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Spite: Legal and Social Implications

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SPITE: LEGAL AND SOCIAL IMPLICATIONS

by
*Jeffrey L. Harrison**

Spite is not a simple concept. Spiteful actions may be motivated by a desire to harm others as a source of the actor's satisfaction. They may also be a reaction to a personal sense of injustice. Finally, spite-like actions are consistent with simply righting a wrong. This Article makes the case that spite, in its worst form, is comparably to theft. It is a taking of someone's sense of well-being without consent. It also claims that the purchase of positional goods is ultimately spite driven. It canvasses tort law, contracts, tax law, trademark, and criminal law in an effort to assess the reaction of the law to spite.

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I. INTRODUCTION

You are driving in your car on a four-lane road. Maybe the windows are down and the radio is up high. You pull into the outside lane to pass a slower car and just as you are side by side with that car, someone drives up behind you, way too close. You are annoyed and you ease your foot off the gas or maybe even tap the brake ever so slightly. The tailgating driver has to brake to avoid running into you. Why did you do that? Spite is the most likely answer. Spite is “a . . . desire to harm, annoy, frustrate, or humiliate another person.”¹ The key word here is “desire” as in having a preference. In effect, the spiteful person enjoys a boost in utility or some other measure of pleasure from having a negative impact on others.²

The braking driver is but one example of spiteful behavior. Spite actually explains a great deal of behavior and law. In varying degrees, examples are found in tax,³ tort,⁴ contracts,⁵ criminal law,⁶ and property.⁷ Arguably even political actions with broad implications can be motivated by spite.⁸ This Article is about spite and focuses on how the law reacts to spite. Section II begins by defining spite more specifically and then examines the explanation for spiteful behavior. It makes the case that spiteful actions are a special kind of theft—they involve taking from others without consent. On the other hand, like the detractors in the

¹ WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1840 (1996).

² In more economic terms the parties have interdependent utility functions. As the subject of spiteful behavior had a decrease in utility, the utility of the spiteful person increases.

³ John Cullis et al., *'Spite Effects' in Tax Evasion Experiments*, 41 J. SOCIO. ECON. 418, 418 (2012).

⁴ RICHARD A. POSNER, *THE ECONOMIC ANALYSIS OF LAW* 207 (6th ed. 2003).

⁵ In contract law, duress occurs when there is an improper threat. Under the Restatement (Second) of Contracts, one example of improper threat is when “the threatened act would harm the recipient and would not significantly benefit the party making the threat.” RESTATEMENT (SECOND) OF CONTRACTS § 176 (2)(a) (AM. LAW INST. 1979).

⁶ One of the standard justifications for punishment in the criminal law context is retribution. Punishment, however, is expensive, and in the case of retribution, the benefits to those meting it out is merely psychic.

⁷ People buy what are referred to as “positional goods” as a way of raising their status relative to others. Thus, part of the motivation for buying positional or status goods is the demotion of the rank or status of others. *See also* Larissa Katz, *Spite and Extortion: A Jurisprudential Principle of Abuse of Property*, 122 YALE L.J. 1444, 1446–47 (2013).

⁸ At least one theory is that the actions of President Trump are motivated by a spiteful reaction to President Obama. Paul Krugman, *Trump Gratuitously Rejects the Paris Climate Accord*, N.Y. TIMES (June 1, 2017), https://www.nytimes.com/2017/06/01/opinion/trump-gratuitously-rejects-the-paris-climate-accord.html?_r=0; Bill Palmer, *Donald Trump Damaged Himself Badly Today by Trying to Spite President Obama*, (June 1, 2017), <http://www.palmerreport.com/opinion/harmed-trump-obama/3227/>.

well-known ultimatum game,⁹ spiteful-like behavior may be the product of justice-seeking.¹⁰ In this sense, perhaps actions that appear spiteful are actually not self-regarding but have deontological significance in that the detractor acts out of sense of duty. Consequently, a distinction is made between spite as commonly understood and actions that are similar but based on principle. Section II also explains why the purchase of “positional goods”¹¹ is ultimately spiteful. Section III is a survey of the law of spite. The question is whether law takes a consistent view of spite and, if it does not, if there is some underlying principle that explains the inconsistency. More specifically, are spiteful people treated like thieves? This research has a quantitative and a qualitative component. The conclusion is that criminal and tort law are, to some extent, designed to decrease spite. Other areas of law are largely neutral, except for trademark, which actually subsidizes spite. Generally, the law is not nuanced sufficiently to distinguish self-regarding spite from spitefulness that may be socially beneficial.

A final note is in order. Much of what is printed in law reviews is advocacy. The author has a point of view or a position to advance. There are questions about whether advocacy or “normative scholarship” actually is scholarship.¹² In either case it can be valuable. The analysis that follows reflects a different sort of effort. It begins with no agenda nor any preconception of where the research would go. The goal is to achieve an understanding of these rarely discussed matters and to assess the position of American law.

II. FOCUSING ON SPITE

A. *What is Spite?*

Spiteful actions are characterized by two necessary conditions. First, spite comes at a cost to the spiteful person. It is important to note that the cost is material and not, on balance, psychic. In fact, the net expected *psychic* benefit is positive; otherwise, the spiteful actions, barring irrationality, would not occur. They do occur as long as the utility derived

⁹ See *infra* text accompanying notes 29–32.

¹⁰ See *infra* text accompanying notes 31–33. Briefly, the game involves two players, one of whom is the controller. The controller is given a sum of money, which he or she may keep as long as he or she gets the permission of the other player. This means the controller can offer the other player none or some portion of the sum. There is only one try and, if the other player accepts the offer, both parties keep their shares. If the other player declines, both players leave empty-handed.

¹¹ Positional goods are “those things whose value depends relatively strongly on how they compare with things owned by others.” Robert Frank, *The Demand for Unobservable and Other Nonpositional Goods*, 75 AM. ECON. REV. 101, 101 (1985).

¹² See Robin West, *The Contested Value of Normative Legal Scholarship*, 66 J. LEGAL EDUC. 6, 9 (2016).

from the perceived harm to someone else is greater than the disutility of the spiteful action. For example, in the case of the brake tapper described at the outset, the action delays the actor's progress, but the hope is that the inconvenience is more than offset by the harm to the tailgater. Thus, it is probably incorrect to view spite as irrational, although the outcome may appear that way if the spiteful person makes an incorrect judgment.¹³ Second, the pleasure or utility derived from spite is exclusively a function of the expected disutility, pain, or discomfort of the target of the spiteful conduct. This does not mean that spite is the only reason for the spiteful person's actions. For example, in the conventional case of what are called "spite fences," the builder of the fence may actually enjoy the privacy the fence affords without regard for the impact on others. In addition, there may be satisfaction from knowing a disliked neighbor will not be able to enjoy the view of forest or beach. The key is that at least part of the motivation for the action is based on interdependent utility functions.

Spite is distinguishable from other actions that harm others.¹⁴ For example, in negligence, the harm is typically the result of one party attempting to save money by not taking preventive measures. The money saver in the case of negligence would just as soon desire that the harmed party not be harmed. They derive no independent pleasure from the harm of another. In contract law, the harm to a non-breaching party is a direct result of the benefits the breaching party seeks. Again, though, a contract breaching party causes harm but is not motivated by a desire to cause harm. The spiteful person's satisfaction, on the other hand, occurs because someone is worse off.

These factors also explain the difference between spite and *schadenfreude*. They are similar in that they involve deriving pleasure from the misfortune of others. They differ in an important way that has implications for the law. For the most part, in the case of *schadenfreude*, the pleasure is a windfall. The person finding pleasure in the bad luck or poor decision making of another may not play any role in bringing the events about that lead to the unpleasantness.

It also makes sense to distinguish spite from hate and envy. Envy does not necessarily lead to action designed to harm the subject of that envy. Envy can result in spiteful actions, but this is most likely to occur when accompanied by a sense of injustice.¹⁵ Much the same is true of hate. Extreme dislike of someone or something does not mean taking actions to make the subject of that hate worse off. Hate crimes, on the

¹³ This would occur if the target of the spiteful action actually did not care.

¹⁴ A variety of definitions are found in David K. Marcus et al., *The Psychology of Spite and the Measurement of Spitefulness*, 26 PSYCHOL. ASSESSMENT 1, 2 (2014).

¹⁵ Rawls classifies envy as a non-moral feeling that is not to be confused with resentment, which is a moral feeling in that it is driven by a sense of injustice. JOHN RAWLS, *A THEORY OF JUSTICE* 533 (1971).

other hand, present a special case and are spiteful because they join hate with actual action. In fact, they might be more accurately labeled as “spite crimes.” In a sense, spiteful actions can be regarded as mini hate crimes; they do not reveal hatred for a group or a class of people, but the willingness to make oneself materially worse off in order to make someone else worse off represents the same dynamic as in ordinary hate crimes.

The most difficult distinction is between spite and malice. In fact, the distinction may be impossible because to some they are synonyms. Nevertheless psychologists, sociologists, and courts¹⁶ seem to have a separate category for spite. It is true that malicious people derive pleasure from harming others and this is shared by those who act spitefully. Spite, though, implies a more direct and perhaps intimate target. The spiteful person does not derive pleasure from harming just anyone. Instead, when people act out of spite they are more likely to have a specific target in mind and that target is someone or some group that must be “put in their place.” To some extent law gets to this distinction by distinguishing actual malice and legal malice. Actual malice denotes spite or ill will while legal malice is more in line with reckless disregard.¹⁷

It is important not to confuse spite with retaliation. For example, there are many cases dealing with retaliatory discharge. People are terminated for reasons that seem unfair. Nevertheless, retaliation is often *not* to the detriment of those in power. An employer who fires an employee for taking time off for jury duty may desire to discourage others from doing the same. In fact, although the employer may lose the productive worker, the net outcome may be perceived to result in net *material* gain. Of course, some terminations do appear to be spiteful or vindictive. In an important case dealing with a terminable-at-will employee, *Monge v. Beebe*,¹⁸ a female employee was terminated after repeatedly declining social advances of her supervisor. There the act of terminating a productive employee seems motivated by spite rather than by an effort to affect the behavior of the work force.

Spite as defined here is fundamentally utilitarian and, as noted, depends on interdependent utility functions. One person hurts another because it makes the first person feel better off. It is possible, though, that what appears to be spiteful actions are not utilitarian at all. This idea

¹⁶ Courts have held that a showing of legal malice does not require ill-will or spite. *See, e.g.*, *Macquarie Bank Ltd. v. Knickel*, 793 F.3d 926, 940 (8th Cir. 2015); *Remmick v. Mills*, 165 N.W.2d 61, 71 (N.D. 1968).

¹⁷ *Bocek v. JGA Assoc., LLC*, No 1:11-cv-0546, 2016 WL 1161401 at *13 (E.D. Va. Mar. 23, 2016); *Molina v. Jiffy Lube Intern., Inc.* No. 07-22644-CIV 2008, WL 4541025 at *7 (S.D. Fla. Oct. 8, 2008); *Preyer v. Dartmouth Coll.*, 968 F. Supp. 20, 26 (D. N.H. 1997).

¹⁸ *Monge v. Beebe Rubber Co.*, 316 A.2d 549, 551 (N.H. 1974).

will be returned to later,¹⁹ but consider the brake tapping driver, the detractor from the ultimatum game, and punishment in the context of criminal law. All three can have a utilitarian basis—pleasure is derived from harm to another. On the other hand, it is possible for the motivation to be more rules-driven or corrective,²⁰ rather than utility maximizing, and the party responding gets no satisfaction but feels duty-bound to right the wrong. It is impossible to know when actions that seem spiteful are actually consistent with the self-regarding motivations or the perhaps a more benign sense of moral obligation.

B. “Spite” as Justice Seeking

Spite has a bad name. The idea of harming others is hard to support from any perspective. In fact, one author labels spite “altruism’s evil twin.”²¹ The idea is that altruism and spite are both motivated by the desire to increase one’s own utility. Altruism means doing it by perceiving oneself as having made others better off. Spite accomplishes that greater sense of well-being by seeming to make others worse off. This may put spite in an unfair negative light. Spite is often, and maybe most of the time, motivated by a sense of unfairness or injustice.²² Whether that sense is legitimate or not is another question.

