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[DRAFT]

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> "The conversations I have had with continental lawyers left me with the impression that *abus de droit* is regarded as a dangerous expedient which should only be utilized to prevent manifest injustice [...] It [abuse of rights] resembles a drug which at first appears to be innocuous, but may be followed by very disagreeable after effects. Like all indefinite expressions of an ethical principle it is capable of being put to an infinite variety of uses, and it may be employed to invade almost any sphere of human activity for the purpose of subordinating the individual to the demands of the State. […]. But it is clear that the theories of abuse and of relativity of rights, in general, have no place in our law as it now stands"
>
> H. C. Gutteridge[1]

INTRODUCTION

This article explores a crucial, though often neglected, episode in the history of modern private law: the nineteenth and early twentieth century debate over the concept of "abuse of rights". In broad terms, the formula evokes the idea of an abusive, because malicious or unreasonable, exercise of an otherwise lawful right. The doctrine was applied in a variety of subfields of private law: property, contract, and labour law. It was conceived as a response to the urgent legal questions posed by the rise of modern industrial society: the limits of workers' right to strike, the limits of industrial enterprises' property rights on land *vis a vis* the rights of residential neighbours, the limits of a landowner's property right on crucial economic resources, such as water or coal-land. This article uses a comparative analysis of European and American cases and legal writing to interrogate a widely-shared understanding of the impact and significance of abuse of rights, neatly articulated in H. C. Gutteridge's passage. First, it challenges the notion that abuse of rights is a peculiar "invention" of civil law jurists, absent in the common law. Second, it questions the idea that abuse of rights operated as an effective social "corrective" preventing the "manifest injustices" allowed by modern individualist private law.

More broadly, this article touches upon a number of critical debates in comparative law and legal historiography. It investigates the relation between

[1] H. C. Gutteridge, *Abuse of Rights*, 5 CAMBRIDGE L. J.22, 44 (1933-1935).

law and social change, between the conceptual constraints and potentialities of legal doctrine and private lawyers' aspirations to social reform. Moreover, it attempts a comparative inquiry into styles of judicial reasoning, inviting further reflection on the coexistence of "deductive" and "instrumental" modes of justification in American, as well as in continental European, late nineteenth century cases. Further, the article draws upon and revisits the "functionalist" method of comparative legal analysis, arguing for the enduring relevance of a "textured functionalism". Finally, the story of abuse of rights, speaks to the critical issues faced by contemporary private lawyers: the nature and the role of private law in the era of the crisis of traditional social democracy and the need for new legal tools that would broaden the conversation about the future of our socio-economic institutions.

Abuse of rights was a most typical "invention" of the wave of social legal thought that developed in France and Germany starting from mid-nineteenth century. Swift technological progress, change in the industrial structure, notably the shift from small, artisanal producing units to large scale enterprises, and the consequent outburst of social unrest and class antagonism brought to the fore the question of the terms of liberty in new social and economic conditions. Confronted with the need to foster freedom of enterprise and economic development while attenuating its social repercussions, "social jurists" revolted against "classical" modern private law. They deemed the formalistic and deductive mode of reasoning relied upon by classical "*civilistes*" as well as their individualistic assumptions inadequate to accommodate economic change and social cohesion, freedom of action and security. In contrast, "social jurists" called for a sociological and organicist mode of reasoning that takes into account the purpose of legal rules and the complexity of "social mechanics"[2]. At the substantive level, they advocated complementing

[2] RUDOLF VON JHERING, LAW AS A MEANS TO AN END (trans. Mac Millan, New York 1924). In "Law as a Means to an End" Jhering furnishes both a critique of conceptual formalism and a purposive definition of law. Jhering's "naturalist" conception of law reveals the illusionary nature of the grandiose formalist conceptual architecture, bringing to light the reality of "social mechanics". The formalist image of law as clockwork that runs its regulated course into which no disturbing hand enters is contrasted with the image of law as a "mighty machine" in which "thousands of rollers, wheels, knives move restlessly, some in one direction, some in another, apparently quite independent of one another as if they existed only for themselves, and yet all work ultimately together harmoniously for one purpose". The force that moves the wheelwork is the "will of thousands and millions of individuals, the struggle of interests, of the opposition of efforts, egoism, self will". Purpose is the moving force behind law; "everything found on the ground of law was called into life by a purpose and exists to realize some

"individual law", i.e. law that regulates conflicts among individuals by delimiting their respective rights with a "social law", i.e. law that favours social cohesion and privileges collective interests[3].

The doctrine of "abuse of rights" reflected both the yearning for a new style of legal reasoning and the call for social solidarity. The concept of "subjective right", elaborated over the centuries by continental legal science and defined by German Pandectist Windscheid as the sphere of the individual's absolute and unlimited will,[4] appeared to "social jurists" formalistic and unworkable. Rapidly changing socio-economic conditions demanded a conceptual tool that would account for "subjective rights'" relative and relational nature. Abuse of rights was thought to be such tool. It allowed a purposive analysis of competing rights in light of larger social interests and it promised to deliver distributively fair outcomes.

Conceptually, the doctrine was variously articulated; while subjective formulations focus on the right holder's motive or intent, objective formulations scrutinize the right holder's conduct. Thus, different formulations of the doctrine may be arranged along a spectrum that runs from subjective to objective, each, potentially, entailing a different degree of compression of the right.

In a first formulation, located at the subjective end of the spectrum and known as "*aemulatio*", the right holder is said to abuse her right when her

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purpose.

[3] GEORGES GURVITCH, L'IDEE DU DROIT SOCIAL. NOTION ET SYSTEME DU DROIT SOCIAL (1932, reprint Scientia Verlag 1972). See also, SOCIOLOGY OF LAW, (preface by Roscoe Pound) 166 (1947 reprint Routledge & Kegan Paul 1973) for a later formulation of the idea of "Social Law"; "First we observe the contrast between *social law* and *individual law* (or better inter-individual law) corresponding to the contrast between sociality by interpenetration and sociality by interdependence (intuitive union and communication by signs). "Social Law" is a law of objective integration in the "We", in the immanent whole. It permits the subjects, to whom it is addressed, to participate directly in the whole, which in turn effectively participates in jural relations. That is why "Social law" is based on confidence, while individual law, i.e. inter-individual and inter-groupal law is based distrust. One is the law of peace, mutual aid, common tasks, the other the law of war, conflicts, separation. For, even when individual law partly draws together subjects as in the case of contracts, it simultaneously separates them and delimits their interests. All law being a linking of the claims of some with the duties of others, an "imperative-attributive" regulation, in social law claims and duties interpenetrate each other and form an indissoluble whole, while in individual law they only limit and crash against each other. In social law distributive, in individual law, commutative justice predominates".

[4] BERNHARD WINDSCHEID, LEHRBUCH DES PANDEKTENRECHTS (1862).

exercise of the right is driven by the sole malicious intent to harm another. The classical text-book example of the landowner who erects a tall fence for the sole malicious purpose of depriving her neighbour of light illustrates this narrow subjective formulation of the theory.

In a second formulation, an abuse of a right is detected any time malice is the dominant, though not the exclusive, motive animating the actions of the right holder. For instance, in the previous example, while the fence also serves the purpose of holding ornamental vines, the landowner would have never erected it if not moved by ill will towards her neighbour.

According to a third formulation, a subject is deemed to abuse her right when acting with a lack of "legitimate interest", though not necessarily spitefully. In late nineteenth century developing economies, the landowner who pumped from her land the groundwater feeding her neighbour's mill only to end up wasting it was often found to have abused her right. Although this formulation centres on the subject's motive, it entails a dose of objectiveness in the definition of what amounts to a "legitimate interest".

In a fourth articulation, a right holder acts abusively if she exercises her right contrary to the "normal function" of the right. While, similarly to the previous, this formulation gauges the subject's purpose against the objective criterion of "normal function" of the right, it may entail a higher degree of compression of the right, "normal function" being, potentially, susceptible of a more restrictive definition than "legitimate interest". At the height of nineteenth century industrial struggles, unions were found to abuse their right to strike when their action departed from the right's "normal function".

Finally, in a fifth formulation, located at the objective end of the spectrum, a right is abused when exercised contrary to its "socio-economic purpose". In this articulation, the focus of the scrutiny is shifted from the subject's intent to the nature of her conduct. The test allows sharp limitations of the right holder whose conduct is weighed in light of larger social needs and interests. A landowner who in an arid region drains ground water, diminishing the community's supply, to sell it for the irrigation of distant lands may be deemed

to use of her right contrary to its "socio-economic destination", defined as the productive use and enjoyment of land respectful of the larger needs of the community.

Drawing on an influential comparative law tradition, this article investigates the "functional equivalents" of abuse of rights in the common law. In the 1950s and 60s, at the height of functionalist comparative law[5], a copious literature cast light on the operation of "functional analogues". Arthur von Mehren magisterially examined the various techniques employed in French and German law to solve the problems that the common law handles through the doctrine of consideration[6]. More recently, John Langbein has suggested that trust is a uniquely Anglo-American institution, foreign to the civil law tradition and that Europeans achieve mostly by means of contract what the

[5] On "functionalism" in comparative law see: Michele Graziadei, *The Functionalist Heritage*, in COMPARATIVE LEGAL STUDIES. TRADITIONS AND TRANSITIONS, 100, (Pierre Legrand & Roderick Munday eds., 2003); Ralf Michaels, *The Functional Method of Comparative Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 339 (Mathias Reimann & Reinhard Zimmermann eds., 2006). Max Rheinstein has offered the clearest account of the functionalist method to date. Every rule, according to Rheinstein, "has to justify its existence under two inquiries: first, what function does it serve in present society ? second, does it serve this function well or would another rule serve better?". See Max Rheinstein, *Comparative Law: Its Functions, Methods and Usages,* 22 ARKANSAS LAW REV. 415 (1968-69); Id, *Comparative Law and Conflict of Laws in Germany*, 2 UNIV. CHICAGO LAW. REV., 232 (1934-35); Id, *Teaching Comparative Law,* 5 UNIV. CHICAGO LAW REV 615 (1937-38). Functionalism was a crucial methodological innovation of early twentieth century comparative lawyers. Saleilles and Lambert's emphasis on rules' "function" was meant as a powerful critique of the formalism of conceptual analysis and "legal dogmatics". The second generation of comparative lawyers further developed functionalism's critical potential. Pound's functionalist approach rested on a set of critical moves: a critique of "mechanical jurisprudence", a functional definition of law as an instrument of social control and an "is to ought" move that derives the normative assessment of law from the positive facts of social life. A pragmatic legal science solicits the adjustment of legal principles and doctrines to the human condition they are to govern, to the findings of the science of society. Legal rules derived from social needs and functions are effective in ordering the satisfaction of conflicting and overlapping individual claims with a minimum of friction and waste. In other words, law is to be tailored on the discoverable "social objectives" of *an* ultimately coherent "society". The "is to ought "move was one of the main targets of the Realist critique. If on the one hand, Felix Cohen appropriated the functionalist discourse, denouncing conceptualist legal science as "transcendental nonsense" and advocating a functionalist jurisprudence, on the other hand, he rejected the" is to ought" move, viewing functionalism as a crucial tool for an "ethical criticism" of law. Cohen envisages the normative use of a functional definition of law as the prime danger of the functional approach. In order to avoid blindness, functionalism is to couple an objective legal science and a critical theory of social values. In recent decades functionalism has come under attack on several fronts. It has been charged of reductionism in that it focuses exclusively on rules' socio-legal function and overlooks a whole range of complicating factors: culture, mentality, ideology. Further, critics claim, functionalism assumes a "mirror theory" of the relation between law and society and ignores the fact that law acts upon social interests and needs: the facilitative and ideological role played by law. Finally, functionalism interrogates the comparative effectiveness of functionally equivalent rules, eluding questions of broader legal reform.

[6] Arthur T. von Mehren, *Civil Law Analogues to Consideration: An Exercise in Comparative Analysis*, 72 HARV. L. REV. 1009 (1958-1959).

Anglo-American systems do through trust[7]. Similarly, Friedrich Kessler and Edith Fine showed that while the common law seems to have no counterpart to the German doctrine of *culpa in contrahendo*, notions of good faith as well as the doctrines of negligence, estoppel and implied contract have served many of the functions of *culpa in contrahendo*[8].

This corpus of literature has focused mostly on the socio-legal function performed by analogous private law doctrines, neglecting their rhetorical dimension, that is, the arguments and the justifications common lawyers and civilians provided for functionally equivalent doctrines as well as the expectations and the anxieties the latter spurred. Rather than merely identifying abuse of rights' "functional equivalents", this article seeks to do full justice to the rich rhetorical texture of the abuse of rights debate.

In France and in Italy, abuse of rights spurred reactions of dire condemnation and hyperbolic eulogy. Its critics envisaged it as "a barren logomachy"[9], a "medieval relic thoughtlessly carried over"[10] or, at best, as "a pure piece of sentimentality". By contrast, its champions acclaimed it as the triumph of "a more perfect and broad vision of justice". The wave of emotionality stirred by abuse of rights seems to be far from drying up. Writing in 1965, Italian jurist Pietro Rescigno noted that the changing fortunes of abuse of rights are evidence of "the jurist's agony in redeeming law's ancient misery"[11]. More recently, an experts' report published by the Council of Europe, retrieving nineteenth century social rhetoric at its best, concluded that abuse of rights makes it possible "to establish the connection between the justice ostensibly guaranteed by positive law and genuine justice"[12].

In England and in the United States the debate over the concept of "malice"

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[7] John T. Langebein, *The Contractarian Basis of the Law of Trusts,* 105 YALE L. J. 667 (1995-1996) at 669 ff.

[8] Fredriech Kessler & Edith Fine, *Culpa in Contrahendo, Baragining in Good Faith and Freedom of Contract. A Comparative Study,* 77 HARV. L. REV. 701 (1963-1964).

[9] MARCEL PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL, v. 2 n. 870 (Paris, 1907)

[10] Vittorio Scialoja, *Aemulatio,* in ENCICLOPEDIA GIURIDICA ITALIANA, Napoli-Milano (1884) I 2. I 426 ff.

[11] Pietro Rescigno, *L'Abuso del Diritto,* Riv. Dir. Civ. vol. I 205 (1965); PIETRO RESCIGNO, L'ABUSO DEL DIRITTO (1998).

[12] ABUSE OF RIGHTS AND EQUIVALENT CONCEPTS: THE PRINCIPLE AND ITS PRESENT DAY APPLICATION, Proceedings of the nineteenth colloquy on European Law, Luxembourg 6-9 November 1989 p. 10.

reached similar rhetorical peaks. When discussing "malice" common lawyers seemed to loose their habitual aloofness. Gutteridge described abuse of rights as "an instrument of dangerous potency in the hands of the demagogue and the revolutionary"[13]. In a 1905 article on the role of malicious torts in the field of labor relations, Bruce Wyman, from Harvard Law School, evoked "the horror of anarchy or the hopelessness of socialism".

Exploring the rhetoric surrounding abuse of rights and its analogues may help elucidate the actual stakes of the debate, the multiple, and complexly intertwined, questions and interests laying behind doctrinal disputes and judicial argumentation. Rhetoric illuminates abuse of rights' political saliency. The debate over abuse of rights pitted against each other jurists with different political commitments and various power allegiances. Further, rhetoric sheds light on jurists' relation with larger legal ideological models. The debate over abuse of rights is also a duel between proponents of different models of property, the unitary and absolutist and the pluralized and relativized[14]. Finally, rhetoric allows a glimpse on jurists' hidden professional agendas. In France and in Italy, the debate over abuse of rights was critical to the conflict between different segments of the legal-academic profession as well as to the relation between the professoriate and the judiciary.

Relying, thus, on a "textured functionalism", this article advances and interrogates two hypotheses. First, it suggests that, in vast and highly transversal areas of the law, such as water law, nuisance, tortious interference with contractual relations or economic expectancies and labor law, nineteenth and early twentieth century American courts weighed defendants' motives and conduct through malice tests and reasonable user rules that closely parallel abuse of rights. However, contrary to continental European systems where rules limiting a malicious or unreasonable exercise of one's right congealed in the unitary conceptual and legislative category of "abuse of rights", in the

[13] H. C. Gutteridge, *supra* note 1 at 44.

[14] For the US, see Robert G. Bone, *Normative Theory and Legal Doctrine in American Nuisance Law: 1850-1920*, 59 S. CAL. L. REV. 1104 (1985-1986). Bone discusses the normative theories that jurist used to reason about nuisance disputes between the 1850s and the 1920s; he focuses on three different legal-ideological models: the "competing rights" model, the "static absolute dominion" model and the "relative property rights" model.

United States, these same rules remained largely non-integrated.

This article investigates the reasons why a unitary conceptual category of "abuse of rights" was never developed in the United States. In France and in Italy, I suggest, the shaping of an overarching concept of "abuse of rights" was part of the jurists' struggle to preserve the conceptual coherence of private law at a moment when, under the pressure of social and economic change, new fields of law were being carved out of "*droit privé*"[15]. These new legal disciplines, zoning law, labor law, welfare law, were deemed to be more apt to govern social and economic change. Private lawyers stood up as the staunch defenders of the systematic unity of private law as well as of their own professional power as the "legal architects of modern society". Conversely, in the United States, where pretensions to law's conceptual coherence were increasingly coming under attack, rationalization of these non-integrated reasonableness tests and malice rules was achieved by means of a unitary style of reasoning rather than by means of conceptual integration. This instrumentalist style of reasoning, featuring "balancing", cost-benefit analysis and policy arguments, differed significantly from orthodox late nineteenth century American legal thought. Judges consistent reliance on this pragmatic style of reasoning, I argue, invites a revision of the traditional portrait of nineteenth century classical orthodoxy[16].

Further, this article advances a second hypothesis. The comparative analysis of American cases suggests that, despite the rhetorical hysteria it spurred, abuse of rights' potential as a tool for social reform was consistently defused. Abuse of rights heralded two promises. First, it promised to provide a social corrective to the individualistic language of modern private law, the language of will, property and fault. Second, it promised to operate as critical tool for progressive lawyering, enabling fair distributive outcomes. Both promises remained largely unfulfilled.

As to the latter promise, rarely and timidly did courts deploy abuse of

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[15] FRANZ WIAECKER, A HISTORY OF PRIVATE LAW WITH SPECIAL REFERENCE TO GERMANY, (Tony Weir trans. 1995) at 430ff. Duncan Kennedy, *Thoughts on Coherence, Social Values and National Tradition in Private Law* in THE POLITICS OF A EUROPEAN CIVIL CODE (Martijn W. Hesselink ed 2006) at 9.

[16] See Stephen A. Siegel, *The Revision Thickens*, 20 LAW & HISTORY REV. 631 (2002);

rights and its analogues to effect distributive choices that shifted the balance of power and wealth from socio-economically strong actors, i.e. owners, employers or stronger contractual parties, to weaker actors or to privilege collective interests over individuals' self-interest. At times, the doctrine was articulated as to impose duties on strong parties only to secure and reinforce their "absolute" rights. In "spite fences" cases, abuse of rights served as a buttress to individual property rights, imposing a limit to owners' self-interest to protect the symmetrical "absolute" rights of other property holders. More often, duties of "reasonableness" or "fairness" in the exercise of rights were imposed on weaker parties rather than on strong parties. For instance, in labor cases, abuse of rights was often operated against the weaker party, courts finding unions to have exercised abusively their right to help themselves in the "free" and "fair" competition with employers or with rival unions.

As to the first promise, even when abuse of rights did in fact relieve weaker parties, as often in the case of malicious interference with contractual relations, it did so by virtue of the pervasive individualistic proprietary logic. Existing contracts or future economic expectancies were considered "property" and abusees "owners" to be protected in the quiet enjoyment of their property or in the effort to gain it.

Abuse of rights' corrective potential has been largely overestimated. In the United States the functional equivalents of abuse of rights served as tools for governing and facilitating economic life and the "release of individual creative energy"[17] rather than as social correctives. Time and again, courts' reliance on malice rules and reasonableness tests was premised on the desirability of maximizing economic growth[18]. In water law cases and in nuisance cases, courts consistently deployed "reasonable user" standards to favour technological improvement and new productive uses of land by mills, mining companies and large developers. In cases of interference with contractual relations, judges relied on reasonableness rules and malice tests to define the sphere of legitimate economic competition. Further, at the height of late nineteenth century labor

[17] JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1984).
[18] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 (1977) 35 ff.

upheaval, courts used malice rules were to govern industrial struggle, curbing the effectiveness of the various tactics with which unions threatened proprietary capitalists.

The American developments invite closer scrutiny of the impact of abuse of rights in continental Europe. In France and in Italy, I suggest, abuse of rights was a critical element of a private law system centred on property and paramount to the solidity and longevity of the modern bourgeois socio-economic order. More specifically, abuse of rights paralleled the ambiguities of a wider strategy of "social solidarity" aimed at boosting industrialization while mitigating its social repercussions. Animated by humanitarian impulses, paternalistic concerns and the quest for maximum economic profit, this strategy entailed social legislation and experiments in "avant-garde capitalism". Judges and jurists joined policy makers and capitalists in the effort to demonstrate that, in the era of predatory capitalism, enlightened economic development was possible. Incorporated into the conceptual "system" and purged of its radical potential abuse of rights seemed to allow a fair, and innocuous, compromise between development and solidarity. Abuse of rights was less the vehicle of radical aspirations to social reform than the site where other crucial methodological and political battles took place. It was the battle-field where jurists and writers voiced claims of cultural identity and sought to delineate the boundaries between law and morals and law and politics.

This article is divided in two parts. Part I. tracks the various malice rules and reasonableness tests that worked as functional equivalents of abuse of rights in the common law. It investigates the techniques of legal reasoning through which nineteenth and early twentieth century American courts operated these rules as well as the social and economic concerns that drove judges' resort to "reasonableness" and "malice". Part II shifts the focus from judicial elaborations to scholarly discussions. It shows that the debate spurred by the theory of "intentional tort" at the turn of the nineteenth century in the United States parallels the contemporary European controversy over abuse of rights. Part III and part IV turn to France and Italy, tackling, respectively, the curbing of abuse of rights' potential as a tool for redistributive policy and the methodological and cultural stakes of the academic debate over abuse of rights.

I. ABUSE OF RIGHTS IN AMERICAN COURTS

A. The Functional Equivalents of Abuse of Rights: Malice Rules and Reasonableness Tests

For some decades between the second half of the nineteenth and the first half of the twentieth century abuse of rights assiduously occupied the minds of continental European jurists. It dominated academic discussions and it appeared with increasing frequency in courts' decisions. A newly crafted unitary conceptual scheme resting on medieval sources, it allowed judges to weigh conflicting individual rights, tempering their absoluteness and amplitude, in a variety of legal subfields. Susceptible of application to both extra-contractual rights and contractual rights, it helped courts deal with questions regarding relations among neighbours, conflicts over water resources, marital and paternal authority, the formation of contracts, unilateral recess, business competition and conflicts between capital and labor. A central organizing concept on the Continent, abuse of rights was, allegedly, hardly of any concern to common lawyers. The relatively sparse English literature on abuse of rights insinuates that the concept is nowhere to be found in the common law. A unitary notion of abuse of rights was neither part of the conceptual armoury of academic writers nor readily available in the courts' tool box.

However, a look at courts' records suggests that abuse of rights was, indeed, silently at work in English and, more significantly, in American law. The scattered references to continental European theories should not deceive. In various areas of the law, judges relied on "functional equivalents" of abuse of rights. In other words, the socio-legal function played by abuse of rights on the continent, i.e. limiting the amplitude of individual rights and balancing conflicting rights, was performed by a variety of "malice" tests and "reasonable user" rules that, although not integrated into a unitary category of "abuse of rights", presented a highly similar conceptual pattern. In disputes as diverse as conflicts between riparian owners and controversies between employer and employees, defendants' conduct, otherwise lawful, was deemed to entail liability either because of its malicious nature or by virtue of its unreasonableness. Significantly, the hidden conceptual unity of these various rules did not elude common lawyers. Opinions abounded with allusions to the

parallel operation of similarly structured malice rules in different areas of the law.

1. Water Law

Water law had long been the terrain on which continental theories of abuse of rights were elaborated and tested. Justinian law contained scattered provisions prohibiting *aemulatio* in relation to water rights, provisions which were of avail to medieval jurists in their effort to work out a general theory of *aemualtio*. Drawing on these Roman and medieval precedents, nineteenth century French and Italian jurists framed conflicts over competing uses of water as abuses of landowners' property rights. *Cujus est solum, ejus est usque ad coelum*. As the maxim recites, a landowner's right was said to extend to surface of the land as well as to everything that is upon or above it to an indefinite height. However, although exclusive and absolute, this right was deemed to be susceptible of abuses. Spitefully pumping off the water percolating underneath one's land thereby draining the neighbour's well amounted to one such instance of abuse.

Not surprisingly, in England and in the United States, courts dealt with abuses of water rights relying on rules that closely parallel the continental doctrine. In Acton v. Blundell, a case decided by the Exchequer Chamber in 1843[19], the plaintiff, a cotton spinner, used for the operation of his mill a well which was fed by underground streams of water percolating from the soil underneath the land of the defendants. The latter erected engines and pumps which drained the water preventing it from flowing and percolating to the plaintiff's well and thereby procuring him pecuniary loss. In the court's assessment, the draining of the well amounted to *damnum absque iniuria* and could not become the ground of an action[20]. A landowner, the court noted, has the right to avail herself of all that lies beneath the surface, unless she does so

[19] Acton v. Blundell, [1843] 12 M. & W. 324. The cause was tried before Rolfe, B. at the Liverpool Spring Assizes in 1841. Against the direction of the Judge, the counsel for the plaintiff tendered a bill of exceptions which was argued before the Court of Exchequer Chamber (Tindal J).

[20] The inferior court directed the jury that, if the defendants had proceeded and acted "in the usual and proper manner" for the purpose of working a coal mine, they might lawfully do so and that the plaintiff's evidence was not sufficient to support his allegations. Against the direction of the inferior court, the counsel for the plaintiff tendered a bill of exceptions which was argued before the Court of Exchequer Chamber.

animo vicino nocendi, i.e. maliciously, with the intent to injure the neighbour. However, since ill will was not alleged, the malice qualification was obiter.

In Chasemore v. Richards (1859), Lord Wesleydale, hinted at a notion of "reasonable use" that resembled continental notions of "normal function"[21]. The appellant had owned and operated for sixty years a mill on a river which was fed by the water percolating through the underground strata from higher lands. The respondent, the local Board of Health of the town of Croydon, for the purpose of augmenting the town's supply of water and for other sanitary purposes, sunk a large well in a piece of land situated above the plaintiff's mill. The operation of the well drained the subterranean stream that would have otherwise oozed in the river, diminishing its flow and therefore hampering the working of the appellant's mill. The latter brought action for damages. The Court of Exchequer and the Court of Exchequer Chamber gave judgement in favour of the respondents. The House of Lords confirmed the decision of the lower courts, affirming the respondent's right to intercept subterranean streams. Lord Wensleydale, in an opinion which is "as close to a dissenting judgement as possible without recording a formal dissent"[22], carefully investigated the modalities and purposes of the respondents' use of the water, suggesting that a use not connected with the enjoyment of the land may be "unreasonable"[23].

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[21] Chasemore v. Richards [1859] 7 H. L. Cas 349.

[22] MICHAEL TAGGART, PRIVATE PROPERTY AND ABUSE OF RIGHTS IN VICTORIAN ENGLAND: THE STORY OF EDWARD PICKLES AND THE BRADFORD WATER SUPPLY (2002).

