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Abuse of Rights: The Continental Drug and the Common Law

ANNA DI ROBILANT*

This Article deploys a comparative approach to question a widely shared understanding of the impact and significance of abuse of rights. First, it challenges the idea that abuse of rights is a peculiarly civilian “invention,” absent in the common law. Drawing on an influential strand of functionalist comparative law, the Article identifies the “functional equivalents” of the doctrine in the variety of malice rules and reasonableness tests deployed by American courts in the late-nineteenth and early-twentieth century in fields as diverse as water law, nuisance, tortious interference with contractual relations, and labor law. The Article investigates the reasons why in the United States, contrary to continental systems where rules limiting a malicious or unreasonable use of one’s right coalesced into a unitary category of “abuse of rights,” these rules remained largely nonintegrated. Rationalization of these nonintegrated reasonableness tests and malice rules, I argue, was achieved by means of a novel, unitary style of reasoning, hardly fitting the traditional portrait of nineteenth-century “Classical” orthodoxy, rather than by means of conceptual integration. Further, the Article suggests that abuse of rights’ potential as a tool for social reform was consistently defused. In the United States, rarely and timidly did courts deploy malice rules to effect progressive distributive outcomes. And even when they did, they invariably resorted to the individualistic language of modern private law

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[I]t is clear that the theories of abuse and of relativity of rights, in general, have no place in our law as it now stands.

....

... The conversations which I have had with continental lawyers have left me with the impression that ‘*abus de droit*’ is regarded as a dangerous expedient, which should only be utilized to prevent manifest injustice.

....

... [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.

—H. C. Gutteridge¹

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

1. H. C. Gutteridge, *Abuse of Rights*, 5 CAMBRIDGE L.J. 22, 30, 43-44 (1933) (footnote omitted).

concept involves an abusive exercise of an otherwise lawful right. The concept was applied in a variety of subfields of private law including property, contract, and labor 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 à vis the rights of their residential neighbors, and the limits of a landowner's property right to crucial economic resources, such as water or coal land. This Article uses a comparative analysis of European and American cases and legal writing to explore 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 that was 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 relationship between 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 will broaden the conversation about the future of our socioeconomic institutions.

Abuse of rights was a most typical "invention" of the wave of social legal thought that developed in France and Germany starting in the mid-nineteenth century.² 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 forefront 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 limiting their social repercussions, "social jurists" revolted against "classical"

2. See Marie-Claire Belleau, *The "Juristes Inquiets": Legal Classicism and Criticism in Early Twentieth-Century France*, 1997 UTAH L. REV. 379, 387; Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 19 (David M. Trubek & Alvaro Santos eds., Cambridge Univ. Press 2006).

modern private law.³ The social jurists 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.⁴ In contrast, the social jurists called for a sociological and organicistic mode of reasoning that took into account the purpose of legal rules and the complexity of “social mechanics.”⁵ At the substantive level, they advocated complementing “individual law,” (i.e., law that regulates conflicts among individuals) by delimiting their respective rights with a “social law” (i.e., law that favors social cohesion and privileges collective interests).⁶

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 Bernhard Windscheid as the

3. See Kennedy, *supra* note 2.

4. See *supra* note 2.

5. RUDOLF VON JHERING, LAW AS A MEANS TO AN END (Isaak Husik trans., 1913). 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.” See generally *id.* at 71–176. 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

[t]housands 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, nay in apparent conflict, as if they wanted mutually to annihilate each other—and yet all work together harmoniously for *one purpose*, and one *single* plan rules the whole.

Id. at 71–72. 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.” *Id.* at 72. 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 purpose.” *Id.* at 330.

6. GEORGES GURVITCH, L’IDEE DU DROIT SOCIAL: NOTION ET SYSTEME DU DROIT SOCIAL (Scientia Verlag 1972) (1932). Also see GEORGES GURVITCH, SOCIOLOGY OF LAW 166–67 (John Rex ed., Routledge & Kegan Paul Ltd. 1973) (1947) 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.

Id.

sphere of the individual's absolute and unlimited will,⁷ appeared to social jurists as formalistic and unworkable. Rapidly changing socio-economic conditions demanded a conceptual tool that would account for the relative and relational nature of "subjective rights." Abuse of rights was thought to be this 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 limitation on 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 exercise of the right is driven by the sole malicious intent to harm another. The classical textbook example of the landowner who erects a tall fence for the sole malicious purpose of depriving her neighbor of light illustrates this narrow subjective formulation of the theory.

In a second formulation, an abuse of a right has occurred any time malice is the dominant, though not the exclusive, factor motivating 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 neighbor.

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 neighbor's mill only to end up wasting it was often found to have abused her right. Although this formulation centers 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 similar to the previous formulation, this formulation gauges the subject's purpose against the objective criterion of the "normal function" of the right. Since "normal function" is potentially more susceptible to a restrictive definition than "legitimate interest," it may entail a higher degree of limitation on the right. At the height of nineteenth-century industrial

7. BERNHARD WINDSCHEID, *LEHRBUCH DES PANDEKTENRECHTS* [textbook on the Roman Digest (Pandects)] 153, 155 (1862).

struggles, unions were found to abuse their right to strike when their action departed from the right's "normal function."⁸

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."⁹ 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. Take, for example, a landowner who, in an arid region, drains ground water from the community's supply in order to sell it for the irrigation of distant lands. That landowner may be deemed to use 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 1960s, at the height of functionalist comparative law,¹⁰ a copious literature cast light on the operation of

8. LOUIS JOSSERAND, *DE L'ESPRIT DES DROITS* 5–40 (Éditions Dalloz 2006) (1905).

9. *Id.*

10. On "functionalism" in comparative law, see Ralf Michaels, *The Functional Method of Comparative Law*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 339, 360–63 (2006), and Michele Graziadei, *The Functionalist Heritage*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 100 (Pierre Legrand & Roderick Munday eds., 2003). 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?" Max Rheinstein, *Teaching Comparative Law*, 5 U. CHI. L. REV. 615, 617–18 (1938).