The implications of a sense of unfairness are illustrated by “equity theory” which explains why people act differently toward different distributive outcomes.²³ Different distributions will be seen as fair as long as the following equation holds:

$$\text{outcomes of person A/inputs of person A} = \text{outcomes of person B/inputs of person B}$$

The theory allows for different distributive outcomes to be viewed as fair as long as those favored or disfavored feel the proportions of outcomes to inputs are the same. On the other hand, in a typical case, person B may feel his or her ratio of outcomes to inputs is 1/3 while that of person A is 1/2. There are a number of ways to return to what is

¹⁹ See *infra* text accompanying notes 33–38.

²⁰ This is true in the case of retribution as a purpose of punishment. See *infra* text accompanying notes 33–38.

²¹ W.L. Vickery et al., *Spite: Altruism’s Evil Twin*, 102 OIKOS 413, 413 (2003).

²² For example, tax evasion efforts are more pronounced when there is the perception that the system is unfair. See Cullis, et al. *supra* note 3, at 423.

²³ Equity theory seems to have originated by J. Stacy Adams. See J. Stacy Adams, *Inequity in Social Exchange*, in 2 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 267, 268 (Leonard Berkowitz ed., 1965); J. Stacy Adams, *Toward an Understanding of Inequity*, 67 J. ABNORMAL SOC. PSYCHOL. 422, 422 (1963); see also Elaine Walster et al., *New Directions in Equity Research*, in 9 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 1, 1 (Leonard Berkowitz & Elaine Walster eds., 1976); Peter Shabad, *Giving the Devil His Due: Spite and the Struggle for Individual Dignity*, 17 PSYCHOANALYTICAL PSYCHOL. 690, 691 (2000).

perceived to be an equitable outcome.²⁴ For example, in an employment situation, B could reduce his or her efforts.²⁵ Alternatively, B could take steps to reduce the outcomes of person A. Either one could make the sides of the equation equal.

Perhaps the best example of spite in operation is found in behavioral economics and experiments involving the ultimatum game. In this two-party game a controller is appointed and a sum of money allocated to the parties.²⁶ The parties cannot communicate. It is an ultimatum game because the controller (A) gets *one* opportunity to offer his or her counterpart (B) a portion of the money. If he or she accepts the offer, the parties keep the money. If he or she rejects the offer, neither party keeps any portion of the money. The question is how much A should offer. Traditionally, economic theory would indicate that if both parties are rational, the controller should offer nothing or a very small share.²⁷ The idea is that B is better off²⁸ with even a small share and to reject the offer would mean being worse off.

Repeated experiments with the game indicate that this is not the usual outcome.²⁹ For example, suppose the controller is given \$10. In

²⁴ See Paul D. Sweeny, *Distributive Justice and Pay Satisfaction: A Field Test of an Equity Theory Prediction*, 4 J. BUS. PSYCHOL. 329, 335 (1990).

²⁵ See J. Stacy Adams & Sara Freedman, *Equity Theory Revisited: Comments and Annotated Bibliography*, in 9 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 43, 47 (Leonard Berkowitz & Elaine Walster eds., 1976); J. Stacy Adams & William B. Rosenbaum, *The Relationship of Worker Productivity to Cognitive Dissonance About Wage Inequities*, 46 J. APPL. PSYCHOL. 161, 161–62 (1962); Maurice E. Schweitzer & Donald E. Gibson, *Fairness, Feelings, and Ethical Decision-Making: Consequences of Violating Community Standards of Fairness*, 77 J. BUS. ETHICS 287, 291 (2008); see also Keith Jensen, *Punishment and Spite: The Dark Side of Cooperation*, 365 PHILOS. TRANSACTIONS ROYAL SOC. BIOLOGICAL SCI. 2635, 2643 (2010).

²⁶ See Shmuel Zamir, *Rationality and Emotions in Ultimatum Bargaining*, 61 ANNALES D'ECONOMIE ET DE STATISTIQUE 1, 2 (2001); Madan M. Pillutla & J. Keith Murnighan, *Unfairness, Anger, and Spite: Emotional Rejections of Ultimatum Offers*, 68 ORGANIZATIONAL BEHAV. HUM. DECIS. PROCESS. 208, 220 (1996); Werner Güth et al., *An Experimental Analysis of Ultimatum Bargaining*, 3 J. ECON. BEHAV. ORGAN. 367, 367 (1982). See generally COLIN F. CAMERER, *BEHAVIORAL GAME THEORY—EXPERIMENTS IN STRATEGIC INTERACTION* 44 (2003).

²⁷ Güth et al., *supra* note 26, at 372.

²⁸ Or B is no worse off if B is offered nothing.

²⁹ Alan G. Sanfey et al., *The Neural Basis of Economic Decision-Making in the Ultimatum Game*, 300 SCI. 1755, 1755 (2003); see also Richard H. Thaler, *Anomalies: The Ultimatum Game*, J. ECON. PERSPECT., 195, 197 (1988); Daniel Kahneman et al., *Fairness and the Assumptions of Economics*, 59 J. BUS. S285, S285–86 (1986); Daniel Kahneman et al., *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728, 729–30 (1986). A similar theme is found in Elizabeth Hoffman & Matthew L. Spitzer, *The Coase Theorem: Some Experimental Tests*, 25 J. LAW ECON. 73, 95–96 (1982). See also Elizabeth Hoffman & Matthew L. Spitzer, *Entitlements, Rights, and Fairness: An Experimental Examination of Subjects' Concepts of Distributive Justice*, 14 J. LEG. STUD. 259, 259–60 (1985). See generally Christine Jolls et al., *A Behavioral Approach to Law and*

many instances, an offer of \$0.10 or \$1.00 is rejected. In effect, the small offer offends B, who would rather take nothing than experience what he or she perceives as an unfair outcome.³⁰ This is consistent with equity theory in that the inputs of both participants are the same. Something other than an equal division is likely to seem unfair to B. B can bring equity back by making sure neither party is enriched.³¹ In effect, there is sacrifice to create a sense of fairness.³² It is also consistent with what we regard as spiteful behavior. B is willing to be worse off in order to also make A worse off. On the other hand, it cannot be ruled out that the person rejecting the offer has no real desire to make anyone worse off but is reacting to right the wrong of a stingy offer. This distinction cannot be determined, but it does suggest that what might be regarded as spiteful is not as self-regarding as it initially appears.

When one views spite as a reaction to perceived unfairness—whether in the context of the ultimatum game or paying taxes³³—the concept and the actions seem more defensible and less objectionable. Does this mean that every incident of spite is a case of reacting to a perceived unfairness? In many cases, it is. The driver who slows down as described at the outset of this Article usually regards the tailgating drivers as an advantage taker or at least someone who is not observing a norm. Even in instances of litigation³⁴ or battles over child custody, the likelihood is that one party is willing to sacrifice as a means of rebalancing the equities as subjectively perceived. In effect, the party feeling a sense of unfairness—whether motivated by self-interest or a sense of what is right or wrong—attempts to make an informal adjustment to reestablish a sense of justice.

Related to the possibility that spite or spite-like action is oftentimes motivated by informal fairness seeking is the idea, explored primarily by social scientists, that spite is an important factor in encouraging cooperation.³⁵ People who act spitefully are punishers, and if that

Economics, 50 STAN. L. REV. 1471, 1490 (1998); Georg Kirchsteiger, *The Role of Envy in Ultimatum Games*, 25 J. ECON. BEHAV. & ORG. 373, 374 (1994); Matthew Rabin, *Incorporating Fairness into Game Theory and Economics*, 83 AM. ECON. REV. 1281, 1284 (1993).

³⁰ One of the important aspects of the ultimatum game was that the outcome seemed to disprove the economic assumption that people were rational maximizers of self-interest. On the other hand, whether rejecting an offer is rational or not depends on how powerful a person's sense of fairness is.

³¹ This is not to say there must be an even division for the parties to agree.

³² See generally Edna Ullmann-Margalit & Cass R. Sunstein, *Inequality and Indignation*, 30 PHIL. & PUB. AFF. 337, 349 (2001). But see Armin Falk et al., *Driving Forces Behind Informal Sanctions*, 73 ECONOMETICA 2017, 2028 (2005).

³³ See Cullis, et al., *supra* note 3, at 423.

³⁴ Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEG. STUD. 225, 239 (1982).

³⁵ F. W. Marlowe et al., *The 'Spiteful' Origins of Human Cooperation*, 278 PROC. ROYAL SOC'Y BIOLOGICAL 2159, 2163 (2011); Jensen, *supra* note 25, at 2644; Mark

punishment is wielded in particular ways, it can encourage the target to adhere to group norms.³⁶ In effect, spiteful acts are costly to the actor and to the subject of spite but may accrue to the benefit of a group over the long run.³⁷ One group of social scientists puts it broadly: “It is mainly [spite] that is relevant for understanding the origins of human cooperation.”³⁸

This may paint too rosy a picture of spite or its moral-based equivalent and an incomplete one. First, it is hard to square equity-seeking spite with actions that seem purely motivated by cruelty or hatred. In cases of what might be called “pure spite,” individuals simply enjoy harming others even though that harm comes at a risk of harm or punishment.³⁹ Second, it is important to note that a sense of unfairness is purely subjective and is highly dependent on factors such as self-esteem, a sense of entitlement, and social comparisons.⁴⁰ In short, one should not be too quick to look favorably on the spiteful person because they may react to perceived unfairness. That sense may be based on an inflated sense of entitlement. In fact, consider the findings of one study with respect to the personality traits of spitefulness.⁴¹ Spite was found to be positively correlated with aggression, psychopathy, Machiavellianism, narcissism, and guilt-free shame.⁴² On the other hand, spite was negatively correlated with self-esteem, guilt proneness, agreeableness, and conscientiousness.⁴³ Third, even if one takes a favorable view of spite as a means of advancing cooperation, it is important to note that cooperation in the abstract carries no particular moral connotation. The purposes of cooperation can range from helping the poor to attempting to remain undetected while fixing prices.

Hauser et al., *Evolving the Ingredients for Reciprocity and Spite*, 364 PHIL. TRANSACTIONS ROYAL SOC. Y BIOLOGICAL SCI. 3255, 3263 (2009); Samuel Bowles & Herbert Gintis, *Social Preferences, Homo Economicus, and Zoon Politikon*, in THE OXFORD HANDBOOK OF CONTEXTUAL POLITICAL ANALYSIS 173 (Robert D. Goodin & Charles Tilly eds., 2006).

³⁶ Jensen, *supra* note 25, at 2644; ROBERT AXELROD, THE EVOLUTION OF COOPERATION 85 (1984).

³⁷ Jensen, *supra* note 25, at 2644; Ernst Fehr & Urs Fischbacher, *Social Norms and Human Cooperation*, 8 TRENDS COGNITIVE SCI. 185, 189 (2004).

³⁸ Marlowe et al., *supra* note 35, at 2163.

³⁹ One example may be rape in which the rapist’s utility is a function of the lack of consent by the victim.

⁴⁰ Jeffrey L. Harrison, *Class, Personality, Contract, and Unconscionability*, 35 WM. & MARY L. REV. 445, 456 (1994).

⁴¹ Marcus et al., *supra* note 14, at 1.