[23] However, a few decades later, in Mayor of Bradford v. Pickles, the House of Lords stepped back, finding motives to be immaterial. The Mayor, Aldermen and Burgesses of the Borough of Bradford Appellants v. Edward Pickles Respondent, [1895]AC 587. Mayor of Bradford v. Pickles is another case involving interference with underground water. The respondent, Mr Pickles, owned land on a higher level than the parcel of land acquired by the appellants and used for the operation of the Bradford Waterworks Company. Allegedly for the purpose of working minerals, Mr Pickles drained from the soil the ground water, which would have otherwise percolated to the appellants' land, thereby reducing the latter's supply of water. The appellants brought an action seeking an injunction to restrain the respondent from continuing to sink the shaft or doing anything to draw off the water or diminish its quantity. They claimed that the respondent was motivated by the intent to injure thereby inducing them to purchase his land, rather than by a *bona fide* intention to work his minerals. While the inferior court granted the injunction, the Court of Appeals reversed. The House of Lords confirmed the latter court's decision, dismissing the appeal. In the court's analysis it is the act, not the motive for the act, that must be regarded. The deliberate nebulosity of Mr. Bell's Principles of the Law of Scotland should not deceive, Lord Watson warned. *Aemulatio* is a misleading expression and, while its operative scope in the law of Scotland is narrow, translating in mere variations of degree in the courts' assessment in cases of nuisance, it was never part of English law. On Bradford v. Pickles see: MICHAEL TAGGART, *supra* note 26.

In the United States, notions of "reasonable use" closely resembling continental objective formulations of "abuse of rights" proved crucial organizing concepts in nineteenth century water law, a legal field key to the progress of industrialized agriculture as well as to the development of manufacturing industry. Starting from the 1820s, water law took shape as a distinctively American conceptual creation[24]. Joseph Angell's "A Treatise on the Common Law in Relation to Watercourses" appeared in 1824, laying the foundations on which Justice Story and Chancellor Kent were to shape the common law of waters[25]. "Reasonable user" rules were central to this new conceptual structure. In all of the three major sub-domains of water law, surface watercourses, ground water and diffuse surface water, "reasonable user" doctrines gradually supplanted earlier rules of allocation.

With regard to the first category of waters, i.e. surface watercourses, in the humid eastern states, riparianism soon emerged as the controlling doctrine. According to the riparian doctrine, ownership of riparian land creates a perpetual usufructuary right in the landowner to use the water. As to the allocation of water among riparian owners, the earlier "natural flow" rule[26], dominant in the eighteen and early nineteenth century was gradually replaced by the "reasonable user" principle[27]. The latter accords the riparian a right to alter the flow when, balanced against the uses of other riparians, the use is reasonable. Anticipated by Justice Story in Tyler v. Wilkinson[28], the reasonable

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[24] Samuel C. Wiel, *Waters: American Law and French Authority,* 33 HARV. L. REV. 133 (1919), notes that: "the common law of watercourses is not the ancient result of English law, but is a French doctrine received into English law only through the influence of two eminent American jurists".

[25] JOSEPH ANGELL, A TREATISE ON THE COMMON LAW IN RELATION TO WATERCOURSES (1824); JAMES KENT, COMMENTARIES ON AMERICAN LAW (1889).

[26] The "natural flow" rule prohibits any use of the stream by one riparian so as to diminish the natural flow to the other riparian owners; it allows for modest domestic use, preventing waste, malicious diversion or extraordinary use of water. See Michael Taggart, supra note 26; See

[27] MORTON J. HORWITZ, *supra* note 16.

[28] In Tyler v. Wilkinson 4 Mason 397 Fed Cas no 14 312 (1827), Justice Story provided a schizophrenic articulation of the rule that reflected an uneasy transition between the older rule and the new reasonableness principle. The case involved a typical case of conflict between riparian mill owners where the owners of the upper dam appropriate and use a large quantity of water to the detriment of lower dam. In Story's reasoning, the natural flow principle was still commanding and the reasonableness test was timidly added as a qualification. "The right being common to all the proprietors on the river, no one has a right to diminish the quantity which will, according to the natural current flow to a proprietor below or throw it back upon a proprietor above. This is the necessary result of the perfect equality of right among all proprietors of that which is common to all. […] When I speak of this common right, I do not mean to be understood, as holding the doctrine that there can be no diminution

use rule was fully articulated in Cary v. Daniels, a 1844 case involving a conflict between lower and upper mill owners[29]. Chief Justice Shaw of the Supreme Court of Massachusetts found that each proprietor is entitled to such use of the stream, so far as it is reasonable in light of the needs of the community and the developments in hydraulic technologies.

A similar development occurred in the legal regime governing the second category of waters, i.e. underground percolating waters. While earlier cases rely on the "absolute ownership" rule, occasionally tempered by a narrow subjective malice qualification, by the late nineteenth century courts and writers were shifting towards either a "reasonable user" criterion or a "correlative rights" rule[30]. Professor Ernst Huffcut of Cornell Law School, writing in 1904 on the Yale Law Journal stated confidently that "the prevailing view in America is that, in order to justify the cutting off of another's water supply derived from percolating waters, it is necessary that this should be result of a reasonable user of defendant's rights in his own land"[31]. In Bassett v. Salisbury (1862)[32], a case regarding the obstruction of the natural drainage of percolating water, the Supreme Court of New Hampshire while spelling neatly the "reasonable user" rule, also showed awareness of the hidden conceptual unity of reasonableness rules operating in various legal subfields:

> The maxim "*sic utere*" & c., therefore applies, and, as in many other cases,

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whatsoever, and no obstruction or impediment whatsoever, by a riparian proprietor in the use of the water as it flows; for that would be to deny any valuable use of it. There may be, and there must be, allowed of that, which is common to all, a reasonable use. The true test of the principle and extent of the use is whether it is to the injury of the other proprietors or not. […] The law, here, as in many other cases, acts with a reasonable reference to public convenience and general good and it is not betrayed into a narrow strictness, subversive of common sense, nor into an extravagant looseness, which would destroy private rights. The maxim is applied " *sic utere tuo ut non alienum leadas*".

[29] Cary v. Daniels 8 Metcalf 466 (1844).

[30] The reasonable use rule was anticipated in a number of earlier cases. In De Bok v. Doak 188 Iowa 597, 176 N. W. 631 (1920), the plaintiff complained of an alleged injury caused him by the fact that the defendant appellant used an excessive amount of water percolating from the ground not only as drink for his horses and cattle but also to furnish drink and make a wallow for his hogs. The Supreme Court of Iowa, affirming the decision of the Circuit Court which had granted injunctive relief, held that the appellant defendant had wasted the water in excess to the detriment of the plaintiff. Justice Salinger emphasized the "modern trend" towards a "reasonable use" rule taking into account "the local conditions, the purpose for which the landowner excavates and the use or non use she makes of the water".

[31] Ernst W. Huffcut, *Percolating Waters: The Rule of Reasonable User*, 13 YALE L. J. 222 (1903-1904).

[32] Bassett v. Salisbury 43 N. H. 569 (1862).

> restricts each to a reasonable exercise of his own right, a reasonable use of his own property, in view of the similar rights of others. Instances of its similar application in cases of watercourses, where the detention, pollution or unnatural discharge of the water is complained of, of highways, of alleged nuisances in regard to air or by noises &c., &c., and of the manner of the application are too numerous and familiar to need more special mention.

Finally, reasonableness tests were also developed in relation to the third category of waters, i.e. diffused surface waters. In the nineteenth century and earlier twentieth century, run-off water was considered mainly in terms of disposal and relatively little use was made of it. Earlier governed by an absolutistic "common enemy" rule or by the so called "civil law" rule[33], conflicts over surface run-off increasingly came to be controlled, by a "reasonable use" rule. In Short v. Baltimore City Passenger Railway, the Court of Appeals of Maryland weighed the competing rights of the appellant, the owner of a house in a Baltimore neighbourhood, and the appellee, a railway company, in light of the reasonableness of the latter's use of its property[34]. After a heavy fall of snow the railway company in clearing its track, threw the snow into the adjoining street. The same night it rained hard and the mass of snow obstructed the natural flow of the water which flooded the appellant's house. The court affirmed the judgment of the inferior court finding that the railway company had acted in a "reasonable, usual and proper manner" and hence the appellant' injury was *damnum absque injuria.* Similarly, in City of Franklin v. Durgee, the court declared that "the doctrines of reasonable necessity, reasonable care and reasonable use prevail in this state in a liberal form, on a broad basis of general principle"[35].

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[33] In Gannon v. Hargadon, 10 Allen 106 (1865), a Massachusetts case, the defendant, who owned an upper parcel of land, had placed turfs on his own land to protect it from a considerable flow of surface water caused by the melting of the snow and the spring rains, thereby causing the water to flow off upon the plaintiff's land[33]. Resorting to the language of absolute rights and declaring that *"cujus est solum,ejus est usque ad coelum"* the court applied the "common enemy" rule. The owner of a piece of land, Justice Bellow stated, may lawfully use it in such manner as either to prevent surface water which accumulates elsewhere from coming upon it or to allow surface water to come upon his land from elsewhere, although the water is thereby made to flow upon the land of an adjoining landowner to her loss.

[34] Hicks Short v. The Baltimore City Passenger Railway Company 50 Md. 73 (1878).

[35] City of Franklin v. Durgee 58 L. R. A. 112, 51 A. 911 (1901).

2. Nuisance

Nuisance was another area in which issues of abusive exercise of property rights typically arose. In the common law world, disputes concerning the spiteful erection of fences, walls, chimneys and other structures, largely framed by civilians as hypotheses of "abuse of rights", were treated as "private nuisances". As G. H. L. Fridman noted in an article on "Motive in the English Law of Nuisance", nuisance, as an area of tort liability, is central to the discussion of abuse of rights in the common law.

> In systems of law derived from the Digest a great deal is said about abuse of rights; and the law is certainly made simpler and more patently straightforward by provisions in codes and case law developments therefrom, dealing with *jus abutendi*, *abus des droits*, or *schikanerverbot*. Such ideas are not to be found as part of the common law. But it should not be thought that the common law provides no remedy for such wrongs. There is an ample provision in the present law relating to the tort nuisance for control of activities envisaged by the continental codes[36].

The essence of private nuisance is an unreasonable interference with the use and enjoyment of land[37]. Liability may rest upon the defendant's intentional interference with the plaintiff's interest as well as upon a merely negligent interference or an abnormally dangerous conduct carried out inappropriately. Therefore, subjective notions of malice, closely resembling continental *aemulatio*, and more objective reasonableness tests, echoing French and Italian notions of "normal function" of a right proved critical to determining liability for nuisance. While malice is not necessarily implied in nuisance, it may be an element in the commission of nuisances. Liability may result from a course of activity maliciously designed to inflict harm. More often, liability results from the defendant's unreasonable and excessive exercise of her right. Most late nineteenth and early twentieth century American courts saw nuisance disputes as arising from a conflict between two absolute property rights; in struggling to determine the proper limits on those competing rights they relied, largely, on "reasonableness" and "malice rules" [38].

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[36] G.H. L. Fridman, *Motive in the English Law of Nuisance,* 40 VA. L. REV. 583 (1954).
[37] Robert G. Bone, *supra* note 14
[38] Robert G. Bone, *supra*, at 1137.

American courts' treatment of "spite fence" cases varied significantly and changed over time[39]. While, in an earlier stage[40], in six of the ten states in which actions had been brought for the spiteful erection of a fence, the opinion of the court was against the plaintiff, by the first decade of the twentieth century, courts consistently held defendants liable for maliciously erecting fences or other constructions[41]. Further, in several states, statutes were passed making the erection of a spite fence a tort[42]. In Rideout v. Knox[43], Justice Holmes reluctantly upheld one such statute. In Holmes's reasoning, the power to use one's property malevolently is, to a large extent, an incident of a right established for very different ends, which cannot be taken away even by legislation. However, Holmes concedes, limits to property rights are a matter of degree: while larger limitations would entail too incisive a constraint on the owner's right, smaller limitations may be imposed for the sake of avoiding a manifest evil[44]. Similarly, In Horan v. Byrnes (1903)[45], the Supreme Court of New Hampshire applied the "reasonable use" and upheld a statute declaring

[39] A 1937 case furnished a telling photograph of a "spite fence" complete with the following description: "a fence erected for no benefit or pleasure to the person erecting it, but solely with the malicious motive of injuring the adjoining landowner by shutting out his light, air and view".

[40] In Mahan v. Brown 13 Wend 261(1835), the Supreme Court of Judicature of New York held that an action on the case does not lie against a defendant for erecting a spite fence whereby he obstructs the lights of his neighbour, let the motive of the obstruction be what it may, if the lights be not ancient lights or his neighbour has not acquired a right by grant or occupation and acquiescence. In a nice display of formalistic reasoning, the court distinguished the case at hand from the Aldred's case where the construction of a hog house infesting the neighbour's property with fetid smells had been found to be a nuisance. In the latter case, Justice Savage argued, a positive right had been invaded, every person having a right to the use of natural elements in their purity. Conversely, in the case at hand, the plaintiff enjoys a mere easement that may ripen into a right. But, before sufficient time has elapsed to raise a presumption of a grant, he is deprived of no right, but only prevented from acquiring a right, without consideration, in his neighbour's property.

[41] See James Barr Ames, *How Far an Act May Be a Tort Because of the Wrongful Motive of the Actor,* 18 HARV. L. REV., 411 (1905).

[42] Id., at 415; the states were: Connecticut, Maine, New Hampshire, Vermont and Washington.

[43] Rideout v. Knox, 148 Mass 368, 19 N. E. 390 (1889).

[44] Holmes' concern with the arbitrariness of jury's inquiry into motives echoes the arguments raised by opponents of abuse of right on the Continent: "It has been thought by respectable authorities that even at common law the extent of a man's rights in cases like the present might depend upon the motive with which he acted. […] We do not so understand the common law, and we concede further that to large extent the power to use one's property malevolently in any way which would be lawful for other ends is an incident of property which cannot be taken away even by legislation. It may be assumed that under our constitution the legislature would not have the power to prohibit putting up or maintaining stores or houses with malicious intent and thus to make a large part of the property of the commonwealth dependent upon what a jury might find to have been the past or to be the present motives of the owner. But it does not follow that the rule is the same for a boundary fence, unnecessarily built more than six feet high. It may be said that the difference is only one of degree. Most differences are, when nicely analyzed".

[45] Horan v. Byrnes, 72 NH 93 54 A 945 (1903).

that any fence unnecessarily exceeding five feet in height and erected to annoy an adjoining owner, shall be a private nuisance. Chief Justice Parsons' reference to Franklin v. Durgee, the earlier water case mentioned above, betrays awareness of the underlying conceptual unity of the various "reasonable use" tests operating in different fields of the law:

> The common law right of the ownership of land […] does not sanction or authorize practical injustice to one landowner by the arbitrary and unreasonable exercise of the right of dominion by another (Franklin v. Durgee), but makes the test of the right the reasonableness of the use under all circumstances. In such case the purpose of the use, whether understood by the landowner to be necessary or useful to himself, or merely intended to harm another, may be decisive upon the question of right. It cannot be justly contended that a purely malicious use is a reasonable use.

Reasonableness rules were also deployed in cases of nuisance involving conflicts between industrial enterprises and residential landowners. In the St. Helen case (1865)[46], involving a major episode of industrial pollution, the House of Lords formulated a reasonableness rule placing emphasis on time and locality. Again, the existence of a unitary conceptual pattern linking malice rules and reasonableness tests in disparate legal domains could hardly elude the court. Lord Wesleydale, who a few years before, in Chasemore v. Richards, had boldly alluded at a "reasonable use" rule far exceeding the narrow scope of subjective "malice", approvingly concurred in his bretherns' articulation of "reasonableness".

3. Tortious Interference with Contractual Relations or Economic Expectancies

Cases of tortious interference with contractual relations were a third category of cases raising issues of "abuse of rights" solved through malice rules and reasonableness tests similar to continental doctrines. The typical instance of interference with contractual relations was that of a third party who, in the exercise of her lawful right to compete on the market, interfered with an existing or prospective contractual relation between two parties in order to obtain some advantage. The question facing the courts was whether the interloper had abused her right to compete. Until the 1850s, it was widely

[46] St. Helen Smelting Co. V. Tipping XI HLC 642 (1865).

assumed that a remedy for a breach of contract could be obtained only against the other party to the contract. Courts accorded contractual relations protection from a variety of third parties interferences, but no formally unified tort had developed. While the master-servant relation was shielded through an action of enticement against third parties who persuaded a servant to leave her employment, other contractual agreements were protected from a variety of interferences such as slander, libel, fraud, coercion.

By the 1850s, socio-economic developments and conceptual innovations had cast new light on the problem of third parties' interference. Courts were now inclined to envisage contractual expectations as a form of property to be afforded absolute protection[47]. Once again, the concept of "malice" well served courts' efforts to provide such protection. The defendant's right to compete and the plaintiff's "contractual property" were balanced in light of standards of "malice" or "unreasonableness". As Prosser lamented in his treatise "On Torts", the law of interference with economic relations became "shrouded in a fog of catchwords and rubber-stamp phrases",[48] most of which turned on the question of the defendant's malicious motive or purpose.

In Lumley v. Gye (1853)[49], the Court of Queen's Bench extended the action of enticement to malicious interference with contractual relations other than the master-servant relation. The case involved a contract between the plaintiff, the lessee and manager of the Queen's Theatre in London, and Miss Johanna Wagner, a singer, for the performance by her for a period of three months at the plaintiff's theatre. The court found that the defendant, the impresario of a competing theatre, had procured Miss Holmes to breach the contract animated by a "malicious intention" and awarded damages to the plaintiff.

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[47] See John T. Nockleby, *Tortious Interference with Contractual Relation in the Nineteenth Century: The Transformation of Property, Contract and Tort*, 93 HARV. L. REV. 1510 (1979-1980). Frances Bowes Sayre, *Inducing Breach of Contract*, 36 HARV. L. REV. 663, 675 (1922-1923). "If this tort it not to be regarded as simply a particularized manifestation of the old doctrine of Keeble v Hickeringill its true basis would seem to lie in the policy of the law to accord to promises the same or similar protection as is accorded to other forms of property. By lending its protection to promised advantages, the law creates and secures additional property values which further the social welfare".

[48] WILLIAM L. PROSSER, LAW OF TORTS, (4TH ED. 1971)at 927.

[49] Lumley v. Gye, Court of Queen's Bench (Coleridge, Erle, Wightman and Crompton, JJ.) [1853] 2 E&B 216.

In Temperton v. Russell (1893)[50], the Court of Queens Bench extended the principle of liability for interference beyond existing contractual relations to relations which are merely prospective or potential. Lord Esher saw no distinction between the two categories of relations, the malicious, and hence wrongful, intent and the kind of injury being the same. As nicely put in a later American case, since a large part of what is most valuable in modern life seems to depend more or less directly upon "probable expectancies", it would seem inevitable that courts will "discover, define and protect from undue interference more of these "probable expectancies"[51]. However, in Allen v. Flood, a 1897 case involving a union's interference with the employment relation between the employer and employees affiliated to a rival union[52], the role of malice was minimized. A classic in the literature on abuse of rights, Allen v. Flood is seen as the undisputable evidence that "abuse of rights" had a short life in England. The House of Lords recast and deactivated the doctrine of malice. Malice, Lord Watson noted, depends not upon evil motive but upon the illegal character of the act committed[53]

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[50] Temperton v. Russel (Lord Escher, MR, Lopes and A. Smith LJJ [1893] 1QB 715.

[51] Jersey City Printing Co. v. Cassidy, 63 NJ Eq 759, 53 A 230 (1902).

[52] Thomas Francis Allen Appellant v. William Cridge Flood and Walter Taylor Respondents, *supra* note 19. Along with Pickles v. Bradford, Allen stands as the foremost authority for the absence of abuse of right in English law. The appellant, Allen, the delegate of the union of iron-workers, in order to punish the respondents, a group shipwrights who had in the past engaged in practices resisted by the union, had informed the employer that unless the latter were discharged, all the iron-workers would be called out. Pressed by this threat, the employer discharged the shipwrights and refused to employ them again. The respondents brought an action against the appellant. The inferior court awarded damages to the respondents. The decision was affirmed by the Court of Appeal. Reversing the latter court's decision, the House of Lords gave judgement in favour of the appellant arguing that, however malicious or bad his motive might be, he had done no unlawful act. A deep and hardly disguisable anxiety permeates the court's profuse discussion of the essence and the scope of malice. The court is eager to vindicate and defend its role as the arbiter of social and economic conflict. The conceptual vagueness of malice is said to threaten legal certainty by putting the assessment of human actions at the mercy of juries, hence resulting in great danger for the community and for individual freedom. Retrieving the well-know adagio of malice's conceptual obscurity, the court restates the doctrine. The definition provided by the court is the same offered by the Mogul Steamship case "a wrongful act done intentionally without just cause or excuse"; the emphasis, however, is on the wrongful nature of the act, rather than on the presence of a just cause. By shifting the emphasis from the motive to the nature of the act, the court closes the narrow space left open for a theory of abuse of right in the Mogul case. In the Allen court's words: "For the purpose then in hand [in the Mogul case] the statement of the law may be accurate enough, but if it means that a man is bound in law to justify or excuse every wilful act which may damage another in his property or trade then I say with all respect the proposition [of Lord Bowen] is far too wide; everything depends on the nature of the act, and whether it is wrongful or not"

[53] "The root of the principle is that, in any legal question, malice depends not upon evil motive which influenced the mind of the actor, but upon the illegal character of the act which he contemplated and committed. In my opinion it is alike consistent with reason and common sense that when the act done is, apart from the feelings which prompted it, legal, the civil law ought to take no cognizance of its motive"

From England, the tort of interference with economic relations migrated to America. Frances Bowes Sayre, writing in 1922 in the Harvard Law Review, lamented the little careful inquiry American courts devoted to the precise limits and fundamental nature of the doctrine. In Sayre's words:

> Much of the uncertainty surrounding this tort comes from the shifting ideas which have clustered around the requirement of "malice". Following in the footsteps of Justice Crompton, courts still carefully repeat the formula which requires "malice" as one of the essential elements of the tort. But thus far what constitutes "malice" has been passed over in silence or covered by remarks of the most ambiguous nature[54].

In fact, in cases of interference with contractual relations as well as in cases of interference with prospective advantage, malice was variously framed. While in sparse instances American courts deemed malice irrelevant, a majority of cases held the defendant liable for maliciously or unreasonably interfering with the plaintiff's "contractual property". In Chambers v. Baldwin, a 1891 case of interference with a contract for the sale of a crop of tobacco, the Court of Appeals of Kentucky found that the defendant, in procuring the purchaser of the crop to break the contract, had exercised, rather than abused, his right to compete on the market of goods, his alleged malicious motives being immaterial[55]. Once again, the reasoning of the court betrays awareness of a hidden unitary conceptual structure. The court explicitly drew on water cases to affirm the irrelevance of motive and the absoluteness of the defendant's right. Justice Lewis quoted Chatfield v. Wilson and other earlier water cases to the effect that "an act legal in itself, and which violates no right, cannot be made actionable on account of the motive which induced it". As the landowner who diverts subterranean percolating waters does so in the exercise of her absolute property right, so a tobacco dealer who interferes with contractual relation between the seller and another buyer to become purchaser in his stead, does so in the exercise of his right to compete on the market.

To the contrary, in Jones v. Leslie, a 1910 case of interference with an

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[54] Frances Bowes Sayre, *supra* note 53, at 672.
[55] Chambers v. Baldwin 11 L. R. A. 545 15 SW 57 (1891).

employment contract, the court found malicious motives material[56]. The plaintiff, formerly an employee of the defendant, had found a better job and stipulated an oral contract with the new employer. The defendant induced the latter to discharge the plaintiff by threatening to drive him out of business if he engaged the plaintiff. The Supreme Court of Washington fitted the fact pattern within the mould of a subjective notion of malice as wanton malevolence.

Most courts, however, privileged broader tests that focused on the reasonableness of the interloper's purpose rather than on her mere malevolent intent. In a 1911 case of interference with economic relations, the Supreme Court of Iowa assessed the interloper's conduct in light of a "reasonableness" standard and explicitly suggested the parallel with water cases and nuisance cases. A wealth of water cases and labor cases, Justice Weaver noted, provide authority for the proposition that an act which is legally right when done without malice may become legally wrong when done "maliciously, wantonly or without reasonable cause".

4. Labor Law

Finally, inquiries into motives and notions of "reasonable exercise of a right" were central to emerging modern labor law. In 1901, in Quinn v. Leathem[57], the House of Lords, faced with a conflict between capital and labor, retrieved the notion of malice previously ruled out in Allen v. Flood. The appellant was an official of a meat workers union determined to unionize the respondent, owner of a slaughter yard, who was not willing to bend to the union's pressures. Quinn and other officials notified the retail butcher to whom the respondent regularly sold all of his product, that, unless he ceased dealing with the latter, they would call out his workers. As a consequence, the retail butcher sent a telegram to the respondent, letting him know that he would no longer buy his meat. The latter, who, having just killed a quantity of fine meat, suffered great economic loss, brought action against the appellants. The inferior court gave judgement in favour of the respondent and the Irish Court of Appeal affirmed. Quinn alone appealed and the House of Lords affirmed the

[56] Jones v. Leslie 61 Wash. 107, 112 P. 81. (1910).
[57] Quinn v. Laetham, [1901] A.C. 495 85 LT 289.

decision of the latter court, finding the appellant to have acted maliciously. Lord Shand disguised the court's sudden drift in the understanding of malice with bold and abstract claims as to law's illogical nature:

> […] a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all. My lords, I think the application of these two propositions [the first being that every judgement must be read as applicable to the particular facts proved] renders the decision of this case perfectly plain, notwithstanding the decision of the case of Allen v. Flood.

Likewise, in the United States, at the turn of the nineteenth century, notions of "malice" played a significant role in the development of labor law. American courts deployed reasonableness tests to widen or narrow the scope of permitted collective action. Early American labor cases are said to reflect "a spirit of medievalism with its antagonism to the working classes". These cases involved criminal indictments for conspiracy rather than injunction or damage suits. The unions' very right to exist was at stake. In the 1806 case of the Philadelphia cordwainers a combination to raise wages was held illegal; in a 1835 New York case, People v. Fisher, the court took the same view. As Edwin Witte noted in the Yale Law Journal in 1925, Commonwealth v. Hunt (1842) marked "the overthrew of these archaic doctrines and the beginning of the modern law of labor combinations"[58]. Rather than questioning the union's right to exist or the legality of the combination itself, the court focused on the purpose sought and the means employed by the union. In the following decades criminal conspiracy cases became less frequent and, in a number of states, legislation repealing the conspiracy doctrine was enacted.

By the 1890s, with the tremendous rise in both the size and the organization of labor unions, the old doctrine of criminal conspiracy had been abandoned. Courts came to rely extensively on the labor injunction, an equity remedy, justifying it as the protection of a newly coined concept of "entrepreneurial property rights" from irreparable injury[59]. Further, tort law

[58] Edwin E. Witte, *Early American Labor Cases* 35 YALE L. J. 825 (1925-1926).

[59] Haggai Hurvitz, *American Labour Law and the Doctrine of Entrepreneurial Property Rights: Boycotts, Courts, and the*

came of avail. Picketing, strikes and secondary boycotts were subsumed within the category of malicious torts. Courts focused on the purposes driving unions assessing them in terms of wanton malice, reasonableness and lack of legitimate interest.

