breach, an Inducer honestly wondering whether an asset could be assigned would have to negotiate with Promisor first, then negotiate later with Promisee (or defend against him in court). But a legal rule dictating that when an asset's assignability is in doubt its use by Inducer must be negotiated (tortious interference), rather than taken now and paid for later, again would entail only one round of transaction costs. To allow a defense that assignability was uncertain would encourage Inducers to take now and pay later, then resort to courts to avoid liability for failing to negotiate. Not only would this make courts accomplices in contractual bypass, it would also increase the total number of transaction-type (negotiation plus litigation) costs in cases where Inducers are higher-valuing users.

This summarizes the transaction-cost normative case for tortious interference rather than efficient breach as the rule to be applied in three-party inducement situations.<sup>78</sup> The positive question remains whether the law in fact reflects the normative arguments presented here. That question is all the more intriguing, given that at least some of the commentators arguing for an efficient-breach rule believe that the common law (whence arose the in-

<sup>77</sup> The uncertainty over whether the contract right is assignable would naturally affect the price at which it would trade between Promisee and Inducer. In effect, the law has failed to give clear title to Promisees, reducing the value of their contract rights.

<sup>78</sup> To repeat, the case for efficient breach over tortious interference is made in terms of transaction costs alone (see note 57 *supra*), although a choice between the alternative rules might also affect other margins of behavior.

terference tort) is efficient. The next two sections thus ask, using two different methodologies, whether the actual operation of the law better reflects the property-based concept of tortious interference or the liability-based rule of efficient breach.

#### IV. IMPLICATIONS OF THE PROPERTY MODEL OF TORTIOUS INTERFERENCE

The model of contractual interference as property protection of Promisee's assets makes predictions about the law of inducement different from those in models based on efficient breach. Few if any of these competing implications from the two models are discussed by the commentators summarized in Section II. But one value of the property-based model posited in Section III is its insights into aspects of law that have gone largely unexamined or unrecognized, and—in keeping with Occam's razor—showing how they derive from a central, simple construct of property rights in Promisors' performance. In effect, the separate implications of the two models, tortious interference versus efficient breach, furnish one set of tests as to what the law is truly about.<sup>79</sup> Another set of tests, using a statistical model and a sample of some 130 cases, is presented in Section V.

##### A. *Testable Implications: Liability*

###### 1. Promisee's Property Interest

The most obvious implication separating the two models of third-party inducement (efficient breach and tortious interference) concerns the kinds of contracts for which interference will be actionable. In some respects, the efficient-breach and property-based tortious-interference models make the same predictions. For example, many contracts are explicitly terminable by one side or the other. Each model would imply normatively that Promisor liability for breach in those cases would be inappropriate, although for quite different reasons.

The liability-rule efficient-breach model would deem terminability at will irrelevant; no contract (absent the special circumstances summarized by the authors in their discussion in Section II) would entail liability for inducement if Promisor were persuaded to end it. The efficient-breach model

<sup>79</sup> “A different way to consider the conflict between the interference-with-contract case law and the efficient breach theory is to take the case law as a starting point and examine the efficient breach theory in light of it. If we start with the cases, a corresponding ‘core’ attack would maintain that the existence of a long line of interference with contract cases ‘proves’ the efficient breach theory is simply wrong.” Woodward, *supra* note 7, at 1142 (citations omitted).

would treat all inducement as innocent, even praiseworthy, moving resources to higher-valued uses, as long as Promisee was compensated appropriately (that is, for use value but not exchange value).

Under the property-based model of tortious interference, terminability at will is highly relevant. Promisor has specifically bargained to keep the exchange value that Promisee otherwise would have. When the contract is for a specified period or a specific undertaking, however, the interference model would treat inducement as tortious because Inducer chose to bypass negotiation with Promisee, unless either the law or the contract clearly made rights to Promisor's performance nontransferable. Tortious interference, that is, would differentiate the predictable legal treatment of inducement according to the type of contract. Contracts that are terminable at will would not subject Inducer to risk of liability; liability would be imposed if the contract were for a specific duration or endeavor.

Thus, the two models are testable as to whether interference law differentiates along these lines. In fact, the cases involving most kinds of contracts generally distinguish between at-will contracts and those for a specific performance or period. Employment contracts make up perhaps the single largest category of cases discussing terminable versus nonterminable contracts, but the basic principles apply to any sort of contract. When the relation is terminable at will, William Prosser writes, "the privilege of competition has been recognized. In such a case there is no contract right to have the relation continued. . . . Accordingly, the considerable weight of authority holds that there is a privilege of competition which extends to inducing the termination of agreements terminable at will, whether they concern employment or other relations."<sup>80</sup> Older authorities concur, as does the Second Restatement of Torts.<sup>81</sup> However, Inducer will generally be liable for provoking Promisor's breach of a contract not terminable at will, says the Restatement.<sup>82</sup> As the property-based model predicts, that is, creation of a contract asset that can be exchanged will result in liability for inducement if a third party interferes. Promisor is not free to breach now and pay later; prior negotiations must be had with Promisee.

Thus, whatever its normative claims for economic superiority, the effi-

<sup>80</sup> William J. Prosser, *Torts* 946 (4th ed. 1971) (citations omitted).

<sup>81</sup> For example, Carpenter, *supra* note 2, at 763; American Law Institute, Restatement (Second) of Torts, § 768, comment i ("Contracts terminable at will"): "As for the future hopes, he [Promisee] has no legal right but only an expectancy; and when the contract is terminated by the choice of the third person, there is no breach of it. The competitor [Inducer] is therefore free, for his own competitive advantage, to obtain the future benefits by causing the termination."

<sup>82</sup> Restatement (Second), § 766, comment d. The one exception noted is a promise to marry, interference with which is not actionable.

cient-breach model as a positive matter is not the law. Promisor's ability to terminate at will is not irrelevant. Moreover, the efficient-breach advocates who complain of tortious interference because it supposedly applies even to at-will contracts appear to misunderstand the law. Even Epstein, who feels that the tort is normatively justified, apparently believes that the law generally does penalize inducement to breach at-will contracts.<sup>83</sup> Commentators are commenting on "law" that the restaters say is not the law, with the cases seeming to justify the restaters' claims.<sup>84</sup> The confusion may arise because many of the tortious-interference cases involve contracts that were nominally terminable at will, but only with conditions attached.<sup>85</sup> The distinction between contracts truly terminable at will (with no liability for inducement possible) and those terminable at will but only conditionally (with liability for inducement possible) is recognized in the Restatement.<sup>86</sup>

Whatever the source of confusion, the law of inducement to breach employment contracts as restated in the hornbooks and treatises is very much as the property-based model of inducement predicts. When Promisor does not specifically retain the right to shift her performance to a third party, it belongs to Promisee. As long as the interest is transferable, an Inducer who chooses not to negotiate with Promisee will be liable for interference. There

<sup>83</sup> Epstein, *supra* note 10, at 21–22. Woodward thus observes, "Professor Epstein's criticism of the at-will cases for chilling legitimate competition for employees seems wide of the mark." Woodward, *supra* note 7, at 1126 n.85. For other claims that tortious interference will lie against inducement of at-will contracts, see Dobbs, *supra* note 3, at 335; Myers, *supra* note 9, at 1100, 1118–20.

<sup>84</sup> For example, *Chaves v. Johnson*, 335 S.E.2d 97, 103 (Va. 1985): "[A] competitor is justified by economic self-interest in causing a third person . . . not to continue an existing contract terminable at will. . . . His conduct is tortious, however, if he induces the third party to breach an existing contract which is not terminable at will."

<sup>85</sup> For example, *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917), in which a contract was terminable at will but included also a promise that while employed a worker would not join a union. When the union organized workers and had them keep their membership secret until enough other workers joined the union that a general strike could be called, liability for tortious interference was imposed. But liability had nothing to do with the terminability of the contract; the contract could have been for a period of years yet still be breached by the secret union membership into which the workers were induced. For another example, see *Patterson Glass Co. v. Thomas*, 183 F. 190 (D.C. App., 3d Dist. 1919), in which the employment contract—otherwise terminable at will—required 7 days' notice. When Promisors were induced to breach without giving notice, liability for interference was imposed.

<sup>86</sup> Restatement (Second) of Contracts, § 768, comment i. After discussing the general lack of liability when contracts are terminable at will, the comment continues: "An employment contract, however, may be only partially terminable at will. Thus it may leave the employment at the employee's option but provide that he is under a continuing obligation not to engage in competition with his former employer. Under these circumstances a defendant engaged in the same business might induce the employee to quit his job, but he would not be justified in engaging the employee to work for him in an activity that would mean violation of the contract not to compete."

is no mention in the treatises of independently tortious acts, nor any statement that interference will lie only in the situations of inadequate contract remedies specified by BeVier and by Landes and Posner. (That does not necessarily mean that those circumstances, even if not included explicitly in the case holdings, do not play a role in the adjudications, a hypothesis investigated in the statistical models presented in Section V.)