⁴² *Id.*

⁴³ *Id.*

C. Spite and Positional Goods

Spite as analyzed here is probably under inclusive. If spite entails actions that make others worse off, then it is possible to include the purchase and possession of what economists call “positional goods” as spiteful. Positional goods are: “those things whose value depends relatively strongly on how they compare with things owned by others.”⁴⁴ In short, the appeal of these goods is not based on their usefulness but on their ability to signal the superiority of the purchaser.⁴⁵ For the most part, those who write about positional spending are concerned with positional externalities—pressures on others to “keep up.”⁴⁶ Economist Robert Frank, the leading commentator on positional spending, compares the effort to obtain position goods to a military arms race.⁴⁷ In effect, neither country gains an advantage and each neglects spending on goods and services that satisfy other needs.⁴⁸ The analogy is valid but does not sufficiently emphasize the point that in the context of consumer goods the “winners” actually decrease the status and perceived well-being of those less affluent. Lifting the status of the purchaser means lowering the relative status of those who cannot afford the same goods. Jon Elster captures this idea when he describes unethical preferences: “[T]hese would include spiteful and sadistic preferences, and arguably also the desire for positional goods, i.e. goods such that it is logically impossible for more than a few to have them.”⁴⁹

This is not to say all motivations for purchasing luxury goods are related to their positional quality. They may, in fact, have qualities that are attractive to the buyer regardless of the impact on others. Nevertheless, in some instances people protect their relatively higher status or attempt to establish it by the consumption of goods that are unavailable to others. The more expensive the good, the more likely this is to be true. Accordingly, the non-neutral effect of consuming these goods is noted by Ugo Pagano, who observes that “if an individual *i*

⁴⁴ Frank, *supra* note 11, at 101; see also Fredrik Carlsson et al., *Do You Enjoy Having More than Others? Survey Evidence of Positional Goods*, 74 *ECONOMICA* 586, 586 (2007); Robert Frank, *Should Public Policy Respond to Positional Externalities?*, 92 *J. PUB. ECON.* 1777, 1778 (2008); FRED HIRSCH, *SOCIAL LIMITS TO GROWTH* 27–28 (1976).

⁴⁵ See generally Robert Frank, *Positional Externalities Cause Large and Preventable Welfare Losses*, 95 *AM. ECON. REV. PAPERS & PROC.* 137, 137 (2005). See also Roger Mason, *Conspicuous Consumption and the Positional Economy: Policy and Prescription Since 1970*, 21 *MANAGERIAL & DECISION ECON.* 123, 123 (2000).

⁴⁶ Xavier Landes, *Why Taxing Consumption?*, in 40 *IUS GENTIUM* 101, 103 (Mortimer Sellers & James Maxeiner eds., 2015). See also Thomas D. Griffith, *Progressive Taxation and Happiness*, 45 *B.C. L. REV.* 1363, 1384 (2004).

⁴⁷ Frank, *supra* note 44, at 1777.

⁴⁸ *Id.* at 1778.

⁴⁹ JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* 22 (1983).

consumes [quantity X], the second individual must consume an equal but negative quantity”⁵⁰ In effect, these are zero sum goods. Rawls’ view is somewhat similar:

A person who is better off may wish those less fortunate than he to stay in their place. He is jealous of his superior position and begrudges them the greater advantages that would put them on a level with himself. And should this propensity extend to denying them benefits that he does not need and cannot use himself, then he is moved by spite.⁵¹

While Rawls wrote in terms of denying benefits to others, the fact is that spite is likely to be mixed with other motives. Being motivated to consume, at least in part, because others cannot is enough to evidence spite.

In his 1992 article, *Relative Preferences*,⁵² Richard McAdams pulls many of these themes together.⁵³ He refers to relative and absolute other-regarding preferences. In the case of relative other-regarding preferences, “one derives pleasure or displeasure from the fact of another’s consumption level *in relation to one’s own*, i.e., where the ratio of one’s consumption to the other’s determines the effect on one’s satisfaction.”⁵⁴ A negative relative preference is one in which there “is a preference for a consumption position that is favorable in comparison to that of others.”⁵⁵ Thus, “making someone absolutely better off may itself make others worse off if the others prefer to maintain a certain economic position relative to the one whose wealth is increased.”⁵⁶ In effect, a person can increase his or her satisfaction by lowering the relative consumptive position of those of lower rank, raising the consumptive position of oneself, or both. The goal of these purchases is to increase the distance between those who are higher ranked from those of lower rank. According to McAdams, “[c]onsumptive position’ may refer to the quantity or the quality of particular goods, including intangible goods such as prestige, or it may refer to the sum of all goods, i.e., wealth.”⁵⁷

There is no question that position goods present greater complexity than the more traditional spiteful actions. In a sense they involve a softer

⁵⁰ Ugo Pagano, *Is Power an Economic Good? Notes on Social Scarcity and the Economics of Positional Goods*, in *THE POLITICS AND ECONOMICS OF POWER* 63, 63 (Samuel Bowles, et al. eds., 1999); Mason, *supra* note 45, at 124.

⁵¹ RAWLS, *supra* note 15, at 533.

⁵² Richard H. McAdams, *Relative Preferences*, 102 *YALE L.J.* 1, 7 (1992).

⁵³ For the history of this perspective, see also Nestor M. Davidson, *Property and Relative Status*, 107 *MICH. L. REV.* 757, 777–78 (2009).

⁵⁴ McAdams, *supra* note 52, at 8. In the case of absolute other regarding preferences, the pleasure or displeasure is unrelated to one’s own.

⁵⁵ *Id.* at 9.

⁵⁶ *Id.* at 4–5 (emphasis removed).

⁵⁷ *Id.* at 9.

version of spite. This is because there is unlikely to be any personal animus,⁵⁸ and one does not have a sense of directly denying benefits to others. Nevertheless, the act of consuming these relatively scarce items makes it less likely that others can share in the benefits, and part of the reason for their pricing and desirability is the denial of others. Put more bluntly, like spite more generally, positional goods represent an investment that is only rationale if others are made relatively worse off.

Imagine this thought experiment. You test drive a car and enjoy its comfort, style, acceleration, and handling qualities. You like it enough to buy it. The salesperson then presents you with a choice. For \$40,000 you may buy the car and it will display the Kia identification. Or, for \$55,000 you can buy the same car and it will carry the Bentley insignia. Very importantly, no one will ever suspect the cars are actually the same except for the labeling. In effect, are you willing to pay \$15,000 simply for the impression the car makes on others and for the exclusiveness it signals? Perhaps not, but would you pay \$1.00? In either case, you are actually buying the appearance of scarcity and exclusivity, and ultimately, the only value you derive is the knowledge that others have the appearance of being worse off. Regardless of what your choice might be or how much you would pay in this situation, we know that there is an enormous market ranging from watches and handbags,⁵⁹ to yachts, houses, and cars for signaling goods.⁶⁰

This may not seem as spiteful as tapping on your brakes when the tailgating driver gets too close or as turning down an offer in the ultimatum game even though it makes you and your partner worse off. Nevertheless, the motivation is the same. To elevate oneself relative to others means lowering their rank, perhaps even their sense of well-being, and encouraging the negative utility associated with envy. In short, you feel better because others may perceive themselves to be lower-ranked, and hopefully, experience a sense of frustration.

D. *Spite as Theft*

Self-regarding spite has characteristics that are similar to theft.⁶¹ We do not condone theft for moral as well as economic reasons. First, on purely ethical grounds one may take a Kantian perspective that one should not use others as means to their ends.⁶² This is not to say that Kant

⁵⁸ Although the case of jealous neighbors may be an exception.

⁵⁹ See *infra* text accompanying notes 172–74.

⁶⁰ See ROBERT H. FRANK, LUXURY FEVER 139–40 (1999); Frank, *supra* note 45, at 139–40.

⁶¹ Of course, in the case of theft, the perpetrator believes there will be a material gain. The spiteful person is not out for material gain.

⁶² See H.B. ACTON, KANT'S MORAL PHILOSOPHY 35–41 (1970) (discussing Kant's principle of autonomy); IMMANUEL KANT, THE METAPHYSICAL PRINCIPLES OF VIRTUE 114

would rule out spite-like actions based on the view that a wrong must be addressed. That is different, however, from the self-regarding concept of spite.

Second, it is hard to square theft with any concept of efficiency. For example, it cannot be efficient under a Pareto standard, because the victim of the theft is worse off.⁶³ In addition, it may or may not be efficient from the standpoint of maximizing utility. Stealing a painting may increase my welfare, but for it to be efficient theft, I would have to make sure your utility is decreased by less than mine is increased. This could be the case. Perhaps I love the painting and you were growing quite tired of it. The problem is that it requires the thief to make an interpersonal comparison of utility, which is impossible. Theft *might* be efficient from a Kaldor-Hicks perspective. Under Kaldor-Hicks, or wealth maximization, the transfer would be efficient if I valued the painting more than you did even if you were not compensated for the loss.⁶⁴ Here though, without an actually consensual exchange it is impossible to know who attributes the greater value to the painting.

Now take spite. The same concerns arise. Aside from whatever moral qualms one may have about making some people worse off simply because that increases the utility of the spiteful person, the risks of inefficiency are no less than in the case of theft. Again, from the Paretian standpoint, at least one party is worse off. A utilitarian analysis is more complicated and even riskier than in the context of theft. In general, spite involves making oneself worse off in order to make the victim worse off. There is no net payoff unless the victim is perceived to be more worse off than the spiteful person. This could be the case but opens up a number of possibilities for error all stemming from the difficulty of a comparison. To illustrate, go back to the example of the brake tapper. Two types of errors may occur. The first is the inefficiency error. For example, you may touch your brakes lightly to annoy a tailgating driver

(James Ellington trans., *The Bobbs-Merrill Co., Inc.* 1964) (1797) (respect for others' autonomy is a duty of virtue); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 32 (1974) (using an individual for the greater social good fails to show sufficient respect for the individual); Jeffrey L. Harrison, *Egoism, Altruism, and Market Illusions: The Limits of Law and Economics*, 33 *UCLA L. REV.* 1309, 1334 (1986).

⁶³ A Pareto superior outcome is achieved when a transfer leaves at least one party better off and no one worse off. See THOMAS COTTER & JEFFREY L. HARRISON, *LAW AND ECONOMICS* 45–46 (3d ed. 2013). In the case of spite, quite possibly both are worse off at least materially. In the case of positional goods, the cost of spite is the premium paid for the signaling quality of the good.

⁶⁴ *Id.* at 51–52. In many respects, the concept of efficient spite is like efficient breach in the context of contracts. It is possible for the breaching party to be more better off than the non-breaching party is worse off. The problem is that it is impossible to tell. Even if there is full compensation, there is no guarantee that the non-breaching party is in as good a position, subjectively, as he or she would have been in the absence of a breach. *Id.* at 304–305.

only to see him or her speed off around you without a care in the world. The second error is a misperception error.⁶⁵ You touch your brakes but do not realize the tailgater was in no hurry and actually did not even notice. In the spirit of “I’ll show him a thing or two,” you showed him nothing. When it comes to Kaldor-Hicks efficiency, the same dangers arise. Just as it is impossible to know the impact on utility, it is impossible to know what it would take to compensate the victim.⁶⁶

This suggests that spiteful actions require the same type of legal responses that are employed to deter theft. There are important differences that in the minds of many may make spite even more troublesome. The thief is generally indifferent to who is harmed. There may be no personal animus involved at all. Spite, though, is generally personal. People are targeted because of who they are. Second, at least in some instances, spite-like behavior can result from purely moral considerations. This is less likely to be the case in instances of theft but raises the issue of whether spite-like behavior should, in some instances, be tolerated.

III. THE LAW OF SPITEFULNESS

A. *Tort Law*

1. *Generally*

As noted earlier,⁶⁷ negligence is unlikely to be associated with spiteful actions. The negligent party is guilty of indifference or a calculated effort to save money. The notion of investing to harm others simply because the harm produces a positive response in the actor seems strained in those instances. On the other hand, intentional harms may very well be spiteful. It can range from the well-known “spite fences,” to practical jokes that are “beneficial” to one party because of the humiliation of another, as well as assaults and defamation. If spite is akin to theft, and the position taken here is that it is, the response should logically be the same as it is in cases of theft. In tort law this would mean awarding punitive damages.⁶⁸

⁶⁵ There is an additional possible complication here. The victim of spite suffers, and the spiteful person’s pleasure must exceed that suffering. Suppose, however, that the victim’s harm is itself dependent on the amount of pleasure derived by the spiteful actor. If true, even the hypothetical possibility of efficient spite seems to fade.

⁶⁶ See POSNER, *supra* note 4, at 205.

⁶⁷ See *supra* text accompanying note 14.

⁶⁸ Richard Posner makes a case for punitive damages in these cases as a way of motivating victims to bring private actions, and thus, to relieve the pressure on criminal law. POSNER, *supra* note 4, at 207. See generally A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 909–10 (1998).