For instance, in Moores v. Bricklayers Union, a 1889 Ohio boycott case, Justice Taft resorted to a reasonableness test that echoed continental ideas of "normal function of a right"[60]. A bricklayers union, seeking to coerce an employer to accept its requests, sent the latter's customers a circular stating that any dealings with him would lead to similar measures against them. Since one of the customers, the Moores Lime Company, upon receiving the circular, stopped selling lime to the employer by delivery, the latter sent a teamster who bought it for cash at Moores' car. Having disregarded the union's circular, the Moores Lime Company was banned and brought an action for damages. The question facing the court was whether the defendant union had unreasonably or maliciously exercised its right to the free pursuit of trade. Taft assessed the "immediate motive" driving the Bricklayers' Union in light of the "normal operation of the right to labor", and found it malicious.

5. A Hidden Unitary Concept?

Although operating in an analogous fashion in all these various legal subfields, "malice" and "reasonableness" rules never congealed into a unitary category of "abuse of rights". At times, common lawyers have regarded the absence of a unitary category of abuse of rights with regret, attributing it to the flaws of common law-style legal thinking. As an observer noted:

> The piece-meal, empiricist approach to judicial decision making that characterizes the common law is its greatest weakness as well as its greatest strength. […] in so far as malicious or improper motive is relevant to the determination of a legal right in our law, we probably will now reach the same result as those jurisdictions which have the doctrine [of abuse of rights]; but the reluctance of our courts to consider the theoretical foundations of our law has resulted in a legal fabric that abounds with loose ends, and requires constant and ad hoc patching[61].

Juridical Reorientation of 1886-1895 in 8 INDUSTRIAL RELATIONS LAW JOURNAL 307 (1986).

[60] Moores & Co. v. Bricklayers Union et Al., 10 Ohio Dec. Reprint 665 (1889).

[61] Hamar Foster, *Abuse of Rights. Civil Law, Legal Reasoning: Bradford v. Pickles Revisited*, 8 U. BRIT. COLUM. L. REV.

However, cross-references in cases dealing with water rights, nuisance, tortuous interference with economic relations and labor law are not the only evidence of courts' awareness of an overarching conceptual scheme. Individual personalities also played a role in designing an unstated, though powerfully operative, conceptual structure resembling "abuse of rights". A significant number of the decisions discussed in this article were rendered by the Supreme Courts of Massachusetts and New Hampshire. The vanguard of legal thinking, these two courts, under the guidance of, respectively, Chief Justice Shaw and Chief Justice Doe, were the laboratory where reasonableness standards fashioned on a unitary mold were elaborated. Well-read jurisprudents, conversant with European legal theory, Doe and Shaw may have been well aware of the parallel with the continental theories of abuse of rights[62]. In any case, Doe and Shaw's innumerable discussions of "reasonable use" or "reasonable exercise of a right" betray awareness of an underlying unitary framework[63].

Furthermore, a clear sense of the conceptual unity of the scheme emerges from Jeremiah Smith's opinions and writings. A colleague of Doe on the New Hampshire bench, Smith, in a series of articles, analyzed the questions raised by "malice" and "reasonableness" rules in apparently distant fields, i.e. relations among neighbors and labor disputes[64]. Although aware of the unitary nature of such rules, Smith expressed skepticism towards the general categories and mathematical formulas relied upon by his continental colleagues:

> The question of legal regulation of conflicting rights is not confined to rights in regard to the use of land, but extends to all cases of conflicting rights as to other matters or subjects. […] It is generally admitted that it is impossible to frame a rule so definite that its application will instantly solve all cases of conflicting rights. […]

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343 (1973).

[62] LEONARD LEVY, LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW (1957); JOHN PHILIP REID, CHIEF JUSTICE. THE JUDICIAL WORLD OF CHARLES DOE (1967); FREDERIC HATHAWAY CHASE, LEMEUL SHAW: CHIEF JUSTICE OF THE SUPREME COURT OF MASSACHUSETTS 1830-1860 (1918). SEE ALSO G. E. WHITE, THE AMERICAN JUDICIAL TRADITION (1978).

[63] Green v. Gilbert, 60 NH 144 (1880); Thompson v. The Androscogging River Improvement Co., 54 NH 545 (1874).

[64] Jeremiah Smith, *Reasonable Use of One's Own Property As A Justification for Damage to A Neighbor,* 17 COLUM. L. REV., 383 (1917); *Crucial Issues in Labour Litigation*, 20 HARV. L. REV., 345 (1906);

> The respective rights and liabilities of adjoining landowners cannot be determined in advance by a mathematical line or a general formula. As we said in regard to so called "private nuisances": "No hard and fast rule controls the subject, for a use that is reasonable under one set of facts would be unreasonable under another"[65]

B. Reasonableness Tests: Unorthodox Legal Reasoning?

Although not integrated into a unitary concept of "abuse of rights", as in France and in Italy, malice rules and reasonableness tests were, in fact, unified through a unitary mode of reasoning. When applying these rules, American courts relied on techniques for doctrinal analysis and modes of justification that were hardly consistent with the dictates of so-called "Classical Legal Thought". Attempts at balancing and cost-benefit analysis, justifications drawn from social morals and inquiries into the social consequences of legal doctrines coexisted, at times in the same opinion, with deductive and formalistic reasoning. Although still rudimentary and abstract if compared with post-WW2 "conflicting considerations" analysis, these early instances of balancing and policy reasoning invite a re-characterization of nineteenth century legal reasoning, one that places less emphasis on the discontinuity between subsequent styles of thought and more on courts' continuous reliance on both instrumentalist and formalist modes of reasoning.

A substantial body of legal historical scholarship has traced a neat picture of the orthodox mode of legal thinking dominant in the late nineteenth and early twentieth century[66]. The "Formal Style" which, around the 1850s, ousted an earlier "Grand Style", featuring clear reasoning and attention to policy, was seen as resting on a number of related assumptions. In Llewellyn's words: "the rules of law are to decide the cases"; policy is for the legislature rather than the courts; "opinions run in deductive form with an air, or expression, of single-line inevitability"; the legal order is an ordered system of rules and principles.

Subsequent historical work has further elaborated this picture.

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[65] Jeremiah Smith, *Reasonable Use supra* at 385

[66] ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW (1938); KARL LLEWELLYN, THE COMMON LAW TRADITION. DECIDING APPEALS (1960); GRANT GILMORE, THE AGES OF AMERICAN LAW (1977).

Variously named, "Classical Legal Thought", or "Formalism" or "Classical Orthodoxy"[67] has been described as a relatively homogenous and coherent mode of thought. While the actual characterization and the political nature of legal classicism are a matter of dispute[68], there is substantial agreement on its two major implications for judicial reasoning. First, judicial outcomes were deduced, either logically inferred or analytically derived[69], from a relatively small number of conceptually ordered abstract principles. Further, in justifying their outcomes judges appealed to law's internal coherence rather than to "the norms' purposes, the general policies underlying the legal order or the

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[67] MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1860-1960 (1992); DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT (2006); Thomas C. Grey, *Landgell's Orthodoxy* 45 U. PITT. L. REV. 1 (1983-1984).

[68] American historians have drawn different images of late nineteenth century formalist legal thought. Duncan Kennedy's account focuses on the internal structure of "Classical Legal Thought" as a mode of consciousness. The unity of a mode of thought or consciousness comes from the existence within this structure of a dominant doctrinal subsystem within which concepts, reasoning techniques, ideals and images are analogous across legal domains. In classical legal thought this dominant subsystem consisted of a number of elements: a) all legal rules were built out of a "will theory" using strictly analogous conceptions of public power and private right; b) private law rules were organized around the public/private distinction; c) the preferred mode of reasoning was induction/deduction d) the ideal was the deployment of democratically validated power as the framework for private freedom e) the key image was powers and rights "absolute within their spheres". See DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT , *supra*. Morton Horwitz, on the other hand, focuses more on the relation between legal thought and ideology, between Classical Legal Thought and Liberal Legalism. Classical legal thought was intimately linked to a central aspiration of American legal thinkers, the separation between law and politics, the quest for an autonomous system of law untainted by politics. After the trauma of the Civil war and at the moment of swift social and economic change jurists sought even more fervently to create a system of autonomous law. Through a process of systematization, integration and abstraction they built a coherent legal architecture that sought to depoliticize law by mediating a series of basic contradictions of ante-bellum American law. This legal architecture was characterized by: a) the private-public distinction; b) the creation of increasingly abstract and general legal classifications and categories such as will, ownership or fault; c) clear, distinct bright-line classifications of legal phenomena; d) deductive and analogical reasoning which conferred upon legal reasoning the qualities of "certainty" and "logical inexorability". See MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960 *supra*. Finally, Thomas Grey focuses on the epistemological premises of Classical Orthodoxy. In Grey's analysis, Classical legal science was a set of ideas to be put to work from inside by those who operate legal institutions. It envisioned the legal system as "complete" (i.e. its substantive norms provide a uniquely correct solution for every case that can arise under it.) through "universal formality" (i.e. the outcomes of the system are dictated by rationally compelling reasoning. The system can be made "universally formal" through "conceptual order (i.e. the substantive bottom level rules can be derived from a small number of relatively abstract principles and concepts which themselves form a coherent system. Grey emphasizes the analogy between classical orthodox legal science, which claims to be empirical and yet highly conceptual, experimental and inductive, and Euclidean geometry, seen, in the late nineteenth century, as a set of well confirmed inductive generalizations about the physical world. For legal science the universe of data was not the totality of sense experience of the physical world but the restricted set of reported common law decisions. See Thomas C. Grey, *supra*. More recently see WILLIAM WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA 1886-1937 (1998).

[69] Thomas C. Grey, *supra* note 65 at 7-8.

extrajuristic preferences of the interpreter"[70]. Vague standards, such as reasonableness, or rules requiring determinations of state of mind, such as malice, are deemed to have been largely foreign to this style of reasoning[71].

Abuse of rights cases complicate this understanding of legal classicism, presenting us with courts consistently resorting to unorthodox reasoning techniques. The operation of reasonableness standards required two major modifications in courts' "orthodox" reasoning technique. First, deduction yielded to balancing. Rather than deducing limits to individual rights from abstract principles, judges weighed the defendant and the plaintiff's conflicting rights in light of multi-factor reasonableness standards allowing an assessment of geographical, technological and economic elements. Second, justificatory arguments changed significantly. The factual nature of a judgement of "reasonable exercise of a right" opened up space for policy-based justifications. Rather than invoking the legal system's logical cogency or internal coherence, judges became more inclined to discuss openly the social consequences of their decisions and to rely on extra-juristic considerations.

Nevertheless, this instrumental style of reasoning retained elements of formalism. While the language of balancing and cost-benefit comparison was often abstract and vague, the outcomes' "air of single-line inevitability" was hardly attenuated. Moral norms supposedly rooted in the aspirations of the community, policies allegedly finding wide support in society, and informed experiential propositions[72] substantiated the standard of "reasonableness", conferring a patina of universality and inevitability upon courts' justifications, and lifting them out of the incandescent arena of policy preferences.

Numerous of the thousands of decision rendered by Chief Justice Shaw during his thirty years at the head of the Massachusetts bench exemplify this unorthodox style of reasoning. A figure of transition, operating at the moment when the "Grand Style" was gradually yielding to classical orthodoxy, Chief Justice Shaw heavily relied on reasonableness tests. On the one hand, Shaw,

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[70] Duncan Kennedy, *Legal Formalism*, in THE INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES 8634 (2001).
[71] Thomas C. Grey s*upra* note 65 at 11.
[72] See MELVIN A. EISENBERG, THE NATURE OF THE COMMON LAW (1988).

deeply preoccupied with basic principles, envisaged law as a science founded on reason and strove to impart to the law system and symmetry. On the other hand, in the course of Shaw's tenure, Massachusetts experienced swift economic development and social change. Shaw embarked resolutely in the task of accomodating legal doctrine to meet the new problems posed by a rapidly changing environment and turbulent economic growth. Constantly searching for ways to adapt the old to the new, Shaw used reasonableness tests, to be extracted from a shared, and hence non-contentious, common sense, to restate legal fields as diverse as water law and labor law as to make them "practical and plastic"[73]. Reasonableness satisfied both his quest for general principles as well as his idea of law as responsive to shifting social conditions.

In Shaw's analysis, a variety of factors determines the judgement of reasonableness. A reasonable use of one's property is a question of degree[74], purpose, natural and geographical conditions[75], and technological advancement. For instance, in Thurber v. Martin, Shaw, called to assess the reasonableness of the use of a stream of water, declared that:

> In determining what is such reasonable use, a just regard must be had to the force and magnitude of the current, its height and velocity, the state of improvement in the country in regard to mills and machinery, and the use of water as a propelling power, the general usage of the country in similar cases and all other circumstances bearing upon the question of fitness and propriety in the use of the water in the particular case.

While Shaw's balancing of the landowners' competing interests is an exercise in pragmatic and purpose-oriented comparative reasoning, the allusion to social customs and shared notions of propriety and fitness prevented him from seeing the case as requiring an analytic choice between alternative policies as to the nature and goal of property.

A similar judicial philosophy, and a similar propensity towards reasonableness standards, is typical of another anomalous "classicist"[76], Justice

[73] Leonard W. Levy, *supra* note at 24.
[74] Lewis Elliott v. The Fitchburg Railroad Co., 64 Mass 191 (1852).
[75] John Thurber v. Benjamin Martin 2 Gray 394 Mass 1854.
[76] Llewellyn saw Doe as an exception in the "Formal Style, see KARL LLEWELLYN, *supra* note 64.

Doe of New Hampshire. Basset v. Salisbury (1862) and Swett v. Cutts (1870) signalled the Supreme Court's of New Hampshire turn to the standard of "reasonableness" that Doe will further perfect. In the latter case, Chief Justice Bellow, weighed the conflicting rights of two adjoining landowners disputing over the diversion of the flow of surface water in the season of melting snow, and equated "reasonable use" to domestic, agricultural and manufacturing purposes. Further, Bellow clarified the factual assessment of reasonableness by listing, among the circumstances to be considered, "the nature and importance of the improvements sought to be made", "the extent of the interference with the water", "the amount of injury done to the other land-owners as compared with the value of such improvement" and, finally, "whether such injury could or could not have been reasonably foreseen".

An Associate Justice when Swett v. Cutts was decided, Charles Doe became Chief Justice in 1876. In the twenty years of Doe's tenure, reasonableness became a general principle in the law of torts and the instrument for balancing conflicting rights[77]. Doe's predilection for reasonableness was rooted in his methodological beliefs. In Doe's understanding law was "experience developed by reason and reason checked and directed by experience"[78]. For Doe, legal doctrines were justifications for results obtained by reason and justice, where the latter stood for fairness and practicality. This notion of "justice" led the Chief Justice to favour balancing as a reasoning technique and reasonableness as the guiding criterion. Far from being a vague standard for the lazy, reasonableness took effort to apply; it was to be extracted from the shared norms and practices of a changing society.

In Thompson v. Androscogging R. I. Co., Doe laid bare the complexities of an assessment of reasonableness in the use of property. Drawing on an earlier case, he discussed an hypothetical "unreasonable use" by a riparian

[77] See JOHN P. REID, *supra* note at 133 ff. Though Mr Holmes has received most of the credit for awakening the bar to the need for a theory of torts and for developing the main lines along which that theory was first formulated, others were working in the vineyard, notably Charles Doe; his determination to bring rationality to the chaotic patterns of tort liability is one of the most significant contributions to American law" and p. 145 "As we shall see in a future chapter, few judges expected as much from the concept of "reasonableness" as did Doe. He called it a general principle and in the law of torts made it the instrument for resolving most factual issues". See also G. E. WHITE, *supra* note 60.

[78] JOHN P. REID, *supra* ,at 339.

owner who had a made a deep cut through the river's bank. Doe emphasized that the reasonable expectation of damage is only one of the many factors figuring in "the catalogue of all the possible elements of reasonableness and unreasonableness". In Green v. Gilbert, called to decide whether a mill owner who had devised an ingenious mechanism to discharge the sawdust into a river had exercised his property rights reasonably, Doe further specified the nature of the judgement of reasonableness. Reasonableness is a question of fact depending upon the circumstances of the case, including the purposes, old and new of the parties' use and upon a comparative assessment of the respective costs and benefits.[79] Doe recognized, with the founder of German's "Interests Jurisprudence", Philip Heck, that "law operates in a world full of competing interests and, therefore, always works at the expense of some interests", but for him, as for Shaw, a multifactor standard of "reasonableness" grounded in societal experience, mandated the correct and desirable balance.

Courts were well aware of the implication of reasonableness standards for legal reasoning. Occasionally, they engaged in an explicit and sharp critique of the classicist deductive mode, advocating an instrumental style of judicial analysis. In Tuttle v. Buck, the Supreme Court of Minnesota, faced with the question of defining the proper scope of competition and of deciding which injury to permit without compensation, declared that abstract maxims about malicious motives are of little avail to courts. Rather, the court acknowledged, the question of competition is to be decided by weighing competing social and economic objectives. Justice Elliott profusely elaborated on this new style of reasoning and the judicial philosophy inspiring it. In Elliott's vision, balancing is a corollary of a new organicist notion of law and legal change:

> Mr Justice Black said that malicious motives make a bad case worse, but they cannot make that wrong which in its own essence is lawful. […] Such generalizations are of little value in determining cases. […] We do not intend to enter upon an elaborate discussion of the subject, or become entangled in the subtleties connected with the words "malice" and "malicious". We are not able to accept without limitations the doctrine above referred to, but at this time content ourselves with a brief reference to some general principles. It must be remembered that the common law is the result of growth, and that its

[79] ID., at 342-343.

> development has been determined by the social needs of the community which it governs. It is the resultant of conflicting social forces, and those forces which are for the time dominant leave their impress upon the law. It is of judicial origin, and seeks to establish doctrines and rules for the determination, protection and enforcement of legal rights. Manifestly it must change as society changes and new rights are recognized. To be an efficient instrument, and not a mere abstraction, it must gradually adapt itself to changed conditions. Necessarily its form and substance has been greatly affected by prevalent economic theories. For generations there has been a practical agreement upon the proposition that competition in trade and business is desirable, and this idea has found expression in the decisions of the courts as well as in statutes. But it has led to grievous and manifold wrongs to individuals , and many courts have manifested an earnest desire to protect the individuals which result from unrestrained business competition. The problem has been to so adjust matters as to preserve the principle of competition and yet guard against its abuse to the unnecessary injury to the individual.

Courts' language and reasoning techniques in abuse of rights cases seem to add evidence to the growing strand of revisionist scholarship that invites a more nuanced understanding of late nineteenth century legal thought. Writing in the mid 1970s, Harry Scheiber significantly downplayed the allegedly blunt discontinuity between an instrumental "Grand Style", dominant until the 1850s, and a subsequent formalist style, heavily dependent on deduction and conceptual coherence[80]. Rather, Scheiber contended, late nineteenth century judicial reasoning may be best characterized as an "amalgam" of "instrumentalism" and "formalism". Scheiber's study of post-1865 decisions on property, eminent domain and resource-allocation law sought to show that instrumentalism was well and alive in the late nineteenth century. Even when they posited highly formalist theories of higher law and inalienable rights, judges simultaneously relied on reasoning methods and on concepts, such as "public purpose" or "public use", that validated broad discretion in setting economic priorities.

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[80] Harry N. Scheiber, *Instrumentalism and Property Rights: A Reconsideration of American Styles of Judicial Reasoning in the 19th Century*, 1975 WIS. L. REV. 1 (1975); Schieber's article is a response to the discontinuity thesis advanced by William Nelson who argues that the "instrumental" style of judicial reasoning fell into disfavor after the 1850 s and was supplanted by a "formalist" style. A significant causal factor explaining this shift is, in Nelson's analysis, the success of anti-slavery jurisprudence. The moral crisis over slavery discredited the amoral instrumentalism which had become an obstacle on the path of the anti-slavery movement and called for a principle-orineted jurisprudence reinforced by greater use of precedent. See William Nelson, *The Impact of the Anti-Slavery Movement Upon Styles of Judicial reasoning in Nineteenth Century Americ*a 87 HARV. L.REV 513 (1974).

More recently, legal historians have questioned the idea that all late nineteenth century private law jurisprudence operated under a unified Langdellian paradigm, pointing at the diversity that characterizes Classical legal thought. "Anomalous" figures, such as Justice Stephen Field or James Coolidge Carter, it has been argued, may be more exemplary of late nineteenth century legal thinking than Landgell[81]. A theistically-oriented historical jurisprudence that looked at morals and social customs coexisted with and rivalled Landgellian formalist orthodoxy. Others seek to discard the formalist-realist antithesis. Throughout the formalist age, Brian Tamanaha contends, prevailing understandings of law and of judicial decision-making were, in essential respects, as realist as the accounts propounded by later Realists[82]. Most legal professionals were well aware that law is indeterminate, that judges make policy decisions and that personal predilections may influence judicial outcomes.

The exam of abuse of rights cases may contribute to a further "thickening of the revision". While the political tilt of Classical Legal Thought has been intensely debated, its style of legal reasoning may be more various than assumed. In circumscribed, though critical, legal subfields, courts resorted to rudimental forms of balancing and extra-juristic justificatory arguments well before the echoes of Sociological Jurisprudence were heard. This technical and stylistic variety may have conferred Classical Legal Thought an inner resilience, contributing to its longevity.

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[81] See the Forum "*Once More Unto the Breach: Late Nineteenth Century Jurisprudence Revisited*" in 20 LAW & HIST. REV. (2002); see in particular Stephen A. Siegel, *supra* note; Manuel Cachan, *Justice Stephen Field and Free Soil, Free Labor Constitutionalism* at 541; Lewis A. Grossman, *James Coolidge Carter and Mugwump Jurisprudence* at 577; Id., *Extending the Revisionist Project* at 639.

[82] Brian Z. Tamanaha, *The Realism of the Formalist Age* (on file with author, St John's University School of Law); Tamanaha challenges the view that depicts Holmes as a solitary "proto-Realist". By contrast he argues that the standard account of the "formalist" age is fundamentally wrong; prevailing understanding of law and of judicial decision making throughout the formalist era period were, in essential respects, every bit as "realistic" as the accounts propounded by the later Realists. (p.4) "Realist" notions and a "realist" vocabulary were used in a variety of contexts: effectuating legal reform or legal change, doing justice in particular cases, expressing concern about judicial elections, promoting codification, and criticizing courts for excessive judicial invalidation of legislation. In Tamanaha's account, the Realists are the latest episode in a long history of skepticism about the common law and judging prompted by concerns about the disordered state of the law or by objections, often politically motivated, to the actions of courts" (p. 66)."See also David Seipp, *Formalism and Realism in Fifteenth Century English Courts* (on file with author, Boston University School of Law).

C. A Drug With Very Disagreeable After-Effects or a Buttress for Economic Growth?

Despite the anxiety with which Professor Gutteridge was left after conversing with civilian colleagues, in the United States, the "continental drug" fell short of having "very disagreeable after-effects". Malice rules and reasonableness tests were deployed to achieve a wide variety of outcomes. Occasionally, courts used them to redress distributional asymmetries. More often, through reasonableness rules, judges sought to stir and govern economic growth, creating the conditions for the "release of creative energy". Rather than directly responding to the entrepreneurial class' particularized demands, the functional equivalents of abuse of rights may have played a more general facilitative role. While belief in the facilitative potential of reasonableness and malice rules was only one of a larger set of beliefs driving judges, it is plausible to claim that it was an important one. "Reasonableness" and "malice" were among the legal tools affirmatively deployed to create a legal framework for economic change. Easily manoeuvrable, they allowed courts to expand or restrict at need the range of reasonable, and hence lawful, social and economic "uses" or "activities". The facilitative role played by these rules is not to obscure their ideological function. As suggested earlier, emphasis on shared socio-ethical standards of "reasonableness" helped justify and naturalize changing notions of "permitted" uses of property, "legal" organized labor activity and "lawful" business competition, ultimately precluding alternative arrangements and different distributive outcomes.

The relationship between doctrinal developments in water law, most notably the shift from the "natural flow" rule to the "reasonable user" standard, and economic growth has been discussed at length. Some have posited a direct relation[83]. Reasonableness tests allowed courts to balance the relative efficiency of conflicting uses of water, effectively promoting newer economically valuable uses and sweeping away established and less remunerative uses. Others have challenged the thesis of a direct influence, claiming that, for all their talk of balancing, courts rarely denied relief to an established user whose interests were interfered with by a newcomer. These critics foreground non-

[83] MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, *supra* note 16.

utilitarian elements in riparian water law[84]. While the language of reasonableness might be taken to suggest that courts tended to privilege more valuable uses and hence divest the old, this was not the case. Only in cases of flagrantly wasteful use, did courts wipe out an established use. Further, the argument runs, especially in the Western regions of the country, courts bent the reasonable user doctrine to achieve outcomes that did not necessarily favour new economically profitable uses of water.

However, while actual divestment of established users might be less frequent than broadly assumed, judicial opinions show that courts were well aware of the potential of reasonableness rules for fostering economic growth and were often keenly oriented towards such end. In a large number of cases the conflicting rights of riparian owners were balanced with a bias towards dynamic and productive property[85]. In Cary v. Daniels, Chief Justice Shaw of the Supreme Court of Massachusetts neatly enunciated the productivity rationale of the new rule:

> "But one of the beneficial uses of a watercourse, and in this country one of the most important, is its application to the working of mills and machinery; a use profitable to the owner and beneficial to the public. It is therefore held, that each proprietor is entitled to such use of the stream, so far as it is reasonable, conformable to the usages and wants of the community and having regard to the progress of improvement in hydraulic works and not inconsistent with a like reasonable use by the other proprietors of land".

Shaw's words suggest that, at the time when, as his biographer notes, "out of the older rural agrarian-merchant society was evolving a complex industrial one", the reasonable user rule appeared to him as an effective trigger for economic development. Rhetorically, the allusion to the conditions and needs of the country and to the interest of the community struck a critical chord in a society where energy and dynamism, particularly in the realm of the economy, were dominant values.

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[84] Stephen Williams, *Transforming American Law: Doubtful Economics Makes Doubtful History,* 25 UCLA L. REV 1187 (1977-1978).

[85] MORTON HORWITZ *supra* note 16 at 31; JAMES WILLARD HURST, *supra* note 15 at 24 "dynamic property as an institution of growth: when new forms of technology required an abridgement of older types of property the older forms were forced to yield.

Similar developmental concerns permeate the court's reasoning in Wheatley v. Baugh (1855). Chief Justice Lewis held the defendant, a mining company, not liable for reducing the flow of the subterrenean spring which fed the machines of the plaintiff, a neighbouring tannery[86]. The defendant, Lewis suggested, was not animated by malice but by the reasonable purpose of working his coal mine. Replete with references to continental theories of abuse of rights, the opinion betrays Lewis' favor for valuable economic activities such as mining. An absolutistic notion of property rights of continental flavor is marshalled in support of developmental considerations:

> In conducting extensive mining operations, it is in general impossible to preserve the flow of the subterranean waters through the interstices in which they have usually passed, and many springs must be necessarily destroyed in order that the proprietors of valuable minerals may enjoy their own. The public interest is greatly promoted by protecting this right, and it is just that the imperfect rights and lesser advantage should give place to that which is perfect, and infinitely the most beneficial to individuals and to the community in general.