Functionalism was a crucial methodological innovation of early-twentieth-century comparative lawyers. See KONRAD ZWIEGERT & HEIN KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* (1977). Saleilles and Lambert's emphasis on a rule's "function" was meant as a powerful critique of the formalism of conceptual analysis and "legal dogmatics." See Edouard Lambert, *La Fonction du Droit Civil Compare*, in *ETUDES DE DROIT COMMUN LEGISLATIVE OU DE CIVIL COMPARE* (1903); RAYMON SALEILLES, *RAPPORT GENERAL SUR LES TRAVAUX DU CONGRES INTERNATIONAL DE DROIT COMPARE LU A LA SEANCE DU CLOTURE DE CONGRES* (1900). The second generation of comparative lawyers further developed functionalism's critical potential. Roscoe 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. See Roscoe Pound, *Comparative Law in Space and Time*, 4 AM. J. COMP. L. 70 (1955) [hereinafter Pound, *Comparative Law*]; Roscoe Pound, *Introduction*, 1 AM. J. COMP. L. 1 (1952); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591 (1911). 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." See Pound, *Comparative Law*, *supra*, at 84. In other words, law is to be tailored to 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. See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV.

“functional analogues.” Arthur von Mehren masterfully examined the various techniques employed in French and German law which are used to solve problems that the common law handles through the doctrine of consideration.¹¹ 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 Anglo-American systems do through trust.¹² 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, estoppels, and implied contract have served many of the functions of *culpa in contrahendo*.¹³

This corpus of literature has focused mostly on the socio-legal function performed by analogous private law doctrines, but has neglected their rhetorical dimension. This dimension includes the arguments and justifications that common lawyers and civilians provided for functionally equivalent doctrines, as well as the expectations and anxieties spurred by those doctrines. 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,”¹⁴ a “medieval relic thoughtlessly carried over”¹⁵ or, at best,

809 (1935). Cohen envisaged the normative use of a functional definition of law as the prime danger of the functional approach. *Id.* In order to avoid blindness, functionalism should couple an objective legal science with a critical theory of social values. *Id.* In recent decades, functionalism has come under attack on several fronts. It has been charged with reductionism in that it focuses exclusively on rules’ sociolegal function and overlooks a whole range of complicating factors, including culture, mentality, and ideology. See Pierre Legrand, *How to Compare Now*, 16 *LEGAL STUD.* 232 (1996); Pierre Legrand, *The Impossibility of ‘Legal Transplants’*, 4 *MAASTRICHT J. EUR. COMP. L.* 111 (1997); Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 *COLUM. J. EUR. L.* 63 (2001). 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. See Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 *HARV. INT’L L.J.* 411 (1985); David Kennedy, *The Methods and the Politics*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS*, *supra*, at 345; Jeremy Waldron, *Dirty Little Secret*, 98 *COLUM. L. REV.* 510 (1998) (reviewing ROBERTO MANGABEIRA UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* (1996)). Finally, functionalism interrogates the comparative effectiveness of functionally equivalent rules, eluding questions of broader legal reform. See *id.*; Frankenberg, *supra*; Kennedy, *supra*.

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

12. John T. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 *YALE L.J.* 625, 629 (1995).

13. Friedrich Kessler & Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 *HARV. L. REV.* 401, 401 (1964).

14. 2 MARCEL PLANIOL, *TREATISE ON THE CIVIL LAW* No. 871 (La. State Law Inst. Trans., 11th ed. 1939).

as "a pure piece of sentimentality."¹⁶ By contrast, its champions acclaimed it as the triumph of a more perfect and broad vision of justice.¹⁷ The wave of emotion 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."¹⁸ More recently, an experts' report published by the Council of Europe, reviving 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."¹⁹

In England and in the United States, the debate over the concept of "malice" reached similar rhetorical peaks. When discussing "malice," common lawyers seemed to lose their habitual aloofness. Gutteridge described abuse of rights as "an instrument of dangerous potency in the hands of the demagogue and the revolutionary."²⁰ In a 1905 article on the role of malicious torts in the field of labor relations, Harvard Law School Professor Bruce Wyman evoked "the horror of anarchy or the hopelessness of socialism."²¹

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 behind doctrinal disputes and judicial argumentation. In this way, rhetoric illuminates abuse of rights' political saliency. The debate over abuse of rights pitted jurists with different political commitments and various power allegiances against one another. 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 versus the pluralized and relativized.²² Finally, rhetoric allows a glimpse of jurists' hidden professional agendas. In France and Italy, the debate over abuse of rights was critical to the conflict between

15. Vittorio Scialoja, *Aemulatio*, in 1 ENCICLOPEDIA GIURIDICA ITALIANA 426 (NAPOLI-MILANO, 1884).

16. Cf. Gutteridge, *supra* note 1, at 43; MARIO ROTONDI, L'ABUSO DI DIRITTO "AEMULATIO" (1979); Vittorio Scialoja, *Note to Cassazione Firenze*, FORO IT. I, 96 (1877).

17. PIETRO RESCIGNO, L'ABUSO DEL DIRITTO (1998); 1 PIETRO RESCIGNO, L'ABUSO DEL DIRITTO, RIV. DIR. CIV. 205 (1965).

18. *Supra* note 17.

19. COUNCIL OF EUROPE, ABUSE OF RIGHTS AND EQUIVALENT CONCEPTS: THE PRINCIPLE AND ITS PRESENT DAY APPLICATION 10 (1990).

20. Gutteridge, *supra* note 1, at 44.

21. Bruce Wyman, *The Perpetuation of the Open Market*, 17 GREEN BAG 210, 221 (1905).

22. For the U.S., see Robert G. Bone, *Normative Theory and Legal Doctrine in American Nuisance Law: 1850-1920*, 59 S. CAL. L. REV. 1104, 1137, 1184, 1200 (1986). Bone discusses the normative theories that jurists 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. *Id.*

different segments of the legal-academic profession, as well as to the relation between academia and the judiciary.

Thus, relying on a “textured functionalism,” this Article advances and explores 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 United States, these same rules remained largely nonintegrated. This Article investigates the reasons why a unitary conceptual category of “abuse of rights” was never developed in the United States.

Second, 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 a critical tool for progressive lawyering, enabling fair distributive outcomes. Both promises remained largely unfulfilled.

This Article is divided into 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.