There is, however, an important distinction between theft and spite that may have implications for this response. In the case of theft, aside from important moral considerations described above, the idea is to channel the transfer of wealth into the market. Thus, if I want your car and am inclined to simply take it, the threat of punitive damages means it would be less expensive for me to seek your permission by reaching an agreement on the compensation due. In the case of spite, there is unlikely to be compensation. In the case of spite, an actual transaction seems unlikely. After all, the pleasure of the spiteful person is derived from the displeasure of victim. The idea of channeling the transaction into the market makes little sense. If the victim consents, it eliminates the pleasure for the person acting out of spite.

Take the example of a spite fence. Landowner A is angry at his neighbor, B, because B's son operates a loud but legal motorcycle. A has approached B and even offered to pay to have the noise reduced. He was told to mind his own business and to "get a life!" A constructs an eight-foot fence between their properties that blocks B's view of some distant mountains. In the case of theft, by virtue of punitive damages or criminal penalties, we would prefer to channel the transaction into the market, and B would sell his right to his view for a price. B would demand a price that means he is at least indifferent between the view and the sum paid. Of course, that would not happen because A's entire purpose is to make B worse off. Alternatively, B may file a lawsuit. If he prevails, the court, in effect, sets the price. The price might be higher, lower, or equal to that demanded by B in a voluntary transaction. In no case do we know if efficiency in any form is served, and clearly, the spiteful person uses others without their consent to achieve his or her ends. In fact, lack of consent is the source of the pleasure.

Given that efficient spite is but a possibility and that there can be enormous costs to the spiteful person, it is arguably most efficient to discourage spite or decrease its consequences. This can be done in two ways. First, if possible, the gains to the spiteful actor could be disgorged. This is impossible to measure in monetary terms. Plus, it cannot be a successful deterrent unless it is effective 100% of time.⁶⁹ Nevertheless, in the cases of removal of spite fences⁷⁰ and the retraction of defamatory statements, for example, this can be comparable to undoing the harm. Otherwise, penalties are appropriate.

And, as it turns out, whether on moral, efficiency, or some other basis, tort law does signal general societal disapproval of spiteful actions.⁷¹

⁶⁹ Unless the probability of success by victims is 100%, there may still be positive expected gains from spiteful actions.

⁷⁰ See, e.g., *Geiger v. Carey*, 154 A.3d 1093, 1101 (Conn. App. 2017); *Austin v. Bald II, L.L.C.*, 658 S.E.2d 1, 3 (N.C. App. 2008).

⁷¹ See, e.g., *Soderbeck V. Burnett Cty*, Wis. 752 F.2d 285, 290 (7th Cir. 1985); *Lewis v. Bellows Falls Congregation of Jehovah's Witnesses*, 248 F. Supp. 3d 530, 543

Whether it follows through on this “signal” or is sensitive to equity seeking or even the occasional benefits of non-self-regarding spiteful behavior is another matter. To illustrate this distinction, consider three cases. In a North Carolina case, *Austin v. Bald II*,⁷² plaintiff owned a home next to an apartment development. The apartment property was surrounded by a six-foot-high fence except for the portion that ran along plaintiff’s property. That part of the fence was ten feet tall and blocked the view of a nearby lake and the breezes that came off the lake. There was testimony that when asked why the fence was ten feet tall, an employee of the defendant remarked, “we are going to show her.”⁷³ The court reversed the trial court decision not to permit the jury to consider punitive damages.

Other cases suggest a different approach to the spiteful actor who is equity seeking.⁷⁴ But this is not always the case. In *Humphrey v. Mansbach*,⁷⁵ the appellants appealed from a decision that they had erected a spite fence. Although the appellate court reversed on other grounds, it noted that before the fence was erected “appellees’ children had been trespassing upon appellants’ lot and destroying flowers and shrubbery thereon; that after they protested to appellees, the latter refused to take steps to prevent further trespasses . . . ; that appellees’ children would come upon appellants’ property immodestly attired and commit acts of indecency directed toward appellants”⁷⁶

Although not exactly on point and politically objectionable in many respects, another case also illustrates some leeway for the spiteful person who perceives him or herself as protesting an injustice. *Johnson v. Johnson*⁷⁷ dealt with punitive damages in the context of a spouse calling

(D. Vt. 2017); *Estate of Jackson v. Phillips Petroleum Co.*, 676 F. Supp. 1142, 1149 (S.D. Ala. 1987); *Lee v. Crump*, 40 So. 609, 610 (Ala. 1906); *Fousel v. Ted Walker Mobile Homes, Inc.*, 602 P.2d 507, 511 (Ariz. 1979); *Geiger*, 154 A.3d at 1113–14; *Austin*, 658 S.E.2d at 3; *Clements v. Withers*, 437 S.W.2d 818, 822 (Tex. 1969); *Watkins v. Simonds*, 354 P.2d 852, 854 (Utah 1960). See generally DAN B. DOBBS, 1 DOBBS LAW OF REMEDIES 455 (2d ed. 1993); W. PAGE KEETON, PROSSER & KEETON ON THE LAW OF TORTS 9–10 (5th ed. 1984). This is not to say that spite is necessary for the award of punitive damages. See *Crues v. KFC Corp.*, 729 F.2d 1145, 1153 (8th Cir. 1984); *Tierco Md. Inc. v. Williams*, 849 A.2d 504, 526 (Md. Ct. App. 2004); *Burnett v. Thrifty Imports*, 773 S.W.2d 508, 511 (Miss. Ct. App. 1989); *Prime Co. v. Wilkinson & Snowden, Inc.*, No. W2003-00696-COA-R3CV, 2004 WL 2218574 at *1 (Tenn. Ct. App. Sept. 30, 2004).

⁷² *Austin*, 658 S.E.2d at 3.

⁷³ *Id.* It appears that the plaintiff was on a city commission that played a role in denying the expansion of the complex although the plaintiff had no part in that decision. *Id.* at 5.

⁷⁴ See supra note 71 and accompanying text.

⁷⁵ *Humphrey v. Mansbach*, 64 S.W.2d 454, 455 (Ky. 1933).

⁷⁶ *Id.*

⁷⁷ *Johnson v. Johnson*, 654 A.2d 1212, 1212 (R.I. 1995).

his ex-wife a “whore” in a public place. Evidently, after their marriage the wife had numerous sexual affairs with men including the husband’s cousin who she also later married and divorced.⁷⁸ There were in fact, a string of divorces, affairs, and pregnancies.⁷⁹ Eventually, the former wife returned to the original husband (the defendant) and claimed they had a common law marriage from which she wanted a divorce and a property settlement.⁸⁰ Although the court claimed otherwise, the case is likely indicative of gender bias.⁸¹ The rationale for not permitting punitive damages reflects a willingness to tolerate some level of informal equity seeking: “We are then confronted with the question concerning whether a truthful statement, but one issued with a supportable finding of spite or ill will under enormous provocation may meet the rigorous standard we set for punitive damages. We believe that it does not.”⁸²

2. *The Cases: Empirical and Qualitative Assessment*

Aside from the examples above, there is little additional evidence that courts acknowledge that spiteful actors may be justice seekers. What is clear from a broader perspective is that tort law takes a dim view of those who act out of spite. This can be inferred from a quantitative or empirical perspective and a qualitative one. A general examination of tort law in this regard found the words “spite” and “punitive damages” in the same paragraph without the term “in spite of” in nearly 1,100 opinions.⁸³ In addition, the terms “actual malice”—a common substitute for “spite”—and “punitive damages” were in the same paragraph without the term “in spite of” in 4,700 opinions.⁸⁴ Finally, 306 opinions used the terms “actual malice,” “spite,” and “punitive damages” in the same paragraph, again excluding cases that used the term “in spite of.”⁸⁵ As a general matter, when the terms “spite” and “actual malice” were found in the same paragraph, a court was defining actual malice. For example, as one Texas case put it: “Texas permits recovery of punitive damages for

⁷⁸ *Id.* at 1213–14.

⁷⁹ *Id.* at 1214.

⁸⁰ *Id.*

⁸¹ *Id.* at 1217.

⁸² *Id.*

⁸³ Westlaw Search for Cases Including “Spite” and “Punitive Damages,” WESTLAW, <https://goo.gl/AoMvWK> (search using the following: spite! /p “punitive damages” % “in spite of”). “In spite of” was eliminated because the phrase is commonly used in cases that would be irrelevant for the research at hand.

⁸⁴ Westlaw Search for Cases Including “Actual Malice” and “Punitive Damages,” WESTLAW, <https://goo.gl/FjKGoN> (search using the following: “actual malice” /p “punitive damages” % “in spite of”).

⁸⁵ Westlaw Search for Cases Including “Actual Malice,” “Spite,” and “Punitive Damages,” WESTLAW, <https://goo.gl/626B2S> (search using the following: “actual malice” /p spite! /p “punitive damages” % “in spite of”).

wrongful discharge upon a showing of actual malice, defined as ‘ill will, spite, evil motive, or specific intent to cause injury to the employee.’”⁸⁶

Clearly, “spite” or its substitute “actual malice” plays a key role in the award of punitive damages. Because the search involving “punitive damages” and “spite” or its substitute, “actual malice” yielded an unwieldy number of possible “observations,” three narrower and specific areas were more closely examined. These were cases of abuse of process and malicious prosecution.⁸⁷ In addition, although not a tort, it was felt that cases involving possible Rule 11 sanctions, which have a tort-like character, would also be informative.⁸⁸ These areas were selected because they seem particularly likely to involve actions in which a party would act simply to make an opponent worse off.

According to Prosser, abuse of process is designed to provide a remedy “for a group of cases in which legal procedure has been set in motion in proper form, with probable cause, and even with ultimate success, but nevertheless has been perverted to accomplish an ulterior purpose for which it was not designed.”⁸⁹ The key is that the process is used to produce a result for which the process was not designed. A Westlaw search found 388 cases in which the terms “spite” and “abuse of process” were found in the same paragraph. In 717 instances, the terms “abuse of process” and “actual malice” were found in the same paragraph. Courts are very clear that the defendant in these cases may be motivated by spite or ill will but as long as the goal sought is the one the process was designed for, there will be no liability.⁹⁰ Consequently, “abuse of process” cases did not reveal a policy to punish spite. And, although

⁸⁶ Richey v. Wal-Mart Stores, Inc. 670 F. Supp. 2d 608, 611 (S.D. Texas, 2009); *see, e.g.*, Drug Fair of Md., Inc. v. Smith, 283 A.2d 392, 398 (Md. Ct. App. 1971); Burnett v. Thrifty Imports, 773 S.W.2d 508, 511 (Miss. Ct. App. 1989); Bennett v. 3M Co., No. 3:14-CV-198, 2014 WL 1493188 at *2 (E.D. Va. Apr. 15, 2014).

⁸⁷ Tortious interference of contract was also examined. *See infra* text accompanying notes 132–35.

⁸⁸ *See infra* text accompanying notes 101–08.

⁸⁹ KEETON, *supra* note 71, at 897.

⁹⁰ *See, e.g.*, Scott v. D.C., 101 F.3d 748, 755 (D.C. Cir. 1996); Jensen v. Barlas, 438 F. Supp. 2d 988, 1003 (N.D. Iowa 2006); Grabinski v. Nat’ Union Fire Ins. Co., No. CV041751PHXMHM, 2005 WL 2412784 at *5 (D. Ariz. Sept. 23, 2005); Shoney’s, Inc. v. Barnett, 773 So. 2d 1015, 1025–26 (Ala. Civ. App. 1999); Bothmann v. Harrington, 458 So. 2d 1163, 1169 (Fla. Dist. Ct. App. 1984); Bourbon Cty. Joint Planning Com’n v. Simpson, 799 S.W.2d 42, 45 (Ky. Ct. App. 1990). *But see* Pundzak, Inc. v. Cook, 500 N.W.2d 424, 429–30 (Iowa 1993). Although spiteful intent is not required to establish abuse of process, spite can enter into the decision about punitive damages for the defendant who is found guilty of an abuse of process. *See* Nitcher v. Does, 956 F.2d 796, 800–01 (8th Cir. 1992). As noted above, though, a great number of these cases noted that even spiteful actors may not be guilty of abuse of process. *See generally* 3 RESTATEMENT (SECOND) OF TORTS § 683, cmt. b (AM. LAW INST. 1977).

courts are tolerant of spite, it was hardly because the spiteful people, like the ultimatum game participants, were justice seekers.