On the other hand, critics rightly point at the ambiguous persistence of non-utilitarian concerns in courts' articulation of the new rule. While the maximization of growth and productivity were critical concerns driving judges, occasionally "reasonable user" rules were deployed to reach bold distributive outcomes. In Western states, the "correlative rights" rule brought into sharp focus the notion of general welfare at the expense of individual economic dynamism and new valuable uses of water. Courts equated "reasonable use" with use on riparian land, thereby severely limiting flexibility in water use[87].

For instance, in Katz v. Walkinshaw, the critical potential of the reasonable use doctrine was fully exploited and the notion of a social function of property, although not explicitly articulated, was alluded to. The defendant, who owned a lot of land in arid Southern California, drained from his land with powerful pumps the underground water which would have otherwise percolated to plaintiffs' land feeding their artesian well. The defendant

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[86] Wheatley v. Baugh 25 Pa 528, (1855).

[87] Williams, Samuel C. Wiel, *Fifty Years of Water Law,* 16 OREGON L. REV. 203 (1937); Id., *Theories of Water Law* 27 HARV. L. REV., 530 (1913-1914).

diverted the water in order to sell it to for the irrigation of distant lands. The Supreme Court of California reversed the decision of the inferior which had given judgement in favour of the defendant. Considerations of public policy drove the court's reasoning. Having profusely examined the impact of the reasonable use rule in light of California's peculiar climatic situation, the court weighed the profit of the individual owner against the interest of the community at large[88].

> In short, the members of the community, in the case supposed, have a common interest in the water, It is necessary for all, and it is an anomaly in the law if one person can for his individual profit destroy the community and render the neighbourhood uninhabitable.

A similar variety of results, and an analogous tension between the promotion of productive and economically valuable uses of property and the protection of static property, characterizes nuisance cases involving questions of malice or reasonableness. In dealing with disputes among residential neighbours, courts relied upon malice rules and reasonableness tests to weigh neighbours' respective right to a peaceful enjoyment of their property, favouring quiet habitation, agriculture and other time-honoured uses of the land.

In Christie v. Davey, a 1892 English case, the Chancery Division carefully examined the reasonableness of the parties' conduct, holding that while the giving of musical lessons seventeen hours a week by a music teacher did not constitute a nuisance, the annoying noises produced by the latter's neighbour as a malicious response did amount to a nuisance to be restrained[89]. In a 1888 West Virginia case concerning the troublesome cohabitation of two

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[88] Katz v. Walkinshaw 64 L. R. A. 236 70 P. 663 (1902). "Such law as has been made upon the subject comes from countries and climates where water is abundant and its conservation and economical use of little consequence as compared with a climate like Southern California. The learned counsel for appellants state in their brief that water at San Bernardino is worth $ 1,000 per inch of flow. Percolating water or water held in the earth is the main source of supply for domestic uses and for irrigation without which most lands are unproductive. [….]But the maxim *cuius est solum, ejus est usque ad inferos* furnishes a rule of easy application and saves world of judicial worry in many cases. And perhaps in England and in our Eastern states a more thorough and minute consideration of the equities of parties may not often be required. The case is very different, however, in an arid country like Southern California where the relative importance of percolating water and water flowing in definite courses is greatly changed.

[89] Christie v. Davey, [1893]1 Ch. 316.

litigious families, the court gauged against the yardstick of reasonableness the defendant's right "to enjoy the privileges of a home" and the plaintiff's right "to security in their home", finding that the former had been exercised unreasonably and maliciously[90]. Conversely, in a Michigan case, the intrinsic usefulness of the purpose, excused the defendant's conduct. A shed used for coal and wood, although spitefully erected by the defendant so as to shut off some of the neighbour's light, was not considered a nuisance on account of it serving a useful purpose[91].

However, with the expansion of industry and the development of steam-powered, coal-burning and synthetic alkali technology, the question of the reasonable use of property assumed a new dimension. Effective in protecting landowners' quiet enjoyment of their "static" property in cases involving disputes among residential neighbours, reasonableness tests soon became a critical tool for protecting "dynamic" property in cases pitting against each other residential landowners and industrial enterprises. As the century progressed, conflicts between residential or agricultural and industrial uses of land came to comprise a greater portion of courts' dockets. "Reasonable user" tests allowed courts to weigh exploitive and conservatory uses of land, often favouring the former. For the most part, productive and manufacturing firms were not found to abuse their rights over the land. In analysing the "reasonableness" of the use, courts' focused on the economic context and social utility of industrial activity.

Legal historians and social historians have debated at length the relationship between developments in the law of nuisance and the advancement of the Industrial Revolution in England. Some have suggested that courts consciously established a new balance between industrial uses and other uses, effectively emasculating the law of nuisance as a useful curb on industrial pollution and leaving little room for successful legal action by

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[90] Medford v. Levy, 2 L.R.A. 368 8 S.E. 302 (1888) The defendants' habit to open the door leading from the kitchen to the hall, thereby "filling the whole house with objectionable odors owing to the frequent cooking of cabbage, onions, and other things the odor of which is particularly nauseating" was deemed unreasonable in light of the plaintiff's wife suffering from a form of neuralgia that made her "nervous and excitable" and hence peculiarly affected by the incidents of domestic habits not conform to those of "a neat and tidy housewife".

[91] Kuzniak v. Kozminski 107 Mich. 444 65 N.W. 275 (1895).

individuals and communities adversely affected by it[92]. Others have posited a more loose relationship between courts' articulation of nuisance and the needs and demands of nascent big industry, pointing at a variety of institutional, procedural and social factors complicating too easy a deterministic account[93]. The cost of litigation, the difficulty of establishing cause and effect in the absence of sophisticated scientific monitoring, the existence of private ordering as a valid alternative to litigation, and, finally, the social exclusion of the prime victims of industrialization, the urban working classes, to whom legal action was largely unavailable, explain the weakness of the common law of nuisance as a response to the adverse effects of industrialization. And, overall, these observers note, "the body of nuisance law which developed during the Industrial Revolution was anything but monolithic in quality and could well have encouraged the victim of industrial pollution, as it may have done the perpetrator".

While the relation is a highly ambiguous and layered one, in a significant number of cases, English courts relied on reasonableness tests to tilt the balance between residential and industrial uses in favour of the latter. By the mid nineteenth century, courts expanded the range of factors to be considered in assessing the reasonableness of defendants' use of the land, increasingly often taking into account not only the modalities of use but also the locality in which the contested use was carried out. In Hole v. Barlow (1858), the Court of Common Pleas found the defendant not liable for erecting a brick-kiln in front of the house of the defendant and burning a large quantity of bricks thereby causing a noxious and unwholesome vapour which invaded the plaintiff's house and garden. The court ruled that no action lies for the

[92] Joel F. Brenner, *Nuisance Law and the Industrial Revolution,* 3 J. LEGAL STUD. 403 (1973). Brenner's thesis is that until the very end of the eighteen century courts strongly held the view that in nuisance cases, unless the inconvenience caused by a defendant's activity was trivial, liability would follow once the plaintiff had established an interference with the use and enjoyment of her land. The predominant thought was that the plaintiff had a pre-eminent claim to protection; it was considered no defence the fact that the defendant had acted reasonably in the circumstances or that her activity was of public utility. With the advent of industrialization, and the new relavence and frequency of conflicts between ttime-honoured conservatory uses of land and new exploitive industrial uses, courts' view changed. After a period of vacillation, the House of Lords compromised with industrial interests, emasculating the common law of nuisance as a curb on air, noise and water pollution.

[93] John P. S. McLaren, *Nuisance Law and the Industrial Revolution. Some Lessons from Social History,* 3 OXFORD J. LEGAL STUD. 155 (1983). See also, A. E. Dingle, "*The Monster Nuisance of All": Landowners, Alkali Manufacturers, and Air Pollution,* 1828-64, 35 THE ECONOMIC HISTORY REVIEW, 529 (1982).

reasonable use of a lawful trade in a convenient and proper place, even though some one may suffer inconvenience. The court reported and approved the trial judge's finding that:

> It is not every body whose enjoyment of life and property is rendered uncomfortable by the carrying on of an offensive or noxious trade in the neighborhood, that can bring an action. If that were so, -as has already been observed by the learned counsel for the defendant,- the neighbourhood of Birmingham and Wolverhampton and the other great manufacturing towns of England would be full of person bringing actions for nuisances arising from the carrying on of noxious and offensive trades in their vicinity to the great interests of the manufacturing and social interests of the community". I apprehend the law to be this that no action lies for the use, the reasonable use, of a lawful place in a convenient and proper place, even though some one may suffer annoyance for its being so carried on.[94]

Judge Willes of the Court of Common Pleas neatly spelled out the link between public interest and the needs of productivity:

> The common law right which every proprietor of a dwelling house has to have the air uncontaminated and unpolluted, is subject to this qualification, that necessities may arise for an interference with that right *pro-bono publico*, to this extent that such interference be in respect of a matter essential to the business life, and be conducted in a reasonable and proper manner, and in a reasonable and proper place.

A few years later, the House of Lords' decision in the St. Helen case[95], arguably the most important case of industrial pollution of the era[96], made residential owners' "actions in respect of discomfort virtually impossible in the industrial Midlands and in regions such as Swansea and Cardiff."[97]. The activity of the St. Helen Copper Smelting Company caused large quantities of "noxious gases, vapours and other noxious matters" which diffused over the land of the plaintiff, damaging the vegetation and injuring the cattle. The House of Lords upheld the Exchequer Chamber's decision that the company

[94] Hole v. Barlow [1858] 4 C. B. (N.S.) 334.
[95] St. Helen Smetling Co. v. Tipping *supra* note 44.
[96] See Joel F. Brenner, *supra* note 50 at 413.
[97] *Id.,* at 413-414.

was liable for any physical damage but not for the deterioration of the plaintiff's comfort. When the cause was tried before Mr Justice Mellor at Liverpool in 1863, the defendant's counsel submitted that the three questions which ought to be left to the jury were "whether [the copper smelting activity] was a necessary trade, whether the place was a suitable place for such trade and whether it was carried on a in a reasonable manner". The opinion of the House of Lords focused on the reasonableness of the locality. In Lord Cranworth's words:

> You must look at it not with a view to the question whether, abstractedly, that quantity of smoke was a nuisance, but whether it was a nuisance to a person living in the town of Shields.

A few paragraph later, Lord Wesleydale neatly spelled out the court's concerns: a more stringent articulation of the reasonableness test would impact adversely national economic development:

> The defendants say: "If you do not mind you will stop the progress of works of this description" I agree that it is so, because no doubt, in the county of Lancaster above all other counties, where great works have been created and carried on, and are the means of developing the national wealth, you must not stand on extreme rights and allow a person to say "I will bring an action against you for this and that and so on".

Similarly, in the United States, in pollution cases, courts deployed reasonableness tests with an eye at economic growth, largely disregarding the costs imposed on the victims of development, i.e. workers and residential owners. The impact of nineteenth century tort doctrine on the economy has been the object of a well-known debate. A substantial body of scholarship has agreed, although with different methodological and political nuances, on the view that courts deliberately structured tort law to promote industrial expansion and powerful economic interests, by exempting corporate enterprises from liability for the harm caused by their activity[98]. In its most controversial

[98] This view has been variously articulated, reflecting different methodological approaches and political positions. JAMES WILLARD HURST, *supra* note 15 argued that the development of 19th century American private law promoted economic growth in that it was shaped by a variety of economic, social, geographical and technological needs. More specifically, it reflected the needs of the emerging industry and a broad societal consensus, among the various social groups, on a set of shared societal values, above all, "the release of individual creative energy".

formulation, this thesis claims the doctrinal development of tort law translated into a "subsidy" to the rising entrepreneurial class; this "subsidy" was coerced from the very victims of economic growth and ultimately increased the inequalities of wealth and power in nineteenth century America. Others have objected that, depending on the industrial sector, the latter thesis is either irrelevant or false.[99] Generally speaking, these critics note, evidence of utilitarian or growth-driven judicial reasoning is scant[100]. Further, records show that the negligence system was applied with impressive sternness to major industries and that courts exhibited a keen concern for victim's welfare. While a critical appraisal of the debate is largely beyond the scope of this article, a glance at air and water pollution cases seems to add evidence in support of the "maximization of economic growth" thesis.

More specifically, studies of pollution nuisance cases in states which were early bloomers in nineteenth century American industrialization, such as Pennsylvania, New York and New Jersey, have shown that, by and large, courts deployed balancing tests to deny plaintiffs injunctive relief or damages[101]. In weighing the right of defendant industries against that of pollution victims, courts were inclined to emphasize the reasonableness of the former's use and to overstate the ruinous impact a judgement in favour of the

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These economic and social factors shaped private law, and tort law in particular, in the sense that they exerted "pressure" on law; Hurst assumes a complex notion of historical causation and distinguishes between three types of such "pressure": focused pressure, functional pressure and inertia. LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW (1973) provides a more deterministic and materialist account of the development of nineteenth century tort law. The contours of American nineteenth century tort law, Friedman argues, are molded by economy and society, by the interplay of plural pressure groups motivated primarily by economic interests, an interplay where the group that wins is that of the capitalist-entrepreneurs. However, the most well known and controversial formulation of the thesis is due to MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 *supra* note 16; Horwitz argued that in the nineteenth century courts, working in concert with big economic interests, effected a revolution in tort law, that from strict liability to negligence, which promoted industrialization by exempting corporate enterprises from liability for the harm caused by their activity. This doctrinal shift translated into a subsidy to the entrepreneurial class, a subsidy coerced from the very victims of industrialization.

[99] Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L. J. 1717 (1980-1981).

[100] Other s have placed emphasis on other factors, such as the litigation costs, that, along with or more than the judiciary's ideology and its conscious objectives in shaping tort doctrine, explain tort law's weak response to industrial pollution at the moment of industrialization. See John P. S. McLaren, *supra* note 92 and, more generally, Keith N. Hylton, *Litigation Costs and the Economic Theory of Tort Law*, 46 U. MIAMI L. REV. 111 (1991-1992).

[101] Christine Rosen, *Differing Perceptions of the Value of Pollution Abatement Across Time and Place: Balancing Doctrine in Pollution Nuisance Law, 1840-1906,* 11 LAW AND HISTORY REV., 303 (1993).

plaintiff would exert on economic life. Courts' judgements of reasonableness betray a constant preoccupation with economic growth and a tendency to "domino-effect" thinking. Typically, a judgement granting injunctive or damage relief was seen as originating a parade of horrific effects: from the termination of all coke manufacturing in Pennsylvania, to the automatic stifling of all industrial development in the state, to decline of industrial cities and people's deprivation of all the benefits of urban life[102].

The Sanderson case (1886), the last episode of a protracted dispute among residential owners and a coal mining company, may be exemplary of courts' attitude[103]. The defendant, the Pennsylvania Coal Company discharged large volumes of mine water into the stream flowing through the Sandersons' land thereby corrupting the water to such an extent as to render it totally unfit for domestic and agricultural purposes. The Supreme Court of Pennsylvania did not found the defendant to have abused their property rights, declining to award damages to the Sandersons. In the court's analysis, "reasonable use" was equated with "ordinary and natural use" The defendants, the court argued, being the owners of a lot of coal land, had the right to the "natural use and enjoyment" of their property. Since coal mining in the ordinary and usual form is the "natural use" of coal land, the court concluded, any damage resulting from such natural use is, in the absence of negligence or malice, *damnum absque injuria.* Developmental concerns were key to the court's notion of "reasonableness". Justice Clark profusely examined the dimensions and the social utility of coal mining in Pennsylvania's economy:

> It has been stated that 30.000.000 of tons of anthracite and 70.000.000 of bituminous coal are annually produced in Pennsylvania. It is therefore a question of vast importance, and cannot, on that account, be too carefully considered. […] Indeed if the right to damages in such cases is admitted, equity may, and under the decisions of this court undoubtedly would, at the suit of any riparian owner, take jurisdiction, and, upon the ground of a continuous and irreparable injury, enjoin the operation of the mine altogether[104].

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[102] Christine Rosen, *supra* at 319

[103]Pennsylvania Coal Co. v. Sanderson 113 Pa 126 (1886). For an extensive discussion of the Sanderson case, see Robert Bone *supra* note 35.

[104] Similarly, in the Huckenstine case (Huckenstine Appeal 10 Penn St. 102 Am Rep 669 (1872), the court reversed the decision of the lower court which had issued an injunction preventing the defendant from burning

A few years later the Supreme Court of Pennsylvania embarked in a bolder argumentation[105]. The plaintiff brought an action against a coal company to recover damages for injury to his farm caused by the smoke and gas from the coke-ovens erected on the adjoining land. The defendants relied on Sanderson to claim that the alleged injuries did not entitle the plaintiff to recover, since they were the natural and necessary consequence of a reasonable use of their property. The court distinguished the case from Sanderson. Since the land in question is not coal land, the court reasoned, the injury results from the defendant's decision to devote their land to the burning of coal mined elsewhere, rather than from the natural use of their land. However, Justice Williams found the selection of the location reasonable and proper. The court's discussion of the measure of the damages betrays its developmental concerns:

> The plaintiff's farm is a in a region in which bituminous coal is obtained in large quantities. He himself mines coal upon his own land for sale. The conversion of coal into coke to supply fuel for the great iron and steel mills of Western Pennsylvania is one of the great industries of the region. Many millions of money are invested in, an many thousands of men are employed about, its production. It has been largely instrumental in the development, growth, and general prosperity of the region. The plaintiff shares the general benefits […] these considerations should be borne in mind in adjusting the damages if any have been sustained

Economic preoccupations also pervade opinions dealing with instances of malicious interference with contractual relations. Loaded with distributive implications, this relatively new tort raised critical questions as to the role and

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bricks, thereby causing injury and annoyance to the plaintiff. The defendant's use of his land, the court argued, was a reasonable one, the land having upon it a deposit of fine brick clay which could be made into bricks with profit if this was done near the pit form which the clay was taken. See also Doellner v. Tynan 38 How. Pr 176, NY Super (1869): the court found that the defendant exercised his business of blacksmithing reasonably and refused to grant an injunction; Quoting an earlier English case the court noted: an action does not lie for a reasonable use of my right, though it be of annoyance of another. The court dismissed the plaintiffs injury as mere annoyances and remarked the usefulness of the blacksmith trade in urban life. See also, Rhodes v. Dunbar 16 Am. Law Rec. W.L. 7175 (1868): the defendants owned a planning mill that produced shavings, chips and saw dust; further the material used in it was highly inflammable, rendering it dangerous to buildings in the vicinity. In May 1866 the mill burned, injuring many houses in the neighborhood. The plaintiffs sought to prevent the defendants form re-building the mill. Chief Justice Thompson conceded that the species of property in question is extra-hazardous (but this is a question of policy to be decided by the legislator, we only decide about legal rights) but claimed that if carried on reasonably, the business cannot be a nuisance. Justice Thompson discussed at length the benefits and the problems of modern urban life.

[105] Robb v. Carnegie Bros & Co. 145 PA 324, 22 A. 649.

scope of market competition. Most instances of interference involved employment contracts or sale contracts, thereby calling courts to define the proper and reasonable limits of "the right to compete in business life or in the labor market". As Prosser's treatise on the law of torts notes, "in this field, perhaps more obviously than any other, the problem has continuously been one of adjustment of the conflicting claims of different enterprises, industries, classes and groups where interests are nicely balanced and decisions on the basis of social policy is not an easy matter"[106].

In cases involving business competition, reasonableness tests and malice rules proved useful tools for governing and stirring economic life by delimiting the sphere of fair and permissible market competition. In Dunshee v. Standard Oil and Co. (1911) the Supreme Court of Iowa struggled with the perplexities arising "in the effort to sustain, on the one hand, the widest practicable liberty of men to engage in any and every line of business, and, on the other, to protect the business of each from wrongful encroachment or interference by others"[107]. The plaintiff, who retailed oil from tank wagons driven about the streets, used to leave green cards with customers to display in their windows when in need of oil. The defendant, a former wholesale supplier of the plaintiff seeking revenge upon the latter, entered the retail business trying to sell his oil wherever the plaintiff's green cards were exposed. The court found that the defendant had transgressed the bounds of legitimate competition. While the defendant, the court conceded, has the right to establish a retail oil business and to send their agents over the same routs covered by the plaintiff, he ought to exercise such right reasonably and without malice. The court expressed its view as to the perversions of unbound competition. The laws of competition in business are harsh enough; the rule that motive is irrelevant would lead to pernicious consequences, justifying the worst wrongs upon the theory that "it is business". Fortunately, Justice Weaver added:

> There has for many years been a distinct tendency of the courts to look beneath the letter of the law and give some effect to Its beneficent spirit, thereby preventing the perversion of the rules intended for the protection of human rights into engines of oppression and wrong.

[106] WILLIAM L. PROSSER, LAW OF TORTS, (4TH ED. 1971) at 927.
[107] Dunshee v. Standard Oil Co. 152 Iowa 618, 132 N. W. 371

Justice Waeaver's bold social language should not deceive. The functional equivalents of abuse of rights left largely untouched and, ultimately strengthened, the pervasive individualistic vocabulary of "rights" and "property". In justifying the protection granted to the victims of the interference, courts resorted to the theory of "contractual property". Contracts were conceptualized as a form of intangible property to be protected. In Jones v. Leslie, the Supreme Court of Washington deployed a subjective notion of malice as wanton malevolence to protect the weaker contractual party. Significantly, however, the court's effort to "correct" the balance of power between the stronger actor, the former employer, and the weaker party, the employee seeking a better job, was not paralleled by a "correction" of the individualistic notion of "contractual property". Rather, the court profusely articulated the property rationale underlying the protection of employment relations from malicious interference:

> It would be well to remember in the beginning that a man has a right to be protected in his property. This was the doctrine of the common law, is, and always has been, the law in every civilized nation. It is of necessity one of the fundamental principles of government, the protection of property being largely one of the objects of government. […] Is, then, the right of employment in a laboring man property? That it is we think cannot be questioned. The property of the capitalist is his gold and silver, his bonds, credit etc., for in these he deals and makes his living. For the same reason, the property of the merchant is his goods. And every man's trade or profession is his property because it is his means of livelihood, because through its agency, he maintains himself and family and he is enabled to add his share towards the expenses of maintaining the government. […] To destroy this property, or to prevent one from contracting it or exchanging it for the necessities of life is not only an invasion of a private right but it is an injury to the public, for it tends to produce pauperism and crime.

Not dissimilarly, in Huskie v. Griffin (1909)[108], the court's decision to afford protection to the weaker party was couched in the language of ample and equal individual freedom rather than in that of solidarity and social duties. The issue presented by the case at hand, the court noted, is "that of the existence and extent of what has come to be known as the right to an open market", a

[108] Huskie v. Griffin 75 NH 74 A 595, (1909).

right "inherent in the idea of Anglo-Saxon liberty". Far from being an absolute right, the right to an open market is to be exercised with respect of the equal right of others. How far one may lawfully interfere to prevent the making of contracts between third parties depends upon a reasonableness test that takes into account the motive of the defendant as well as the circumstances[109].

With the intensification of labor upheaval in the latter part of the nineteenth century, the tort of interference with contractual relations became critical to the struggle between labor unions and capitalist employers. As in cases of business competition, courts relied on standards of "reasonableness" or "malice" to define the compass of legitimate labor competition. However, when dealing with episodes of unions' interference with employment relations, courts' commitment to ensuring fairness and to protecting weaker contractual parties often translated into an effort at stifling union's energetic activism.

A prolific literature has shed light on the powerful attack mounted against organized labor by courts alarmed by the economic power acquired by nationally organized trade unions and state federations[110]. The burgeoning of new types of collective action such as secondary boycotts, sympathy strikes, recognition strikes, called for a prompt legal response[111]. The doctrine of "malice" was part of such response. A study of the re-orientation of labor law between 1886 and 1895, has shown that the concept of "malice" proved critical for containing labor's ability to use concerted action[112]. The interloper union was often found to have acted maliciously rather than in the pursuit of free competition. In a similar vein, an analysis of late nineteenth century labor decisions in Massachusetts and Illinois has described how courts consistently

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[109] One may not interfere with his neighbour's open market or "reasonable expectancies" solely for the purpose of doing harm. It has been said, however, in several cases that a wrongful motive cannot convert a legal act into an illegal one, and many judges have thought this was the end of the law upon the question. They seem to proceed upon a theory of absolute right in the defendant […] [the right] is a qualified one and rightfulness of its exercise depends upon all those elements which go to make up a cause for human action. The reasonableness of the act cannot be satisfactorily determined until something is known of the state of the actor's mind. The justification may be found sometimes in the circumstances under which it is done, irrespective of motive, sometimes in the motive alone, and sometimes in the circumstances and motive combined.

[110] WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991); DANIEL R. ERNST LAWYERS AGAINST LABOR. FROM INDIVIDUAL RIGHTS TO CORPORATE LIBERALISM (1995).

[111] WILLIAM E. FORBATH *supra.*

[112] Haggai Hurvitz, *supra* note 57.

relied on a circular, and apparently neutral, notion of "malice" to assert unions' rights in abstract while negating them in practice. Judges "referred to the actions of unions as malicious as if that was a finding of fact, in order to support a legal conclusion that the union actions were not legally justified"[113].

A widely known case of obstruction and interference with employment relations, Walker v. Cronin (1871) well exemplifies the use of "malice" to curb labor's action[114]. The defendant, the agent of a union, in order to compel a shoe manufacturer to agree on higher wages, had persuaded a large number of the latter's actual and prospective employees to abandon their job. The employer, who as a consequence of the union's action had difficulties recruiting other skilled workmen and had to pay higher wages, brought an action for damages. The question around which the case revolved was whether the defendant union had exercised maliciously its right to freely compete for better conditions. The court refused to see the controversy as an instance of competition between labor and capital and fit the case into the template of subjective "malice". The defendants' efforts to induce the shoemakers to abandon their jobs were seen as driven by the arbitrary and malicious purpose of causing disturbance and economic loss rather than as instrumental to broader labor objectives. As the court concluded:

> Everyone has the rights to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance. If disturbance or loss come as a result of competition or the exercise of like rights by others it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with. But if come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing and falls within the principle of the authorities first referred to [the suggestion in Greenleaf v. Francis that malicious acts without the justification of any right, that is, acts of a stranger, resulting in like loss or damage, might be actionable]

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[113] Ellen M. Kelman, *American Labor Law and Legal Formalism. How Legal Logic Shaped and Vitiated the Rights of American Workers* 58 ST. JOHN'S L. REV 1 (1983-1984).
[114] Walker v. Cronin, 107 Mass 555 (1871).

In Vegelahn v. Guntner (1896), the Supreme Court of Massachusetts examined the reasonableness of the means employed by the defendants the defendants' and found them to fall outside the compass of permissible competition, amounting to an unlawful combination to injure the employer[115]. The case involved episodes of picketing, obstruction and intimidation in front of the employer's factory on the part of workers seeking to obtain higher wages and shorter time schedules. The employer filed a bill for an injunction restraining the workers from picketing and obstructing. Again, the critical question was whether the defendants had exercised maliciously their right to freely communicate in a public space, the sidewalk in front of the employer's premises, to improve their labor conditions[116]. Justice Allen examined the reasonableness of the defendants' purpose and activity and granted an injunction:

> The defendants contend that these acts were justifiable because they were only seeking to secure better wages for themselves by compelling the plaintiff to accept their schedule of wages. This motive or purpose does not justify maintaining a patrol in front of plaintiff's premises as a means of carrying out their conspiracy. A combination among persons merely to regulate their own conduct is within allowable competition and is lawful although others may be indirectly afflicted thereby. But a combination to do injurious acts expressly directed to another by way of intimidation or constraint either of himself or of persons employed or seeking to be employed by him is outside of allowable competition and is unlawful.