I. ABUSE OF RIGHTS IN AMERICAN COURTS

A. THE FUNCTIONAL EQUIVALENTS OF ABUSE OF RIGHTS: MALICE RULES AND REASONABLENESS TESTS

For several 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.²³ 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 extracontractual rights and contractual rights, it helped courts deal with questions regarding relations among neighbors, 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 law 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 armory of academic writers nor readily available in the courts' toolbox.

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 available to medieval jurists in their effort to work out a general theory of *aemulatio*.²⁴ Drawing on these Roman and medieval precedents, nineteenth-century French and Italian jurists framed conflicts over competing uses of water as abuses of landowners'

23. ROTONDI, *supra* note 16, at 60; Marc Desserteaux, *Abus De Droit ou Conflict du Droit*, in REV. TRIMESTRIELLE 129 (1906); JOSSEAND, *supra* note 8, at 32.

24. ROTONDI, *supra* note 16, at 36-94.

property rights.²⁵ *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 to abuses. Spitefully pumping off the water percolating underneath one's land, thereby draining the neighbor'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 by relying on rules that closely paralleled the continental doctrine. For instance, in *Acton v. Blundell*, a case decided by the Exchequer Chamber in 1843,²⁶ the plaintiff, a cotton spinner, used a well for the operation of his mill which was fed by underground streams of water percolating from the soil underneath the land of the defendants.²⁷ The latter erected engines and pumps which drained the water preventing it from flowing and percolating to the plaintiff's well and thereby caused him pecuniary loss.²⁸ In the court's assessment, the draining of the well amounted to *damnum absque injuria* and could not become the basis of an action.²⁹ A landowner, the court noted, has the right to avail herself of all that lies beneath the surface, unless she does so *animo vicino nocendi* (i.e., maliciously), with the intent to injure the neighbor.³⁰ However, since ill will was not alleged, the malice qualification was dicta.

In *Chasemore v. Richards*, Lord Wensleydale hinted at a notion of "reasonable use" that resembled continental notions of "normal function."³¹ For sixty years the appellant had owned and operated a mill on a river, which was fed by the water percolating through the underground strata from higher lands.³² 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.³³ The operation of the well drained the subterranean stream that would have otherwise flowed into the river, diminishing its flow and therefore hampering the

25. *Id.* at 141.

26. (1843) 152 Eng. Rep. 1223, 1224. 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. *Id.* at 1232.

27. *Id.* at 1223.

28. *Id.* at 1223-24.

29. *Id.* at 1235. The inferior court instructed 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; it further instructed that the plaintiff's evidence was not sufficient to support his allegations. *Id.* at 1225.

30. *Id.* at 1228.

31. (1859) 11 Eng. Rep. 140, 145 (H.L.) (appeal taken from Exch. Div.).

32. *Id.* at 140.

33. *Id.* at 141.

working of the appellant's mill.³⁴ The latter brought action for damages.³⁵ The Court of Exchequer and the Court of Exchequer Chamber gave judgment in favor of the respondents.³⁶ The House of Lords confirmed the decision of the lower courts, affirming the respondent's right to intercept subterranean streams.³⁷ Lord Wensleydale, in an opinion which is "as close to a dissenting judgment as possible without recording a formal dissent,"³⁸ carefully investigated the modalities and purposes of the respondent's use of the water, suggesting that a use not connected with the enjoyment of the land may be "unreasonable."³⁹

In the United States, notions of "reasonable use" closely resembling continental objective formulations of "abuse of rights" proved to be 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 in the 1820s, water law took shape as a distinctively American conceptual creation.⁴⁰ Joseph Angell's *A Treatise on the Common Law in Relation to Watercourses* appeared in 1824, laying the foundations on which Justice Story and

34. *Id.* at 142.

35. *Id.*

36. *Id.*

37. *Id.* at 152.

38. MICHAEL TAGGART, *PRIVATE PROPERTY AND ABUSE OF RIGHTS IN VICTORIAN ENGLAND: THE STORY OF EDWARD PICKLES AND THE BRADFORD WATER SUPPLY* 65 (2002).

39. *Chesmore*, 11 Eng. Rep. at 145 (opinion of Lord Wensleydale). However, a few decades later, in *Corp. of Bradford v. Pickles*, [1895] A.C. 587 (H.L.) (appeal taken from Ch.), the House of Lords stepped back, finding motives to be immaterial. *Corp. 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. *See id.* at 587–88. 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. *Id.* at 589. 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. *Id.* 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. *Id.* While the inferior court granted the injunction, the Court of Appeals reversed. *Id.* The House of Lords confirmed the latter court's decision, dismissing the appeal. *Id.* at 605. In the court's analysis it is the act, not the motive for the act, that must be regarded. *See id.* at 594. The deliberate nebulosity of George Bell's *Principles of the Law of Scotland* should not deceive, Lord Watson warned. *Id.* at 597–98. The court stated that *Aemulatio* is a misleading expression and, while its operative scope in the law of Scotland is narrow—translating in mere variations of degree in cases of nuisance—it was never part of English law. *Id.* at 598. On *Corp. of Bradford v. Pickles*, see TAGGART, *supra* note 38, at 54.

40. *See* Samuel C. Wiel, *Waters: American Law and French Authority*, 33 HARV. L. REV. 133, 147 (1919). Wiel notes that "the common law of watercourses is not the ancient result of English law, but is a French doctrine (modern at that) received into English law only through the influence of two eminent American jurists." *Id.*

Chancellor Kent were to shape the common law of water.⁴¹ “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.⁴² According to the riparian doctrine, ownership of riparian land “creates a perpetual usufructuary right in the landowner to use the water.”⁴³ As to the allocation of water among riparian owners, the earlier “natural flow” rule,⁴⁴ dominant in the eighteenth and early-nineteenth century, was gradually replaced by the “reasonable user” principle.⁴⁵ The latter accords the riparian a right to alter the flow when, balanced against the uses of other riparians, the use is reasonable.⁴⁶ Anticipated by Justice Story in *Tyler v. Wilkinson*,⁴⁷ the reasonable use rule was fully articulated in *Cary v. Daniels*, an 1844 case involving a conflict between lower and

41. See JOSEPH K. ANGELL, A TREATISE ON THE COMMON LAW IN RELATION TO WATERCOURSES (1824); see also 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW (Boston, Little, Brown, & Co., George F. Comstock ed., 11th ed. 1889).