## 2. Stipulated Damages

Yet another implication of the property-based model of tortious interference concerns stipulated (liquidated) damage clauses in the contract interfered with. Analytically, stipulated damage clauses represent Promisee's agreement *ex ante* that Promisor may breach, as long as the stipulated payment is made, keeping any additional exchange value for herself. With this property right agreed to in advance, the property-based model of interference presented in Section III would predict that no action for tortious interference would lie: the right to interfere has already been purchased from Promisee.<sup>87</sup> Moreover, and crucially, the amount of compensation due Promisee has already been agreed on, so a second set of negotiations (or litigation) over compensation to him is unnecessary, removing the principal advantage of a tortious-interference regime. This of course assumes that a court upholds the validity of the liquidated damages clause; when such clauses are deemed "punitive," and so, unenforceable, tortious interference would still be available as a cause of action.

Those advocating efficient breach do not discuss the relationship of stipulated damages and tortious interference, but one can infer their positions on that point from their models. Perlman would presumably allow an action for interference despite the liquidated damages clause when there had been an independent tort. For others, whether tortious interference would be available when damages had been stipulated in the contract predictably would depend on whether the damages proved over- or undercompensatory. Where the damages were "excessive" (overcompensatory), certainly the BeVier and perhaps the Landes-Posner models of tortious interference would seem inapplicable, so no tort cause of action would lie.<sup>88</sup> But if the stipulated damages, though upheld, were still *infracomensatory* (either le-

<sup>87</sup> That is, liquidated damages are *ex ante* contractual agreements between Promisee and Promisor dividing the gains from the arrival of a higher-valuing user. See Haddock, McChesney, & Spiegel, *supra* note 62, at 34–36; Goetz & Scott, *supra* note 48, at 554, 593–94.

<sup>88</sup> Under the efficient-breach model more generally, *supra*compensatory damages are already undesirable for their deterrence of efficient breach. For example, Craswell, *supra* note 13, at 638 (Overcompensatory remedies "could deter a defendant from breaching even in cases when it was more efficient not to perform").



gally or practically), tortious interference predictably would still be available to fill the damages gap.

The cases involving inducement to breach contracts with stipulated damages are few. But they do not appear to differentiate between over- and undercompensating plaintiffs in addressing the issue of tortious interference when damages have been stipulated by the parties. Nor do the cases resolve the issue by reference to independent torts. Rather, as the tortious-interference model presented here would predict, the presence of liquidated damages puts an end to any additional liability for inducement, period. “Authority on the question seems to be quite limited, but such as there is . . . limits liability of the tortfeasor to the liquidated damages provided in the contract, even though he did not bargain for such a limitation nor pay consideration for it.”<sup>89</sup> Thus, the rules concerning stipulated damages are analytically identical to the rules on contracts at will or those of specific duration. Whether a cause of action for tortious interference exists does reflect the extent of the property rights over exchange value that Promisee and Promisor created by contract.

### 3. “Malice” and Intent

Particularly in the early years of the tort’s existence, writing on contractual interference focused on what exactly must be shown as to Inducer’s state of mind. Possibly, interference would be tortious when done out of hatred, spite, or otherwise malicious motives. *Lumley* itself spoke in terms of Inducer “malice” as a necessary condition for any tort liability, and modern cases sometimes discuss malice.<sup>90</sup> In neither economic model of inducement, however, should malice of this sort (deriving from Inducer’s utility function being interdependent with that of Promisee) matter. To efficient-breach partisans, the source of Inducer’s gains (utility) is irrelevant: if Inducer values the contract right more, inducement should be permitted. In the property-based tortious-interference model, likewise, the motive for taking rather than negotiating would be irrelevant. It would suffice that Inducer knew (had notice) of Promisor’s prior contract with Promisee and opted to take rather than pay for its utility gains.

More modern cases have redefined “malice” to mean just intent to interfere or Inducer’s knowledge (notice) that contracting with Promisor would

<sup>89</sup> Dobbs, *supra* note 22, at 464 (citing cases).

<sup>90</sup> “Since *Lumley v. Gye* there has been general agreement that a purely ‘malicious’ motive, in the sense of spite and a desire to do harm to the plaintiff for its own sake, will make the defendant liable for interference with a contract.” Prosser, *supra* note 80, at 943 (citing cases).

cause her to breach her contract with Promisee.<sup>91</sup> But in the efficient-breach model, knowledge should be just as irrelevant as malice, for the same reason. If Gye values Johanna Wagner's services more than does Promisee Lumley, why would it matter if Gye did not know of the Lumley-Wagner contract? Or, turning to the BeVier model, why would Gye's intent or knowledge at the time of inducement have any bearing on the adequacy of expectational damages later?

In the property-based model, however, intent is critical. Sanctions are imposed to punish attempts to game the property-rights system by taking rather than negotiating. The existence of a contractually established asset and Inducer's notice while inducing (rather than negotiating) would be sufficient in themselves for an award of tort liability. On the other hand, one who is unaware of existing property rights by definition has not taken to avoid negotiation. No extraordinary sanctions would be required or appropriate.<sup>92</sup>

In fact, inducement law does reflect these property-based concerns about intent. Intent is not irrelevant, as the liability-based efficient-breach model would make it. It is a necessary element of the tort. "To be subject to liability under the rule stated in the [Restatement] Section, the actor must have knowledge of the contract with which he is interfering and of the fact that he is interfering with the performance of the contract. . . . [T]he actor does not induce or otherwise intentionally cause that failure if he has no knowledge of the contract."<sup>93</sup>

#### 4. Interference as a Separate Cause of Action

If, as argued here, tortious interference is designed to punish Inducers who game the system by taking property rights rather than negotiating for them, it follows that Inducer's liability is completely independent of the breaching Promisor's. Regardless of whether Promisee is adequately compensated by Promisor or not, or of Inducer's independently tortious behavior, Inducer would be liable when low-cost negotiating was possible but cir-

<sup>91</sup> For example, Carpenter, *supra* note 2, at 734–37; Woodward, *supra* note 7, at 1115–16.

<sup>92</sup> Moreover, the property-based model would also protect against merely negligent takings. See Haddock, McChesney, & Spiegel, *supra* note 62, at 27. This is a factual pattern understandably ignored by the authors discussed here, as there are relatively few cases in which Inducer did not know of the existing contract. See note 69 *supra*. Promisor would seemingly always have an incentive to inform Inducer of her existing obligations. Nonetheless, Carpenter notes cases imposing liability for negligent interference, although they apparently involve some independent negligence that then prevents performance of a contract (for example, negligently injuring an agent prevents him from performing his contract with the principal). Carpenter, *supra* note 2, at 740–41.

<sup>93</sup> Restatement (Second) of Contracts, § 766, comment i (1977).

cumvented. Thus, courts would impose liability for interference when no issue of Promisee's being made whole by Promisor was even presented. That is, whether or not Promisor would "make plaintiff whole," Promisor then would be paying only use value, not the greater exchange value to which Promisee is entitled.

That Inducer will be liable for interference in tort, regardless of Promisor's liability in contract, is indeed the law. Dobbs writes that "one problem is whether the tort action will lie at all against the breach inducer where, after all, the aggrieved party can recover in contract from the contract breaker himself. This issue has pretty much been resolved in favor of the plaintiff, who is usually permitted to sue both."<sup>94</sup>

A related implication concerns the necessity of including the contract-breaching Promisor in any action for tortious interference. If tortious interference is designed to remedy problems in the underlying contract action (per BeVier and Landes-Posner), a court naturally would have to rule on Promisor's liability and damages for the breach itself; to do so would, of course, require that the breacher be named as a party. Yet it appears well settled that an action for tortious interference will lie without the breacher being deemed an indispensable or necessary party.<sup>95</sup>

An even stronger implication from the property-based model concerns the possibility of liability where no contract damages at all are due. Because extraordinary sanctions are designed to protect the negotiation regime, punitive damages are awarded in other areas of law, even when no actual damage has been suffered by the victim of a taking.<sup>96</sup> It is defendant's gain, not plaintiff's loss, that is relevant. Likewise, even if no damages are available for breach of contract, one predictably would still get damages for interference.<sup>97</sup>

And, in fact, there are many cases where the contract that Inducer supposedly induced Promisor to breach was legally unenforceable or where for other reasons no damages were due from Promisors on breach. As the Second Restatement summarizes, "[B]y reason of the statute of frauds, formal defects, lack of mutuality, infancy, unconscionable provisions, conditions precedent to the obligation, or even uncertainty of particular terms, [Promisor] may be in a position to avoid liability for any breach. The defendant

<sup>94</sup> Dobbs, *supra* note 22, at 460. For example, *Mahoney v. Roberts*, 86 Ark. 130, 110 S.W. 225 (1908).

<sup>95</sup> For example, *Dail-Overland Co. v. Willys-Overland Co.*, 263 F. 171, 183 (N.D. Ohio 1919).

<sup>96</sup> Haddock, *McChesney, & Spiegel*, *supra* note 62, at 32–33.