In his widely quoted dissent, Justice Holmes investigated the possible malicious nature of the means employed by the defendants, i.e. a combination, to reach the opposite conclusion. While an individual has an undeniable right to freely communicate in order to better her position, a collective exercise of such right, entailing a higher degree of pressure and disruption, might be deemed an unreasonable, malicious and unjustified exercise of the right. However, Holmes noted, "free competition means combination and the organization of the world now going on so fast, means an ever increasing might

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[115] Vegelahn v. Guntner 35 L. R. A. 722 44 N.E. 1077 (1896). By interfering with "his right to engage all persons who are willing to work for him at such prices as may be mutually agreed upon" and with the other actual or prospective employees' right "to enter into or remain in the employment of any person or corporation willing to employ them".

[116] Later free speech see Thornhill v. Alabama 310 US 88 (1940)

and scope of combination".

When the notion of subjective malice or the inquiry into the reasonableness of the means did not help, courts resorted to rigid and pre-fixed notions of "reasonable and legitimate purpose" as a restrictive, and apparently neutral, yardstick for assessing the objectives sought by unions. As discussed earlier, in Moores v. Bricklayers, the court analyzed the immediate motive driving the defendant union and found it to be that of "showing to the building world what punishment and disaster necessarily followed a defiance of their demands". Such purpose, Justice Taft concluded, if assessed in light of the "normal operation of the right to labor", defined as the securing of workers' wages and terms of employment, appears malicious. Justice Taft's opinion is ridden with anxiety. A new and effective form of organized action, boycotts spurred alarm among judges and lawyers. Labor historians have investigated the different modalities of capital's response. Some have told the story of the American Anti-Boycott Association, examining the efforts of proprietary capitalists to organize and lobby against labor[117]. Others have analysed the imaginative metaphorical language developed by judges to deal with boycott cases[118]. Abuse, malice and unreasonableness were central to this vocabulary, emphasizing labor's irresponsible and tyrannical exercise of its rights. As Justice Carpenter noted in State v. Glidden (1887):

> If a large body of irresponsible men demand and receive power outside of law, over and above the law, it is not to be expected that they will be satisfied with a moderate and reasonable use of it. All history proves that abuses and excesses are inevitable. The exercise of irresponsible power by men, like the taste of human blood by tigers, creates an unappeasable appetite for more.

Although less inventive than Carpenter, Justice Taft must have shared these fears and, towards the end of his opinion, quoting an earlier case, described boycotts as "oppressive to the individual, injurious to the prosperity of the community and subversive of the peace and good order of society".

Did the equivalents of abuse of rights operate as dangerous "social

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[117] Daniel R. Ernst, *supra* note 107.

[118] GARY MINDA, BOYCOTT IN AMERICA. HOW IMAGINATION AND IDEOLOGY SHAPE THE LEGAL MIND (1999)

drugs" exerting potent after-effects? The cases discussed above indicate that malice rules and reasonableness tests were thought to perform a powerful role in facilitating and governing economic growth. Rather than being consistently deployed to redress distributive asymmetries, as the rhetoric surrounding abuse of rights suggests, they were used to allocate and to shift roles and costs between the various actors of nineteenth century blooming economic development: developers of land and large "static" landowners, industrial enterprisers and smaller residential owners, capitalist employers and organized labor. While not necessarily single-mindedly and systematically used to subsidize the "interests" at the expense of the weaker social strata, standards of "malice" and "reasonableness" were largely deployed to facilitate the needs of the more dynamic and economic actors. Of course, as observers have noted, concern for economic development was only one element of a larger set of beliefs that determined judges' reliance on "malice" and "reasonableness", beliefs about the principles of legal reasoning, about the nature of rights and the value of property[119].

II. COMMON LAWYERS DEBATING MALICE AND THE THEORY OF INTENTIONAL TORT

The frequent deployment by English and American courts of functional equivalents of "abuse of rights" raises the question of the place of the latter in the scholarly debate. The absence of a unitary concept of "abuse of rights" in the common law may be taken to suggest that, while on the continent a heated controversy pitted against each other proponents and critics of the doctrine, Anglo-American legal scholarship showed tepid interest for the continental *querelle*. However, this does not seem to be the case.

Continental theories of "abuse of rights" were well-known and profusely reviewed. In his 1905 disquisition on the relevance of wrongful motive in tort liability, James Barr Ames corroborated his analysis with Continental examples, examining French and Belgian decisions along with American and English cases[120]. Similarly, in the 1910 issue of the Harvard Law Review, F. P.

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[119] See Robert Bone, *supra* note 14.

[120] James Barr Ames, *How Far an Act May Be a Tort Because of the Wrongful Motive of the Actor*, 18 HARV. L. REV. 411 (1904-1905).

Walton of McGill University accurately laid out the main positions in the French debate, contrasting the different articulations of the doctrine by Josserand, Saleilles, Charmont, and Esmein[121].

Further, "malice" was at the centre of a vibrant transatlantic conversation. For a twenty-year period spanning the turn of the twentieth century, Michael Taggart suggests in his study of Bradford v. Pickles, the place of "malice" in the law of torts was "a fashionable topic of conversation on both sides of the Atlantic, at a time when British and American lawyers spoke much the same language and listened to one another".[122] The conversation took place in the pages of the Harvard Law Review, the American Law Register and the Law Quarterly Review between the 1880s and the 1920s. Henry Terry, Frederick Pollock, Oliver Wendell Holmes, William Draper Lewis, James Barr Ames, Bruce Wyman and Ernst Huffcut were the participants. The conversation developed along lines similar to those of the continental debate on abuse of rights. Similar methodological and political questions were raised. At stake were the organization of the conceptually haphazard law of torts, the development of a new mode of legal thought, alternative to Classical Legal Thought, and, ultimately, the choice between competing models of socio-economic governance.

The question of malice, was, in the first place, a matter of clear analytical reasoning. The actual significance of the question of "malice" could only be elucidated through a re-organization of the conceptual structure of the law of torts. The abolition of the modern common law forms of action in the mid nineteenth century confronted American jurists with the problem of organizing the various forms of civil liability in a unitary conceptual scheme. Henry Terry, Frederick Pollock and Oliver Wendell Holmes struggled to draw an analytically clear map of the law of torts that would dispel the fog of empty abstractions that had long obfuscated the problem of malice, bringing to light its real

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[121] F. P. Walton, *Motive as an Element of Torts in the Civil Law and in the Common Law*, 22 HARV. L. REV. 501 (1908-1909).

[122] MICHAEL TAGGART, *supra* note 20 at 167. See Cosgrove Our Lady The Common Law, the formation of a community dedicated to the celebration of the common law for its unifying force dated from about 1870, reached a zenith of influence in the years before WWI and then declined until about 1930, when it ceased to attract loyalty on either side of the Atlantic. See FREDERICK POLLOCK THE LAW OF TORTS (1887 1st edition), p. V.

nature. The maps they sketched contributed to the refutation of one of the central tenets of classical legal science, i.e. the proposition that individuals exercise their rights, absolute within their spheres, so as not to injure the equal rights of others. Rather, there are instances in which individuals are permitted to exercise their rights maliciously or unreasonably to the injure of others. The question of "malice" is the question of defining these instances and is, ultimately, a question of policy.

In an article on malicious torts published in 1884, Henry Terry integrated malice in a conceptual scheme that reflected the most sophisticated analytical tradition[123]. Terry's scheme aimed at showing that there is a general duty not to act maliciously which is subject to exceptions motivated by reasons of policy and justice. Rather than questions about the nature of malice, malicious torts raise crucial questions regarding the possibility of admitting exceptions to the general duty to refrain from malicious acts. These questions are not to be decided by deduction from an abstract notion of malice, depending, instead, on broad considerations of justice and policy.

The widespread misapprehension of the problem of malice, Terry noted, arises from a lack of clear views about certain elementary legal ideas and their relation to each other. By tracing a clear analytical scheme of legal ideas, Terry sought to disentangle the different kinds of questions posed by malicious torts, clarifying the actual role played by malice. Terry drew a threefold classification of legal duties: peremptory duties, duties of reasonableness and duties of intention. The latter include both duties not to act with a mere intention to produce a certain result, which may be broken without malice, and duties not to act maliciously, in the breach of which malice is essential. Malice means an intention to cause harm or damage to another, the harm or damage as such being the very thing desired.

Further, Terry distinguished between two types of rights. Permissive rights are liberties to do or refrain from an act uncorroborated by a duty on others not to interfere. Protected rights, on the other hand, describe the legal condition of a person for whom the law protects a condition of fact by imposing

[123] Henry Terry, *Malicious Torts,* 20 L. Q. REV. 10 (1904).

duties on others. The protected condition of fact is the content of the right, any impairment of such condition amounting to a violation of the right. Terry delineated several classes of protected rights, i.e. rights of personal security, rights in the persons of others, normal property rights, abnormal property rights and rights of pecuniary condition, each displaying different features and corresponding to different duties. In rights of pecuniary condition the protected condition of fact is the holding of value or purchasing power in some form.

Having laid out this table of elementary legal ideas, Terry confined the relevance of malice to a specific hypothesis. An actual question of malice, he noted, arises in case of breach of a duty not to act maliciously followed, as its proximate consequence, by the violation of a corresponding right of pecuniary condition.

> When it appears that there has been a violation of the right of pecuniary condition and of no other right and the case is not one of fraud, then the duty which must be proved to have been broken will usually be a duty not to act maliciously, malice will be an essential question on case of action and the question will arise, what is malice? And what is the legal duty as to malicious conduct?

However, even in this hypothesis, Terry added, malice might be irrelevant, the question being whether there is any exception to that duty. There may be good reasons why a particular class of cases should be excepted out of the general rule; the opportunity of these exceptions "is to be decided upon grounds of justice or policy special to each class of cases".

> To sum up: when malice is alleged the questions maybe be any of the following…..If there has been a malicious act and thus prima facie a breach of the last named duty, whether there is any exception to that duty that covers the case. Thus depends not on any theory of malice, but on considerations of justice and policy.

A decade later, the appearance of Holmes' article "Privilege, Malice and Intent" marked a shift in the conceptualization of malice[124]. Holmes' conceptualization of malice further developed Terry's idea that, in certain

[124] Oliver Wendell Holmes, *Privilege, Malice and Intent*, 8 HARV. L. REV (1894-1895).

cases, policy reasons suggest that malicious acts may be done, without the actor being liable. However, Holmes took Terry's scheme one step further, developing a general theory of intentional tort in which malice was purged of any moral connotation and equated with "the absence of just cause or excuse". Holmes' scheme proved extremely influential, setting the terms of a transatlantic conversation between Frederick Pollock and the Americans.

"Privilege, Malice and Intent" represents the final stage in the shaping of a new conceptual structure of tort law; Holmes altered and refined his earlier conceptual scheme of tort law according malice a central role. Holmes' earlier efforts were directed at anchoring liability to an external objective standard, ultimately dependent on policy considerations, rather than to an internal subjective standard based on fault[125]. The general purpose of the law of torts, Holmes argued, is to secure a man indemnity against certain forms of harm, not because they are wrong but because they are harms. The preoccupation with articulating an objective, policy-based theory of liability, induced Holmes to arrange different types of torts in a "philosophically continuous series", running from intentional torts to negligent torts to strict liability. The continuum was organized according to the degree of foreseebility of the harm, rather than on any subjective notion of fault. For this scheme to hold, the role of malice was to be eclipsed. Malice was deemed to be a comparatively insignificant form of liability, circumscribed to isolated instances, and malicious torts were disguised into the broader category of intentional torts. Holmes noted that there certain harmful acts which may done even with malevolent intent.

> [A man] may establish himself in business where he foresees that the effect of his competition will be to diminish the custom of another shopkeeper, perhaps to ruin him. He may erect a building which cuts another off from a beautiful prospect, or he may drain subterranean waters and thereby drain another's well; and many other case may be put.

Privileged malicious acts and strict liability functioned as the two extremes proving the irrelevance of any subjective moral standard of liability.

[125] Id., *The Theory of Torts,* 7 AM. L. REV. 652 (1872-1873); see also lectures III and IV in ID., THE COMMON LAW (1881).

> As the law on the one hand allows certain harms to be inflicted irrespective of the moral condition of him who inflicts them, so at the other extreme it may on grounds of policy throw the absolute risk of certain transactions on the person engaging in them irrespective of blameworthiness in any sense.

The echo of Holmes' scheme was heard on the other side of the Atlantic. In 1887, setting out to show that "there is really a Law of Torts, not merely a number of rules about various kinds of torts", Frederick Pollock acknowledged his debt with Holmes, warning him that "you will recognize in my armoury some weapons of your own forging". Pollock' distinction between causes of action based on intentional conduct, negligent conduct and strict liability mirrored Holmes' continuum. Further, similar to Terry and Holmes he emphasized the range of situations in which injury is legally permitted without compensation. Pollock pointed to trade competition and the interception of water as instances in which "the exercise of ordinary rights for a lawful purpose and in a lawful manner is no wrong even though it causes damages". As to the role of malice, Pollock noted that, while in Roman law the exercise of a right accompanied by a malicious intent is ground for an action, there is no positive English authority on the matter.

By the 1890s, Holmes had revised his conceptual structure of tort law, hinging it on intentional torts and according malice central relevance by linking it to the question of justification. The new arrangement was neatly spelled out in "Privilege, Malice and Intent"[126]. Acknowledging that the objective test of the degree of manifest danger does not exhaust the theory of torts, Holmes shifted the focus from the external objective standard of liability to the assessment of the subjective state of mind. Malice gained new centrality. In some cases, Holmes noted, the actor is not liable for a very manifest danger unless he actually intends to do the harm; in other cases actual malice may render the actor liable, when, in the absence of it, she would have not incurred in liability; still in other cases, the actor may even intend to do the harm and yet not have to answer for it. The intentional infliction of temporal damage, or the doing of an act manifestly likely to inflict such damage and inflicting it, is actionable if done without just cause. When acting with just cause, the actor is privileged to inflict the damage. Motive affects claims of privilege. Actual

[126] Oliver Wendell Holmes, *supra* note 119.

malice or improper motive is a crucial factor in weighing the defendant's justification. While a good motive justifies the intentional infliction of harm, a bad motive may render the actor liable. The question of justification, Holmes warned, ultimately rests on delicate considerations of policy, rather than on empty logical deductions. Two years later in his famous dissent in the Vegelhan case[127], Holmes restated the gist of the problem of malice. In numberless instances, Holmes noted, the law warrants the intentional infliction of temporal damages because it regards it justified. The true ground of justification, he continued, are considerations of policy and of social advantage which are rarely unanimously accepted.

While at the conceptual level, the debate on malicious torts translated in an ambitious effort of analytical clarification, at the level of legal reasoning, it was the laboratory where a new mode of policy analysis, anticipating the relativist and pragmatic approach of Legal Realism, was developed. The conceptual clarification of the problem of malice confronted American jurists with the task of modifying and attuning their reasoning techniques[128]. If, as Terry and Holmes suggested, the question of malice was, essentially, the question of admitting exceptions to the general duty to refrain from intentionally inflicting damage, and, if such question was ultimately decided on the basis of considerations of policy, a new and more sophisticated mode of policy analysis was to be developed. The tools of classical legal science, i.e. logical deduction and the rudimental forms of policy analysis that we have seen deployed by the courts, were to abandoned or refined. Terry, Holmes, Ames and

[127] Vegelhan v. Guntner, *supra* note 111.

[128] This organicist and policy-oriented mode of reasoning was proudly championed as a peculiarly American trait, distinguishing American jurists and judges from their English counterparts.. In a 1910 article on the influence of social and economic ideals on the law of malicious torts, Gordon Stoner effectively contrasted the social organicism of American judicial reasoning with the formalistic approach of the English courts. The questions raised by malice and abuse of rights signal the need for a law organically reflecting evolving ethical, social and economic ideals. Judges are called to adjust the pace of legal change to that of social and economic evolution. American judges, Stoner notes, were best equipped for this daunting task. Quoting Justice Park in Mirehouse v. Rennel, Stoner argues that English common lawyers aim at uniformity, consistency and certainty. Their mode of reasoning consisted in the mechanic application of rules derived from judicial precedents and their ultimate goals were the rigour and coherence of legal science. Justice Park's words are contrasted with Justice Elliott's bold organicist act of faith in Tuttle v. Buck. American courts, Stoner suggests, aim at adaptability to social needs rather than uniformity and consistency. Their reasoning techniques and their familiarity with policy questions enable them to facilitate law's constant adaptation to changed conditions See Gordon Stoner, *Influence of Social and Economic Ideals on the Law of Malicious Torts,* 8 MICH. L. REV. 468 (1909-1910).

Lewis were eager to denounce the failures of hollow deductive reasoning in solving the question of malice. In Terry's words:

> The real questions in Allen v. Flood and in Quinn v. Leathem were of this kind. They are not questions about the nature of malice or the general duty not to do malicious acts. Discussions of these points simply obscure the true issue. They are of admitting exceptions to the general duty. They are not to be decided by deductions from legal theories about malice and there are very few precedents or established legal principles which will throw much light upon them. They are really questions of the adjustment of the law to new states of act arising out the new and complicated conditions of modern life…..the decisions of the courts upon them must and will amount in reality to somewhat bold and extensive judicial legislation, somewhat more bold and extensive than courts nowadays like to engage in, which must be based on broad considerations of justice and policy, with little help from precedents or theory.

The forms of balancing and policy analysis that we have seen deployed by courts were to be further developed. When deciding the question of justification, courts had, by and large, weighed conflicting interests in light of multifactor standards of "malice" or "reasonableness" reflecting notions of social morals or policy considerations presented as "widely shared" and, hence, relatively uncontroversial. To the contrary, Holmes pointed at the fact that questions of privilege and malice call for analytic choices among alternative considerations of policy or justice. Judges are to balance, case by case, weighing the actual and concrete gains and losses entailed by alternative solutions. Balancing involves tracing the line in one place rather than in another and hence involves gains and losses that are the result of policy preferences rather than of universal notions of justice or the public good[129]. Holmes was generous in examples:

> Let us suppose another case of interference with business by an act which has some special grounds of policy in its favour. Take the case of advice not to employ a certain doctor, given by one in a position of authority. To some extent it is desirable that people should be free to give one another advice. On the other hand, commonly it is not desirable that a man should lose his business. The two advantages run against one another and a line has to be drawn. In such a case

[129] Duncan Kennedy & Marie Claire Belleau, *Le place de René Demogue dans la généalogie depensée juridique contemporaine*, 56 REVUE INTERDCIPLINAIRE D'ÉTUDES JURIDIQUES 163 (2006).

> probably it would be said that if the advice was believed to be good and was given for the sake of benefiting the hearers the defendants would not be answerable. But if it was not believed to be for their benefit and was given for the sake of hurting the doctor, the doctor would prevail…

The scholarly debate over malicious torts revealed the limits of courts' reasoning tool kit and the need for a more sophisticated mode of legal analysis. But the ultimate stake of the debate lay elsewhere. Jurists and writers were quick to realize the implications of the question of malice in the larger and incandescent context of industrial struggles. Contrary to their continental European colleagues who discussed the problem of abuse of rights at a rather abstract level, they did not shy away from examining the problem of malice in light of the questions posed by labor/capital disputes. Holmes's scheme of intentional tort proved a critical weapon in labor cases. As his Vegelhan dissent shows, Holmes envisaged his theory of intentional tort as a crucial tool for governing industrial warfare, furthering the cause of peaceful trade unionism. By focusing on motive, Holmes was able to expand the scope of justification, exempting from liability peaceful labor activities.

In a lengthy and careful investigation of crucial issues in labor law, that appeared in 1907 in the Harvard Law Review, Jeremiah Smith further elaborated the question of justification, attuning the scheme of intentional tort to recent labor cases[130]. Smith set four requisites for the validity of "just cause or excuse" in labor cases: pertinence, reasonable fitness, proportionality and direct conduct. First, there must be a conflict of interest between plaintiff and defendant as to the subject matter in regard to which the damage is done. Second, the damaging act must be reasonable calculated to substantially advance the interest of the defendant. Third, the resulting damage must proportional to the benefit to the defendant. Four, the justification must be

[130] Jeremiah Smith, *Crucial Issues in Labor Litigation*, *supra* note 62. It is impossible to have any clear discussion of the crucial labour cases, he contended, unless "we either discard certain ambiguous expressions altogether or distinctly indicate the meaning intended to be affixed to them". Seeking to bring clarity, he distinguished between "intent" and "motive": the former describes the defendant's immediate intent, the latter denotes the defendant's ulterior intent. While intent is often material upon the question of the defendant's liability, the cases where motive is material are comparatively rare. Smith quotes Ames' articulation of the doctrine of intentional tort as an accurate representation of the law. In Ames' words, "The wilful causing of damage to another by a positive act whether by a man alone or by several acting in concert and whether by direct action against him or indirectly by inducing a third person to exercise a lawful right, is a tort unless there was cause for inflicting the damage".

confined to those case where the defendant uses only his own conduct as a lever, rather than an outsider's conduct.

At closer inspection, Smith's fourfold guide to justification translates in a restrictive approach to certain sophisticated forms of labor struggle, such as secondary boycott. The requisite of direct conduct rules out labor's activity that rely on a third party. While the right to abstain from work is absolute, Smith notes, yet it cannot be used to induce a third person to take action damaging to the plaintiff. Moreover, the requisites of reasonable fitness and proportionality exclude methods of warfare dependent on inter-trade solidarity. Smith concedes that while workers in one trade may take measures to strengthen unionism in their own trade, they cannot do so to bolster unionism in another trade.

Ultimately, the debate over malicious torts grew into a broader clash over different models of socio-economic development and power relations among social actors. Judicial decisions and juristic conceptualizations in the area of malicious torts, Gordon Stoner noted in 1909, reflect changes in the public opinion, registering variations in political, economic and ethic ideas[131]. Stoner's survey of different lines of cases involving business competition, boycott and closed shop evinced a marked shift from individualistic thinking committed to absolute rights and freedom of action to a social outlook weighing individual rights against societal welfare. Stoner was eager to denounce the asymmetry between courts' treatment of malice in labor cases and in cases involving business competition. In the former, he suggested, judges, when determining liability, tend to consider the immediate motive of the defendant, i.e. the immediate result desired to be accomplished by the act, disregarding the ultimate motive, i.e. the result which the actor wishes to effect not by the act as part of a broader strategy.

> To illustrate suppose a labor union some of whose members are employed by a manufacturer who also employs non-union men orders him to discharge the non union men and threatens to compel its men to quit work if he does not comply with the order. To avoid a strike he discharges the non-union men. Here the immediate result desired is the injury-the discharge-of the non-union men. It

[131] Gordon Stoner, *Influence of Social and Econmic Ideals on the Law of Malicious Torts, supra* note 123.

> may very well be that the ultimate motive is to force all laborers to join the union and thus to increase its power and usefulness. It may be stated as a general rule that in labor cases the courts have not regarded the ultimate motive of the defendants in determining their liability

On the other hand, Stoner argued, courts seem reluctant to adopt the same principle in cases of business competition, when the interests of big business are at stake.

> Suppose this principle were to be applied in the same way in suits brought by an independent company against a trust where the trust has cut process so as to lose money in the district where it competes with the independent company in order to drive the independent concern out of business and so to destroy it or force it to enter the combination to preserve itself. Here the immediate motive is the injury or destruction of the plaintiff company, the ultimate motive the benefit to be derived by the trust through forcing the independent concern to unite with it or go out of business

So far, in similar cases, Stoner noted, judges have tended to adopt an opposite principle, disregarding the immediate motive and focusing on the ultimate motive. While fear of an increment in labor power leads courts to gloss over the defendant union's ultimate motive, an individualistic commitment to freedom of action and the sacredness of unrestrained competition has so far prompted them to deem the ultimate motive of business competition a valid justification. A similar awareness of the asymmetry veins Walter Wheeler Cook's analysis .

> When the legality of attempts to close a market by economic pressure on those who deal with rivals has been called in question …the tendency has been to regard the acts of the defendants as lawful; when the legality of similar attempts to unionize a shop has been called in question, the tendency has been to regard such attempts as illegal[132].

On the contrary, advocates of unrestrained competition and "the open market" denounced the power of labor unions as a threat to individual morality, the independence of workers and employers, the natural equilibrium

[132] Walter Wheeler Cook, *Privileges of Labor Unions in the Struggle for Life* 27 YALE L. J. 779 (1917-1918).

of competition and the principle of equality before the law[133]. Bruce Wyman's denunciation of courts' illiberal efforts to side with labor in the mounting industrial warfare betrays disquiet. Even to the most superficial observers of current events, he noted, it is clear that the competitive system is threatened from many quarters. Courts' treatment of unions' malicious competitive activity poses the greatest danger to individual freedom and industrial liberty. The doctrine of the closed shop is being surreptitiously established and the courts seem to be abdicating their task of "protecting the freedom of the individual against the oppression of the combination". Unionizing and boycotting, Wyman claimed, pose a despotic and tyrannical threat to individual liberty, their efficacy resting on the overpowering force of numbers. Not only is strengthening the power of labor a menace to individual freedom, it is also prejudicial to the larger interest of society. While the public wants the best services that can be gotten at the lowest wages that will be accepted, unionizing means less efficient services and increasing wages. In a crescendo of anxiety, Wyman warns that the end of the open market and the disturbance of the competitive system would be "the final catastrophe beyond which there could be nothing but the horror of anarchy or the hopelessness of socialism".

III. ON THE CONTINENT: *ABUS DE DROIT* AND *ABUSO DEL DIRITTO*

Comparative law is, ultimately, an exercise in self-reflection: comparativists use their examination of the "other" system to question their "own"[134]. Our long comparative detour in nineteenth century common law calls for a fresh look at the continental concept of abuse of rights and invites speculations about its actual significance and impact.

In Europe, contrary to England and the United States, abuse of rights was expressly framed as a unitary conceptual category, one that sparked a raging controversy. Jurists holding different political and methodological

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[133] Bruce Wyman, *The Maintenance of the Open Shop*, 17 GREEN BAG 21 (1905); Id., *The Perpetuation of the Open Market,* 17 GREEN BAG 210 (1905). See also Daniel R. Ernst, *supra* note 103.

[134] Karen Engle, *Comparative Law as Exposing the Foreign System's Internal Critique: An Introduction*, 1997 UTAH L. REV., 359 (1997).

beliefs set out to either discredit the new jurisprudential creation or build a systematic theory of abuse of rights. The echo of the French debate soon reached Italian jurists, at the time intent in shaping a new private law for the newly unified country and, hence, alert to transalpine legal novelties. While Italian judges were reluctant to appropriate the new category, scholars were quick to re-elaborate the theories sketched by Louis Josserand, Raymond Saleilles and Francois Geny.