42. See T.E. Lauer, *Reflections on Riparianism*, 35 MO. L. REV. 1 (1970); J. H. Beuscher, *Appropriation Water Law Elements in Riparian Doctrine States*, 10 BUFF. L. REV. 448 (1960).

43. See CHARLES DONAHUE ET AL., CASES AND MATERIALS ON PROPERTY: AN INTRODUCTION TO THE CONCEPT AND INSTITUTION 246 (3d ed. 1993).

44. 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, thereby preventing waste, malicious diversion, or extraordinary use of water. See TAGGART, *supra* note 38, at 114, 128, 130, 136.

45. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780–1860, at 34, 37–43, 102 (1992).

46. *Id.*

47. 24 F. Cas. 472 (C.C.D. R.I. 1827) (No. 14,312). In *Tyler v. Wilkinson*, 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 conflict between riparian mill owners, where the owners of the upper dam appropriated and used a large quantity of water to the detriment of the lower dam. *Id.* at 473. In Story’s reasoning, the natural flow principle was still commanding and the reasonableness test was timidly added as a qualification.

[T]he 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 to 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 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.”

Id. at 474.

upper mill owners.⁴⁸ 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.⁴⁹

A similar development occurred in the legal regime governing the second category of waters, underground percolating waters. While earlier cases relied on the “absolute ownership” rule, occasionally tempered by a narrow and subjective malice qualification,⁵⁰ by the late-nineteenth century, courts and writers were shifting towards either a “reasonable user” criterion or a “correlative rights” rule.⁵¹ Professor Ernst Huffcut of Cornell Law School, writing in 1904 in the *Yale Law Journal*, stated confidently that “the prevailing American view 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 the result of a reasonable user of defendant’s rights in his own lands.”⁵² In *Bassett v. Salisbury*,⁵³ a case regarding the obstruction of the natural drainage of percolating water, the Supreme Court of New Hampshire, while clearly articulating the “reasonable user” rule, also showed an 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, 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 water-courses, 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.⁵⁴

Finally, reasonableness tests were also developed in relation to the third category of waters, diffused surface waters. In the nineteenth century and early-twentieth century, run-off water was considered mainly

48. 49 Mass. (8 Met.) 466, 477–78 (1844).

49. *Id.* at 476–77.

50. JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY 128 (2005).

51. The reasonable use rule was anticipated in a number of earlier cases. In *De Bok v. Doak*, 176 N.W. 631, 632 (Iowa 1920), the plaintiff complained of an alleged injury caused him by defendant-appellant’s use of 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 excess water to the detriment of the plaintiff. *Id.* at 632–33. 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.” *Id.* at 634.

52. Ernst W. Huffcut, *Percolating Waters: The Rule of Reasonable User*, 13 YALE L.J. 222, 223 (1904).

53. 43 N.H. 569 (1862).

54. *Id.* at 577.

in terms of disposal and relatively little use was made of it.⁵⁵ Previously governed by an absolutistic “common enemy” rule or by the so called “civil law” rule,⁵⁶ conflicts over surface runoff increasingly came to be controlled by a “reasonable use” rule.⁵⁷ 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 neighborhood, and the appellee, a railway company, in light of the reasonableness of the latter’s use of its property.⁵⁸ After a heavy snowfall, the railway company, in clearing its track, threw the snow into the adjoining street.⁵⁹ That same night, it rained hard and the mass of snow obstructed the natural flow of the water, flooding the appellant’s house.⁶⁰ 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’s injury was *damnum absque injuria*.⁶¹ 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.”⁶²

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 instances of “abuse of rights,” were treated as “private nuisances.”⁶³ As G. H. L. Fridman noted in his article *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.⁶⁴

55. DONAHUE ET AL., *supra* note 43, at 245–48.

56. In *Gannon v. Hargadon*, 92 Mass. (10 Allen) 106, 107 (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 melting snow and spring rains, thereby causing the water to flow off upon the plaintiff’s land. 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. *Id.* at 109. 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. *Id.* at 107–09.

57. WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* 432 (3d ed. 2000); 6 THOMPSON ON REAL PROPERTY 524–26, 559–61 (David A. Thomas ed., 1994).

58. 50 Md. 73, 80 (1878).

59. *Id.*

60. *Id.*

61. *Id.* at 82.

62. 51 A. 911, 911 (N.H. 1901) (quoting *Haley v. Colcord*, 59 N.H. 7, 8 (1879)).

63. See *Wilson v. Handley*, 119 Cal. Rptr. 2d 263, 268 (Ct. App. 2002).

64. G. H. L. Fridman, *Motive in the English Law of Nuisance*, 40 VA. L. REV. 583, 583 (1954).

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 ample provision in the present law relating to the tort of nuisance for the control of activities envisaged by the continental codes.⁶⁵

The essence of private nuisance is an unreasonable interference with the use and enjoyment of land.⁶⁶ Liability may rest upon the defendant's intentional interference with the plaintiff's interest, upon a merely negligent interference, or upon inappropriate and abnormally dangerous conduct.⁶⁷ 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.⁶⁸ 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."⁶⁹

American courts' treatment of "spite fence" cases varied significantly and changed over time.⁷⁰ In an earlier stage,⁷¹ in six of the

65. *Id.* at 586.

66. Bone, *supra* note 22, at 1115.

67. *See id.* at 1139-41.

68. *Id.* at 1161.

69. *Id.* at 1137.

70. A 1937 case, *Racich v. Mastrovich*, 273 N.W. 660, 661 (S.D. 1937), 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 owner by shutting out his light, air and view."