More instructive was a survey of cases involving malicious prosecution. In 1,872 cases, the terms “actual malice” and “malicious prosecution” were found in the same paragraph. In 451 cases, the terms “spite” and “malicious prosecution” were found in the same paragraph. In 142 cases, all three terms were found in the same paragraph. The elements of malicious prosecution are: the institution of a proceeding, termination of that proceeding in favor of the accused, absence of probable cause, and malicious motivation.⁹¹ These cases provide a closer look at the role of spite since the accused must be cleared of any wrongdoing, which raises the likelihood that the prosecutor⁹² was simply interested in the harmful effects on the defendant. It should be noted that spite or actual malice is not always required for malicious prosecution. They appear to be *sufficient* but not *necessary* for a finding of liability. Instead, legal malice, as opposed to actual malice, often will be inferred from an absence of probable cause.⁹³

What this means is that the range of cases goes from ones in which there was obvious ill will toward specific individuals to those in which there seems to be no more than indifference to the welfare of others.⁹⁴ A typical example of a case in which spite appeared critical was *Grundstein v. Levin*,⁹⁵ which involved a group of siblings that had inherited a parcel of land. The land was partitioned but one of the siblings refused to leave when the others had found buyers for their shares. Eventually that sibling left but sued the others for conversion of the personal property he left behind.⁹⁶ The others countersued for abuse of process and malicious prosecution.⁹⁷ The court found no abuse of process but found that there was malicious prosecution. The Vermont Supreme Court affirmed and wrote:

The [lower] court found that plaintiff’s multiple post-partition motions and appeals were baseless; that there was no objectively reasonable basis to believe that they were meritorious; that they were brought by plaintiff “in bad faith and with ill will and actual malice” and “solely out of spite and for the purpose of thwarting his siblings and preventing them from exercising their rights duly

⁹¹ KEETON, *supra* note 71, at 871.

⁹² Prosecutor is used here generally to mean the person giving rise to the action, whether criminal or civil.

⁹³ See *Lowth v. Town of Cheektowaga*, 82 F.3d 563, 571–72 (2d Cir. 1996); *Lee v. Mihalich*, 847 F.2d 66, 69–70 (3d Cir. 1988); *Pallares v. Seinar*, 756 S.E.2d 128, 131 (S.C. 2014).

⁹⁴ This search excluded incidents of the use of the term “in spite of.”

⁹⁵ *Grundstein v. Levin*, No. 16-242, 2017 WL 571272, at *1 (Vt. Feb. 1, 2017).

⁹⁶ *Id.*

⁹⁷ *Id.*

granted them by the partition judgment”; and that defendants prevailed in all of them.⁹⁸

In the context of malicious prosecution, courts seem to be in line with the idea that spite can be analogized to theft in that a finding of actual malice is followed by awarding punitive damages.⁹⁹

Although not a tort, Rule 11 sanctions have a tort-like quality. In fact, over 20 years ago, it was noted that Rule 11¹⁰⁰ plays a role similar to the rules against spite fences.¹⁰¹ The question here is to what extent courts take spiteful motives into account when sanctioning an attorney for Rule 11 violations. Again, it is difficult to separate cases involving spite as defined here from efforts meant to harass with some hope for more than psychic gain. Nevertheless, spite is often mentioned as the basis for Rule 11 sanctions.¹⁰² A good example is *Fox v. Boucher*,¹⁰³ a Second Circuit

⁹⁸ *Id.* at *2.

⁹⁹ See *Goodwin v. Metts*, 885 F.2d 157, 166 (4th Cir. 1989); *Hampton v. Mathis*, No. 87-2653, No. 87-2654, 1988 U.S. App. LEXIS 20542, at *11-12 (4th Cir. Sept. 1, 1988); *Chavez v. Sears, Roebuck & Co.*, 525 F.2d 827, 831 (10th Cir. 1975); *Scott v. Bender*, 948 F. Supp. 2d 859, 871 (N.D. Ill. 2013); *Tierco Md. Inc. v. Williams*, 849 A.2d 504, 526 (Md. Ct. App. 2004); *Sanders v. Daniel Int’l Corp.*, 682 S.W.2d 803, 814 (Mo. 1984); *Abbitt v. Bartlett*, 112 S.E.2d 751, 753-54 (N.C. 1960); *Columbus Finance, Inc. v. Howard*, 327 N.E.2d 654, 658 (Ohio 1975); *Davis v. Tunison*, 155 N.E.2d 904, 906-07 (Ohio 1959); *Lee v. Southland Corp.*, 244 S.E.2d 756, 759 (Va. 1978); *Gaut v. Pyles*, 181 S.E.2d 645, 647 (Va. 1971). For the necessity of actual malice in the context of tortious interference, see *Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 210 (Tex. 1996).

¹⁰⁰ FED. R. CIV. P. 11(b) (“(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.”).

¹⁰¹ Joseph M. Perillo, *Abuse of Rights: A Pervasive Legal Concept*, 27 PAC. L.J. 37, 67 (1995). See also Daniel B. Kelly, *Strategic Spillovers*, 111 COLUM. L. REV. 1641, 1685 (2011).

¹⁰² See, e.g., *Fox v. Boucher*, 794 F.2d 34, 37-38 (2nd Cir. 1986); *Cavallary v. Lakewood Sky Diving Ctr.*, 623 F. Supp. 242, 246 (S.D.N.Y. 1985); *Florida Bar v. Pascoe*, 526 So. 2d 912, 913 (Fla. 1988); *Tilman v. Brink*, 911 N.E.2d 764, 770 (Mass. App. Ct. 2009); *Taupā Lithuanian Fed. Credit Union v. Bajercius*, 1997 Mass. App. Div. LEXIS 15, at *9 (Mass. App. Div. Mar. 11, 1997). See also *Mortell v. Mortell Co.*, 887 F.2d 1322, 1328 (7th Cir. 1989).

¹⁰³ *Fox*, 794 F.2d at 37-38.

opinion in which the plaintiff, an attorney, leased a home to the Hogges. When Mr. Hogge died suddenly, Mrs. Hogge moved out and, by telephone, requested a return of her security deposit. Fox refused noting that she probably did not need the money since she likely collected insurance. Hogge became upset and handed the phone to her father (Boucher) and an argument ensued in which Boucher may have referred to Fox as a “rich lawyer.”¹⁰⁴ Eventually, Hogge sued and recovered the security deposit, and in the aftermath, was told by Fox that “I’m going to get you for this.”¹⁰⁵ Fox then sued Boucher on a theory of prima facie tort and requested punitive damages. The lower court sanctioned Fox and was upheld by the Second Circuit, which reasoned that, “[c]ourts look with disfavor on this sort of unfounded spite action.”¹⁰⁶

This examination finds that spite plays a key role in awarding punitive damages, in finding malicious prosecution, and in Rule 11 sanctions. Although the same tendency was not found in the case of abuse of process, it can safely be said that tort law is designed to discourage spiteful actions. On the other hand, there was no evidence that tort law created a safe harbor for justice seekers or those acting for non-self-regarding reasons.¹⁰⁷

B. Arising Out of Contractual Relations

The search for judicial reactions to spite was extended to contract law. One initial possibility concerned duress and Restatement (Second) of Contracts, section 176(2)(a)¹⁰⁸ which includes this definition of an improper threat: “the threatened act would harm the recipient and would not significantly benefit the party making the threat,”¹⁰⁹ Examples include a threat to reveal harmful information about a party unless he or she will enter into a contract.¹¹⁰ Although there is a clear spite-like flavor to these types of threats, there is ultimately a payoff for the threatening party that extends beyond the satisfaction of simply harming another.

As in conventional tort remedies, the more fertile areas for reacting to spite would be in the area of damages. In the context of a contract breach, punitive damages are generally not permitted even if the breach

¹⁰⁴ *Id.* at 38. This was denied by Boucher.

¹⁰⁵ *Id.* at 36.

¹⁰⁶ *Id.* at 38.

¹⁰⁷ One qualifying comment is in order. The definition of spite in the context of tort law is broader than the one employed in this Article. This follows from the notion that spite is often equated with actual malice, which, itself can, but not always, be inferred from the harshness of one’s action.

¹⁰⁸ RESTATEMENT (SECOND) OF CONTRACTS § 176 (AM. LAW INST. 1981).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at Illustration 12.

were designed simply to injure another and create predominately psychic gains for the breaching party. Probably the best-known example of this resistance is *White v. Benkowski*.¹¹¹ The Whites purchased a house without an independent water supply but contracted for the supply of water from their neighbors, the Benkowskis. Evidently the parties had a friendly relationship that turned sour at which time the Benkowskis began to shut the supply of water off intermittently.¹¹² The jury found that the Benkowskis had acted maliciously and simply to harass¹¹³ but disallowed an award of punitive damages.¹¹⁴

In general, even if there were spiteful breaches like that in *White v. Benkowski*, under the expectancy measure of damages, the non-breaching party is compensated for whatever monetary harm is suffered. This, of course, is the notion of an efficient breach, a theory that has been roundly criticized.¹¹⁵ Nevertheless, whether the efficient breach is a mirage or not, contract theory seems to go out of its way to avoid penalizing those who breach. Indeed, under conventional law with respect to liquidated damages, the parties may not even stipulate to damages that would constitute a penalty.¹¹⁶

In the case of the efficient breach, the breaching party is seen to gain, in a monetary sense by virtue of the breach. This has generated some calls for disgorgement of these gains.¹¹⁷ This is related to a theoretical reaction to spite. The spiteful contract breaching party is rewarded in part by the psychic gain from making his or her contractual counterpart worse off. Although impossible to measure, the need to cancel these psychic gains amounts to an argument for routine punitive damages when breaches are spiteful. Nevertheless, there appear to be no reported cases in which a plaintiff has recovered on the basis of the psychic pleasure experienced by the breaching party as a result of harming another.

¹¹¹ *White v. Benkowski*, 155 N.W.2d 74, 77 (Wis. 1967).

¹¹² Unlike the typical efficient breach scenario, there was no sign that the water was to be sold to a higher bidder.

¹¹³ *White*, 155 N.W.2d at 78.

¹¹⁴ *Id.* at 77–78.

¹¹⁵ See generally Jeffrey L. Harrison, *A Nihilistic View of the Efficient Breach*, 2013 MICH. ST. L. REV. 167, 176 (2013); Peter Linzer, *On the Amorality of Contract Remedies—Efficiency, Equity, and the Second Restatement*, 81 COLUM. L. REV. 111, 116–17 (1981).

¹¹⁶ 3 RESTATEMENT (SECOND) OF CONTRACTS § 356 (AM. LAW INST. 1981).

¹¹⁷ Kelsey A. Hayward, Comment, *Disgorgement of Defendant's Gains from "Opportunistic" Breach of Contract: Its Fit in Rhode Island*, 22 Roger Williams U. L. Rev. 614, 616 (2017); John D. McCamus, *Disgorgement for Breach of Contract: A Comparative Perspective*, 36 LOYOLA OF L.A. L. REV. 943, 943 (2003); Caprice L. Roberts, *A Commonwealth of Perspective on Restitutionary Disgorgement for Breach of Contract*, 65 WASH. & LEE L. REV. 945, 948 (2008).

Four thin possibilities exist for courts to react to spite in the context of contracts. First, not every court has followed the teachings of *White v. Benkowski*; there appear to be isolated instances in which courts do allow the recovery of punitive damages for breach of contract unrelated to a tort claim. A word of caution is warranted here: The fact that punitive damages may be permitted does not mean they are rewarded consistently or at all for spiteful breaches. Second, there are instances in which what would be a contract breach is successfully pled as a tort claim. Here again, the connection to spiteful or malicious action is tenuous. Third, and more promising, are cases based on tortious interference. Finally, there are isolated cases that allow for recovery of mental suffering as a result of contract breach. These damages seem susceptible to having a punitive element, and thus, may reflect a policy opposed to spite.