The reason for the intensity and animosity of the debate, in both France and Italy, is said to lie in that abuse of rights was perceived by its opponents as a threatening inroad into individual liberty and freedom of action. However, an analysis of the language and the distributive outcomes of the decisions refracts a different image. Abuse of rights looses some of its fabled social aura. The alleged distance between civilians' potent social "drug" and common lawyers' pragmatic and growth-oriented use of "malice" and "reasonableness" shrinks. The two fields where abuse of rights could have exerted a significant distributive impact, i.e. property law and labor law, remained largely immune from its potentially corrosive effect. Rather, abuse of rights served a mildly conservative legal/political agenda. In cases dealing with property rights, courts curbed the excesses of the absolutist modern notion of property, ultimately strengthening it. Similarly, in labor cases, abuse of rights was part of a bland solidaristic strategy aimed at "domesticating" the nascent labor movement.

A. Abuse of Property Rights: A Cosmetic Corrective to Roman-Bourgeois Private Law ?

Property is the field where the theory of abuse of rights was more extensively developed and carefully articulated. The effort of the French courts to tame the owner's abusive exercise of her right was widely perceived as an attack to the grandiose and absolutist modern concept of property designed in the wake of the French Revolution[135].

The attack on modern property generated alarm[136]. It was seen as a fatal

[135] On modern Continental private law see: James Gordley, *Myths of the French Civil Code,*42 AM. J. COMP. L. 459 (1994); ID., FOUNDATIONS OF PRIVATE LAW: PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT (2006).

[136] LOUIS JOSSERAND, DE L'ESPRIT DES DROITS ET DE LEUR RELATIVITÉ. THÉORIE DITE DE L'ABUS DES DROITS

blow to the product of centuries of highly sophisticated legal/philosophical elaborations. The cultural roots of modern property were deemed to rest in the Roman Classical notion of *dominium*[137], as re-invented by nineteenth century Roman law scholars. More specifically, they rested in the new articulation of the relation between the subject and the thing delineated by the Spanish jurists/theologians of the Second Scholastic at the dawn of the sixteenth century. The influence of late medieval voluntarism, the questions raised by the Franciscan debate on poverty, the cultural sensitivity of Humanism and the Reformation as well as the needs of a pre-capitalist socio-economic order had concurred in shaping a new vision of property. Soto, Vitoria and their fellows of the Salamanca School gave legal shape to this new vision of property. Their voluntaristic premises translated in a new centrality of the subject/owner. An expansive and domineering force, property became the measure of the subject's liberty. The owner's absolute power over the thing was seen as the quintessential expression of autonomy and the highest guarantee of freedom[138].

This early-modern subjectivist notion of the relation between the owner and the thing was the basis on which modern property was built. The Enlightenment and the political rise of the bourgeoisie shaped a highly abstract and eminently individualist notion of property, enshrined in article 544 of the Code Napoleon and in article 463 of the Italian 1865 Civil Code[139]. Property was endowed with absoluteness, exclusivity and irrevocability. The

(1927 1st ed, Dalloz 2006) at 5: "Comment comprendre ques certains consciences, cependant trés averties, aient été choquèes par le développement d'une these sociale qui a deriére elle un tel passé et qui offer de semblables gages? La responsabilité de cette attitude hostile incombe, non pas au droit romain, ni meme aux glossateurs ou aux postglossateurs par les soins desquels il fut si souvent déformé, mais bien à notre droit révolutionnaire et aux grandes codifications […] Né des excés et des abus de l'ancien regime, ce droit, élaboré sous l'influence dominante des philosophes du XVIIIe siécle, est marqué au coin d'un individualisme exaspéré"

137 The 1890s is the moment when the Roman archetype was actually "invented". The Romanists and the *civilisti* were partners in a grandiose cultural and political operation: the construction of "diritto romano borghese" ; see ALDO SCHIAVONE, ALLE ORIGINI DEL DIRITTO BORGHESE. HEGEL CONTRO SAVIGNY (1984). The archetype had thick ethical and political implications: a) RD Sanctioning the most ample power of a single individual over a thing, was seen as the quintessential expression of freedom. b) RD granting to a privileged individual, the Roman citizen, full power over a thing, was seen as reinforcing the economic and political power of the ruling class.

138 The Salmaticenses envisioned self-dominon, (Dominium Sui) as the quintessential expression of freedom and claimed that property over external things is the qualitatively identical external manifestation of self-dominion. See PAOLO GROSSI, IL DOIMINIO E LE COSE. PERCEZIONI MEDIEVALI E MODERNE DEI DIRITTI REALI (1992).

139 Art 544: "la propriété est le droit de jouir et disposer des choses de la manière la plus absolue pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements"

owner was consecrated "moderator and arbiter" of the thing, exercising over it an unlimited and despotic power[140]. Absolute and unitary, admitting no graduation in the scope of the right and no differentiation between proprietary relations, property was the backbone of modern codifications. In the *Code Civil*, Rene Savatier ironically noted, property and things took up 1766 articles while only 515 articles were devoted to rights of persons. Similarly, as one of its architects illustrated, the structure of the 1865 *Codice Civile* hinged on two pillars: property as "the fundamental idea" and persons as property owners.

Not only was the attack on modern property a blow to the product of the most sophisticated Western legal culture, it was also a rift in the solid edifice of the bourgeois legal order, of which property was the central pillar. As Aldo Schiavone has argued, in nineteenth century capitalist Europe, two disciplines, a recent one, political economy, and an ancient one, Roman private law, concurred in designing a powerful, and apparently unassailable, socio-legal order: "Roman-Bourgeois private law". The products of Roman legal science, and in particular Roman Classical *dominium*, were put in service of the needs of the capitalist economic system. The uninterrupted continuity of a millenary legal science conferred upon the "Roman-Bourgeois legal order" a patina of neutrality and universality. Towards the end of the nineteenth century, under the pressure of new social and economic conditions, this solid edifice began to shake. However, what in the fears of many, appeared an attack on "Roman-Bourgeois private law" turned out to be a mere adjustment in its structure, ultimately contributing to its longevity.

Courts' resort to abuse of rights was part of this adjustment. It was a cosmetic corrective to the "*volontarisme individualiste*" informing the

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[140] See LOIUS JOSSERAND *supra* note 131 at 15: "A tout seigneur tout honneur: le droit de propriété est considéré traditionellment comme le droit individuel par excellence, comme le prototipe de la prérogative absolue; c'est un dominium conferant à celui qui en est investi les pleins pouvoirs, plena in re potestas; le droit révolutionnaire, acceptant et fortifiant meme l'héritage du passé, lui a reconnu solennellment la valeur d'un attribute naturel et imprescriptible, inviolable et sacré, de la personnalité humaine, au meme titre que la liberté, la sureté et la résistance à l'oppression […] Dans la conception millénaire, le propriétaire est un souverain qui, rentranché dans sa chose comme dans une fortresse, agit à sa guise, discrétionnairement, sans qu'on puisse lui demander compte de ses actes et moins encore des mobiles qui les lui ont inspires". In the Italian literature see: EMIDIO PACIFICI MAZZONI, ISTITUTZIONI DI DIRITTO CIVILE ITALIANO (1874)

absolutist model of property[141], rather than its rejection. Aware of the unsettling potential of the device they had created and wary of the distributive issues at stake, judges tailored the doctrine of abuse of rights in a rather narrow fashion. By and large, decisions dealing with property rights, confined abuse of rights within the safe perimeter of a subjectivist notion. Rather than disrupting the absolutist notion of property, abuse of rights operated as a buttress to a more dynamic and efficient, though equally absolutist, idea of property.

The Colmar case, decided in 1855, is considered path-breaking[142]. The appellant had built a fake chimney on his roof opposite to, and nearly against, the respondent's window. The inspection ordered by the court showed the chimney to bear no utility for the appellant, serving no function other than that of obscuring the respondent's window. Confirming the judgement of the inferior court, which had ordered the demolition of the chimney, the Court of Appeals of Colmar took a narrow subjectivist approach resting on a twofold test: the owner's malicious intent to harm and the lack of a serious and legitimate interest. However, the court was eager to reassure that

> Property rights, are absolute, allowing the owner to use and abuse of her property; the exercise of property rights, however, finds a limit in that the use of property is to satisfy a serious and legitimate interest; principles of morals and equity demand that courts repress acts inspired by malicious passions that do not serve any personal utility while causing damage to another[143].

The ample and absolutist scope of property rights was left intact and ultimately strengthened, the court limiting its intervention to the repression of the most blatantly anti-social excesses, i.e. acts motivated by the sole purpose

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[141] LOIUS JOSSERAND *supra* note 131 at 1 [….] l'abus de droits qui constitue une des pièces maitresses des systèmes juridiques de tous les pays civilises, ou, plus exactement, l'atmosphère, le "climat" dans lequel ces sysèmes se développent et se réalisent". On " volontarisme individualiste" p. 7.

[142] Colmar, May 2, 1855, D.P. 1856 2.9.

[143] Id., "Considérant que, s'il est de principe que le droit de propriété est un droit en quelque sorte absolu, autorisant le propriétaire à user et abuser de la chose, cependant l'exercise de ce droit, comme celui de tout autre, doit avoir pour limite la satisfaction d'un intérèt serieux et légitime; que les principes de la morale et de l'èquité s'opposent à ce que la justice sanctionne une action inspirée par la malveillance, accomplice sous l'empire d'une mauvaise passion, ne se justifiant par aucune utilitépersonnelle et portent un grave prejudice à autrui; qu'ainsi c'est le cas, tout en reconnaissant l'affranchissement de la propriété de l'appelant de tout droit de servitude de vue, de maintenir la decision des premiers juges quant à la demolition de la fausse cheminée.

of harming another and lacking any utility.

The Saint Galmier mineral waters decision (1856) differs in style but not in substance[144]. Relinquishing the dry and pragmatic language of the Colmar court, the court of Appeal of Lyon indulged in a skirmish of Roman brocards, only to re-affirm the subjectivist notion of abuse of rights. Three sources of mineral water, that owned by the Andrè partners, the Badoit source and the source owned by the town of Saint Galmier, were located at the distance of a few meters from each other; the three sources were communicant, both through a common reservoir as well as through subterranean infiltrations. The Andrè partners built a powerful hydraulic system that pumped the water from the reservoir, reducing of two thirds the output of the Badoit source and lowering the level of the water of the communal Saint Galmier source. While the hydraulic system significantly interfered with the operation of the other two sources, the surplus of water obtained by the Andrè partners was wasted by letting it run along the terrain into a nearby creek. Confirming the judgement of the inferior court, the Court of Appeals of Lyon found the appellants' conduct to be animated by the exclusive intent to harm and awarded damages to Badoit. The Court adopted the Colmar twofold subjective test. Andrè's conduct met both the test of the intent to injure, being dictated by no purpose other than that of harming Badoit and the test of the lack of serious and legitimate interest, revealed by the fact that the water was wasted. A passage in the opinion is symptomatic of the Court's reluctance to incisively curb the owner's absolute right. The court seemed to suggest that the absolute nature of property rights entails the owner's power to abuse of her property and merely set a limit to such power[145]. In the court's words:

> Considering that the owner's right necessarily finds a limit in the obligation to let the neighbour enjoy her property and [considering] that the [owner's] power to abuse of the thing cannot describe an act which, inspired exclusively by the desire to harm, takes up, in reason of the subterranean communication between the two lots of land, the character of an action carried on the neighbour's land and aimed at affecting its value by annihilating or reducing a natural resource that determines

[144] Lyon, April 18, 1856, D.P. 1856 2.199.

[145] Significantly the maxim reads: Le droit qu'a tout propriétaire d'abuser de sa chose trouve une limite dans l'obligation de laisser le voisin joiur aussi de sa proprété, et ne saurait autoriser l'accomplissement d'actes inspires uniquement par l'envie de nuire a celui-ci.

> most of the value of the land; [considering] that, this act, rightly assessed in light of the maxim *malitiis non est indulgendum,* integrates an hypothesis of quasi-delictum regulated by art. 1382[146]

Several decades later, in the Clement-Bayard case, the Court of Appeals of Amiens imperceptibly expanded its concept of abuse of rights to include the hypothesis of "mixed motives"[147]. The Court suggested that, for the owner's conduct to be abusive, the malevolent motive need not be the exclusive but the dominant motive. The Court also implicitly signalled that not any interest alleged by the defendant may count as a serious and legitimate motive. The case was a peculiar one. Mr Coquerel had bought a small piece of land facing the hangar for dirigibles operated by Mr. Clement Bayard. The relationship between the two neighbours was hardly a friendly one. Mr Coquerel decided to erect, on the border of his land, two 15 meters long and 11 meters tall wooden fences and to adorn it with steel spikes which were meant to obstruct the operation of the zeppelins in case of strong wind. Manifestly, the fences, separated by an interruption of a few meters and hence inapt to serve as a closure, did not serve any function other than damaging the dirigibles. Mr Coquerel contended that he was driven by the desire to attempt an economic speculation, by inducing Clement Bayard to buy his land at a conspicuous price, rather than by the sole intent to harm. The Court carefully weighed Coquerel's alleged motivation. While the desire to speculate, fully profiting by one's property is perfectly legitimate, the Court argued, the means employed by Mr. Coquerel are illegitimate and exclusively inspired by a malevolent intent to harm:

> Considering that, in fact, in order to justify his behaviour, Coquerel claims, that, by carrying out these operations, thereby spurring Clement Bayard's interest in acquiring his land, he ventured in nothing but an act of economic speculation. Considering that it is legitimate for the owner of a piece of a land to try to fully

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[146] Considérant, sur l'exception ainsi formulée, que le droit du propriétaire trouve nécessirement une limite dans l'obligation de laisser le voisin joiur de sa propriété; que le pouvoir d'abuser de sa chose ne peut server à colorer un acte, qui, inspire excluivement par l'envie de nuire, prend, aà raison d'une communication souterraine entre deux fonds, le caractére d'une enterprise portée sur le fonds voisin, pour toucher à sa substance et anéantir ou amoindrir un bien naturel, qui en fait la principale valeur; qu'un pareil acte sainement apprécie à la lumiére de la régle malitiis non est indulgendum, constitue un des cas de quasi-délits prévus par l'art. 1382.

[147] Amiens, February 7, 1912 D.P. III 1913.2.177; in 1915 the Court de Cassation rejected Coquerel's appeal confirming the arret of the Court of Appeals of Amiens, Req., August 3, 1915, D.P. 1917.1.79..

> reap the benefit of his property, acts of speculation being, in themselves and for themselves perfectly licit, provided that the means employed be not, as in the case at hand, illegitimate and inspired exclusively by a malicious animus….[148].

Finding that Coquerel's conduct amounted to an abuse of rights, the court ordered to dismantle the fence and to pay damages. However, the court failed to fully build on the corrective potential of its expanded notion of abuse of rights. While this enlarged notion would have allowed a more thorough inquiry into the value and legitimacy of different uses of property, the court ultimately retrieved its subjectivist test. Rather than questioning Coquerel's motives, weighing the latter's speculative ambitions against the public utility of Clement Bayard's activity, the court focused on the malicious nature of the means employed. As in the previous cases, the court seemed reluctant to challenge the absolutist model of property and merely curbed it excesses.

In a 1902 case dealing with subterranean waters the *Cour de Cassation* opted for a more decidedly objectivist approach, drawing a notion of abuse of rights that hinges primarily on the test of the owner's lack of interest[149]. Confirming the judgement of the Court of Appeals of Lyon, the *Cour de Cassation* found the appellants, Mr Forissier and his wife, liable for persisting in drilling activities that, while lacking any utility for them, exerted a highly damaging impact on the Chaverots' source. As a footnote in the Sirey report emphasizes, the Court went beyond the well-established subjectivist approach, focusing instead on the objective criterion of the lack of utility for the owners[150]. However, the language of the court is that of modern absolute property and the Code Napoleon. The court compensated the shift towards a potentially more invasive objective test with the reaffirmation of the

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[148] Considérant que Coquerel prétend , il est vrai, pour justifier ses agissements, qu'il n'à fait, en exeécutant ces travaux et en augmentant ainsi l'intéret de Clement Bayard à se rendre acquéreur de sa piéce de terre, qu'un acte de spéculation; Considérant que s'il est loisible au propriétaire d'un fonds de chercher à en tirer le meilleur parti possibile, et si la spéculation est par elle-meme et en elle-meme un acte parfaitement licite, ce n'est qu'à la condition que les moyens employés pour la réaliser ne soient pas, comme en l'espéce, illégitimes et inspirés exclusivement par une inetntion maliceuse.

[149] Req., June 10, 1902, D.P. III 1902.1.454; S. 1903.1.11.

[150] Le propri[taire d'un fonds a le droit d'y faire des fuilles et de couper ainsi les veines d'eau alimentant un fonds voisin […] Mais c'est à la condition que les fouilles ne soient pas pratiquéesmécliamment et avec inetntion de nuire. […] L'arret actuel va plus lion, car il parait exiger que les fouilles présentent un caractére d'utilité pour le propriétaire qui les pratique.

absoluteness of property rights:

> Given that, while art. 544 attributes everyone the right to enjoy and dispose of his thing in the most absolute manner, this right is tempered by the natural and legal obligation not to cause damage to another's property; -

If French judges deployed the doctrine of abuse of rights with remarkable caution, their Italian colleagues were even more hesitant. When dealing with cases of abusive exercise of property rights, Italian courts were wary not to exceed the safe notion of *aemulatio*[151]. In his now classic study of abuse of rights Mario Rotondi praised the court's scrupulous attitude, contrasting it with the irresponsible audacity of the French courts[152]. All of a sudden, France, the revered transalpine sister, appears "foreign":

> In our legal system, in all the cases in which the French courts invoke the concept of abuse of rights, either an express legislative disposition avails or our courts were able to reach, through a different path, these equitative solutions and temperaments that are the greatest pride of the *foreign* rhetoric. […] Why turn to dangerous constructions of liability for de iure acts, conflict of rights and similar, that mess up the basic concept of our legal system, when the same results can be reached through far more orthodox ways?

A widely commented 1877 decision of the Florentine *Corte di Cassazione* well exemplifies the courts' predilection for a narrow concept of *aemulatio*[153]. The case was a relatively ordinary one. Signor Sguanci had elevated the common wall separating his orchard from Signor Contini's courtyard.

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151 For Italian decisions relying on the notion of aemulatio see: Corte Appello Palermo 24 gennaio 1890, (Foro it. 1890, I, 203) "però per quanto illimitato voglia ritenersi il diritto del proprietario, suprema ragione per la convivenza sociale impone che non possa farsene un uso sfrenato e selvaggio". Corte di Cassazione di Torino 24 maggio 1898 (Foro it. 1898, I, 157): "ne il ricorrente cerchi rifugio nell' art. 436 c.c. che assicura al proprietario la facoltà di usare e disporre nel modo l più assoluto della cosa sua, purchè non ne faccia un uso vietato dalle leggi o dai regolamenti. La legge garantisce l'uso peperò esclude l'abuso che apparisce evidente nel fatto di chi, col pretesto di esercitare il proprio diritto, si propone e raggiunga il solo iniquo intento di nuocere ad altri"; See also Cassazione Torino 20 aprile 1907 (Foro it. 1907, I, 163) ; Vittorio Scialoja, in his entry on aemualtio, is dismissive of Italian courts' use of *aemulatio*: "le corti italiane trascinate dalla corrente tradizionale, ammettono in generale il divieto dell'emulazione: ma fortunatamente lo spirito pratico dei magistrati fa si, che spesso poco logicamente ma con molta utilità da un falso principio essi deducano buone conseguenze; giungano cioè ad un giusto risultato senza accorgersi che questo non è giusto in forza della massima, che essi credono di applicare, bensì in forza di principi ben differenti"; see Vittorio Scialoja, *supra* note 9.

152 MARIO ROTONDI, L'ABUSO DI DIRITTO. AEMULATIO. (1923 first ed., 1979).

153 Cassazione Firenze 4 maggio 1877 (Foro it. 1877, I, 96)

Confirming the judgement of the Court of Appeal, the court held that Sguanci's elevation works served no purpose, being exclusively directed at depriving Contini of light and prospect, and ordered the demolition of the elevation. The court noted that amplitude of property rights is tempered by principles of "natural honesty" and that the law intervenes to moderate abuses and excesses and to neutralize malice and emulation. According to the court, the prohibition of acts *ad aemulationem*, implicit in the Italian Civil Code, has both the sanction of morality, being dictated by higher principles of natural honesty as well as that of time, being the superlative creation of medieval jurists.

B. Abuse of Rights in Industrial Relations: An Experiment in Avant-Garde Capitalism?

In France and in Italy, labor activity and strikes, relatively sparse until the 1880s, multiplied in the latter part of the nineteenth century, changing in size and duration and gaining new economic and political significance. Organized labor's new vigour called for legal and institutional responses. Abuse of rights was private lawyers' response.

The changing structure of French industry had rendered the 1791 Le Chapelier *Loi*, prohibiting any form of association in all trades, inadequate. In 1864 a new bill sanctioning workers' right of coalition was passed, followed, in 1884, by the *Loi relative à la creation des syndicates professionels.* A new institutional structure for organized labor was soon established. In 1895 the *Federation of the Bourses du Travail* and the syndicates combined in the *Confederation Generale du Travail.* Empowered by more solid institutional foundations, the labor movement launched an active strategy of strikes and non-violent work stoppages. While the Glass Strike of 1895 in Carmaux and the coal-miners strikes of the 1880s and 1890s in the Lower Languedoc are well-known, the *Statistique des grèves* chronicles the large number of strikes that inflamed industrial relations in the latter decades of the nineteenth century[154].

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[154] Edward Shorter & Charles Tilly, *The Shape of Strikes in France 1830-1960*, 13 COMPARATIVE STUDIES IN SOCIETY & HISTORY 60-86 (1971); Harvey Goldberg, *Jaurès and the Carmaux Strikes: The Glass Strike of 1895* 17 AMERICAN JOURNAL OF ECONOMICS & SOCIOLOGY 307-319 (1958); Id., *Jaurès and the Carmaux Strikes: The Coal Strike of 1892,* 17 AMERICAN JOURNAL OF ECONOMICS & SOCIOLOGY 167-178 (1958); Leo Loubére, *Coal Miners, Strikes and Politics in the Lower Languedoc 1880-1914*, 2 JOURNAL OF SOCIAL HISTORY 25-50 (1968).

In Italy, by the late 1890s the form and scale of labor organization and the frequency and size of strikes were very similar to those in France. Although trade unions had no legal recognition until 1890 a vital network of mutual aid societies, local unions and workers' cooperatives existed. The victory of the liberal Zanardelli-Giolitti government in 1900 marked the beginning of what is known as "The Golden Age of Italian Labor". Labor's institutional structure, designed along the lines of the French, consisted of *Camere del Lavoro*, organized in a federation and later, in 1906, in the *Confederazione Generale del Lavoro.* As in France, the 1880s witnessed the intensification of strikes. The Zanardelli Criminal Code, which entered into force in 1890, is said to have legalized strikes, punishing strikes only when accompanied by violence and threats. Inaugurated by the agricultural strikes of the 1890s in the Po Valley the new season of industrial strife culminated in the general strike of 1904[155].

Intensified labor activity confronted nascent labor law with intractable legal questions. Still in its formative moment, labor law was developing in constant dialogue with the "old" science of private law. And it was in the latter's toolbox that a response to the problems posed by industrial strife was found. Courts resorted to the *civilistes'* concept of abuse of rights to control labor activity.

Two famed decisions stirred clamour and alarm among commentators. In 1903, in an interlocutory appeal of a decision of a justice of the peace, the Tribunal of Bordeaux found that an employer who had refused to hire unionized wood workers had abused his right, having acted out of pure malice[156]. The facts were straightforward. An employer, Canis, disregarding a written agreement reached with the *Syndicat des ouvriers en bois merrains* binding him to hire members of the union, notified his intention not to hire workers affiliated with the said union. The justice of the peace noted that endorsing the employer's refusal to hire unionized workers, in the name of freedom of contract, would have frustrated the goals of the 1884 statute

[155] Francesco Saverio Nitti, *Strikes in Italy* 3 THE ECONOMIC JOURNAL 719-733 (1893); Nicola Rossi & Giovanni Toniolo, *Catching Up or Falling Behind? Italy's Economic Growth 1895-1947* 45 THE ECONOMIC HISTORY REVIEW 537-563 (1992); GUIDO NEPPI MODONA, SCIOPERO, POTERE POLITICO E MAGISTRATURA 1870-1922 (1969); UMBERTO ROMAGNOLI & TIZIANO TREU, I SINDACATI IN ITALIA: STORIA DI UNA STRATEGIA (1977).
[156] Bordeaux, December 14, 1903 S 1904.217 note Ferron

recognizing and regulating unions, and thereby awarded damages to the union. Confirming the decision of the inferior court, the Tribunal of Bourdeaux, raised the heated question of abuse of rights, suggesting that the crucial legal issue was whether Canis had exercised his right to freely select his own collaborators or had committed a wrong[157]. As Georges Ferron emphasized in the Sirey note, of the two alternative conceptual articulations of abuse of rights, i.e. abuse of rights as excessive exercise of a right or as malicious exercise of a right, the court privileged the latter[158]. The former, Ferron suggested, would have infringed the sacred dogma of the employer's widest freedom of contract symmetric to the employee's equally ample freedom to sell or not to sell her labor. The court remained instead within the safer perimeter of a subjective notion of abuse of rights. Having secured, at the conceptual level, the individualistic pillars of the system, the court surprisingly and courageously deployed this narrow notion in favour of the union. Noting that the employer has an ample liberty to refuse to hire unionized workers when the refusal serves a specific professional interest, the court found that, in the case at hand, the employer's refusal was exclusively motivated by the intent to harm the union, an institution sanctioned by the law, by hindering its activity.

> Given that, according to the current legislation, it seems that an employer cannot be prevented from announcing his intention of hiring unionized workers; But, given that the general principles of law entail limitations to this faculty; that while, for example, this faculty cannot be contested when the employer acts in order to safeguard an interest, it is to be denied when the employer's interest is not at stake, the latter acting simply to harm the union, blacklisting it…

Relinquishing the traditional arid judicial style and venturing in a bold endorsement of labor's claims, the Tribunal added:

> [given] that, besides, employers will claim in vain that "harming the unions serves in fact our interest!"; that justice will be deaf to such scathing words betraying social hostility and resistance to a law…..

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[157] Attendu, en effet, que toute la question est de savoir si Canis à supposer établi ce qui lui est imputé, devrait etre considéré comme ayant usé d'un droit ou comme ayant commis une faute. While attempts to limit the employer's liberty not to hire or to discharge unionized employees were still at the stage of mere legislative proposals, the employer was deemed to have an ample right to freely choose her own collaborators.

[158] Ferron attributes the first to Charmont and Capitant and the second to numerous judicial decisions.