<sup>97</sup> This point is raised in Epstein, *supra* note 10, at 23, who seems uncertain what a property-based notion of interference would call for if no contract damages are due.

[Inducer] is not, however, for that reason free to interfere with performance of the contract before it is avoided."<sup>98</sup> The rationale is that Promisor remained willing to perform per the agreement with Promisee until Inducer appeared, and Inducer could have negotiated with Promisee. Thus, tortious interference still furnishes a cause of action, all other things being equal.<sup>99</sup>

### B. Testable Implications: Remedies

Finally, the efficient-breach and property-based models of tortious interference differ importantly in their implications for remedies in the event of induced breach. Under the model of efficient breach, plaintiffs are to be made whole. The sole issues are whether contract law (BeVier) or the practicalities of the situation (Landes-Posner) require stepping outside the ordinary confines of contract law to ensure that plaintiffs are indeed made whole.

But under the property-based model, it is defendants (Promisor and Inducer) who are to be made whole by forfeiting their gains from breach. Property is optimally protected from undesirable taking only when gains from taking are removed. Even if plaintiffs are fully compensated for their expectation losses by Promisor, the inducement tort would still lie, and additional relief in law or equity would still be available. Inducement involves gains to both Promisor and Inducer, and so (since side payments between the two are always possible) optimal remedies must negate the aggregate gain received by both. Thus, the tortious-interference model implies that ex-

<sup>98</sup> Restatement (Second) of Torts, § 766, comment f. For example, *Harris v. Perl*, 71 N.J. 455, 197 A.2d 359, 363 (1963): "One who unjustifiably interferes with the contract of another is guilty of a wrong. And since men usually honor their promises no matter what flaws a lawyer can find, the offender should not be heard to say that the contract he meddled with cannot be enforced." See also Dobbs, *supra* note 22, at 460: "[T]he mere fact that [the contract] is unenforceable because of some formal defect, or because of the statute of frauds, or for any reason not going to out and out illegality, should not prevent liability of the breach inducer, since without his interference, the contract might have been voluntarily performed by the parties to it." See also Prosser, *supra* note 80, § 129. For an interesting case where the parties stipulated that in the event Promisor could not perform, Promisee's damages would be zero, see *Chesapeake & Ohio Coal Agency Co. v. Fire Creek Coal & Coke Co.*, 119 F. 942 (S.D. W.Va. 1902). There, the court held that those responsible for inducing breach of the contract by ordering a strike still were liable for tortious interference. But for an interesting twist, see *Carmen v. Fox Film Corp.*, 258 F. 703 (S.D.N.Y. 1919), where a film star aged 20 contracted with a movie producer for a stated period of time, while she was still a minor. When months later she claimed the right to abrogate that contract because she was under age and signed with a different producer, the first producer (promisee) was held liable for tortious interference with the second contract in insisting that she perform under the contract that she had signed as a minor.

<sup>99</sup> A property-minded court would still have to determine whether, as a matter of fact, Promisor and Promisee understood their (legally nonenforceable) arrangement to have been for a specific period, not an at-will arrangement.

traordinary remedies would be available to strip defendants of their gains, remedies by definition not available under a rule of efficient breach. Such extraordinary remedies include restitution by Promisors, damages to be paid by Inducer even if Promisee has already been compensated for his losses by Promisor, and liberal availability of injunctive relief.

### 1. Promisor Restitution and Inducer Damages

The efficient-breach model holds that, as long as Promisee is adequately compensated, Promisor should be allowed to breach now and pay later. As long as Promisee is ultimately made whole, no further damages would be assessed against Promisor or Inducer. Under the property-based model of inducement, however, it is defendants' gains, not plaintiffs' losses, that would determine the ultimate amount of recovery. Defendants (Promisors and Inducers) would be made whole by being stripped of their gains.

Restitution by Promisors would strip them of their gains, and so the tortious-interference model predicts that restitution would be available when Promisors breach to perform at a higher price for Inducer. Obviously, this prediction of the tortious-interference model is squarely at odds with the notion of efficient breach. While cases addressing the issue are few—actions against Inducers are far more numerous than those against Promisors—there are certainly precedents supporting this prediction. When a Promisor sells land to a third party, rather than to the Promisee as promised under the original contract, the Promisor will be required to disgorge all gains, not merely compensate the plaintiff for its losses.<sup>100</sup> Likewise, breach of an agreement not to compete with one's former employer by going to work for a competing firm will result in the disgorgement of both the Inducer's and the Promisor's gains.<sup>101</sup>

Overall, however, relatively few cases discuss disgorgement of Promisor gains when inducement has occurred.<sup>102</sup> As the Massachusetts Supreme

<sup>100</sup> See *Timko v. Useful Homes Corp.*, 168 A. 824 (N.J. 1933); *Lake v. Bayliss*, 2 All E.R. 1114 (1974). In both cases, the court held that the Promisor held the property in trust for the Promisee. For discussion of the doctrinal overlap between fiduciary duties and restitution, see E. Allan Farnsworth, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 Yale L. J. 1339, 1353–60 (1985).

<sup>101</sup> *National Merchandising Corp. v. Leyden*, 370 Mass. 425, 348 N.E.2d 771 (1976).

<sup>102</sup> In *Lake v. Bayliss*, 2 All E.R. at 1117, the court said there was "certainly a dearth of authority" on the restitution for Promisor's contractual interference. It then suggested various reasons that so few cases have arisen, starting with the fact that "most people honourably fulfil their obligations." *Id.* Nonetheless, the court concluded, restitution against breaching Promisors attempting to gain by contracting with a third party "is absolutely in line with authority, and entirely represents the law." 2 All E.R. at 1118. For discussion of earlier precedents, see Farnsworth, *supra* note 100, at 1360–63. Farnsworth states that the few decisions discussing restitution for breach of contract "show no coherent pattern." *Id.* at 1369.

Court noted in awarding restitution against a breaching Promisor, “The 1937 Restatement of Restitution, while approving the unjust enrichment measure for tortious use of another’s trade name, trade secret, franchise, or other similar interest (see sec. 136), took no position on a like measure for contract interference. . . . [But] the current is strong for allowing such a remedy in proper cases.”<sup>103</sup> Recent contracts commentators agree: “[I]f restitution is indeed concerned with deterring wilful misappropriation, it would seem that there could be no more suitable object of a disgorgement remedy than the defendant who consciously defaults on a contractual obligation in order to perform for someone else offering a better price one of the standard scenarios of ‘efficient breach.’ . . . In the absence of a compelling reason to treat contract rights differently from property rights, the analogous remedies for intentional trespass or infringement plainly support an accounting for profits where a breach of this character is wilful.”<sup>104</sup> Thus, the predictions of the tortious-interference model as to Promisor’s disgorgement of her gains are apparently borne out when a higher-valuing user has induced her to participate in taking rather than negotiating.

Restitution is not a necessary remedy under the tortious-interference model. The aggregate gains obtained by Inducer and Promisor as a result of Promisor’s breach can be extracted solely from Inducer. Restitution may not be a sufficient remedy, either, since disgorgement of Promisor’s gains leaves Inducers with their contracted-for gains from trade. Thus, the interference model predicts, a second recovery against Inducer (perhaps in the form of punitive damages or disgorgement of any gains from the inducement) would be available to Promisee. And of course, damages against Inducer would be available even if Promisor had compensated Promisee.

This in fact appears to be the general rule. Even if Promisee is compensated adequately (that is, made whole) by Promisor, further relief against the Inducer is available. “[T]he tortfeasor’s liability may well be more extensive than the contract breaker’s liability, on such matters as special damages and punitive damages, for example. . . . [I]t is perfectly appropriate to hold the tortfeasor for those in spite of a second action, even though the

<sup>103</sup> *National Merchandising Corp. v. Leyden*, 370 Mass. at 433 n.16. The 1937 Restatement, under the title “Tortious Acquisition of a Benefit,” stated flatly, “A person is not permitted to profit by his own wrong at the expense of another.” Restatement of Restitution, § 3 (1937). However, it continued, “principle has not yet crystallized into a rule since . . . it is only in certain types of situations that restitution is permitted.” *Id.* at comment a.