71. In *Mahan v. Brown*, 13 Wend. 261, 261 (N.Y. Sup. Ct. 1835), the Supreme Court of Judicature of New York held that the defendant was not liable for erecting a spite fence that obstructed the sunlight of his neighbor, regardless of the motive of the obstruction, unless the neighbor had benefitted from that sunlight for a specified period of time or had acquired a right by grant or by 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 neighbor's property with fetid smells had been found to be a nuisance. *Id.* at 264. 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. *Id.* Conversely, in the case at hand, the plaintiff enjoyed a mere easement that may have ripened into a right. *Id.* But, before sufficient time had elapsed to raise a presumption of a grant, he was deprived of no right, but only prevented from acquiring a right—without consideration—in his neighbor's property. *Id.*

ten states in which actions had been brought for the spiteful erection of a fence, the opinion of the court was against the plaintiff. But by the first decade of the twentieth century, courts consistently held defendants liable for maliciously erecting fences or other constructions.⁷² Furthermore, in several states, statutes were passed making the erection of a spite fence a tort.⁷³ In *Rideout v. Knox*, Justice Holmes reluctantly upheld one such statute.⁷⁴ In Justice 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.⁷⁵ However, Justice Holmes conceded, limits to property rights are a matter of degree: while larger limitations would entail too significant a constraint on the owner's right, smaller limitations may be imposed for the sake of avoiding a manifest evil.⁷⁶ Similarly, in *Horan v. Byrnes*, the Supreme Court of New Hampshire applied "reasonable use" and upheld a statute declaring that any fence unnecessarily exceeding five feet in height, and erected to annoy an adjoining owner, shall be a private nuisance.⁷⁷ Chief Justice Parsons's reference to *City of Franklin v. Durgee*,⁷⁸ the earlier water case mentioned above, demonstrates an 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," but makes the test of the right the reasonableness of the use under all

72. 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, 412, 414-15 (1905).

73. *Id.* at 415. The states were Connecticut, Maine, New Hampshire, Vermont, and Washington. *Id.* at 415 n.3.

74. 19 N. E. 390, 393 (1889).

75. *Id.* at 392.

76. *Id.* at 391-92. Justice Holmes's concern with the arbitrariness of a jury's inquiry into motives echoes the arguments raised by opponents of abuse of rights 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 a 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.

Id. (citations omitted).

77. 54 A. 945, 948 (N.H. 1903).

78. 51 A. 911 (N.H. 1901).

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.⁷⁹

Reasonableness rules were also deployed in cases of nuisance involving conflicts between industrial enterprises and residential landowners. In *St. Helen's Smelting Co. v. Tipping*, involving a major episode of industrial pollution, the House of Lords formulated a reasonableness rule placing emphasis on time and locality.⁸⁰ Again, the existence of a unitary conceptual pattern linking malice rules and reasonableness tests in disparate legal domains could hardly elude the court. Lord Wensleydale, who a few years before in *Chasemore v. Richards* had boldly alluded to a "reasonable use" rule far exceeding the narrow scope of subjective "malice,"⁸¹ approvingly concurred in his brethren's articulation of "reasonableness."⁸²

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." These cases were resolved 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 assumed that a remedy for a breach of contract could be obtained only against the other party to the contract.⁸³ Courts accorded contractual relations protection from a variety of third party interferences, but no formally unified tort had developed. While the master-servant relation was shielded, through an action of enticement, from third parties who persuaded a servant to leave her employment, other contractual

79. *Horan*, 54 A. at 948 (citation omitted) (quoting *Franklin*, 51 A. at 913).

80. (1865) 11 Eng. Rep. 1483, 1485.

81. *Chasemore v. Richards*, (1859) 11 Eng. Rep. 140, 149.

82. See *St. Helen's Smelting Co.*, 11 Eng. Rep. 1483.

83. See Note, *Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort*, 93 HARV. L. REV. 1510 (1980); Frances Bowes Sayre, *Inducing Breach of Contract*, 36 HARV. L. REV. 663, 675-76 (1923) ("If this tort is 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." (footnote omitted)).

agreements were protected from a variety of interferences such as slander, libel, fraud, and coercion.⁸⁴

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.⁸⁵ Once again, the concept of "malice" 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 *The Law of Torts*, the law of interference with economic relations became "shrouded in a fog of catchwords and rubber-stamp phrases,"⁸⁶ most of which turned on the question of the defendant's malicious motive or purpose.

In *Lumley v. Gye*, the Court of Queen's Bench extended the action of enticement to malicious interference with contractual relations other than the master-servant relation.⁸⁷ 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 her performance for a period of three months at the plaintiff's theatre.⁸⁸ The court found that the defendant, the impresario of a competing theatre, had procured Miss Wagner to breach the contract with a "malicious intention," and awarded damages to the plaintiff.⁸⁹

In *Temperton v. Russell*, the Court of Queens Bench extended the principle of liability for interference beyond existing contractual relations to relations which are merely prospective or potential.⁹⁰ Lord Esher saw no distinction between the two categories of relations, given that the malicious, and hence wrongful, intent and the kind of injury were the same.⁹¹ 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 would "discover, define and protect from undue interference more of these 'probable expectancies.'"⁹² However, in *Allen v. Flood*, an 1897 case involving a union's interference with the relations between an employer and employees affiliated with a rival union, the role of malice

84. Note, *supra* note 83, at 1516.

85. *Id.* at 1511.

86. WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 927 (4th ed. 1971).

87. (1853) 118 Eng. Rep. 1083 (Q.B.).

88. *Id.* at 1084.

89. *Id.* at 1097.

90. (1893) 118 Eng. Rep. 749, 749 (Q.B.).

91. *Id.* at 754.

92. *Jersey City Printing Co. v. Cassidy*, 53 A. 230, 233 (N.J. Ch. 1902).

was minimized.⁹³ A classic in the literature on abuse of rights, *Allen v. Flood* is seen as evidence that “abuse of rights” had a short life in England.⁹⁴ The House of Lords recast and deactivated the doctrine of malice. Malice, Lord Watson noted, “depends not upon evil motive which influenced the mind of the actor, but upon the illegal character of the act committed.”⁹⁵

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.⁹⁶ 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”

93. [1898] A.C. 1 (H.L.) (appeal taken from E.). Along with *Corp. of Bradford v. Pickles*, [1895] A.C. 587 (H.L.) (appeal taken from Ch.), *Allen v. Flood* stands as the foremost authority for the absence of abuse of rights in English law. The appellant, Allen, the delegate of the iron-workers’ union, in order to punish the respondents, a group of 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. *Allen*, [1898] A.C. at 90–91. Pressed by this threat, the employer discharged the shipwrights and refused to employ them again. *Id.* The respondents brought an action against the appellant. The inferior court awarded damages to the respondents. *Id.* at 143. The decision was affirmed by the Court of Appeal. *Id.* at 91. Reversing the latter court’s decision, the House of Lords gave judgment in favor of the appellant arguing that, however malicious or bad his motive might be, he had done no unlawful act. *Id.* at 109. A deep and hardly disguisable anxiety permeates the court’s profuse discussion of the essence and the scope of malice. The court was 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 restated the doctrine. The definition provided by the court is the same as that offered by the court in *Mogul Steamship Co. v. McGregor*, (1889) 23 Q.B.D. 598: 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 closed the narrow space left open for a theory of abuse of rights 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.