In a 1905 case dealing with a union's boycott of an employer, the *Cour de Cassation* took a similar position, adopting a pro-labor decision while struggling to prevent further conceptual inroads, potentially corrosive of capital's power[159]. The case involved an episode of boycott. Monsieur Dumont, who ran a printery in Limoges, refused to sign a clause that would subject to a mixed commission of employers and employees any future controversy between him and his employees concerning the tariffs negotiated with the union of the typographers. As a reaction to Dumont's refusal, the union called a strike and published an announcement on several newspapers proscribing Dumont's printery. The boycott protracted, fuelling incidents and Dumont sued the union for damages. The Tribunal of Limoges rejected Dumont's claim for damages and the Court of Appeal confirmed the judgement. The *Cour de Cassation* confirmed the previous decisions and exempted the union from liability. At first glance a full blow struck to capital's power, the decision is, in fact, highly ambiguous. In a succinct paragraph, the court skilfully restated the doctrine of abuse of rights to tame its corrosive potential and to prevent further conceptual inroads[160]. The boycott, the court found, did not amount to an abuse of rights because it met a three-fold test. First, the boycott was exclusively motivated by the need to safeguard the worker's professional interest, and hence free from any form of malice, violence or fraud; further, it was exclusively directed to the members of the union; finally, it had not inflicted any appreciable harm on the employer. As Marcel Planiol suggested in the Dalloz note:

> The decision should not be attributed a reach that, in fact, it does not have. It falls short of recognizing to the unions an absolute faculty to blacklist an employer without incurring in liability. While undeniably, in the decision at hand, the employer's claim for damages is rejected, it is rejected for factual considerations; and if we examine the conditions and the restrictions to which the right to boycott is subjected, it appears that the union's liability, excluded in this case, can be

[159] Cass, March 13, 1905, D. 1906.I.113

[160] Attendu qu'il est declarè, en fait, par l'arret attaqué et par le jugement dont la cour a adopté les motifs, que les affiches apposes, en mai 1900, par le syndicat des ouvriers typographes des Limoges et defendant aux members de la Federation Francaise du livre de travailler à l'imprimerie Dumont, n'avaient exercé aucune influence sur les ouvriers non syndiquées, auxquels, d'ailleurs, elles ne s'adressainet pas, et n'avaient cause au demandeur en cassation aucun prejudice appreciable;- Qu à cette constation, l'arret ajoute que l'interdiction don't il s'agit, determine par le refus de Dumont d'accepter le tariff syndacal dans l'ensemble de ses dispositions, n'a point eté abusive, et n'a été accompagnée ni de menaces, ni de manoeuvres déloyales; - Attendu que une telle mesure, prise en dehors de toute pensée de malveillance et pour la seule défense des interests professionnels du syndicat…….

admitted in many other cases.

The court slightly widened the notion of abuse of rights, including the hypothesis of mixed motives, only to preserve an ample scope for unions' liability; if motivated by a combination of desire to further professional interests and malevolent intent to harm the union would incur in liability. Further, the court's reference to the absence of damage, seems to imply that a boycott which is in fact harmful to the employer would be abusive. By requiring the absence of damage, the court emptied of any meaning and effectiveness the union's exercise of its right. As with the Bordeaux decision, the court ended up delivering a pro-labor decision, but it was careful not to alter significantly the balance of power in industrial relations.

The ambiguous potential of the doctrine of abuse of rights is even more evident in cases dealing with the right to strike. By affirming the workers' right of coalition, the legislator had provided labor with a powerful tool in the increasingly heated social struggle. However, courts and commentators were quick to turn the doctrine into a device for curbing labor's power. As any other right, the right to strike, Josserand suggested, is attributed for a specific purpose, that of furthering the workers' professional interests; any exercise of the right that departs from this purpose amounts to an abuse[161].

A 1896 decision of the *Cour de Cassation* well illustrates this attitude[162]. The case involved an intra-labor conflict. Twelve workers of a boilermaking firm based in Nantes had threatened to strike in order to induce the employer to discharge their supervisor, Monsieur Monnier, because of his abusive and authoritarian behaviour. As a consequence of his supervisees' threats to strike, Monsieur Monnier was discharged and, finding it hard to find a suitable and well paid job in Nantes, had to move to nearby Saint-Nazaire. Monnier's claim

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[161] LOUIS JOSSERAND, DE L'ABUS DES DROITS (1905) p. 27: comme tous les autres, le droit de gréve doit avoir été concédé dans un but déterminé; il doit etre pourvu d'une finalité, sinon, il faut le rayer de nos lois. Cette finalitéla jurisprudence et , plus spécialment la cour de cassation, l'ont parfaitment dégagée: elle s'identifie avec l'intérest professionnels des ouvriers ou des employés; c'est pour la sauvegarde de ces intérests que le droit de coalition leur a été accordé et c'est seulement s'ils le font servir ° cet usage qu'ils auront carte blanche et qu'ils pourront prétendre l'iimunité ° raion des faits de gréve. Sinon. Le droit ayant été devié de son but, devient, dans la mesure du préjudice causé par sa rèalisationn, générateur de responsabilite.

[162] Civ., June 9, 1896, D.P. 1896.I.582; S 1897.I.27.

for damages was rejected by the Tribunal of Nantes and, subsequently, by the Court of Appeal of Rennes. While the two lower courts found that the boilermakers had legitimately exercised their right to sell their labor, the *Cour de Cassation* took a different approach. The workers, the court found, had abused their right. Although the threats were neither violent nor fraudulent, they were inspired by mere malevolence rather than by the purpose of safeguarding the workers' professional interests.

> Given that, after the abrogation of art 416 c.pén., threats to strike not accompanied by violence of fraud and addressed to an employer as part of an organized plan are legitimate if they serve the purpose of defending a professional interest;- Given, nevertheless, that such threats do not amount to a wrong commanding reparation when, inspired by a purely malevolent spirit, have as an effect that of imposing to the employer the discharge of an employee without any serious complaint justifying it…

The court interpreted narrowly the workers' goal and interests. Turning a blind eye to the fact that the latter's action, being a reaction to Monnier's abuses, did, in fact, reflect a professional interest to a peaceful and congenial work environment, the court detected spite and malice.

A 1892 decision of the Court of Chambery regarding a similar case of intra-labor conflict evinces a analogous attempt to deploy a restrictive notion of "professional interest" to streamline unions' power. Members of a union had threatened to call a strike if the employer did not discharge a worker, Mr Joost, who had withdrawn from the union. The court weighed the workers' right to strike against the plaintiff's "natural right to freely exercise his craft" and found that the workers had abused their right. The exercise of the workers' right, the court held, served no professional interest, being exclusively driven by a malicious intent to harm. The court suggested that it is functional to the pursuit of a "professional interest" any action concerning salaries, relations with the employer or work conditions. Omitting any mention of organized labor's interest in consolidating its bargaining power by eliminating and containing scabs, the court reasoned that Mr Joost, far from being an exceptional and indispensable employee, was "*un home indifferent en soi",* whose permanence or discharge would hardly have impacted salaries, work

conditions, or the workers' bargaining power[163].

The decisions of the French courts aroused anxiety and concern among Italian commentators. Responding to an isolated voice who had praised the above mentioned decision of the Tribunal of Bordeaux, Mario Rotondi did not spare his transalpine colleagues blunt criticism[164]. Fortunately, Rotondi noted, since in Italy the "right to strike" is not explicitly sanctioned and, thereby, amounts to a mere "liberty", no similar cases arise. Hopefully, he added, Italian courts, if confronted with similar cases, would be firm in upholding freedom of contract.

While in late nineteenth century Italy the significance of abuse of rights for labor cases was modest, the transition from strike as "crime" to strike as "liberty" to strike as "right" having been fully completed only with the 1948 Constitution,[165] nevertheless, reasonableness tests proved critical for limiting the scope of labor's "liberty to strike". The Sardinian-Italian criminal code, adopted after unification and in force until 1890, punished every combination of workmen which tended, without reasonable cause, to impede, suspend or raise the price of labor when the combination had commenced active operations[166]. As observers have noted, the Italian post-unitary judiciary, deeply "*borghese"* and hardly inclined to sympathize with the working classes, effectively emptied the "reasonable cause" clause of any meaning[167].

In 1882, in a rare pro-labor decision, the *Corte di Cassazione* of Palermo rejected the inferior court's contention that a reasonable cause existed only when workers were reacting to the employer's abusive attempt to reduce

[163] Civ. June 22 D.P. 1892.I.449; S 1893.I.41. Attendu que les assignements du syndicat constituent à l'encontre de Joost une attenite a droit naturel qu'a tout l'homme d'exercer librement son industrie en se conformant aux lois; que sans doute les ouvriers syndiqués avaient de leur coté la droit de se mettre en grève, mais qu'il n'est permis à persone d'abuser de son droit; qu'il y a abus d'un droit toutes les fois que celui qui prétend l'exercer n'agit que dans le but de nuire à altrui, san aucun intéret pour lui-meme; que, dans l'espéce, Joost était, comme les intimés le reconnaissent dans leurs conclusions, "un homme indiffeérent en soi"; que son maintien dans l'usine, pas plus que son exclusion, ne pouvait avoirune influence quelconque sur la hausse ou la baisse de salaries, les rapports des ouvriers avec le patron, ni sur aucune des conditions de travail;

[164] MARIO ROTONDI, *supra* note 147 at 70-71

[165] Pietro Calamandrei, *Significato costituzionale del diritto di sciopero*, RGL 1952 I 221; GIOVANNI TARELLO, TEORIE E IDEOLOGIE NEL DIRITTO SINDACALE ITALIANO (1972)

[166] GUIDO NEPPI MODONA, *supra* note; 150 Francesco S. Nitti, *supra* note 150.

[167] GUIDO NEPPI MODONA, *supra* note 150.

salaries[168]. Rather, the court took a liberal approach, arguing that the existence of a reasonable cause is to be assessed in light of the special circumstances and the peculiar economic conditions of the individual case. However, decisions drawing a broad notion of reasonableness were scant. By and large courts limited workers' "liberty to strike" either by narrowing the notion of "reasonable cause" or by referring "reasonableness" to the means relied upon by the workers rather than to the cause of the strike. For instance, in a 1886 decision of the *Corte di Cassazione* of Torino, the scope of "reasonableness" was significantly narrowed. The local "workers' society" had sought to negotiate with the employer an employment rotation scheme involving both employed members of the society and unemployed members. The court found that the employer's refusal to accept the scheme did not constitute a "reasonable cause" for the strike which followed. Resuming the language of "liberty" and "individual will" the court argued that the scheme proposed by the union was an unreasonable violation of the employer's freedom of contract[169].

Courts' ambiguous use of abuse of rights in labor cases may be understood as partly driven by a larger ambivalent sentiment of "social solidarity" which became dominant in late nineteenth century France and Italy, translating in an outpouring of social legislation as well as in efforts at what is known as "avant-garde capitalism"[170]. While in 1905 the idea of a national obligation to "social solidarity" sparked vivid debate in the French legislature as well as in the public opinion, between the 1890s and the 1910s a considerable body of legislation designed the main lines of the welfare system. Similarly, in Italy, in less that a decade, an old age pension law, a law for compulsory insurance against accidents, a Factory Act, a Public Health Act, malaria legislation and a bill regulating labor contracts were passed. Capitalists also joined in this policy of solidarity. Rugged individualism seemed *passé*, the labor precepts of conventional conservative capitalism amoral, and experiments at a new variant of "avant-garde capitalism" flourished[171]. Major private enterprises in the French industrial firmament launched a

[168] Cass Palermo, May 22, 1882, in 16 RIVISTA PENALE 509 (1882).
[169] Cass Torino, March 18, 1886, in 24 RIVISTA PENALE 50 (1886).
[170] J-J. Ermenc, *Avant-Garde Capitalism in France*, 31 THE FRENCH REVIEW 129 (1957).
[171] Id., More recently see: JANET R. HORNE, A SOCIAL LABORATORY FOR MODERN FRANCE (2002).

comprehensive strategy of social cushioning, running the gamut from *citès ouvrières,* to health, welfare and education plans. While the influence of men such as Sismondi, Fourier, Proudhon and Louis Blanc, increased the sensitivity of the reflective capitalists to the appalling social conditions engendered by industrialization, observers warn, the persistence of avant-garde capitalism required more than humanitarian impulses. Concern with higher productivity and financial profits was critical. At a moment when France's anomalous economic development[172] was finally gaining speed and the size of production units was expanding, a satisfied, willing and educated workforce was crucial for the functioning of the industrial system. Abuse of rights was private lawyers' and judges' contribution to this wider solidaristic strategy. It allowed them to endorse and circumscribe labor's claims, safely balancing the latter's demand for more fair and just conditions and capital's managerial freedom and control.

IV. THE JURISTS BATTLE OVER ABUSE OF RIGHTS

If abuse of rights' actual impact hardly explains the rage of the storm it originated, what was it that roused jurists' fervor? A plunge in the heart of the controversy suggests that abuse of rights was the site where crucial methodological, professional and political battles were fought. Duelling tightly, at times with striking exhibitions of rhetorical bravura, French and Italian jurists debated over a number of critical questions. Through abuse of rights the powerful professional guild of the *civilistes* or *civilisti* sought to defend the citadel of its legal science, besieged by new legal disciplines; they contended over the shaping of coherent and antithetical cultural identities; they furthered opposite visions of the modern socio-economic order; they advanced different conceptions of the nature of law and the boundaries between normative systems; finally, they endorsed conflicting ideas as to the goals and the method of legal science.

[172] The debate over the retard of French economic growth is wide; for the classical retardationist view, see DAVID S. LANDES, THE UNBOUND PROMETHEUS (1969); for the revisionist view see Rondo Cameron and Charles E. Freedman, *French Economic Growth*, 7 SOCIAL SCIENCE HISTORY 3 (1983).

A. The Professional Battle: The Civilistes Resistance to the Disintegration of Private Law

The battle over abuse of rights was, in the first place, a professional battle over the scope of private law and its role in modern society. Industrialization, technological developments and increasing social interdependence had rendered "Roman-Bourgeois private law" obsolete and inadequate. The conceptual unity of the system was under attack[173]. New legal fields such as zoning law, labor law, welfare law, were being carved out of private law. The proliferation of these new fields threatened the professional power of private lawyers. It entailed the formation of new disciplinary tools and vocabularies, saluted as innovative and more responsive to rapid socio-economic change, as well as the consolidation of new academic power-groups challenging the long unrivalled primacy of the *civilistes*.

Not only were the latter loosing to new academic potentates, they were also loosing to the legislator. Their traditional role as interpreters and "administrators" of the Civil Code was at risk as the centrality of the latter was displaced by a burgeoning body of "special legislation". Abuse of rights was part of private lawyers' defense strategy. Heralded as a product of the most refined European private law science, rooted in Roman sources and in the elaborations of the Commentators and the Humanists, abuse of rights had the merit of being a private category susceptible of application to a variety of legal questions raised by the new socio-economic conditions, questions that would have otherwise fallen in the domain of the new disciplines[174]. Progressive *civilistes* envisaged it as a critical tool for negotiating the new terms of liberty in modern industrial society without yielding to legislative intervention and the new legal disciplines. More specifically, abuse of rights was one of the means through which progressive private lawyers sought to offer tools and guidance to new disciplines, preserving their role as custodians of "the legal science". Labor law, zoning law, welfare law were to develop under the aegis of the *civilistes'* science rather than in antagonism to it[175].

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[173] FRANZ WIAECKER, A HISTORY OF PRIVATE LAW IN EUROPE (WITH PARTICULAR REFERENCE TO GERMANY) (1995).

[174] Mario Rotondi's traces a long genealogy of abuse of right running from Cino da Pistoia through Baldo degli Ubaldi to Alessandro Tartagno and Alciato; see MARIO ROTONDI, *supra* note at 104 ff.

[175] Giovanni Cazzetta, *Leggi sociali, cultura giuridica ed origini della scienza giuslavoristica in Italia tra Otto e Novecento,* XVII QUADERNI FIORENTINI, 156 (1980)

Not only was abuse of rights critical to the *civilistes'* struggle against the disintegration and the de-centering of their science, it was also the site where a methodological conflict between the *civilistes* themselves took place. The conflict between the devotees of formalism, committed to deductive reasoning and abstract conceptual architectures, and the champions of a sociological approach privileging the study of law in its relation to social change. Again, the methodological rift had implications for the fragile equilibria of professional power. The proponents of the new sociological approach, who were scientifically dominant but temporally subordinate, challenged the very criteria sanctioning the power of the old formalistic guard[176].

The formalists rejected the doctrine of abuse of rights, disputing its conceptual soundness. The notion of abuse of rights, they claimed, does not pertain to the domain of the legal; it is a social phenomenon hardly translatable in a legal concept. As a legal concept, abuse of rights is a contradiction in terms, laying on a structural contradiction between right and abuse. Planiol was the most vocal expounder of the formalist critique:

> The formula abuse of rights is a logomachy, since if I use my own right, my act is licit and when it is illicit it is because I have exceeded my right and *acted sine jus, iniuria* as the *Lex Aquilia* says. To reject the category abuse of rights is not to try to hold licit the various damaging activities repressed by our courts. It is only to note that an abusive act to the extent that it is illicit is not the exercise of a right and that abuse of rights is not a category distinct from "illicit act". In other words, the right ends where the abuse begins[177].

Planiol's idea of a logomachy became the adagio restlessly repeated by the formalists[178]. However, faced with a subtle conceptual problem requiring a re-designing of the traditional categories and a modification of the conceptual architecture of civil liability, even jurists who were timidly sympathetic to the concept of abuse of rights defensively retreated. Rotondi's metaphor of the alpinist marvelously captures their sense of fear and impotence:

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[176] See GUIDO ALPA, LA CULTURA DELLE REGOLE (1999) PAOLO GROSSI, SCIENZA GIURIDICA ITALIANA (2000); CHRISTOPHE JAMIN, LA DOCTRINE (2003).

[177] MARCEL PLANIOL, *supra* note 8.

[178] In Italy, both Rotondi and Brunetti parrot Planiol: GIOVANNI BRUNETTI, IL DELITTO CIVILE (1906) at 173-176; MARIO ROTONDI, *supra* note at 18

> Our position in wandering through such disparate fields resembles that of an alpinist who, after long roaming through mountain valleys, finds himself not at the summit, but in front of a steep slope and looses the hope of conquering the summit. Showing at which conclusions any theory of abuse of right fatally leads may inspire prudence in embarking in dangerous paths.

A prudent alpinist, Rotondi called for a mitigation of the absolutist notion of rights, but ended up retreating within the safe boundaries of formalistic legal science.

Conversely, proponents of the sociological approach saw abuse of rights, as an organic emanation of social facts and needs and a crucial conceptual category. The extraordinary development of the social sciences, they suggested, should make jurists and judges aware of their role*, i.e.* governing and directing socio-economic evolution. In his monographic study of abuse of rights, Tedeschi urged his colleagues to disregard the dictates of abstract logic, facing the challenges posed by real life:

> Often, out of respect for traditional and widely recognized principles, theories that manifestly clash with the real necessity of things are still payed tribute; out of love for symmetry and abstract logic the real moral, psychological ed economic forces that govern the world are replaced with juridical categories.

B. Roman v. Medieval: Different Images of the Roman in Service of Legal/Cultural Identity

Abuse of rights also raised crucial identity questions. It involved contradictory re-constructions of the Roman past as well as the creation of neatly differentiated legal/cultural identities. The Roman legacy was central to the civilian identity, differentiating it from the Anglo-American. Both the critics and the advocates of abuse of rights cherished and claimed for themselves the Roman legacy juxtaposing it to the "medieval" which they coloured with a pejorative connotation.

The former envisaged abuse of rights, in the form of *aemulatio*, as a

medieval creation, alien to Roman law[179]. In their characterization, "Roman" stands, to a large extent, for Roman/Classical and equates absolutism and individualism. They claimed that the medieval meaning of the word *aemulatio*, i.e. acts lacking any utility and exclusively inspired by a malicious intent, hardly approximates any of the meanings the word had in classical Latin[180]. Further, the critics of abuse of rights interpreted restrictively the Roman sources offered by their adversaries as evidence of the existence of the doctrine in Roman law. These texts, they argued, were either too broad and, therefore, merely declamatory, or they bore no relation to the topic of *aemulatio*, or they concerned public law and were hardly extensible to private law[181]. Although conceding that the individualistic Roman/Classical law was partially modified in Justinian's time, the critics of abuse of rights regarded the doctrine as a medieval coinage. The prohibition of *aemualtio,* they noted, was masterfully introduced by the Commentators as a response to new Christian ethic and to the unexpected legal questions posed by the development of urban life. In their assessment, abuse of rights was plagued with all the defects typically associated, in the Enlightenment literature, with things medieval: excessive complexity, uncertainty and unpredictability[182].

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[179] Vittorio Scialoja notes with irony and contempt: "questa in breve è la teoria dell'emulazione segnata in ogni sua parte dallo stampo medievale e che tuttavia volea derivarsi dal diritto romano." See the note to Cassazione Firenze 1877, *supra* note at 486.

[180] See Vittrio Scialoja, *supra* note at 426: "Cicero in the Tusculane: lib IV cap. 8 § 17 *aemulatio autem dupliciter illa quidam dicitur ut et in laude et in vitio nome hoc sit. Nam et imitatio virtutis aemulatio dicitur….et est aemulatio aegritudo, si eo, quod concupierit, alius potiatur, ipse careat.* He adds: ma il senso che fu dato a questa voce dai giuristi medievali e che nel linguaggio giuridico essa conserva tuttora, non corrisponde esattamente ad alcuno di quelli dichiarati dal latino classico, sebbene si avvicini al secondo".

[181] Id., "fr. 3 de oper. Publ. 50, 10 *opus novum privato etiam sine principis auctoritate facere licet, praeterquam si ad aemulationem alterius civitatis pertineat vel mateiram seditionis praebeat vel circum theatrum vel* **amphitheatrum** esso riguarda il diritto pubblico ed è motivato dalla ragion politica della tranquillità dello stato. Da esso si poteva bensì derivare l'inibizione di elevare fortezze e castelli ma non se ne doveva mai estendere l'applicazione al campo del diritto privato. Fr. 38 de rei vindicatione 6, 1 Celso scriveva: ….*constituimus vero, ut, si paratus est dominus tantum dare, quantum habiturus est possessor his rebus ablatis, fiat ei potestas: neque malitiis indulgendum est, si tectorium, puta quod induxeris, picturasuqe corrodere velis, nihil laturus nisi ut officias;* il testo perciò non ha a che fare con l'emaulazione, come si intese dipoi, e la massima malittis non est indulgendum va accettata nei limiti posti dal testo medesimo, cioè nel caso di conflitto di diritti, dei quali l'uno abbia il suo fondamento nell'utilità di colui al quale è concesso contro l'altro. Gaio, Ist libro I § 53: *male enim nostro iure uti non debemus; qua ratione et prodigis interdicitur bonorum quorum aministratio.* Tutti color che hanno qualche pratica con gli scritti dei giureconsulti romani sanno che bisogna guradarsi dall'accettare le definizioni e le massime generali da essi formulate, le quali sono per lo più troppo estese e quindi false".

[182] Abuse of rights was seen an excessively complex rule (an exception to the general rule, the right of the property holder is absolute, harboring in itself a further long list of exceptions to its fundamental postulate: the intention to harm cannot be presumed, the burden of proof is on the plaintiff), allowing a broad and arbitrary

Conversely, the champions of abuse of rights claimed for the doctrine a Roman lineage[183]. However, the "Roman" they invoked hardly resembled that of their adversaries. They constructed an alternative Roman archetype, downplaying the individualist and egoistic traits of Roman law and emphasizing its social and equitative aspects. The Roman texts interpreted restrictively by their adversaries were subject to extensive analogical readings. Further, the advocates of abuse of rights viewed the emergence of the theory of *aemulatio* as part of a broader shift towards a social and equitative law. *Aemulatio,* along with the wealth of equitative devices designed by praetorian law, the *extra-ordinem* procedure and the *bona fides* typical of the *ius gentium,* mitigated the rigor of the *ius civile*[184].

Reframed in social terms, the Roman archetype provided the champions of abuse of rights with a crucial tool for shaping a coherent civilian, or "Roman-Germanic", identity and for differentiating it from the Anglo-Saxon. The alleged absence of the doctrine in the common law bolstered bold claims as to the respective nature of the two "races", the Latin and the Anglo-Saxon. Josserand and his followers were eager to vindicate altruism and equity as the defining features of the "Latin race" as opposed to the individualist and absolutist nature of the Anglo-Saxon tradition.

> The legal world is crossed by a twofold current: the individualist current and the

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equitative judgment by the courts; see cardinal DE LUCA, IL DOTTOR VOLGARE (1673) LUDOVICO MURATORI DEI DIFETTI DELLA GIURISPRUDENZA, (1742); Vittorio Scialoja, with obvious critical and ironic intent, reports the doctrine as it appeared from the medieval and subsequent texts: "l'emualzione si divide in buona e cattiva; la prima è una virtù, la seconda è un vizio. In quest'ultima peraltro si deve distinguere l'aemulation putative licita, cioè quella per cui si nuoce ad altri col fine di giovare a se stesso e l'aemualtio vera illicita per cui si nuoce animo nocendi. L'emulazione non si presume; deve provarsi da chi l'allega ma se circostanze particolari favoriscano la congettura dello spirito di emulazione si fa eccezione alla regola. Le principali di queste circostanze sono: …." and then he lists 14 circumstances, among which "quando il vicino abbia una bella moglie o belle ragazze perché si suppone l'opera sia fatta pel fine disonesto di vederle e trattenersi con loro; quando si alzi l'edificio o si apra la finestra in modo da vedere i segreti dei vicini o da gettare lo sguardo indiscreto nell'abitazione o nell'orto di monache e frati".

[183] See Louis Josserand *supra* note at 355: responding to Ripert he notes: "dans cette direction, on va jusqu'à présenter la thése de l'abus comme un poison nevu d'Asie, par le canal de la République des Soviets, oubliant que ce prétendu virus a une origine romaine".

[184] See MARIO ROTONDI *supra* note at 75 offering an estensive reading of the same passages discussed by Scialoja. See also Loius Josserand *supra* note at 314: "de meme que le préteur romain avait fait sortir du vieux droit civil tout un droit noveau, plus humain et plus souple, ainsi nos tribunaux et nos auterus s'effrocent de dégager de notre codification immobile".

> social current. The individualist current, which deserves the epithet of absolutist, is the on e which characterizes the Anglo-Saxon race. Profoundly individualist the Anglo Saxons are in their institutions, in their philosophy, in their behavior. If their most outstanding philosophers praise with pleasure the inexorable laws governing the struggle for life and natural selection, their jurists, in nice symmetry, hold a rigorous and merciless conception of law; most of all they want legal weapons, means of action. In fact, for them, acting is everything; the only individuals who count in their eyes are those who act. The task of the legislator is not that of securing the reign of distributive justice but that of allowing citizens to fully develop their faculties. This is the purpose for which they attribute rights, prerogatives that can be exercised to pursue any goal, weapons that can be used any direction to satisfy any interest, passion or caprice. This is the theory of splendid isolation transposed from the nation to the individuals who invoke, for their rights and vis à vis the equal rights of others, the application of the doctrine of Monroe[185].

To the contrary, the "Latin race" and its Germanic progeny, altruistic and benevolent by nature, set out along a progressive evolutionary path leading to a social law and a conception of right as instruments of social harmony. This conception, of which abuse of rights is the quintessential manifestation, originated in the law of the Roman Republic and of the Empire and found fertile breeding ground in the Germanic countries, fully blossoming in the German BGB[186].

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[185] See LOIUS JOSSERAND, DE L'ABUS DE DROIT, *supra* note at 7, 8. Josserand's rage seems irrepressible and does not spare Frederick Pollock: "The applications of this point of view are innumerable; English and American jurists apply it unpityingly and even with pride, and especially Frederick Pollock, justly of the most well-known jurists. In his outstanding work on tort law "The Law of Torts" this author shows with a wealth of examples taken from everyday life, this principle cherished by his compatriots, i.e. the immunity in the exercise of common rights".