<sup>104</sup> Andrew Kull, Restitution and the Noncontractual Transfer, 11 *J. Cont. L.* 93, 104 (1997). Kull is reporter of the American Law Institute’s forthcoming Restatement of Restitution. See also Andrew Kull, Restitution as a Remedy for Breach of Contract, 67 *S. Cal. L. Rev.* 1465 (1994). Likewise, Levmore discusses restitution as in part a mechanism of “market encouragement,” that is, a way to increase the amount of contracting. Saul Levmore, Explaining Restitution, 71 *Va. L. Rev.* 65, 79–82 (1985).

contract breaker has satisfied a judgment in favor of the same plaintiff.’’<sup>105</sup> Likewise, the law of interference has developed in favor of requiring tortious inducers to disgorge profits made from inducement.<sup>106</sup>

## 2. Prebreach Equitable Relief

The efficient-breach rule (breach now, pay later) means that damages subsequent to breach will be the only appropriate remedy. If those damages are infracomensatory (BeVier, Landes and Posner), or if an independent tort has occurred (Perlman), additional damages after the fact would be called for, but damages nonetheless would be the only remedy available.<sup>107</sup> Liberal availability of injunctions before impending breach (that is, against Promisors and would-be Inducers) would be abominable. The only role for the inducement tort is correcting contract damage rules after the fact, when they do not result in breaches being efficient.<sup>108</sup>

Under the property-based model of interference, however, injunctive relief against Promisor and Inducer should be freely available before breach occurs. Again, the goal is to make defendants whole by ensuring that they do not gain from their refusal to negotiate. Injunctions before the fact against inducing breach would nullify any possibility of unnegotiated gain. To the property-minded, then, injunctions against inducement would be as routine as injunctions against takings more generally, both desirable (normatively) and predictable (positively).<sup>109</sup>

That, in fact, is the general legal rule, as illustrated in the sample of cases about to be studied, in a third of which injunctive relief was granted.<sup>110</sup> When inducement is discovered before Promisor’s breach and formation of

<sup>105</sup> Dobbs, *supra* note 22, at 464 (citing cases).

<sup>106</sup> *Id.* at 465. Dobbs worries that computation of Inducer’s profits has not always been very precise, creating “a fairly grave risk that punitive rather than restitutionary action” occurs. It is not clear why this possibility is worrisome. There is no economic cost to stripping tortious defendants of more than their gains. In addition, as Dobbs notes, punitive damages are available against tortfeasors anyway. See text accompanying note 105, *supra*.

<sup>107</sup> “In the efficient breach theory, damages payable under the contract system are central because they are thought to supply the promisor with the correct incentives in deciding whether to breach.” Woodward, *supra* note 7, at 1142.

<sup>108</sup> To repeat, BeVier also favors equitable relief as a remedy in inducement cases. See note 9 *supra*. But she does so as part of a more general approach to breach of contract, in which she (like others) views equitable relief superior to damages for breach. More important, she claims that the inducement tort is needed to correct problems of contract damages *because* equitable relief is not available generally. But the property-based model would predict precisely the opposite, that in the event of inducement, injunctive relief would typically be available before breach actually has occurred.

<sup>109</sup> Epstein, *supra* note 10, at 33–36, makes the normative case.

<sup>110</sup> Equitable relief was sought in 47 of the 134 sample cases and granted in 44 of them.

a new contract with Inducer, equitable relief to end the inducement normally is available. Alternatively, if the new contract has been concluded but performance not yet rendered, injunctive relief blocking Promisor's performance is available.<sup>111</sup>

The liberal availability of injunctive relief when contract breach is being induced has implications for the ongoing debate, now 20 years old, concerning damages versus specific performance as the more efficient contract remedies to be awarded against Promisor.<sup>112</sup> In that debate, evaluations of efficient remedies have largely been modeled as two-party breach situations, in which Promisor's actual (not opportunity) costs of performance rise. Thus, the analysis often ignores the fact that, when breach is due to the arrival of a third-party Inducer, neither damages nor specific performance awarded against Promisor constitute the full set of Promisee's available remedies. Injunctive relief against the Inducer, stripping it *ex ante* of any gains, effectively substitutes for specific performance against Promisor and complements damages against Promisor. Indeed, the fact that additional damages are available to force disgorgement of Inducer's gains means that tortious-interference remedies accomplish just what specific performance against Promisor would, even if specific performance itself is not available.

## V. STATISTICAL EVIDENCE

From the foregoing, it appears that the property-based concepts of contractual interference embodied in the interference tort better describe the way the law operates than does the liability-based efficient-breach model, at least as the law is reported in the secondary sources. Whatever its alleged normative desirability, efficient breach is hardly the way the law operates in third-party inducement settings. However, using the treatises to test the competing implications may raise objections from some in the efficient-breach camp. The treatise authors do not explain how they decide what "the law" is. The tortious-interference commentators (Perlman, BeVier, Landes and Posner, Myers, Epstein) may just be reading a different sample of cases from those relied on by the treatise writers.<sup>113</sup>

Moreover, individual cases may be determined by several factors. Each

<sup>111</sup> "The competitor who induces the breach by the plaintiff's employee may also be enjoined in appropriate cases from accepting the services made available by the breach." Dobbs, *supra* note 22, at 466 (citing cases).

<sup>112</sup> Prominent arguments for the superiority of specific performance include Ulen, *supra* note 14, at 358; Schwartz, *supra* note 14, at 271; and Kronman, *supra* note 14, at 351.

<sup>113</sup> Further, Schwartz and Scott suggest that treatise authors' maximization of their own utility may result in different interpretations of what "the law" is. Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. Pa. L. Rev. 595 (1995).



of the authors discussed in Section II focuses on a particular determinant of case outcomes, but the presence of one factor in a case (for example, an independently tortious act) does not exclude the possibility of another factor (an informational-relational investment). Further, what constitutes “the law” itself usually emerges only from several dozens, perhaps hundreds, of cases. An accurate distillation thus requires appraising the effects of multiple factors as exhibited in many cases.

The nature of the data suggests resort to larger-sample statistical methodologies.<sup>114</sup> Multiple-regression analysis is used here to test the effect of different factors on courts’ imposition of liability for interference. No statistical technique is perfect; all require identifying the factors that explain judicial decisions—no small difficulty in the face of claims that the “elements of the tort of interference with contract have been discussed but little in the cases.”<sup>115</sup> But, of course, the traditional doctrinal approach used by the authors discussed in Section II above faces the same problem. If legal analysts can divine the various factors potentially at work in a particular case (a task to which the doctrinal analysis is well suited), statistical analysis then can advance the inquiry by estimating each factor’s independent effect on case-law outcomes.

#### A. *Sample*

Choosing an appropriate sample is crucial, especially to avoid bias by overaccentuating the importance of certain factors. The cases cited by Perlman predictably would include many instances, perhaps a disproportionate number, in which independently tortious acts and interference liability both are found. BeVier’s cases would likewise involve problems of undercompensation for (or free riding on) certain informational and relational investments. And so forth. To avoid relying on the samples of those arguing that a particular factor dominates the decisions, cases cited by one author, Charles E. Carpenter, are used here.<sup>116</sup>

Carpenter’s article offers several advantages. Written in 1928 but citing mostly cases from around the turn of the century, it reports on the period when the tort of contractual interference was establishing itself in the United States. It thus provides a good overview to observe what judges considered in imputing tort liability. In turn, this mitigates the selection bias occurring when areas of law are quite settled. If the law is unwavering in

<sup>114</sup> See Fred S. McChesney, *Doctrinal Analysis and Statistical Modeling in Law: The Case of Defective Incorporation*, 71 Wash. U. L. Q. 493 (1993), and the articles cited there.

<sup>115</sup> Carpenter, *supra* note 2, at 732.

<sup>116</sup> *Id.* at 764–68 (app. A & app. B). On close reading, not all cases cited by Carpenter in fact involve tortious interference. See note 121 *infra*.

imposing liability whenever an accused tortfeasor was wearing purple socks, soon there will be no cases involving defendants with purple socks. The very certainty in the law will ultimately cause purple-sock defendants to cease litigating, knowing it was futile, and simply settle with plaintiffs.<sup>117</sup>

The Carpenter sample offers other advantages. His article does not argue a particular point of view but instead discusses various ways that courts have addressed different issues. His sample of the American cases (over 100 in all) was explicitly designed to be geographically random, covering federal courts and those of almost all the states, rather than focusing on any particular factor producing liability. Nonetheless, Carpenter discusses positively the sorts of reasons advanced by the authors above as potentially important in a court's decision, such as possible undercompensation of plaintiff, independently tortious acts, at-will versus long-term contracts, and contract rights as property. Finally, although his sample is now dated, cases listed by Carpenter continue to be cited in tortious-interference decisions today.<sup>118</sup>

Carpenter's sample entails one difficulty. In most of the interference cases cited (103 out of 118), liability for interference was in fact imposed; most jurisdictions presented with the question of whether to establish a new tort for interference in fact did so. Therefore, what causes liability *not* to be imposed is somewhat difficult to determine from the Carpenter sample.<sup>119</sup> His sample was thus enlarged by including other cases in which there was no liability for tortious interference. Cases in the Carpenter list in which no interference liability was imposed were used to locate, via *Shepard's Citations*, new cases citing the Carpenter nonliability cases as precedent on interference liability. These cases were then read, and those in which no liability was imposed were added to the sample. Next, these new cases were themselves used, via *Shepard's*, to locate additional cases in the same fashion. Two more iterations of the same process, using the preceding round's nonliability cases, completed the sample and added 16 nonliability cases. This resulted in a final sample of 134 cases; in 103 liability was imposed, and in 31 there was no liability.