[1898] A.C. at 139–40.

94. See *infra* note 187 and accompanying text.

95. *Allen*, [1898] A.C. at 94 (“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.”).

96. Sayre, *supra* note 83, at 672.

has been passed over in silence or covered by remarks of the most ambiguous nature.⁹⁷

In fact, in cases of interference with contractual relations as well as in cases of interference with prospective economic 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."⁹⁸ In *Chambers v. Baldwin*, an 1891 case of interference with a contract for the sale of tobacco, the Court of Appeals of Kentucky found that the defendant, in inducing 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.⁹⁹ Once again, the reasoning of the court demonstrates an 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 "[a]n act legal in itself, and which violates no right, cannot be made actionable on account of the motive which induced it."¹⁰⁰ 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 a 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.

In contrast, in *Jones v. Leslie*, a 1910 case of interference with an employment contract, the court found malicious motives material.¹⁰¹ The plaintiff, formerly an employee of the defendant, had found a better job and had an oral contract with the new employer.¹⁰² The defendant induced the latter to discharge the plaintiff by threatening to drive him out of business if he employed the plaintiff.¹⁰³ The Supreme Court of Washington fitted the fact pattern within the mould of a subjective notion of malice as wanton malevolence.¹⁰⁴

Most courts, however, used 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

97. *Id.*

98. See generally Note, *supra* note 83.

99. 15 S.W. 57, 57 (Ky. 1891).

100. *Id.* at 59 (quoting *Chatfield v. Wilson*, 28 Vt. 49 (1855)).

101. 112 P. 81, 81 (Wash. 1910).

102. *Id.*

103. *Id.* at 82.

104. *Id.* at 84.

water cases and nuisance cases.¹⁰⁵ 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.”¹⁰⁶

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. Leatham*,¹⁰⁷ 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.¹⁰⁸ 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.¹⁰⁹ As a consequence, the retail butcher sent a telegram to the respondent, letting him know that he would no longer buy his meat.¹¹⁰ The latter, who, having just killed a quantity of fine meat, suffered great economic loss, brought action against the appellants.¹¹¹ The inferior court gave judgment in favor of the respondent and the Irish Court of Appeal affirmed.¹¹² Quinn alone appealed and the House of Lords affirmed the decision of the latter court, finding the appellant to have acted maliciously.¹¹³ 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 judgment 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*.¹¹⁴

105. *Dunshee v. Standard Oil Co.*, 132 N.W. 371, 371 (Iowa 1911).

106. *Id.* at 373.

107. *Quinn v. Leatham*, [1901] A.C. 495 (H.L.) (appeal taken from Ir.) (U.K.).

108. *Id.* at 496.

109. *Id.*

110. *Id.*

111. *Id.* at 495.

112. *Id.*

113. *Id.* at 533.

114. *Id.* at 506.

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.”¹¹⁵ 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;¹¹⁶ in an 1835 New York case, *People v. Fisher*, the court took the same view.¹¹⁷ As Edwin Witte noted in the *Yale Law Journal* in 1925, *Commonwealth v. Hunt* marked “the overthr[o]w of these archaic doctrines and the beginning of the modern law of labor combinations.”¹¹⁸ 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.¹¹⁹ In the following decades, criminal conspiracy cases became less frequent and, in a number of states, legislation repealing the conspiracy doctrine was enacted.¹²⁰

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.¹²¹ Courts came to rely extensively on the labor injunction, an equitable remedy, justifying it as the protection of a newly coined concept of “entrepreneurial property rights” from irreparable injury.¹²² Further, tort law provided an alternative remedy. 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 *Moore & Co. v. Bricklayers’ Union*, an 1889 Ohio boycott case, Justice Taft resorted to a reasonableness test that echoed continental ideas of “normal operation of [a] right.”¹²³ 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

115. Edwin E. Witte, *Early American Labor Cases*, 35 YALE L.J. 825, 825 (1926) (quoting GEORGE GORHAM GROAT, ATTITUDE OF AMERICAN COURTS IN LABOR CASES 49 (1911)).

116. See *id.* at 826 (citing 3 DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 68, 233 (John R. Commons & E. A. Gilmore eds., 1910)).

117. 14 Wend. 9, 20 (N.Y. Sup. Ct. 1835).

118. Witte, *supra* note 115, at 825 (citing *Commonwealth v. Hunt*, 58 Mass. (4 Met.) 49 (1849)).

119. *Hunt*, 45 Mass. at 111.

120. See Witte, *supra* note 115.

121. See *id.*

122. Haggai Hurvitz, *American Labor Law and the Doctrine of Entrepreneurial Property Rights: Boycotts, Courts, and the Juridical Reorientation of 1886–1895*, 8 INDUS. REL. L.J. 307, 308 (1986).

123. 10 Ohio Dec. Reprint 665 (1889).

to similar measures against them.¹²⁴ One of the customers, the Moore's Lime Company, upon receiving the circular, stopped selling lime to the employer by delivery. However, the employer then sent a "teamster" to buy the lime directly from Moore's.¹²⁵ Having disregarded the union's circular, the Moore's Lime Company was banned and brought an action for damages.¹²⁶ The question facing the court was whether the defendant union had unreasonably or maliciously exercised its right to the free pursuit of trade. Justice Taft assessed the "immediate motive" driving the Bricklayers' Union in light of the "normal operation of the right to labor" and found it malicious.¹²⁷

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 law 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 one 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. . . .

. . . .