The examination of the first possibility begins with a 1999 article by William Dodge representing a painstaking study of the availability of punitive damages in breach of contract cases.¹¹⁸ As of 1998, Dodge found that eight states allowed or appeared to allow punitive damages.¹¹⁹ He concluded, however, that the trend was toward lessening the availability of punitive damages in contracts cases.¹²⁰ The difficulty of pinning down the actual position of each state is exemplified by Tennessee in which courts have stated that there are exceptions to the no punitive damages rule in cases of “fraud, malice, gross negligence or oppression.”¹²¹ On the other hand, Tennessee courts have also written, “[t]he rare case where punitive damages may be awarded for breach of contract under Tennessee law occur when the breach of contract ‘is coupled with a tort involving, fraud, malice, gross negligence, or oppression.’”¹²² Similarly, Hawaii, which seems to allow punitive damages for breach of contract

¹¹⁸ William S. Dodge, *The Case for Punitive Damages in Contracts*, 48 DUKE L.J. 629, 633–34 (1999). See also Mark Pennington, *Punitive Damages for Breach of Contract: A Core Sample from the Decisions of the Last Ten Years*, 42 ARK. L. REV. 31, 31 (1989).

¹¹⁹ Dodge, *supra* note 118, at 647–48 (Four more states allowed punitive damages if there existed a special relationship between the parties. The 8 states seeming to allow punitive damages were Hawaii, Idaho, Mississippi, New Mexico, Rhode Island, South Carolina, Tennessee, and Vermont.).

¹²⁰ *Id.* at 635.

¹²¹ *Medley v. A.W. Chesterton Co.*, 912 S.W.2d 748, 753 (Tenn. Ct. App. 1995). See also, *Bennett v. CMH Homes, Inc.*, Nos. 15-5541/5577, 2016 U.S. App. LEXIS 16930, at *18 (6th Cir. Sept. 13, 2016); *Mohr v. DaimlerChrysler Corp.*, No. W2006-01382-COA-R3-CV, 2008 Tenn. App. LEXIS 619, at *40–41 (Tenn. Ct. App. Oct. 14, 2008).

¹²² *Boyd v. State Farm Fire and Cas. Co.*, Case 2:11-cv-02616-STA-cgc, 2012 U.S. Dist. LEXIS 183690, at *26–27 (W.D. Tenn. Nov. 8, 2012) (quoting *Smith v. Nationwide Property & Cas. Ins. Co.*, 505 F.3d 401, 408 (6th Cir. 2007) (emphasis added)).

puts it this way: “[B]reach of contract in Hawaii must result in ‘tortious injury’ to justify an award of punitive damages.”¹²³

When courts do award punitive damages in contracts cases, the facts typically resemble those that would support a claim in tort. For example, in *VanDyke v. Mountain Coin Machine Distributors*,¹²⁴ a Utah case, the breach of contract—a settlement—claim was closely related to abuse of process. Evidently, the breach was in the form of a lawsuit filed after a dispute about a debt had been settled. The lower court instructed the jury that punitive damages under contract were available if the breach was “intentional and accompanied by malice.”¹²⁵ On the other hand, in a decision by the Utah Supreme Court, the court noted that “we and other jurisdictions have allowed punitive damages where the breach of contract amounts to an independent tort.”¹²⁶

Given the paucity of cases in which punitive damages are awarded in contracts it made sense to explore contract breaches that were pled as tort claims. More specifically, to what extent is spite a factor in those cases that cross over the so-called borderline¹²⁷ between contract and tort? It would be a simple matter if the crucial variable were spite. It is not that simple. Although difficult to support with actual case analysis, the standard that makes the most sense in this context is that contract crosses over to tort, and therefore, the possibility of punitive damages when the “harm is deliberately caused and the satisfaction obtained by the actor is ‘illicit.’”¹²⁸ Illicit is, however, broader than the psychic rewards of simply making another party worse off. For example, an insured may be awarded punitive damages when an insurer persistently refuses to pay a claim that is due. In fact, at least one court found that this behavior was evidence that the insurer “acted maliciously, with an intent to oppress, and in conscious disregard of the rights of its insured.”¹²⁹ In these types of cases, often dealing with the absence of fair dealing or good faith, the target selected is based on the monetary benefit to be gained by the breaching party. The element of personal animus necessary to be labeled “spiteful” is not present.

¹²³ *Cuson v. Maryland Cas. Co.*, 735 F. Supp. 966, 970 (D. Haw. 1990). *See also* *TruGreen Cos. v. Mower Bros., Inc.*, 199 P.3d 929, 933 (Utah 2008).

¹²⁴ *VanDyke v. Mountain Coin Machine Distribs., Inc.*, 758 P.2d 962, 963 (Utah Ct. App. 1988).

¹²⁵ *Id.* at 964.

¹²⁶ *Jorgensen v. John Clay & Company*, 660 P.2d 229, 232 (Utah 1983).

¹²⁷ *See* Leslie E. John, *Formulating Standards for Awards of Punitive Damages in the Borderland of Contract and Tort*, 74 CAL. L. REV. 2033, 2034 (1986).

¹²⁸ Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 77 (1982).

¹²⁹ *Neal v. Farmers Ins. Exch.*, 582 P.2d 980, 986–87 (Cal. 1978). *See generally* John, *supra* note 127.

Frank Cavico captures the tort/contract distinction when he suggests that tortious breach should include cases in which the defendant's conduct "maliciously or oppressively caused harm to the plaintiff."¹³⁰ It requires something more than an "economic decision not to perform."¹³¹ Moreover, punitive damages would apply when there is an intentional breach "with the *intent of causing* the victim harm *beyond* the harm usually considered as reasonably foreseeable for breach of contract."¹³² Cavico distinguishes the type of behavior leading to punitive damages from bad faith in which the *primary* goal is not to harm the victim.¹³³ Nevertheless, many tortious breach cases fall under the general label of "bad faith" and the effort here was to probe these cases to see the extent to which they seemed to address spite in its purest form.

To assess whether spite was a factor in awarding punitive damages in tortious breach cases, a sample of 271 cases using the search terms set out in the footnote was selected.¹³⁴ Well over half of the sample involved cases in which insurers refused to pay or defend insureds and were, therefore, alleged to have acted in bad faith.¹³⁵ Regardless of how one feels about the practice of insurance companies of delaying or refusing to pay, these are not true spite cases. Although no cases were found that involved spite as cleanly as that in *Benkowski*, it is clear that a number of jurisdictions have broad enough parameters for what would constitute a tortious breach deserving of punitive damages to accommodate spiteful behavior.¹³⁶

One Maryland court is particularly on point in this regard. Accordingly, "[w]hen a tort is alleged to arise out of a contractual relationship, actual malice is the essential prerequisite to the recovery of punitive damages."¹³⁷ Actual malice means the purpose is "to deliberately and willfully injure the plaintiff."¹³⁸ Similarly a Mississippi court notes that

¹³⁰ Frank J. Cavico, Jr., *Punitive Damages for Breach of Contract: A Principled Approach*, 22 ST. MARY'S L.J. 357, 445 (1990).

¹³¹ *Id.* at 448.

¹³² *Id.*

¹³³ *Id.* at 447.

¹³⁴ To identify these cases the following search was conducted using Westlaw: "tortious breach" /p "punitive damages and any of the following terms: spite, malice, oppression, "actual malice."

¹³⁵ In addition, "tortious breach" did not always refer to breach of contract.

¹³⁶ *See, e.g.,* Rodriguez v. Wells Fargo Bank, Inc., No. 2:15-cv-01303-KJM-CMK, 2016 U.S. Dist. LEXIS 119327, at *28–29 (E.D. Cal. Sep. 2, 2016); Quality Auto. Co. v. Signet Bank/Md., 775 F. Supp. 849, 853 (D. Md. 1991); L.L. Cole & Son, Inc. v. Hickman, 665 S.W.2d 278, 282–283 (Ark. 1984) (dissent); Cohen v. Sterling, No. B247899, 2015 Cal. App. LEXIS 1952, at *33 (Ct. App. Cal. Mar. 17, 2015); Willard v. Paracelsus Health Care Corp., 681 So.2d 539, 543 (Miss. 1996).

¹³⁷ *Quality Auto. Co.*, 775 F. Supp. at 853.

¹³⁸ *Id.* (quoting Drug Fair of Md., Inc. v. Smith, 283 A.2d 392 (Ct. App. Md. 1971)).

“punitive damages [based on tortious breach of contract] are recoverable for breach of contract when such breach is attended by intentional wrong, insult, abuse or . . . gross negligence.”¹³⁹ Despite this language, a close look at the cases did not reveal any instances in which the courts identified spite, as defined here, as the basis for punitive damages when liability was based on tortious breach of contract. There is an element of consistency here. In a sense, those who breach contracts are strictly liable. Except in the narrow group of instances in which performance is excused due to unforeseen circumstances, damages are paid. Courts do not tend to assess the motivation for a breach, and in so doing, also treat most breaching parties alike.¹⁴⁰

A pattern of finding punitive damages appropriate in cases of spite (or actual malice) is present in tortious interference cases. The cases here, though, are a bit muddled. In some instances, spite or actual malice is required to establish a case of tortious interference.¹⁴¹ In other instances, spite or actual malice is critical only in the award of punitive damages.¹⁴² But even with respect to punitive damages, courts are not consistent in what is required. For example, in *Banks v. Mario Industries of Virginia, Inc.*, sales agents for an 80-year-old firm set up a new firm as a competitor.¹⁴³ They did this while still employed by the plaintiff firm and made use of confidential records of that firm. The lower court awarded punitive damages and the Virginia Supreme Court upheld the decision. The defendants argued there was no showing of “malice, willfulness, or wantonness[,]” and thus, punitive damages were unwarranted.¹⁴⁴ The

¹³⁹ *Willard*, 681 So.2d at 543.

¹⁴⁰ The entire inquiry into the possibility of cases arising from contracts also resulting in punitive damages is difficult because of the dual use of spite. Specifically, if spite-like actions result in crossing the borderline from contract to tort, can they also be used to assess punitive damages? It seems like they must be, but the dearth of cases that mention spite in the context of tortious interference makes this assessment impossible.

¹⁴¹ KEETON, *supra* note 71, at 984. *See, e.g.*, *Mountain States Pipe & Supply Co. v. City of New Roads, La.*, No. 12-2146, 2013 WL 3199724, at *3 (E.D. La. 2013); *Powderly v. MetraByte Corp.*, 866 F. Supp. 39, 43 (D. Mass. 1994); *Skaskiw v. Vermont Agency of Agric.*, 112 A.3d 1277, 1288 (Vt. 2014).

¹⁴² *See, e.g.*, *Lawyers Title Co. v. Kingdom Title Sol.’s, Inc.*, 592 F. App’x 345, 353 (6th Cir. 2014); *Zimmerman v. Direct Fed. Credit Union*, 262 F.3d 70, 81 (1st Cir. 2001); *Bullet Express, Inc. v. New Way Logistics, Inc.*, 70 N.E.3d 251, 266 (Ill. App. Ct. 2016); *Alexander & Alexander v. B. Dixon Evander & Assoc., Inc.*, 650 A.2d 260, 269 (Md. 1994). In *Zimmerman*, the court assessed the level of maliciousness under the steps provided by the Supreme Court in *BMW of N. Am. v. Gore*, 517 U.S. 559, 575 (1996). (In particular the Gore Court noted that a critical factor was the degree of reprehensibility of the conduct.).

¹⁴³ 650 S.E.2d 687 (Va. 2007).

¹⁴⁴ *Id.* at 700.

Court rejected the argument evidently equating the purpose of competing and the resulting injury to the plaintiffs as malicious.¹⁴⁵

This can be compared with a Texas case, in *Clements v. Withers*,¹⁴⁶ which arguably has a higher standard for punitive damages.