Expansion of the original Carpenter sample thus entailed oversampling of nonliability cases. Given the oversampling, the expanded sample was weighted in the regression models estimated and presented here, to guard

<sup>117</sup> See, generally, George L. Priest & Benjamin Klein, The Selection of Disputes for Litigation, 13 J. Legal Stud. 1 (1984).

<sup>118</sup> For example, *Angle v. Chicago, St. P., M. & O. Ry. Co.*, 151 U.S. 1 (1894), cited, for example, in *Chaves v. Johnson*, *supra* note 84.

<sup>119</sup> Econometrically, logit estimates of the multivariate regression models using just the original Carpenter sample frequently resulted in a particular variable predicting case outcomes (liability or nonliability) perfectly and dropping appreciable numbers of observations.

against possible bias in the estimators and correct for possible misestimation of the estimates' standard errors.<sup>120</sup> Unweighted regression results, not presented here, were not materially different from those derived through weighting, however.

### *B. Variables and Measurement*

After the selection of a case sample, the relevant variables must be identified. The dependent variable (LIABILITY) is a binary (dummy) variable coded one when liability for interference is imposed and zero when it is not. The independent variables are those that the various authors discussed in Section II identify as explaining courts' liability decisions.<sup>121</sup> The issue is whether, using the relatively simple models proposed by various authors, statistical modeling validates their hypotheses about tortious interference. The variables that the authors propose themselves are first used in simple one- or two-variable regressions, in ways that each author might have done, ignoring the variables suggested by others. Models using the variables suggested by all the authors together are then estimated. Finally, the variables indicated by the property-based model of tortious interference presented here are added.

#### 1. Independently Tortious Acts

Perlman claims that Inducer's commission of independently tortious acts explains the bulk of interference cases. In the sample here, such acts (captured by the variable INDTTORT) appear with some frequency. While inducing workers to breach their employment contracts, for example, unions

<sup>120</sup> For further discussion of the sampling problem and the weighted-sample solution, see Stata User's Guide 305–8 (Release 5, 1997). For an example of weighted-sample adjustments in multiple-regression analysis, see Theodore Eisenberg, Stefan Sundgren, & Martin T. Wells, Larger Board Size and Deceasing Firm Value in Small Firms, 48 J. Fin. Econ. 35 (1998).

<sup>121</sup> The author and a research assistant read all the cases in the sample and independently identified on a spreadsheet separately maintained by each whether the various factors identified by the efficient-breach and tortious-interference models were present or absent in the case. The criterion was not whether the case holding purported to rely on a particular factor but simply whether it appeared, as a factual matter, in the case. When a particular factor was present, that cell on the spreadsheet was coded one. Each case was discussed cell by cell to see whether there was any disagreement. Disagreements were relatively rare, but when they could not be resolved, the factor was deemed not necessarily present in the case, and that cell coded zero. Some 200 cases had to be read in order to generate the 134-case sample, as many cases identified in the Carpenter sample as tortious-interference matters were not. In addition, some cases reported the facts so sparsely that no confident judgment could be made about which factors were present in the case.

frequently commit assault, battery, and other torts.<sup>122</sup> In other cases, defamation and other torts are noted.<sup>123</sup> Still, independent torts are present in only some 20 percent of the cases where tort liability is imposed.<sup>124</sup>

## 2. Legal Barriers to Full Compensation from Breacher

In the efficient-breach model, the appropriate remedy is fully compensatory expectation damages. Both BeVier and Landes and Posner point to the inducement tort as remedying a problem of Promisee undercompensation. The source of the problem is different in the two models, however. For BeVier, the source is contract damage law, which, for example, limits a plaintiff to foreseeable but not all consequential damages. Although the present sample includes many cases presenting no damage-calculation problems (for example, when lost profits from Promisor's breach were easily calculated),<sup>125</sup> in others courts do refer to Promisee's difficulty of obtaining full compensation.<sup>126</sup> Thus, the variable LEGALDAM is coded one when a court discusses potential legal obstacles to full compensation. In addition, BeVier maintains, the existence of informational or relational invest-

<sup>122</sup> *Wyeon v. Deadly*, 65 A. 129 (Conn. 1906) (painters' union induced employees to leave a nonunion shop by threats and intimidation); *Kinloch Tel. Co. v. Local Union No. 2*, 275 F. 241 (8th Cir. 1921) (union members assaulted employees who crossed picket lines); *Dail-Overland Co. v. Willys-Overland, Inc.*, 263 F. 171 (N.D. Ohio 1920) (employees who crossed union picket lines were beaten).

<sup>123</sup> *Hollenbeck v. Ristine*, 86 N.W. 377 (Iowa 1901) (inducer caused an employer to discharge an employee by means of a libelous statement); *Kock v. Burgess*, 149 N.W. 858 (Iowa 1914) (inducer's false statement prevented second mortgage holder from redeeming his interest in real property).

<sup>124</sup> There may be some terminological confusion. Several cases recite that the Inducer behaved "fraudulently." However, the "fraud" was simply inducing Promisor to breach her contract. For example, when reduced-rate train tickets were nontransferable and so required that the one to whom the ticket was issued be the person using it, ticket "scalpers" were held to behave fraudulently in inducing breach. *Nashville, C. & St. L. Ry. Co. v. McConnell*, 82 F. 65 (M.D. Tenn. 1897); *Delaware, L. & W. Ry. Co. v. Frank*, 110 F. 689 (W.D.N.Y. 1901). But in the Perlman schema, this is not *independently* fraudulent; the fraud consisted of inducing the breach of contract. Likewise, defendants in interference cases may be accused of "conspiracy," the term referring to a third party inducing Promisor to breach her contract, not a separate tort. Landes & Posner, *supra* note 9, at 554, note several such cases.

<sup>125</sup> For example, *Heath v. American Book Co.*, 97 F. 533 (D. W.Va. 1899) (expected profits from a contract to supply the state with textbooks certain and recoverable against inducer); *Tubular Rivet & Stud Co. v. Exeter Boot & Shoe Co.*, 159 F. 824 (1st Cir. 1908) (lost profits from breach of contract to deliver production machinery recoverable against the inducer).

<sup>126</sup> For example, *Lewis v. Bloedes*, 202 F. 7 (4th Cir. 1912) (finding that damages have been incurred by plaintiff but that accurate measure of damages would be difficult); *Automobile Ins. Co. of Hartford, Conn. v. Guaranty Securities Corp.*, 240 F. 222 (S.D.N.Y. 1917) (concluding that induced breach of insurance contract entailed loss but expected profits uncertain).

ments by Promisee would increase the likelihood of a court's imposing liability for interference. Courts do in fact discuss the presence of such things, such as Promisees' investments made in salesmen who are expected to develop routes and customer lists.<sup>127</sup> Where these concerns are present, a variable INFO/REL was coded one.

However, the damage-related problems that courts discuss usually do not arise in the contexts BeVier discusses. Courts usually discuss the problems of legal damage rules not as a basis for interference liability but as to whether they should award equitable remedies.<sup>128</sup> One question to be examined with the sample data, therefore, is the extent to which BeVier's damage-based issues turn up in cases seeking only monetary relief, as opposed to ones where equitable relief is granted. When injunctive relief is granted *ex ante* against prospective interference, rather than damages *ex post* for actual interference, liability can hardly depend on inadequacy of damages.

### 3. Practical Barriers to Full Compensation from Breacher

In the Landes-Posner model, the compensation problem is practical, not legal. Although not typically noted as the reason for imposing liability, problems due to lack of jurisdiction, multiplicity of breachers and lawsuits, and the like, are often mentioned by courts.<sup>129</sup> Where so indicated in the sample cases, the practical compensation problem is captured here by the variable PRACDAM, coded one when compensation might be a concern, zero otherwise.<sup>130</sup>

<sup>127</sup> For example, *Kinney v. Scarborough Co.*, 74 S.E. 772 (Ga. 1912) (breacher employed by plaintiff as a salesman and local manager for assigned territory).

<sup>128</sup> For example, *Dail-Overland Co. v. Willys-Overland, Inc.*, 263 F. 171, 181–82 (W.D. Ohio 1919).

<sup>129</sup> For example, *Sperry & Hutchins Co. v. Louis Wela Co.*, 161 F. 219 (N.D. Ill. 1908) (action against every merchant breaching its exclusive dealings contract with plaintiff would require multiplicity of actions); *Kirby v. Union Pac. Ry. Co.*, 119 P. 1042 (Colo. 1911) (action against every holder of a nontransferable ticket who sold his ticket to the inducer would be impracticable); *Salter v. Howard*, 43 Ga. 601 (1868) (servants induced away from their employer were financially irresponsible, so recovery against Promisors unlikely); *Employing Printer's Club v. Doctor Blosser Co.*, 50 S.E. 353 (Ga. 1905) (action against each employee induced to breach employment contract impractical).