. . . [I]n so far as a 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 fourth, 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 ad hoc patching.¹²⁸

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. These two courts, under the guidance of, respectively, Chief Justice Shaw and Chief Justice Doe, were at the vanguard of legal thinking. They were the laboratory where reasonableness standards fashioned on a unitary mold were elaborated.

¹²⁴ *Id.* at 665.

¹²⁵ *Id.* at 666.

¹²⁶ *Id.* at 665.

¹²⁷ *Id.* at 672.

¹²⁸ Note, *Abuse of Rights: Civil Law, Legal Reasoning: Bradford v. Pickles Revisited*, 8 U. BRIT. COLUM. L. REV. 343, 348-50 (1973).

Well-read jurists conversant with European legal theory, Justices Doe and Shaw may have been well aware of the parallel with the continental theories of abuse of rights.¹²⁹ In any case, Justices Doe and Shaw's innumerable discussions of "reasonable use" or "reasonable exercise of a right" betray awareness of an underlying unitary framework.¹³⁰

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).¹³¹ 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. . . . "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."¹³²

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

129. See FREDERICK H. CHASE, LEMEUL SHAW: CHIEF JUSTICE OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS 1830-1860 (1918); LEONARD W. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW (1957); JOHN P. REID, CHIEF JUSTICE: THE JUDICIAL WORLD OF CHARLES DOE (1967); see also G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES (1976).

130. See, e.g., *Green v. Gilbert*, 60 N.H. 144, 145 (1880); *Thompson v. Androscoggin River Improvement Co.*, 54 N.H. 545, 547 (1874).

131. See Jeremiah Smith, *Reasonable Use of One's Own Property as a Justification for Damage to a Neighbor*, 17 COLUM. L. REV. 383 (1917) [hereinafter Smith, *Reasonable Use*]; Jeremiah Smith, *Crucial Issues in Labor Litigation II*, 20 HARV. L. REV. 345 (1906) [hereinafter Smith, *Crucial Issues II*].

132. Smith, *Reasonable Use*, *supra* note 131, at 384-85 (footnote omitted) (quoting *Middlesex Co. v. McCue*, 149 Mass. 103, 103-04 (1889); *McCarty v. Natural Carbonic Gas Co.*, 189 N.Y. 40, 46 (1907)).

analysis, as well as justifications drawn from social morals and inquiries into the social consequences of legal doctrines coexisted, at times in the same opinion,¹³³ with deductive and formalistic reasoning.¹³⁴ Although still rudimentary and abstract if compared with post-World War II “conflicting considerations” analysis,¹³⁵ these early instances of balancing and policy reasoning invite a recharacterization 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.¹³⁶ The “Formal Style,” which around the 1850s ousted an earlier “Grand Style,”¹³⁷ featuring clear reasoning and attention to policy, was seen as resting on a number of related assumptions.¹³⁸ In Karl 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.¹³⁹

Subsequent historical work has further elaborated on this picture.¹⁴⁰ Various named, “Classical Legal Thought,” “Formalism,” or “Classical Orthodoxy” has been described as a relatively homogenous and coherent mode of thought.¹⁴¹ While the actual characterization and the political nature of legal classicism are a matter of dispute,¹⁴² there is substantial

133. See Harry N. Scheiber, *Instrumentalism and Property Rights: A Reconsideration of American Styles of Judicial Reasoning in the 19th Century*, 1975 WIS. L. REV. 1; *infra* notes 182, 184.

134. See Scheiber, *supra* note 133; *infra* notes 182, 184.

135. Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s Consideration and Form*, 100 COLUM. L. REV. 94 (2000).

136. See, e.g., GRANT GILMORE, *THE AGES OF AMERICAN LAW* (1977); KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960); ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* (1938).

137. See LLEWELLYN, *supra* note 136.

138. *Id.* at 73.

139. *Id.*

140. See, e.g., DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* (2006); Thomas C. Grey, *Langdell’s Orthodoxy*, 45 U. PITT. L. REV. 1 (1983); HORWITZ, *supra* note 45.

141. See Grey, *supra* note 140.

142. American historians have drawn different images of late-nineteenth-century formalist legal thought. Duncan Kennedy offered a nuanced understanding of Classical Legal Thought. For Kennedy, Classical Legal Thought was a mode of thought providing a conceptual vocabulary, organizational schemes, modes of reasoning, and characteristic arguments. Classical Legal Thought had no essence, but presented a number of dominant or important traits. More specifically, in Kennedy’s own words:

My claim was that, in the second half of the nineteenth century, legal actors dramatically revised the conceptual apparatus, reasoning techniques, ideals and images that had dominated in the pre-Classical period. The Classical subsystem built all legal rules out of a will theory using strictly analogous conceptions of state and federal power private right. Private law rules were elaborately divided and subdivided around the public/private

agreement on its two major implications for judicial reasoning. First, judicial outcomes were deduced, either logically inferred or analytically derived,¹⁴³ from “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 extrajuristic preferences of the interpreter.”¹⁴⁴ Vague standards, such as reasonableness, or rules requiring determinations of state of mind, such as malice, are thought to have been largely foreign to this style of reasoning.¹⁴⁵

distinction *within private law*. The preferred reasoning technique was induction/deduction, the ideal was the deployment of democratically validated public power as the framework for private freedom, and the key image was powers and rights that were “absolute within their spheres.”

KENNEDY, *supra* note 140, at xi. For Kennedy, Classical Legal Thought was not the view of law of a particular political ideology: it was “liberal in either a conservative or a progressive way, according to how it balanced public and private in market and household.” Kennedy, *supra* note 2, at 22. Classical Legal Thought was also not “a philosophy of law in the usual sense: in each period there was positivism and natural law,” as well as various theories of rights and pragmatisms. *Id.*; see also KENNEDY, *supra* note 140. Morton Horwitz, on the other hand, focused 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, and the quest for an “autonomous system of law untainted by politics.” HORWITZ, *supra* note 45, at 9. After the trauma of the Civil War and at a moment of swift social and economic change, jurists sought even more fervently to create a system of autonomous law. *Id.* at 10. 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 in antebellum legal thought.” *Id.* his 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; and (d) deductive and analogical reasoning which conferred upon legal reasoning “the qualities of certainty and logical inexorability.” *Id.* at 16. Finally, Thomas Grey focused 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.” Grey, *supra* note 140, at 6. It envisioned the legal system as “complete” (i.e., “its substantive norms provide a uniquely correct solution—a ‘right answer’—for every case that can arise under it”) through “universal formality” (i.e., the outcomes of the system are dictated by rationally compelling reasoning). *Id.* at 7. 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”). *Id.* at 8. Grey emphasized 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.” *Id.* at 16–17. “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 . . .” *Id.* at 20. For a more recent view, see WILLIAM WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA 1866–1937* (1998).