Actual malice need not be shown to recover *compensatory* damages for the tort of interference with an existing contractual relationship. Intentional and knowing interference must be shown, but there may be liability even though the interferor's motive be to save money for himself or another. On the other hand, to support the recovery of *punitive damages* in such a case, there must be a finding of actual malice: ill-will, spite, evil motive, or purposing the injuring of another.¹⁴⁷

Aside from torts arising out of contractual relations, there is one remaining possible avenue for courts to respond to spite—by allowing recovery for mental suffering when there is a breach of contract. In some sense there seems to be a logical connection here. After all, spiteful behavior is actually designed to have a negative impact on the emotional well-being of the victim. This is not the direction the law has taken, at least not directly. Ordinarily, contract damages are not available for mental suffering.¹⁴⁸ These would be consequential damages, and therefore, subject to both foreseeability and certainty of amount limitations.¹⁴⁹ According to the Restatement (Second) of Contracts, “[r]ecovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result.”¹⁵⁰

Spitefulness looks to the intention of the breaching party in breaching the contract. Instead, as the Restatement reflects, the issue is less along the lines of the state of mind of the breaching party and more along the lines of whether the type of breach could be expected to result in significant mental suffering regardless of any specific ill-will of the defendant. The exclusion of damages for mental suffering is not absolute.¹⁵¹ For example, even in a commercial context, buyers of onion seeds that turned out to be defective recovered damages for emotional

¹⁴⁵ *Id.*

¹⁴⁶ *Clements v. Withers*, 437 S.W.2d 818, 822 (Tex. 1969). *See also* *Compuspa, Inc. v. Int'l Bus. Mach. Corp.*, 228 F. Supp. 2d 613, 627 (D. Md. 2002).

¹⁴⁷ *Clements*, 437 S.W.2d at 822 (emphasis added). Even there, though, the court observed that actual malice may not be required in cases of fraud. *Id.*

¹⁴⁸ E. ALLAN FARNSWORTH, *CONTRACTS* 840 (3d ed. 1999); 3 RESTATEMENT (SECOND) OF CONTRACTS § 353 (AM. LAW INST. 1981).

¹⁴⁹ 24 SAMUEL WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* § 64:7 (4th ed. 2001). *See, e.g.,* *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1200 (11th Cir. 2007).

¹⁵⁰ RESTATEMENT, *supra* note 148, at § 353.

¹⁵¹ *Sheely*, 505 F.3d at 1200.

distress when their farm was forced into bankruptcy.¹⁵² Plus, the restriction does not apply to cases that cross the borderline into tort where damages for mental suffering are available. Nevertheless, it is rare to find that the spitefulness of the defendant plays a role in awarding damages for mental suffering.

One example of this rarity is *Cabaness v. Thomas*,¹⁵³ a Utah Supreme Court case. The plaintiff, a discharged employee, brought an action based on “harassment, intimidation and abuse” in the workplace.¹⁵⁴ Defendants were granted summary judgment. On appeal, the court held that recovery based on mental suffering was permitted based on a contract theory. According to the court, such damages were recoverable when they were both “a foreseeable result of the breach of contract and *explicitly* within the contemplation of the parties at the time the contract was entered into.”¹⁵⁵ Somewhat similarly, a court has permitted damages for mental suffering when the display of plaintiff’s photograph (in violation of the contract) was deemed to be malicious.¹⁵⁶ Very little, if anything, should be inferred from these cases. Although the hurtful *intent* of the actor might well exist in instances in which mental suffering is the basis for recovery, it is not at all clear that there is a causal connection.

C. Facilitation of Positional Goods

As a general matter, current law does little to discourage positional externalities resulting from the consumption of positional goods. The two areas of law that are most relevant are tax and trademark. Tax law has the capacity to lower positional spending and does so, in a minor way, by the application of a progressive income tax. Trademark, as currently applied, encourages it by allowing trademarks to be used as symbols of status and wealth.

¹⁵² Lutz Farms v. Asgrow Seed Co., 948 F.2d 638, 643 (10th Cir. 1991).

¹⁵³ *Cabaness v. Thomas*, 232 P.3d 486, 486 (Utah 2010). For a differing approach, see *Riggs v. MySpace, Inc.*, No. CV 09-03073-GHK (CTx), 2009 WL 10671689, at *5 (C.D. Cal. 2009); *Rodriguez v. J.P. Morgan Chase Bank*, No. 3:08-CV-1417(PCD), 2009 WL 3710688, at *4 (D. Conn. 2009); *Stokes v. Charleston Cty Sch. Dist.*, No. C.A. 2:05-CV-02970-DCN, 2007 WL 858864, at *7 (D. S.C. 2007).

¹⁵⁴ *Cabaness*, 232 P.3d at 492.

¹⁵⁵ *Id.* at 508.

¹⁵⁶ *McCreery v. Miller’s Grocerteria Co.*, 64 P.2d 803, 805 (Colo. 1937). *See also* *Trimble v. City & Cty. of Denver*, 697 P.2d 716, 730 (Colo. 1985).

1. Tax Policy

For generations proposals have existed to curb rivalrous spending.¹⁵⁷ It is tempting to think of a luxury tax as having the greatest potential for lowering the level of position spending.¹⁵⁸ By taxing the purchase of yachts, expensive cars, and jewelry at higher rates, the level of consumption is reduced. This is because demand for luxury goods is viewed as relatively elastic.¹⁵⁹ There are two problems, however, with a luxury tax as a means of controlling positional spending. First, since the demand for any one positional good is elastic, people interested in positional goods may simply switch to ones on which the tax is not imposed. Second, some goods are subject to a “Veblen effect,”¹⁶⁰ which means as their price goes up they actually become more attractive as positional goods.¹⁶¹ At the extreme, higher prices, at least in theory, could lead to increases in the quantity demanded. Consequently, a luxury tax is probably not an effective response to positional spending.

The challenge, then, is to structure a tax system that more or less penalizes all positional spending. This seems to call for a progressive tax on *consumption*. The leading modern proponent of such system is economist Robert Frank, who has published widely on the issues raised by positional spending.¹⁶² He follows, however, the example of philosophers and economists ranging from Hume to Milton Friedman.¹⁶³ The system would work like this. Suppose your income was \$300,000. You might save \$20,000 and the rest (the amount used for consumption) above a certain amount and with possible deductions, would be subject to a progressive tax. Thus, your consumption above \$200,000 might be taxed at 20%. Consumption above \$300,000 might be taxed at 25% and

¹⁵⁷ See FRANK, *supra* note 60, at 223–24. For a history of the consumption tax, see Arthur Cockfield, *Income Taxes and Individual Liberty: A Lockean Perspective on Radical Consumption Tax Reform*, 46 S. D. L. REV. 8, 33–34 (2001).

¹⁵⁸ The United States experimented with a luxury tax in the period 1990–1993. It was a tax on automobiles, yachts, furs, jewelry, and aircraft that had a price above a certain amount. Omnibus Reconciliation Act of 1990 Pub. L. No. 101-508 §§ 4001–4007, 104 Stat. 1388, 439–42 (repealed 2002).

¹⁵⁹ Because demand curves slope downward, an increase in the price of an item typically leads to a decrease in quantity demanded. Elasticity refers to the percentage change in price as compared to the percentage change in quantity demanded. If demand is elastic, the percentage change in quantity demanded is higher than the percentage change in price. *Price Elasticity of Demand*, INVESTOPEDIA, <https://www.investopedia.com/terms/p/priceelasticity.asp>.

¹⁶⁰ This is a reference to Thorstein Veblen, to whom the term “conspicuous consumption” is attributed. See Laurie Simon Bagwell & B. Douglas Bernheim, *Veblen Effects in a Theory of Conspicuous Consumption*, 86 AM. ECON. REV. 349, 349 (1996).

¹⁶¹ See Mason, *supra* note 45, at 125.

¹⁶² See *supra* notes 11, 44, 45, & 47.

¹⁶³ FRANK, *supra* note 60, at 223. See generally NICHOLAS KALDOR, AN EXPENDITURE TAX 11 (1955); Cockfield, *supra* note 157.

so on. Frank believes that the system would be successful in curbing spending because it leaves everyone in the same relative position. He puts it like this: “In a society with a progressive consumption tax, the wealthiest drivers might buy a Porsche 911 Turbo for \$150,000 rather than a Ferrari Berlinetta F12 for more than twice that amount. But since everyone would be scaling back, that society’s Porsche owners would be just as excited about their cars as Ferrari owners are under the current tax system.”¹⁶⁴

In theory, a consumption tax would likely have a huge impact on spending that is ultimately intended to diminish others by virtue of demonstrating or signaling superiority. There are, however, detractors.¹⁶⁵ For example, there are questions about whether the tax could ever be passed with levels of progressivity that would make a difference.¹⁶⁶ Moreover, the notion that expenditures must be taxed because of the negative effect they have on others is not one that appeals politically.¹⁶⁷ There is also an underlying empirical question of how serious relative consumption is.¹⁶⁸ Regardless of these reservations, as far as current U.S. tax policy, it clearly falls short of the optimal policy to curtail positional consumption.

2. Trademark

While tax policy can be viewed as neutral with respect to positional consumption, trademark law is nothing less than a method of subsidizing it. Normally we think of trademark law as a method of avoiding confusion by providing information to buyers in the marketplace. A certain label or mark carries with it information about the quality of the product. The terms “Rolex” and “McDonalds” in their own ways tell a story. The problem is that trademarks can carry two stories. One is about the product and one is about the person possessing the product. When it communicates about the buyer, the two most relevant types of information have been called snob effects and Veblen effects.¹⁶⁹ The snob effect occurs when consumer demand is influenced by a desire to

¹⁶⁴ ROBERT H. FRANK, SUCCESS AND LUCK: GOOD FORTUNE AND THE MYTH OF MERITOCRACY 119 (2016).

¹⁶⁵ A good summary of objections is found in Cockfield, *supra* note 157, at 66–68. See also Alvin Warren, *Would a Consumption Tax Be Fairer than an Income Tax?*, 89 YALE L.J. 1081, 1096–97 (1980); David R. Henderson, *Robert Frank’s Strange Case for Taxing ‘The Rich,’* CATO (Nov./Dec. 2007), <https://www.cato.org/policy-report/novemberdecember-2007/robert-franks-strange-case-taxing-rich>.

¹⁶⁶ FRANK, *supra* note 60, at 225.

¹⁶⁷ *Id.*

¹⁶⁸ Henderson, *supra* note 165.

¹⁶⁹ Harvey Leibenstein, *Bandwagon, Snob, and Veblen Effects in the Theory of Consumers’ Demand*, 64 Q.J. ECON. 183, 189 (1950). Leibenstein also identifies “bandwagon effects” in which consumer demand is influenced by a desire to go along with the crowd.

distinguish oneself. The idea is to signal a different set, and presumably superior set of tastes.¹⁷⁰ Veblen goods, on the other hand, are associated with what is normally called conspicuous consumption, and the attraction can be the price itself.¹⁷¹ The two concepts can merge at times; very expensive items can be believed to be associated with snobbery and standing out from the crowd in terms of one's taste. Nevertheless, the key ingredient in these cases is something that identifies the good in the eyes of observers—often this means trademark is critical to signaling.

This type of signaling is quite different from the signaling that is meant to convey information about product quality and to lower transaction costs yet it seems to be part of modern mainstream trademark law.¹⁷² For example, in *Mastercrafters Clock and Radio Company v. Vacheron & Constatin-Le Watches, Inc.*¹⁷³ the manufacturer of a relatively expensive clock challenged the manufacturers of a significantly less expensive copy. The appellate court reversed the lower court and endorsed status signaling:

[P]laintiff copied the design of the Atmos clock because plaintiff intended to, and did, attract purchasers who wanted a “luxury design” clock. This goes to show at least that some customers would buy plaintiff's cheaper clock for the purpose of acquiring the prestige gained by displaying what many visitors at the customers' homes would regard as a prestigious article. Plaintiff's wrong thus consisted of the fact that such a visitor would be likely to assume that the clock was an Atmos clock.¹⁷⁴

¹⁷⁰ *Id.*; Jeffrey L. Harrison, *Trademark Law and Status Signaling: Tattoos for the Privileged*, 59 FLA. L. REV. 195, 207 (2007).

¹⁷¹ Leibenstein, *supra* note 169, at 189. For an empirical examination of signaling, see Angela Chao & Juliet B. Schor, *Empirical Tests of Status Consumption: Evidence from Women's Cosmetics*, 19 J. ECON. PSYCHOL. 107, 109 (1998). See also Bagwell & Bernheim, *supra* note 160, at 349 (examining situations where “Veblen effects” arise from the desire to gain social status by conspicuous consumption to signal wealth); Robert L. Basmann et al., *A Note on Measuring Veblen's Theory of Conspicuous Consumption*, 70 REV. ECON. & STAT. 531, 531 (1988).