<sup>130</sup> In some cases, no practical problem of compensation was apparent. For example, *United S. Fidelity & Guaranty Co. v. Millonas*, 89 So. 732 (Ala. 1921) (employee discharged because Inducer insurance company threatened to cancel employer's policy if employee kept on); *Order of Railway Conductors v. Jones*, 239 P. 882 (Colo. 1925) (conductor's action against union for inducing employer railroad company to discharge him). In other cases, it was unclear whether compensation would be practically problematic. For example, *Doremus v. Hennesy*, 52 N.E. 924 (Ill. 1898) (the number of breached contracts totaled five, and financial position of breachers not mentioned by court).

These are the variables identified by those who would reconcile the tort of interference with the general principle of efficient breach. The competing construct, modeling interference as protecting property rights in contract performance, identifies a different set of relevant variables.

#### 4. At-Will Contracts

The tortious-interference model is particularly concerned with inducement to breach contracts that could have been assigned (transferred) by negotiation with Promisee, noting that assignability is increasingly the general rule unless the parties specify otherwise, such as by making the contract terminable at will. Thus, a variable (ATWILL) was included here to capture whether a contract was terminable at will. Under the property model of interference proposed here, if a contract is at will, the chances of liability for tortious interference should decrease.<sup>131</sup> Terminability at will is irrelevant under the efficient-breach model: there should be no liability for inducement, regardless of whether the contract was freely terminable or not.

#### 5. Notice

Finally, a variable NOTICE was included to indicate whether the defendant knew of the contract whose breach it was inducing. As discussed above, this is a factor logically of no consequence in the analyses of interference based on the efficient-breach model but a factor of critical importance in a property-based model of tortious interference. Interference is an attempt to game the system, to take now and pay later rather than negotiate now. From the property perspective, knowing interference with a contractual relationship (one not terminable at will) thus would suffice for liability.<sup>132</sup> Consequently, the presence or absence of notice should be a useful factor in distinguishing courts' underlying rationale in imposing liability for interference.

#### C. Data Summary

Table 1 lists all the variables of relevance under the various models of tortious interference, their predicted signs under each model, and the num-

<sup>131</sup> It would likewise be true that no liability would arise when a contract specifically forbade assignment, but in none of the cases analyzed here was there such a clause.

<sup>132</sup> Occasionally in the present sample, the third party lacked notice at the time of inducement but learned before breach occurred. For example, *Vaught v. Jonathan L. Pettyjohn & Co.*, 178 P. 623 (Kan. 1919) (A mortgage company filed a fraudulent lien without notice of contracts concerning transfer of land but refused to lift the lien when it learned that lien would cause Promisor to breach).

TABLE 1  
LIST OF VARIABLES FOR REGRESSION ANALYSIS

Variable (and Analyst)	Variable Name	Predicted Sign*	No. of Cases
1. Independently tortious act (Perlman)	INDTTORT	+	28
2. Legal inadequacy of damages (BeVier)	LEGALDAM	+	13
3. Informational/relational investments (BeVier)	INFO/REL	+	31
4. Practical inadequacy of damages (Landes-Posner)	PRACDAM	+	40
5. Notice (property-based model)	NOTICE	+	129
6. At-will contract (property-based model)†	ATWILL	-	22

NOTE.—Dependent variable: 1 = liability tortious interference (103 cases); 0 = no liability for interference (31 cases). Independent variables: 1 = factor present in case; 0 = factor not present in case.

\* Predicted sign refers to the predictions made by those sources who believe that the particular variable would have an effect on liability for tortious interference.

† Under the liability-rule model of efficient breach, whether a contract is terminable at will or not is irrelevant in theory. Some efficient-breach authors discuss at-will contracts, claiming that the interference cases do not distinguish at-will contracts from others. The property-based model predicts that at-will contracts in fact will be a negative factor in imputation of interference liability.

ber of times in the sample of 134 that each variable appears in a case (that is, is coded one). Several phenomena are of preliminary interest.

First, one sees that notice was present in practically all cases—more frequently (129 cases) than interference liability was found (103 cases), in fact. So, knowledge alone was not sufficient for interference liability. It remains to be seen whether it nonetheless is an influential factor in imposition of liability for inducement.

The sample reveals other phenomena not shown in Table 1. As concerns efficient breach generally, in only 60 cases from the sample of 134 is the notion of efficient breach even applicable. That is, most of the cases are not about breach to allocate resources to higher-valuing, competing users. Rather, they concern merely redistributive attempts to force revision of the existing contract. A union that induces workers to strike in violation of their contracts, for example, is not interested in moving resources to higher-valued uses but in extracting gains from Promisee in the resources' current use.<sup>133</sup>

The sample of cases here reveals another problem with the efficient-breach objections to tortious interference: in most cases, neither breaching Promisor nor breaching Inducer is in fact offering to compensate Promisee.

<sup>133</sup> For example, *Hitchman Coal v. Mitchell*, *supra* note 85; *Kinloch Telephone Co. v. Local Union No. 2*, 275 F. 141 (8th Cir. 1921).

Almost never did Inducer explicitly stand ready to compensate the Promisee directly (or indirectly, through the Promisor).<sup>134</sup> Typically, Inducers clearly intended that no payment at all be made to Promisee, that is, to take without compensation. For example, Landes and Posner's concerns that breacher compensation was unlikely as a practical matter (40 sample cases) often appear justified.<sup>135</sup> There is nothing efficient about breach without compensation.

The sample is also revealing with respect to claims that the interference tort is anticompetitive. Myers, for example, is particularly concerned about imposition of liability in efficient-breach situations when contracts are at will, arguing that interference liability prevents competition for otherwise available resources. But the sample here indicates that this situation arises rarely if ever in tortious-interference law. In the 134 cases, only 60 of which involved competition between competing claimants for valuable resources, the contracts were terminable at will only twice. And in neither case was liability for interference imposed.<sup>136</sup>

It is especially ironic, given Myers's fears that the tortious-interference cause of action collides with competition goals, that many cases of interference liability seem actually to further the goal of competition. Several early interference cases imposed liability on Inducer-discounters who persuaded Promisor-retailers bound by resale price maintenance contracts to breach their contracts and sell to the discounter. One plaintiff in such cases was Dr. Miles Medical Company,<sup>137</sup> and one defendant was John D. Park & Sons.<sup>138</sup> When the two parties later met in the Supreme Court on Dr. Miles's tortious-interference claim, John D. Park & Sons used the antitrust laws to fend off the interference claims and was awarded treble compensation on

<sup>134</sup> For one exception, notable for its rarity, see *Westinghouse Elec. & Mfg. Co. v. Diamond State Fibre Co.*, 268 F. 121 (D. Del. 1920).

<sup>135</sup> In none of these cases where Promisor was effectively judgment proof was Inducer offering to breach efficiently by taking the contract right and then paying for it. Rather, Inducer claimed that it was not liable for anything. The leading case cited by courts unwilling to impute tort liability for interference is *Chambers v. Baldwin*, a paradigm "efficient-breach" situation. 15 S.W. 57 (Ky. 1891). Promisor, who had breached a contract for sale of tobacco in order to sell at a higher price to Inducer, was insolvent. Relying on the dissenting rather than majority opinion of *Lumley v. Gye*, the court declined to impose any tort liability on Inducer, leaving Promisee completely uncompensated. While *Chambers* is a classic "competition for resources" case, it is hardly one of "efficient breach," since Promisee was not compensated at all.

<sup>136</sup> *Passaic Print Works v. Ely Walker Dry-Goods Co.*, 105 F. 163 (8th Cir. 1900); *Katz v. Kapper*, 7 Cal. App. 2d 1 (1935).

<sup>137</sup> *Dr. Miles Medical Co. v. Goldthwaite*, 133 F. 794 (D. Mass. 1904); *Dr. Miles Medical Co. v. Jaynes Drug Co.*, 149 F. 838 (D. Mass. 1906).

<sup>138</sup> *Hartman v. John D. Park & Sons*, 145 F. 358 (E.D. Ky. 1906), rev'd on other grounds, 153 F. 24 (6th Cir. 1907).



its antitrust counterclaims.<sup>139</sup> Very few cases of resale price maintenance appear to entail anticompetitive conduct; evidence indicates that such vertical price clauses are economically beneficial.<sup>140</sup> Tortious interference provided a cause of action for Promisees to enforce these generally benign contracts against Inducers—until antitrust law trumped the interference tort.

In the early interference cases as well, tort liability was also assessed against boycotters and price fixers. Conspiracies are fragile prisoner's dilemmas; members of the cartel cheat on the agreement, all the while hoping that others will continue to adhere to it. In the cases sampled here, one means of enforcing otherwise fragile horizontal conspiracies entailed the conspirators enlisting others (for example, input suppliers) to breach their contracts with the recalcitrant firm when that firm refused to join or maintain the conspiracy.<sup>141</sup> Liability for inducing breach against firms attempting to buck the cartel provided a way of furthering, not defeating, the fundamental goals of antitrust.<sup>142</sup>

In short, the sample cases suggest that denigration of tortious interference because it hinders efficient breach and/or competition is unwarranted. Relatively few cases arise in a true efficient-breach context, that is, one in which Inducer and Promisee are competing as to who is the higher-valuing user of Promisor's resources. And in those few cases, there is often no way to know whether the breach is efficient or not, since defendants (Inducers and Promisors) are not offering to compensate Promisees. Inducers may hope

<sup>139</sup> *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

<sup>140</sup> Lester G. Telser, *Why Should Manufacturers Want Fair Trade?* 3 *J. Law & Econ.* 86 (1960); Pauline Ippolito, *Resale Price Maintenance: Empirical Evidence from Litigation*, 34 *J. Law & Econ.* 263 (1991).