[186] In the mind of the participants in the debate the problem of abuse of rights was inextricably linked to the question of legal/cultural identity. If Josserand viewed the doctrine as a critical element differentiating Roman-Germanic legal systems from the Anglo-Saxon tradition, Italian jurists seemed eager to mark the originality of their legal culture *vis à vis* the French by claiming paternity over abuse of rights. Avvocato Sebastiano Gianzana in a well known work on water rights published in 1879 presented *aemulatio*, as a distinctively Italian doctrine and was eager to prove that its existence antedated the French influence by emphasizing its significance in pre-unification legal systems. "And this (aemulatio), which was really an Italian doctrine, didn't fail to pass into our legislative systems: relying on the authority of Tesauro as well as of the Sardinian Royal Constitutions, we have already mentioned, a propos of the appropriation of superfluous waters, that in Piedmont, until the 1500s, a special magistrato delle aque was called to determine whether there were superfluous waters and to redistribute them fairly among those who were in need. Also, a splendid embodiment of this theory was the diritto di insistenza (???), long recognized by Piedmontese courts, as Richieri attests, which the courts, in the interest of collective prosperity, turned into a weapon for the weak, bridling the powerful owners of irrigation canals".

> But in Rome the rigor of this system did not last long; the citizens of the Republic and of the Empire shaped a conception of rights more in line with the spirit of the Latin race, so sensitive and so inclined to altruistic sentiments: this conception is precisely that of abuse of rights. […] But it is not in Rome or among the Latin people that this conception was fully systematized: the German countries were to be the fertile breeding ground for this full blooming. [in the German texts and contrary to Anglo-Saxon law] rights are no longer individual prerogatives that each individual exercises in her own manner; they are social concepts that are to be exercised socially, in a certain way, according to a certain spirit; they are instruments of peace and, under any circumstance or pretext, can they be turned into war machines; they have to accomplish their destiny rather than rebel against it.

C. Law v. Morals: The Debate on Positivism and Natural Law

Further, the debate over abuse of rights became the site for formidable attacks to nineteenth century legal positivism and hints at a "new naturalism". The doctrine of abuse of rights, critics claimed, rests on a dangerous confusion between two neatly demarcated domains: law and morals. The two systems of norms differ as to their ontological nature, reach and purpose. In his lengthy study "*Il Delitto Civile*", Giovanni Brunetti provided the standard formulation of the argument:

> The violation of moral norm characterizes, by and large, the factual patterns that are usually qualified as abuse of rights. However, as we have demonstrated with multiple arguments and from different perspectives, a fact cannot be declared illegal, even if it results in damage, for the only reason that it offends morality. Admitting that the objective limits of rights are to be found in moral norms, rather than exclusively in legal norms, would mean that not only legal norms but also moral norms provide a legal definition of human actions would therefore entail a confusion between law and morals[187].

In a similar vein, though with sharper critical verve, Vittorio Scialoja acknowledged the need for equitative temperaments but claimed that abuse of rights is the expression of a sentimental and bizarre *aequitas cerebrina* rather than of juridical equity:

> But here they [the proponents of abuse of rights] say that equity calls for a

[187] GIOVANNI BRUNETTI *supra* note at 187

> temperament of the rigor of law and that you cannot speak of law when a right is exercised with the intent to harm. First of all, what is equity? The word has multiple meanings: the ancient world distinguished between *naturalis aequitas, civilis aequitas, aequitas canonica, aequitas scripta and aequitas non scripta* and a form of equity they nicely called *cerebrina*, that is bizarre and wild, an equity that everyone measures differently and that, lacking any rationality, is to be rejected. Unfortunately aequitas cerebrina left deep traces and plays no little role in the question of aemulatio[188].

The critics of abuse of rights were profuse in emphasizing the dangers of a confusion between law and morals. Some expressed deep concern regarding judges' ability to fulfill the daunting task of penetrating individual consciences. Subtle technicians, judges are ill equipped to penetrate the complexities of human psychology[189]. Others noted with alarm the risk of a despotic drift. In a widely quoted passage, Adhemar Esmein noted that by substituting the notion of moral fault for that of legal fault, the theory of abuse of rights, turns the judge into a censor, opening the way for dangerous attacks to individual liberty and the rule of law[190].

Those who favoured abuse of rights devoted rivers of ink to refute the law v. morals argument. Their response entailed a twofold claim: a descriptive assertion and a normative postulation. Descriptively, they denounced the idea of a neat separation between the two domains as a chimera[191] and an outdated legacy of the Natural Law school that triggered the shift from one excess to the other: from the lack of boundaries between law and morals typical of the Middle Ages to the rigid separation of the revolutionary era[192]. Philosophers, moralists and jurists have racked their brains trying to draw coherent criteria for distinguishing between the realm of law and that of moral, but their efforts are doomed to failure. The boundaries between law and moral are highly

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[188] Vittorio Scialoja, note to Cassazione Firenze, *supra* note at 490

[189] M. Marc Desserteaux, *Abus de droit ou conflit de droits*, REV. TRIMESTRIELLE 121 (1906). See also LOUIS JOSSERAND *supra* note at 351 responding to Saleilles's critique that an inquiry into the subjective intent is both a) dangerous b) not useful

[190] Adhemar Esmein, S. 1898. I . 17

[191] LOIUS JOSSERAND, *supra* note at 348: nous répondrons qu'à notre sentiment ces frontiéres n'ont jamais esisté que dans l'imagination des juristes, ou de bon nombre d'entre eux du moins: toujours elles furent inceratines et chimerique".

[192] MARIO ROTONDI *supra* note at 183.

flexible and constantly shifting. The two domains are interconnected, legal norms and moral norms springing from the same breeding ground, the common conscience of the people[193]. In Josserand's words, "law and morals are one and the same thing, the latter being social moral, moral in action"; moral, he added, is the crucible where law is elaborated". From a normative point of view, the advocates of abuse of rights claimed that law and morals ought to be intertwined. The degree of mutual communication between the two domains, Rotondi argued, echoing Josserand, is an indicator of social and legal progress. A legal system divorced from ethical considerations is repugnant and odious to the collective sensitivity of modern societies[194].

The contending parts envisaged the question of defining what is law and what is not law as a critical one. To the champions of abuse of rights the old positivistic paradigm seemed no longer able to mediate and disguise its inherent contradictions. The tension between the premise of the ultimate existence of a natural and inherently rational law and the claim that positive law is the translation of this natural rational law in positive rules appeared no longer containable, if not at the price of blatant contradiction. The French *Ecole de l'Exegese* and its Italian followers had obliterated the naturalistic premise to fully realize its corollaries: codification, the rule of law and the judge as the *bouche de la loi*[195].

A plausible mediation for the old guard of formalists, this mediation was unsatisfactory for the new generation of social jurists who were fighting the battle for abuse of rights. The latter propounded a new naturalism[196] which was a blend of philosophical positivism, historicism and natural law. Familiarity with the teachings of the Historical School and the enthusiastic acceptance of postulates of positivistic philosophy led them to foreground law's

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193 GIOVANNI TEDESCHI, L'ABUSO DEL DIRITTO, (1908) at 92; Louis Josserand *supra* note at 348.

194 MARIO ROTONDI *supra* note at 83; LOUIS JOSSERAND, *supra* note at 349 alluding to Italian legal philosopher Giorgio Del Vecchio and the resurgent tradition of natural law, claimed that "In fact, law is deeply imbued in moral, it is, as he [Del Vecchio] rightly said, "le profit social de l'éthique" and luckily so, otherwise it would become simply odious and insensate".

195 See Mario A. Cattaneo, entry "*Positivismo giuridico*", NOVISSIMO DIGESTO, vol. defining this "Illuminismo giuridico decapitato" (Legal Enlightnement beheaded).

196 See Giovanni Marino, Positivismo e Giurisprudenza. Biagio Brugi alla Congiunzione di Scuola Storica e Filosofia Positiva (1986) p. 28 ff.

historical and social substratum and its restless evolution. Commitment to a rejuvenated brand of natural law inspired their belief in the moral perfecting of law. Rejecting any positivistic deference to the command of the legislator, the advocates of abuse of rights envisaged law as social product constantly responding to new felt needs and evolving towards moral perfection[197]. The new paradigm, however, did not escape contradiction. The old tension between the natural law foundations of the legal order and legal positivism reappeared as the tension between the perfection of natural law and the positive materiality of legal/social facts[198].

D. Individualism v. Solidarism: Different Visions of the Social Order

However, in the skirmish over abuse of rights, the highest peak of tension was reached when the two factions contended over opposite visions of the social order. The question of abuse of rights was critical to the debate over individualism and solidarism, urging jurists of various tendencies to confront it. The respective alignment and positioning in the debate is revealing. While the old guard of the classical individualist school rejected the concept, the "legal socialism" movement showed skepticism and little interest[199]. In France, Josserand's theory, regarded as a radical manifestation of socialism by Ripert, was dismissed as neither useful nor original by a foremost spokesman of legal socialism, Emmanuel Lévy. Leon Duguit's neglect of abuse of rights, on the

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[197] See BIAGIO BRUGI, LA PROPRIETÀ (1911), at 95; Id., *L'abuso del diritto come concetto giurisprudenziale* in Rendiconto ACCADEMIA LINCEI XXIII (1914) AT 37 FF.

[198] So evident, for example in GIOVANNI NOTO SARDEGNA, L'ABUSO DEL DIRITTO (1909). Noto Sardegna invokes "gli immutabili principi della legge morale svelati alla coscienza per mezzo della ragione divina scintilla che lo illumine costantemente, dote sublime che costituisce l'eccellenza e la superiorità della sua natura", but then he emphisizes time and again the need to take into account the material positivity of human needs and the struggle for life.

[199] See EMMANUEL LEVY, LA VISION SOCIALISTE DU DROIT (1926); for Levy abuse of rights is artificial, contradictory and superfluous; he sees no need for a separate conceptual category, abuse of rights falls whithin a broader rule of civil liability:; p. 48 pour éhcapper à cette contradiction pratique, on a construit la théorie artificielle et théoriquement contradictoire de l'abus de droit; nous serions responsables, en principe, quand nous agissons sans droit, et, par exception, quand nous exercons abusivement notre droit. Or cette exception, c'est la régle meme: nuos sommes obliges parce que nous exercons notre droit contre le droit d'autrui; alors seulment il peut etre question de résoudre le conflit entre notre liberté et la liberté d'autrui. In Italy see: CESARE NANI, IL SOCIALISMO NEL CODICE CIVILE (1892); GIOVANNI VADALÀ PAPALE, CODICE PRIVATO SOCIALE (1893); GIOVANNI SALVIOLI, I DIFETTI SOCIALI DELLE LEGGI VIGENTI DI FRONTE AL PROLETARIATO ED IL DIRITTO NUOVO (1906); GIOELE SOLARI, SOCIALISMO E DIRITTO PRIVATO. INFLUENZA DELLE DOTTRINE SOCIALISTE SUL DIRITTO PRIVATO (1906); EMANUELE GIANTURCO, L'INDIVIDUALISMO ED IL SOCIALISMO NEL DIRITTO CONTRATTUALE (1891).

other hand, was a corollary of his rejection of the very notion of subjective rights as a metaphysical, or better theological, concept[200]. Similarly, in Italy, the most prominent socialists, Cimbali, Salvioli and Vadalà Papale, barely mentioned abuse of rights. Significantly, the champions of abuse of rights were, by and large, either the proponents of a blander solidarism or the vanguard of the classical school, eager to strengthen the individualist system of private law by tempering its most blatant asperities.

The critics of abuse of rights envisaged society as the sum of independent spheres of action; they advanced an absolutist notion of rights and they cherished individual freedom as the highest moral principle. Tirelessly invoked, the geometrical metaphor of the spheres well exemplified their vision of society. Individual freedom of action is the central pillar of society's legal/political structure. Individuals are endowed with rights that are ample and absolute within their sphere; the legislator is called to police the boundaries of the respective spheres of freedom, securing their harmonic coexistence. Any act that remains within the perimeter of the individual's sphere is not an abuse. Scialoja's formulation of the geometric metaphor is wonderful in its complexity:

> In fact, law in an objective sense, traces the limits of the single individual liberties: but as we said above, these limits are traced according to necessity. The single liberties resemble polyhedra that touch each other in every point of their periphery, so that you cannot exit from one without invading the other; but, conversely, as far as you don't invade an another's, you don't exit your own. Hence as long as there is not legal invasion of another's right, either of single individuals or of society, nobody can be said to have transgressed the limits of her right.

The critics condemned the doctrine of abuse of rights as an inadmissible interference with this harmonious coexistence of separate spheres as well as a dangerous attack to the highest moral principle, i.e. individual liberty. Again, Scialoja's words are crisp and clear:

> And note how this liberty [individual liberty] is a warranty of morality itself, a liberty that looses its real nature when it subject to external coercion […] The

[200] LEON DUGUIT, LES TRANSFORMATIONS GÉNÉRALES DU DROIT PRIVÉ DEPUIS (1804), at 18

> social interest that law pursues by allowing the owner to act, even if animated by wrong purposes, is that of liberty. The inquisition about the owner's intent destroys liberty, while law cherishes this liberty and hence impedes this inquisition.

In more dramatic tones, others saw abuse of rights as an aberration and the master-way to socialism. Georges Ripert's review of Josserand's recently published *"De l'esprit de droits ed de leur relativité"* waged a bold attack to the social school based in Lyon by evoking the specter of "Soviet materialism". Reporting Josserand's words of praise for the doctrine of abuse of rights as formulated in the Sovietic Code, Ripert noted:

> The University of Lyon seems to have an inclination towards the Code Civil of the Soviet Socialist Republics. Its *Institut de Droit Comparé* has provided a translation presented by Mr. Lambert as a magic mirror refracting the guiding principles of a new legal regime. Mr Josserand, in turn, seems to look at law through this mirror. [….] This book [Josserand's] which opens with an invocation of the principles of eternal justice against these of strict law, that in certain pages seems to be written by a whole-hearted idealist, ends, in a peculiar contradiction, by taking as a model the code of a purely materialist society lost in the absurd dream of entirely rational economy[201].

Conversely, although with different nuances and in varying degree, the champions of abuse of rights advanced a relativistic conception of rights and a notion of "social freedom". They deemed their opponents' image of an harmonious coexistence of absolute spheres of freedom artificial and their absolutist view of rights dangerous. Referring to the geometrical image of individual liberties as neighboring polyhedra, Rotondi suggested that:

> What appears so clear in theory turns out to be problematic in practice, since human activity is so intense and restless, multifarious and mutable that law inevitably fails to foresee all its manifestations, so that the perimeters [delimiting the spheres of liberty], far from being determined with mathematical precision fade in a grey zone, in a hinterland that separates the two legal spheres in a way that the right and the wrong, as Manzoni would say, or better, the right of the one and the right of the other cannot be separated with a neat cut.

"Subjective rights" seemed to Josserand and his Italian followers "powerful

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[201] Georges Ripert, *Abus ou relativité des droits,* REVUE CRITIQUE DE LA LEGSILSATION ET JURISPRUDENCE 37 (1929).

war-machines susceptible of being deployed against society at large or against single individuals" and hence a conceptual category at variance with the laws of solidarity governing a highly interdependent society. Modern industrial society, the advocates of abuse of rights claimed, mandates a different notion of freedom and a relativistic conception of rights. Rights are a guarantee of freedom but this freedom, far from being an abstract, egoistic and anti-social liberty, is a "social freedom", embodying a higher ideal of solidarity and justice. As instruments of social freedom rights are relative rather than absolute. The freedom of the right holder encounters a limit in the content or social function of the right itself; rights are to be exercised in accord to their social function rather than for the pursuit of whatever individual goal or interest.

> […] and the relativity of rights has long been postulate because of their origin: social products, rights are to serve a social purpose. Whatever idea one has regarding the origins of law and even if one acknowledges the existence of some sort of natural law, prior and superior to positive law, one has to admit that our individual prerogatives presuppose the consent of the social community, whether emanating expressly from the public powers or coming directly from the collective consciousness […] In any way, individual prerogatives, even the most egoistic, are social products in form and in substance; it would be unconceivable that they could be exercised at the right holder's convenience, diverted from their original purpose and employed for any goal; it would be at contrary to their origin as well as to the most urgent need of the social community which confers them.

CONCLUSION

The story of abuse of rights in the United States and in continental Europe, I noted earlier, speaks to contemporary private lawyers called to re-think the nature and role of private law in the era of post-national sovereignty and the crisis of social democracy. Comparative law's potential as a tool for large-scale legal reform has been the object of dispute in recent decades. Some have argued that comparative law may have a constraining effect, reinforcing legal professionals' "fetishism of the actual". The existing variations among the legal institutions of Western capitalist democracies, they suggest, represent only a subset of a larger inventory of unrealized possibilities[202]. Others have

[202] ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME (1996).

envisioned comparative legal analysis as a trigger for institutional imagination, providing radical reformers with a repertoire of alternative legal/institutional arrangements that have proven effective under real life conditions[203]. This article suggests that comparative law may help fostering private layers' imagination by casting light on the potentialities and limits of the revival of abuse of rights as a tool for redressing distributive inequalities.

Contemporary private lawyers face challenges which resemble the ones encountered by European and American jurists at the turn of the nineteenth century. Social democracy in its two Western manifestations, the New Deal regulatory state and the celebrated "European Social Model" have long been in crisis[204]. Although more a normative vision than a consolidated reality, the European Social Model has evolved in the post-war era as a unique combination of social and economic policies furthering security and promoting growth and productivity. These policies were encapsulated in the institutional arena of the nation-state[205]. However, world social and economic developments have disempowered member states, severely limiting the ability of European social capitalism to live up to its promises. The monetary union has constrained member states' leverage in formulating and implementing monetary and fiscal policies and, in turn, re-distributive programs. Liberalization and privatization policies have reduced the possibility of using public-sector industries as an employment buffer. Further, European competition policies have limited the possibility of resorting to state aids to a similar effect[206]. As the rise of modern industrial society called jurists to re-think the terms of liberty, balancing economic freedom and social security, economic globalization and regional integration confront contemporary lawyers with the dramatic tension between market-making and market-correcting policies.

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[203] Jeremy Waldron, *Dirty Little Secret,* 98 COLUM. L. REV 510 (1998).

[204] SOSKICE, VARIETIES OF CAPITALISM. THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE (2001); GOSTA ESPING-ANDERSEN, THE THREE WORLDS OF WELFARE CAPITALISM (1990).

[205] Claus Offe, *Social Protection in a Supra-National Context. European Integration and the Fates of the European Social Model*, in GLOBALIZATION AND EGALITARIAN REDISTRIBUTION, Pranah Bardhan, Sameul Bowels & Micheal Wallerstein eds, (2006) at 33.

[206] Fritz W. Scharpf, *The European Social Model: Coping With the Challenges of Diversity*, 40 J. COMMON MKT STUD 645-70 (2002).

Faced with this tension, European private lawyers have shown novel interest for abuse of rights. Some believe that abuse of rights has a long history but little future. They contend that the need to prove the right holder's intention is too onerous, that the doctrine is too rigid as a tool for balancing conflicting interests and that similar equitable results are best achieved through other means[207]. Others, retrieving the language of nineteenth century "social" jurists, invoke a coherent and social European private law, in which abuse of rights would play a novel role as a tool for achieving social values. For instance, they call for the revival of an objective notion of abuse of rights in European contract law. Contractual rights are seen as endorsing a variety of larger socio-economic interests and their exercise for a purpose contrary to such interests is deemed to be abusive[208]. Still others suggest departing from the vocabulary of the "social", and even setting aside the very word "social", loaded with implications and bent to serve hegemonic projects, to develop new legal/institutional answers. More specifically, they claim that abuse of rights, as other notions of nineteenth century "social" private law, is to be fully updated to the current vocabulary[209].

The comparative examination of American and European nineteenth century abuse of rights theories and cases, I believe, provides contemporary reformers with two cautionary tales. Progressives' faith in abuse of rights as a tool for social justice in European private law may be misplaced: abuse of rights may fail to deliver what promises.

First, it may fall short of rectifying the market-oriented language of European private law. In its nineteenth century life, abuse of rights hardly challenged the individualistic premises of modern private law, leaving largely intact the language of free will, individual autonomy and absolute property. Similarly, today, abuse of rights may delude those who advocate a new social lexicon for European private law. Abuse of rights, advocates of its revival hope, would encourage a new vocabulary of "shared fundamental values concerning

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[207] Antonio Gambaro, *Abuse of Rights in Civil Law Tradition,* 4 EUR. REV. PRIV. L 561 (1995).
[208] Study Group on Social Justice in European Private Law, *Social Justice in European Contract Law. A Manifesto,* 10 EUR. L. J. 653 (2004).
[209] Ugo Mattei & Fernanda Nicola, *A "Social Dimension" in European Private Law? A Call for Setting a Progressive Agenda,* 41 NEW ENGL. L. REV. 1 (2006).

the social and economic relations between citizens". It would challenge the idea of rights as freedoms that simply exist, drawing attention on the relativity of rights and on rights' "purpose". Further, it would privilege notions of "public interest" and duties of "solidarity". Yet, abuse of rights may prove little more than an acoustic concession to a nineteenth century social vocabulary largely inadequate to make sense of the questions faced by contemporary private lawyers[210]. It may fail to address the complexity of class structure in a globalized socio-economic order where weaker strata are plural, layered and often engaged in a zero-sum competition. Further, abuse of rights may prove of limited impact because part of an emerging supra-national legal vocabulary which coexists with deeply-rooted national legal traditions where the doctrine has been framed and interpreted to very different effects.

Second, abuse of rights may fail to deliver progressive distributive outcomes. In the nineteenth and early twentieth century, American and European cases show, abuse of rights resulted in highly diverse and ambiguous outcomes, only occasionally re-dressing distributive asymmetries. The case law of the European Court of Justice on abuse of rights displays a similar ambiguity. In recent decades, the Court has used the doctrine to disqualify individuals from relying upon a right conferred by a EU provision in circumstances deemed undeserving.[211] By and large, the Court has framed the notion of "abuse" in objective terms, requiring a combination of objective circumstances in which, despite the formal observance of the conditions laid down by EU provisions, the purpose of those rules has not been attained[212].

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[210] Duncan Kennedy, *supra* note 13.

[211] See the opinion of Advocate General Poiares Maduro in the Halifax case, C-255/02, delivered on April 7th 2005. Maduro discusses the two main contexts in which the notion of abuse has been analysed by the Court." First, when Community law provisions are abusively invoked in order to evade national law. Second, when Community law provisions are abusively relied upon in order to gain advantages in a manner that conflicts with the purposes and aims of those same provisions" He then continues: "To my mind a general principle of Community law can certainly be considered to derive from this case-law. The Court synthesised it by stating that 'Community law cannot be relied on for abusive or fraudulent ends'. That principle, however, enunciated in that broad and rather circular way, is not, by itself, a useful instrument for assessing whether a right arising from a specific provision of Community law is being exploited abusively. A more detailed doctrine or test to determine when an abuse occurs is necessary to render it operative.

[212] See Maduro's objective articulation of abuse of rights in the Halifax opinion, *supra*."In my view it is not therefore a search for the elusive subjective intentions of the parties that ought to determine the existence of the subjective element mentioned in *Emsland*. Instead, the intentions of the parties to improperly obtain an advantage from Community law are merely inferable from the artificial character of the situation to be assessed in the light

The outcomes, however, has proven double-edged. In the field of tax avoidance, the doctrine has been used to prevent stronger parties' fiscal abuses. Through abuse of rights, the Court has enabled the tax authorities of a Member state to reject companies' claims for recovery or deduction of input VAT where the transaction on which the right is based are aimed at artificially creating the conditions to justify the application for deduction[213]. On the other hand, in the area of free movement of persons and workers, abuse of rights raises critical issues. In an enlarging Europe, where the volume of free movement has increased dramatically, Member States have increasingly invoked abuse of rights to prevent individuals from using the opportunity afforded by EU law to "abusively" obtain social advantages or residency permits or to evade restrictive national immigration rules. While the Court has tended to narrow the application of the doctrine, the possibility that abuse of rights might operate as an effective tool for emasculating weaker parties' social and economic rights is far from remote[214]

Abuse of rights' ambiguity as a "social corrective" raises broader questions as to the nature and the structure of contemporary private law. Over the course of the last two centuries, private law has evolved to reflect, facilitate and legitimate changes in Western societies' economic, political and ideological structure. The legal fabric of the new order established by the French Revolution and the modern bourgeoisie, "classical" nineteenth century private law consisted of an essential framework meant to organize and police the free interaction between autonomous individuals. In the late nineteenth century and early twentieth century, the structure of "classical" private law was altered to accommodate the development of industrial society and to reflect the social-

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of a set of objective circumstances. Provided that those objective circumstances are found to exist one must conclude that a person who relies upon the literal meaning of a Community law provision to claim a right that runs counter to its purposes does not deserve to have that right upheld. In such circumstances, the legal provision at issue must be interpreted, contrary to its literal meaning, as actually not conferring the right. It is consideration of the objective purpose of the Community rules and of the activities carried out, and not the subjective intentions of individuals, which, in my view, lies at the heart of the Community law doctrine of abuse. I am of the view, therefore, that the use of the term 'abuse of rights' to describe what is, according to the case-law of the Court, in essence a principle of interpretation of Community law may actually be misleading. I prefer therefore to use the term 'prohibition of abuse of Community law' and will speak of 'abuse of rights' only where simplicity so requires.

[213] See Halifax, C-255/02 [2006]; Kefalas, C-367/96 [1998].

[214] See Lair C-39/86 [1988]; Chen, C-200/02 [2004].

democratic compromise. Called to ensure simultaneously market efficiency and non exploitative distributive outcomes, private law was re-organized according to a binary structure "rights/will + corrective". Abuse of rights, good faith, unconscionability, the labor contract were conceived as "correctives" allowing the effective enjoyment of rights and mitigating the most blatant distributive inequalities[215].

Faced with new challenges, contemporary private lawyers interrogate the enduring desirability of the binary structure "rights/will + corrective". In Europe, while market liberals advocate the "un-making" of private[216], i.e. the rolling back of social correctives, progressives invoke "flex-security" and call for setting up "social correctives" at the supra-national level. The most promising avenue, however, might be that indicated by a growing strand of "experimentalist" private law scholarship[217]. A "freedom-promoting" private law, capable of expanding the set of viable options an individual faces and of re-dressing distributive asymmetries, might look very different from binary twentieth century private law. Rather than "limiting" and "correcting" rights, experimentalist private lawyers direct attention to the need for recasting rights, expanding the domain of resources subject to rights and devising new criteria of ownership[218].

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[215] The "un-making" of private law is described by Jay Feinman, *Un-Making Law: The Classical Revival in the Common Law*, 28 SEATTLE U. L. REV. 1 (2004-2005).

[216] On the developments of twentieth century private law, see: Daniela Caruso, *The Missing View of the Cathedral. The Private Law Paradigm of European Legal Integration,* 3 EUR. L. J. 3 (1997); Id., *Private Law an State-Making in the Age of Globalization,* N.Y.U J. Int'l L. (2006); Christian Joerges, *The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutionalist Perspective* 3 EUR. L. J 378 (1997); Peer Zumbansen, *Semantcis of European Law,* 5 EUR. L. J. 114 (1999); Id., *The Law of Society. Governance Through Contract* (CLPE Research paper 2/2007).

[217] See ROBERTO MANGABEIRA UNGER, *supra* note 198; Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates,* 72 U. CHI. L. REV 1237 (2005); James Boyle, *The New Enclosure Movement and the Construction of The Public Domain*, 66 L & CONTEMP. PROBS 33 (2003);Yochai Benkler, *Freedom in the Commons: Towards a Political Economy of Information*, 52 DUKE L. J. (2003).

[218] Jedediah Purdy, *supra.*