¹⁷² See generally Harrison, *supra* note 170, at 227; Jeremy N. Sheff, *Veblen Brands*, 96 MINN. L. REV. 769 (2012). See also Jonathan M. Barnett, *Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property, and the Incentive Thesis*, 91 VA. L. REV. 1381, 1386 (2005). Although status signaling was endorsed before this time, it is noteworthy that the Lanham Act was amended in 1962. Prior to that time it covered instances in which confusion might be caused to “purchasers as to the source of original . . . goods or services.” The 1962 amendments dropped the word “purchasers.” Lanham Act, Pub. L. No. 87-772, sec. 11, § 16, 76 Stat. 769, 771 (1962) (codified as amended at 15 U.S.C. § 1114 (2006)).

¹⁷³ *Mastercrafters Clock and Radio Co. v. Vacheron & Constatin-Le Coultre Watches, Inc.*, 221 F.2d 464, 467 (2d Cir. 1955) (decided on the basis of unfair competition).

¹⁷⁴ *Id.* at 466.

The same sentiment is found in a more recent case concerning knock-offs of the so-called “Kelly Bag.”¹⁷⁵ The lower court focused on confusion by purchasers and noted that any confusion would be dealt with at the point of sale.¹⁷⁶ In effect, there was no harm to the public. The Second Circuit Court of Appeals reversed, finding that there was an infringement by those making knock-offs.¹⁷⁷ According to the court, “a loss occurs when a sophisticated buyer purchases a knockoff and passes it off to the public as the genuine article, thereby confusing the viewing public and achieving the status of owning the genuine article at a knockoff price.”¹⁷⁸

Finally, Judge Kozinski has weighed in with his own defense of the public investment in promoting Veblen effects. In the context of the Rolex watch he argues: Allowing the copies to exist is “a pure loss” because it “will make it less likely that Rolex . . . and others will invest in image advertising, *denying the image-conscious among us something we hold near and dear.*”¹⁷⁹ Judge Kozinski does not explain why the fact that people value status should result in a public investment to maintain vanity.¹⁸⁰

One can debate the proper role of trademark law but there is little or no basis to believe this area of American law does anything other than incentivize positional consumption and the underlying spiteful underpinnings. One question this Article addresses is whether United States law is sufficiently nuanced to permit spitefulness when it is, like in the ultimatum game, a protest against injustice.¹⁸¹ At least in the context of trademark law, this question is moot. It is not clear how justice seeking in the context of conspicuous consumption would manifest itself.

¹⁷⁵ *Hermes Int'l v. Lederer De Paris Fifth Ave., Inc.*, 219 F.3d 104 (2d Cir. 2000). The Kelly Bag is made by Hermes. Its value skyrocketed when Princess Grace of Monaco was spotted carrying one in the mid 1950s. Today Kelly Bag prices can exceed \$10,000. *Hermes 32 cm Kelly Capucine Bag*, BAGHUNTER, <https://baghunter.com/products/hermes-kelly-32-capucine-ghw>. See generally, Harrison, *supra* note 170 at 201 n.27.

¹⁷⁶ *Hermes Int'l v. Lederer De Paris Fifth Ave., Inc.*, 50 F. Supp. 2d 212, 226 (S.D.N.Y. 1999).

¹⁷⁷ *Hermes Int'l*, 219 F.3d at 110; see also *Payless Shoesource, Inc. v. Reebok Int'l Ltd.*, 998 F.2d 985, 989 (Fed. Cir. 1993); *Polo Fashions, Inc. v. Craftex, Inc.*, 816 F.2d 145, 148 (4th Cir. 1987).

¹⁷⁸ *Hermes Int'l*, 219 F.3d at 109.

¹⁷⁹ Alex Kozinski, *Trademarks Unplugged*, 68 N.Y.U. L. REV. 960, 970 (1993) (emphasis added).

¹⁸⁰ For an argument that there is no economic or moral basis for an investment in status signaling, see Harrison, *supra* note 170, at 227. For a different view, see Shahar J. Dilbary, *Famous Trademarks and the Rational Basis for “Irrational Beliefs”*, 14 GEO. MASON L. REV. 605, 605 (2007).

¹⁸¹ See *supra* text accompanying notes 21–38.

D. Criminal Law

Does spite play a role in criminal punishment? This is a difficult question, in part, because there are two perspectives to adopt. One can ask whether the general deterrence function of criminal law deters some actions that are spite-based. Almost certainly it does. There are many crimes in which the satisfaction of the perpetrator is directly related to the disutility of the victim. Hate crimes fit this description, as do rape and various instances of cruelty to people and animals.¹⁸² The fact that assaults and batteries are more harshly punished if they are “aggravated” lends some support to this as well.¹⁸³

In particular when it comes to harms to people, as opposed to property, it makes sense to have enhanced penalties. This is a broad statement to make, and it is impossible to say whether crimes to persons are more severely punished than crimes to property, because there is no standard for comparison. Still, spite-motivated crimes are quite different from property crimes. As noted earlier,¹⁸⁴ at least one theory for punishing theft and perhaps other crimes involving property is that we would like to channel those activities into the market. One could think of punishment as the price one pays for bypassing the market.¹⁸⁵ If the price is high enough, a market transaction becomes more attractive. In the case of spite, there can be no market transaction—there is no gain to the spiteful person if there is consent.¹⁸⁶ The theory and several examples suggest that criminal law does attempt to some degree to deter spiteful conduct.

The other perspective is whether criminal law exists as a reflection of our own spite. As a starting point, consider the generally accepted rationales for punishment: rehabilitation, deterrence, incapacitation, retribution.¹⁸⁷ It seems doubtful that those who determine the

¹⁸² For express considerations of spite see, e.g., *U.S. v. Diamond*, 65 M.J. 876, 892 (A. Ct. Crim. App. 2007); *B.A.L. v. Apple*, No. 00-0068-C-B/G, 2001 WL 1135024, at *7 n.4 (S.D. Ind. 2001); *People v. Gomez-Perez*, No. C056219, 2009 WL 795289, at *12 (Cal. Ct. App. 2009); *Klokoc v. Florida*, 589 So.2d 219, 219 (Fla. 1991); *Commonwealth v. Tanzer*, No. 096-P-902, 2010 WL 1539860 at *1 (Mass. App. Ct. 2010); *North Carolina v. Forest*, 362 S.E.2d 252, 255 (N.C. 1987); *Tennessee v. Carlton*, No. W2009-01004-CCA-RD-CD, 2010 WL 571798, at *4 (Tenn. Crim. App. 2010).

¹⁸³ See, e.g., *Young v. Florida*, 753 So. 2d 725, 727 (Fla. Dist. Ct. App. 2000); *Moakley v. Florida*, 547 So. 2d 1246, 1247 (Fla. Dist. Ct. App. 1989); *State v. Lutz*, 113 N.E.2d 757, 758 (Ohio C.P. 1953).

¹⁸⁴ See *supra* text accompanying notes 61–66.

¹⁸⁵ This price is in terms of expected punishment, which is the probability of apprehension and conviction times the actual penalty.

¹⁸⁶ For a discussion, see *Ciraolo v. City of New York*, 216 F.3d 236, 246 n.8 (2d Cir. 2000) (Calabresi concurring).

¹⁸⁷ Christopher Adams Thorn, *Retribution Exclusive of Deterrence: An Insufficient Justification for Capital Punishment*, 57 S. CAL. L. REV. 199, 200 (1983).

appropriate level of punishment for deterrence are motivated by spite.¹⁸⁸ Nor does it seem that spite can explain incapacitation or rehabilitation. It is not that these are not costly to society nor that they are not aimed to achieve specific goals. The problem is that they are designed to accomplish goals that accrue to the benefit of society. It is true that someone may feel gratified to know someone else is suffering, but none of these future-looking goals seem to have spite as an underlying rationale.

As defined here, it is retribution that appears to be akin to spite; all we get out of it is the satisfaction that others will suffer. This would be, however, a utilitarian perspective, and for the most part, retribution is not viewed as having a utilitarian basis. In this vein, John Cottingham writes about “Varieties of Retribution”¹⁸⁹ of which he says there are no less than nine. One he labels “satisfaction theory,” which he defines as: “A man is rightly punished because his punishment brings satisfaction to others.”¹⁹⁰ In effect, “there should be some kind of reciprocity between the sense of grievance felt by the victim . . . and the satisfaction he gets from the suffering of the offender.”¹⁹¹ Cottingham rejects this view of retribution first, because it involves interpersonal comparisons of utility, and second, because it is fundamentally utilitarian in that it is “a mechanism for the prevention of vendettas” which makes society better off.¹⁹²

Rawls also captures this non-instrumental view of retribution: “What we may call the retributive view is that punishment is justified on the grounds that wrongdoing merits punishment. It is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing The state of affairs where a wrongdoer suffers punishment is morally better than the state of affairs where he does not”¹⁹³ He goes on to contrast this with the utilitarian view whereby punishment is dependent on the net beneficial consequences for society.¹⁹⁴

Finally, the idea is beautifully expressed by Kant:

Even if a civil society were dissolved through the unanimous vote of its members (e.g., if an island society decided to dissolve with its members spreading themselves over the rest of the earth), the last murderer within its prison first must be executed so that he experiences what his own deeds are worth and the bloodguilt does

¹⁸⁸ For a possibly dissenting view, see James Fitzjames Stephen, *History of Criminal Law in England* 81 (1883) cited in, Stanley C. Brubaker, *Can Liberals Punish?*, 82 AM. POL. SCI. REV. 821, 824 (1988).

¹⁸⁹ John Cottingham, *Varieties of Retribution*, 29 PHIL. Q. 238, 238 (1979).

¹⁹⁰ *Id.* at 241.

¹⁹¹ *Id.* at 242.

¹⁹² *Id.* See also Richard A. Posner, *Retribution and Related Concepts of Punishment*, 9 J. LEGAL STUD. 71, 71–72 (1980).

¹⁹³ John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 4–5 (1955).

¹⁹⁴ *Id.* at 5.

not cling to the society that did not insist on this punishment: since, if so, it can be seen as having participated in that public violation of justice.¹⁹⁵

The point is that there are *utilitarian* reasons—rehabilitation, incapacitation, deterrence—for punishment which seem to have little or nothing to do with spitefulness of those imposing the punishment. On the other hand, while we may feel better about a system in which wrongdoers are punished without regard for the any identifiable social benefit, this purpose of punishment similarly cannot easily be tied to spite as it is defined here. Indeed, underlying much of criminal law and procedure seems to be a desire to filter out the spiteful inclinations of victims. As an example, consider the burglaries of two homes while the occupants are away. In one case, the victims are distraught and their hate for the thief so powerful they would like personal revenge and would feel no remorse afterward. Their feelings of spite are so overwhelming they would be willing to violate the law and suffer the consequences as long as the thief is made to suffer. The occupants of the other house are upset but take it in stride. They hate that it happened but feel no hatred toward the thief. Everything else being equal, the two thieves will be treated alike regardless of spiteful feelings.

IV. SUMMARY AND CONCLUSIONS

Spite is not a simple concept. Some actions are motivated by a desire to harm others as a source of the actor's satisfaction. Those same actions may be a reaction to a personal sense of injustice. Finally, spite-like actions are consistent with simply righting a wrong. This Article makes the case that spite, in its worst form, is comparable to theft. It is a taking of someone's sense of wellbeing without consent. This Article also claims that the purchase of positional goods is ultimately spite driven. It canvasses tort law, contracts, tax law, trademark, and criminal law in an effort to assess the reaction of the law to spite.

Because spite is a form of theft, it is not surprising to find that the strongest reactions are in tort law, and to some extent, criminal law. Both are applied in a way to deter spiteful actions. In tort law this means a greater likelihood of punitive damages. In criminal law it may be enhanced punishment. Contract law has yet to develop any coherent reaction to spite and such a development seems unlikely. Interestingly, tax policy falls well short of its potential in terms of curbing spite and trademark law actually subsidizes it. Although there is evidence in sociology and psychology that some spite is relatively benign or even socially beneficial, there is little indication that the law has any

¹⁹⁵ B. Sharon Byrd, *Kant's Theory of Punishment: Deterrence in its Threat, Retribution in its Execution*, 8 *LAW & PHIL.* 151, 151 (1989).

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predictable way to distinguish these instances from ordinary self-regarding spite.