<sup>141</sup> *Doremus v. Hennessy*, 52 N.E. 924 (Ill. 1898) (laundry association forced other laundries to break service contracts with nonmember); *Employing Printers' Club v. Doctor Blosser Co.*, *supra* note 129, at 353 (trade association sought to force membership on printing company by ordering its workers to strike); *Jackson v. Stanfield*, 37 N.E. 14 (Ind. 1894) (retail lumber association threatened a lumber wholesaler with fines and induced the wholesaler not to sell to a nonmember retailer).

<sup>142</sup> The cases also demonstrate courts' ability to distinguish efficient, procompetitive breaches from those that are not. In *Dunshee v. Standard Oil Co.*, 126 N.W. 342 (Iowa 1910), for example, Standard Oil (which had only sold wholesale) induced the home-delivery customers of Crystal Oil to breach their contracts with Crystal Oil and purchase at retail from Standard. Crystal soon went bankrupt. Crystal brought an action for interference, and Standard was held liable. One might think at first that the tort liability ran counter to competition in the market. But the court notes that (a) Standard went into the business only when Crystal, which had bought its oil at wholesale from Standard, became embroiled in a "controversy" over the purchases from Standard; (b) Standard only solicited Crystal's customers, no one else's; and (c) as soon as Crystal went out of business, Standard itself left the market, returning to wholesale sales only. Therefore, the result of Standard's tortious interference, apparently caused by a billing dispute with Crystal, was a reduction in the number of home oil sellers.

TABLE 2  
WEIGHTED-SAMPLE REGRESSION RESULTS, EFFICIENT-BREACH MODELS  
(Various Law Journal Authors)

Independent Variable(s)	(1)	(2a)	(2b)	(3)	(4)
INDTTORT	1.096** (1.68)	...	...	...	1.12** (1.67)
LEGALDAM	...	1.121 (1.07)	.711 (.64)	...	...
INFO/REL	...	.717 (1.26)	.547 (.91)	...	...
PRACDAM	...	...	...	1.29** (2.24)	1.30** (2.22)
DAMAGES	...	...	-1.134** (1.98)	...	...
$\chi^2$	2.82**	2.39	8.84**	5.00**	6.41**
Pseudo- $R^2$	.021	.024	.055	.037	.059

NOTE.—Absolute  $z$ -statistics are in parentheses; the estimated constant term is not reported. All tests are one-tailed.  $N = 134$ .

\*\* Significant at the .05 level.

to use problems like jurisdiction, insolvency, or litigation costs to avoid even the liability-rule compensation after the fact that the efficient-breach model demands. As for competition policy more generally, tortious interference seems to have functioned as a common-law device to enforce valuable contracts (like resale price maintenance) and discourage deleterious ones (boycotts and price fixing). If the *Dr. Miles* case is any indication, tortious-interference law is at worst less destructive of competition than is antitrust law.

#### *D. Econometric Results*

##### 1. Efficient-Breach Models

It remains to be seen whether the factors identified, singly or together, can predict interference liability. Each author attempting to reconcile interference with efficient breach, as discussed in Section II, posits a model in which interference liability depends on one or two factors. With the binary dependent variable LIABILTY, logit weighted-sample estimation is used to test the importance of the factors identified in the various models. The results are shown in Table 2.

*Independent Torts.* In regression (1) of Table 2, LIABILTY is estimated as a function of INDTTORT, the variable on which Perlman fo-

cused. As shown, that independent variable is significant at the 5 percent level in a one-tailed test. Modeled solely as a function of that one variable, then, liability for interference does in fact seem to depend on whether an independent tort exists. The pseudo- $R^2$  is low (.021), however, suggesting that other variables play a role in the determination of liability for interference. When those other variables are identified and included in the model estimated, the significance of INDTORT might well diminish or disappear.

*Legal Inadequacy of Damages.* BeVier's model identifies inadequacy of legal damage rules (LEGALDAM) and in particular the undercompensation of Promisees making informational or relational investments (INFO/REL) as the basis for interference liability. But as shown in regression (2a) of Table 2, LEGALDAM and INFO/REL have no significant effect on the probability of interference liability being imposed.<sup>143</sup>

Because the BeVier model is based on inadequacy of legal damages, it is interesting to see how the estimates might be affected by inclusion of a variable to differentiate cases seeking damages from those seeking equitable relief, where inadequacy of damages would presumably not be a problem. Regression (2b) adds a variable, DAMAGES, coded one when damages are sought and zero when either injunctive relief or specific performance was sought. The variable DAMAGES should be positive if inadequacy of damages is a factor in interference liability. But regression (2b) shows that just the opposite is true: DAMAGES is significantly negative. As before, LEGALDAM and INFO/REL are insignificant as predictors of LIABILITY.<sup>144</sup> The conclusion is strengthened that inadequacy of legal damages in a model of efficient breach does not explain tortious interference.

*Practical Inadequacy of Damages.* The Landes-Posner model of tortious interference sees the tort as facilitating full compensation of Promisees, without which breach by definition cannot be efficient. They focus on practical rather than doctrinal impediments to full compensation, such as Promisor insolvency. The Landes-Posner hypothesis appears to hold some explanatory power. As regression (3) in Table 2 shows, the PRACDAM variable measuring the presence of practical impediments to fully compensatory damages is a significant predictor of LIABILITY.

In short, in the relatively simple models based on efficient breach, the

<sup>143</sup> Neither LEGALDAM nor INFO/REL are significant when the LIABILITY model is estimated using only one variable or the other by itself. LEGALDAM and INFO/REL are joint factors in only eight of the 134 sample cases.

<sup>144</sup> Alternatively, one can eliminate the cases involving equitable relief and reestimate the model estimated in regression (2b). When that is done, leaving 86 sample cases involving just damages, LEGALDAM and INFO/REL are still insignificant.

presence of individual torts and practical obstacles of full compensation to Promisee appears to influence imposition of liability for interference. As regression (4) of Table 2 shows, this conclusion holds when both INDTTORT and PRACDAM are combined in a single model.<sup>145</sup> It remains to be seen, however, how inclusion of variables dictated by the property-based model of tortious interference might affect this conclusion.

## 2. Tortious-Interference Model

In the model of tortious interference developed here, the factors identified by those working in the efficient-breach paradigm do not matter. The important considerations are whether Inducer knew of the contract and whether Promisor could terminate the contract at will.<sup>146</sup> Those two factors are captured by the variables NOTICE and ATWILL used in the regressions shown in Table 3.<sup>147</sup> Regression (1) in the table includes these two variables alone as predictors of LIABILITY. As regression (1) shows, the basic tortious interference does relatively well in explaining liability for inducement. Both variables are significant with the predicted signs (the coefficient for NOTICE is greater), and the pseudo- $R^2$  (.095) is higher than in any of the models estimated in Table 2.

Regression (2) in Table 3 uses the same two tortious-interference variables, along with a new variable, BELOW, which measures whether a lower court had already imposed liability for interference. Several empirical studies have found that, all other things being equal, an appeals court is more likely to find liability if a lower court has already so ruled and less likely to impose liability if the lower court has not.<sup>148</sup> The case sample here included a few trial court decisions but was mostly composed of intermedi-

<sup>145</sup> The coefficients and  $z$ -statistics of the two variables in regression (4) are almost identical to their magnitudes in regressions (1) and (3), in which each variable was used singly. LIABILITY was also estimated as a function of all four variables suggested by the various authors discussed in Section II: INDTTORT, LEGALDAM, INFO/REL, and PRACDAM. As in regression (4), only INDTTORT and PRACDAM showed any significant effect on LIABILITY.

<sup>146</sup> Alternatively, the contract might contain a liquidated damages clause, effectively allowing Promisor to buy out of her obligation. The sample here included no cases involving liquidated damages, however.

<sup>147</sup> The BeVier model of interference as remedying compensatory inadequacies for breach of contract also assumes that Inducers will have notice of the first contract, since in this model the third party interferes in order to free ride on informational/relational investments. But for BeVier, it is the presence of those investments, not the knowing inducement, that explains whether liability will be imposed. When the BeVier model (regression (2a) in Table 2) is run with the NOTICE variable also included, the inferences about the insignificance of LEGALDAM and INFO/REL described earlier are unchanged.

<sup>148</sup> For discussion of this so-called affirmed effect, see McChesney, *supra* note 114, at 522 & n.104.

TABLE 3  
WEIGHTED-SAMPLE REGRESSION RESULTS,  
TORTIOUS-INTERFERENCE MODEL

Independent Variable(s)	(1)	(2)	(3)
NOTICE	2.83* (2.51)	3.16* (3.75)	3.75* (4.04)
ATWILL	-1.35* (2.69)	-1.87* (3.06)	-1.61* (2.46)
BELOW	...	1.89* (2.82)	1.84* (2.76)
INDTTORT	...	...	.826 (1.24)
LEGALDAM	...	...	.847 (.639)
INFO/REL	...	...	.504 (.882)
PRACDAM	...	...	1.26** (1.99)
$\chi^2$	13.21*	21.13*	28.01*
Pseudo- $R^2$	.095	.174	.229

NOTE.—Absolute  $z$ -statistics are in parentheses; the estimated constant term is not reported. All tests are one-tailed.  $N = 134$ .

\* Significant at the .01 level.

\*\* Significant at the .05 level.

ate appellate decisions and supreme court opinions (including some from the U.S. Supreme Court). When an appellate court affirmed a judgment below, the variable BELOW was coded one. BELOW was then added to the simple models reported in the prior subsection, to see whether results and thus inferences changed importantly.

The results in regression (2) parallel those of regression (1). All three variables are significant, with the expected signs. Inducer knowledge of the existing contract increases the likelihood of liability (and again has the highest coefficient and  $z$ -value). Promisor having an at-will contract reduces that likelihood, and prior determination of liability in a lower court increases the chances of liability. The pseudo- $R^2$  is .174, much better than those obtained in the regressions reported in Table 2 but still suggesting that other factors go into determinations of liability for tortious interference.<sup>149</sup>

<sup>149</sup> As noted above, the cases and commentators routinely invoke "malice" as a requirement for tortious interference. Most courts, however, define "malice" as simply notice or knowledge of the existing contract right, of the sort already tested by using the NOTICE variable. But in a few cases (six in the present sample) "malice" is present in its nonlegal sense: Inducer's interdependent utility function creating a genuine desire to harm the plaintiff. The classic case (not in this sample) is *Tuttle v. Buck*, 107 Minn. 145, 119 N.W. 946 (1909), where defendant, the town banker, set up a barber to destroy plaintiff-barber's busi-

Could some of these variables be those identified by the efficient-breach school? Indeed, this is the truly interesting question: in a model that includes the variables identified by both the efficient-breach and tortious-interference models, which variables are useful in explaining liability for tortious interference? Regression (3) in Table 3 addresses that question, combining the variables from regression (2) with those used in Table 2 (INDTTORT, LEGALDAM, INFO/REL, and PRACDAM). As shown, the important tortious-interference variables (NOTICE and ATWILL) remain significant (with NOTICE again having the largest coefficient). As before, neither LEGALDAM nor INFO/REL is significant; now, in addition, INDDTTORT ceases to be significant. That is, in a model that includes both the efficient-breach and tortious-interference variables, the presence of a separate (noninterference) tort has no significant effect on liability for interference. Of the efficient-breach variables, only the Landes-Posner variable measuring practical handicaps to Promisee's full compensation continues to exert a significant influence on liability for interference.

#### *E. Inferences*

Even before regressions are run, there is reason to doubt the claims that the interference tort exists to complement a more fundamental model of efficient breach. In the sample of cases here, the efficient-breach circumstances (resources moving to higher-valuing users) are present in only a minority (60) of the cases. The fact that in 103 instances of interference liability there were independent torts only 28 times, potential legal impediments to full compensation only 44 times, and practical obstacles to full compensation just 40 times suggests further that tortious interference is not just an adjunct to other, more fundamental theories of liability.

However, the tortious-interference model does not predict perfectly either. Type I error is relatively unimportant. There are no cases in which liability was imposed when there was no notice of the contract and it was terminable at will; in only three cases was there liability when Inducer had notice but the contract was terminable at will. (As noted earlier, liability was never imposed when the contract was terminable at will in an efficient-breach setting, when Inducer was a potentially higher-valuing user.) Type

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ness by soliciting his customers. The presence of true malice made acts, otherwise seemingly competitive, actionable. For a similar case from the present sample, see *Dunshee v. Standard Oil Co.*, *supra* note 142 (defendant wholesaler entered retail oil business until a retailer and former customer with whom defendant had a dispute was forced to close its business; defendant then quit the retail market itself). In a regression not reported here, a variable MALICE was included, coded one for the six cases in which actual malice (as opposed to mere notice) was present. The variable MALICE had no significant effect on LIABILITY.

II error is a bigger problem: in 16 cases no liability was imposed even though Inducer had notice of the contract and it was not terminable at will.

Thus, there appear to be no certainties associated with the interference tort. The regression models reveal that liability is a matter of probabilities, with certain factors increasing the likelihood of liability being imposed. The variables identified by those trying to reconcile interference with efficient breach do not for the most part seem to have an effect. The exception is practical impediments to full Promisee compensation that Landes and Posner discuss, which exert a significant, positive influence on the probability of liability. The most impressive model estimated used the Landes-Posner variable along with the two identified by the tortious-interference model (whether Inducer had notice and whether the contract was terminable at will), plus a variable to measure the effect of prior judgments in the same case. These factors were each seen to increase the probability of interference liability, all other things being equal.

Interference, then, depends on various factors, not just a single one. As each factor is present or absent, the probability of liability adjusts at the margin. However, the bigger effect clearly comes from those variables identified by the tortious-interference model.

## VI. CONCLUSION

Justifying tortious interference by “inventing around” it so as to preserve the efficient-breach model seems procrustean, even wrong. Efficient-breach rules (breach now, pay later) may make sense in certain two-party circumstances. But those are not the circumstances presented by the three-party tortious-interference case. There are important distinctions between the two-party and three-party models of efficient breach, distinctions that should affect conclusions about the efficiency of “breach now, pay later” rules in the interference context. The model presented in Section III argues that tortious interference, not “efficient” breach, actually is efficient—or at least should be presumed so in the absence of empirical evidence to the contrary.

That is a normative conclusion, albeit one based on certain assumptions about relative transaction costs. Positively, Section IV indicated that most of the legal rules relevant to inducement are consistent with the property-based model of interference presented here. Some of those rules are also predicted by, or at least consistent with, a contract-based, efficient-breach model. But some are not. Overall, Section IV claimed, the tortious-interference model reflects the actual state of the law better than does the efficient-breach model. Positively, the econometric evidence of Section V also suggests that the interference model better identifies factors of significant effect

when tortious inducement is litigated. Empirically, Inducer notice is particularly important. But even the property-based interference model falls short in some respects. In particular, there are many “core” cases when liability should be imposed but is not.

The introduction asked why there is so little agreement on the tort some 150 years after *Lumley v. Guy*. The foregoing suggests at least two reasons.<sup>150</sup> First, commentators’ inability to make real progress in understanding tortious-interference cases may be due to methodological shortcomings. The standard mode of legal rhetoric, selecting a handful of cases or other commentaries to support one’s claims, is nowhere better displayed than in several commentators’ discussion of tortious interference. But readers not of the same persuasion find the claims less than conclusive.

Further, the commentaries are disappointing in failing to address one another’s claims. The typical article will cite other analysts and recite their claims about what tortious interference is (or should be). Little attempt is made to show whether the previous analyses are right or wrong or whether those other analyses are inconsistent with or complementary to whatever claims the author is propounding. The general failure to address one another’s claims may reflect unawareness of how empirical tools can help resolve such complicated issues.<sup>151</sup> Taken together, previous inquiries have offered many factors that supposedly explain tortious interference with contract. Since several of these are present in different combinations in various cases, there is no way to decide which of them significantly influence the decisions without resort to more probing statistical techniques than have been brought to bear on the problem heretofore.

<sup>150</sup> A third might also be mentioned. Courts often seem confused as to when a true problem of tortious interference with contract really exists. One is struck by the numerous cases decided or cited as tortious interference that have nothing to do with the core notion of Inducer enticing Promisor to abandon her obligations to Promisee. Perhaps the most common example is an agent’s breach of duty to the principal by advancing her (the agent’s) interests at the expense of her principal, most commonly in competing with the principal by trying to take away his customers. The fact that this interferes with the principal’s contracts is totally irrelevant since the agent had already pledged contractually to advance only his principal’s interests, not his own. For example, in *Adler, Barish, Daniels, Levin, & Creskoff v. Epstein*, 393 A.2d 1175 (Pa. 1969), what the court called interference with contractual relations was rather obviously a breach of ordinary agency principles. A lawyer preparing to leave his firm used information gained while at the firm to solicit the firm’s clients. The court in fact referred to violation of general principles of agency in enjoining the departing lawyer from taking clients but treated the matter as one of tortious interference. Appropriately pleaded, a suit for breach of the agency duty accomplishes complete disgorgement of agent’s profits, to which an additional count for tortious interference would add nothing.

<sup>151</sup> But see Woodward, *supra* note 7, at 1142 n.149: “Academic freedom may permit academics to be unbiased, but our academic insulation and our tendency to eschew empirical studies may seriously undermine our ability to predict actual human behavior.”