143. Grey, *supra* note 140, at 7–8.

144. Duncan Kennedy, *Legal Formalism*, in 13 *ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES*, 8634, 8634 (Neil J. Smelser & Paul B. Baltes eds., 2001).

145. Grey, *supra* note 140, at 11.

Abuse of rights cases complicate this understanding of legal classicism because courts consistently resorted 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's and the plaintiff's conflicting rights in light of multifactor reasonableness standards allowing an assessment of geographical, technological, and economic elements.¹⁴⁶ Second, justificatory arguments changed significantly. The factual nature of a judgment 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.¹⁴⁷

Nevertheless, this instrumental style of reasoning retained elements of formalism. While the language of balancing and cost-benefit comparison was often abstract and vague,¹⁴⁸ the outcomes' "air of single-line inevitability" was hardly attenuated.¹⁴⁹ Moral norms supposedly rooted in the aspirations of the community, policies allegedly finding wide support in society, and informed experiential propositions¹⁵⁰ all substantiated the standard of "reasonableness." This conferred a patina of universality and inevitability upon courts' justifications and lifting them out of the incandescent arena of policy preferences.

Of the thousands of decisions rendered by Chief Justice Shaw during his thirty years at the head of the Massachusetts bench, there are numerous examples that exemplify this unorthodox style of reasoning.¹⁵¹ 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.¹⁵² On the one hand, Justice Shaw, deeply preoccupied with basic principles, envisaged law as a science founded on reason and strove to impart system and symmetry to the law. On the other hand, in the course of Justice Shaw's tenure, Massachusetts experienced swift economic development and social change.¹⁵³ Justice Shaw embarked resolutely on the task of accommodating legal doctrine to meet the new problems posed by a rapidly changing environment and

146. See discussion *supra* Part I.A.1-4.

147. See discussion *supra* Part I.A.1-4.

148. See ROGER COTTERRELL, *THE POLITICS OF JURISPRUDENCE: A CRITICAL INTRODUCTION TO LEGAL PHILOSOPHY* 200 (1989).

149. See LLEWELLYN, *supra* note 136.

150. See MELVIN A. EISENBERG, *THE NATURE OF THE COMMON LAW* 14 (1988).

151. See, e.g., *Thurber v. Martin*, 68 Mass. (2 Gray) 394 (1854).

152. See generally LEVY, *supra* note 129; BENJAMIN FRANKLIN THOMAS, *SKETCH OF THE LIFE AND JUDICIAL LABOR OF CHIEF JUSTICE SHAW* (1868).

153. LEVY, *supra* note 129, at 22.

turbulent economic growth. Constantly searching for ways to adapt the old to the new, Justice Shaw used reasonableness tests—extracted from a shared, and hence non-contentious, common sense—to restate legal fields as diverse as water law and labor law in order to make them “practical and plastic.”¹⁵⁴ Reasonableness satisfied both his quest for general principles as well as his idea of law as responsive to shifting social conditions.

In Justice Shaw’s analysis, a variety of factors determine the judgment of reasonableness. A reasonable use of one’s property is a question of degree,¹⁵⁵ purpose, natural and geographical conditions,¹⁵⁶ and technological advancement. To illustrate, in *Thurber v. Martin*, Justice 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.¹⁵⁷

While Justice 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,”¹⁵⁸ Chief Justice Doe of New Hampshire. *Basset v. Salisbury*¹⁵⁹ and *Swett v. Cutts*¹⁶⁰ signaled the Supreme Court of New Hampshire’s turn to the standard of “reasonableness” that Justice Doe would further perfect. In the latter case, Chief Justice Bellow weighed the conflicting rights of two adjoining landowners disputing the diversion of the flow of surface water in the season of melting snow, and equated “reasonable use” to domestic, agricultural, and manufacturing purposes.¹⁶¹ Further, Justice Bellow clarified the factual assessment of reasonableness by listing, among the circumstances to be considered, “the nature and importance

154. *Id.* at 24.

155. *Elliott v. Fitchburg R.R. Co.*, 64 Mass (10 Cush.) 191, 194 (1852).

156. *Thurber*, 68 Mass. at 396–97.

157. *Id.*

158. Llewellyn saw Justice Doe as an exception in the “Formal Style.” See LLEWELLYN, *supra* note 136, at 41.

159. 43 N.H. 569, 577–78 (1862).

160. 50 N.H. 439, 443 (1870).

161. *Id.*

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.”¹⁶²

An Associate Justice when *Swett v. Cutts* was decided, Charles Doe became Chief Justice in 1876.¹⁶³ In the twenty years of Justice Doe’s tenure, reasonableness became a general principle in the law of torts and the instrument for balancing conflicting rights.¹⁶⁴ Justice Doe’s predilection for reasonableness was rooted in his methodological beliefs. In Justice Doe’s understanding, law was “experience developed by reason, and reason checked and directed by experience.”¹⁶⁵ For Justice 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 favor 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. Androscoggin River Improvement Co.*, Justice Doe laid bare the complexities of an assessment of reasonableness in the use of property.¹⁶⁶ Drawing on an earlier case, he discussed a hypothetical “unreasonable use” by a riparian owner who had made a deep cut through the river’s bank.¹⁶⁷ Justice 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.”¹⁶⁸ 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, Justice Doe further specified the nature of reasonableness.¹⁶⁹ Reasonableness, he noted, is a question of fact depending upon the circumstances of the case,

162. *Id.* at 446.

163. JEREMIAH SMITH, MEMOIR OF HON. CHARLES DOE, LATE CHIEF JUSTICE OF THE SUPREME COURT OF NEW HAMPSHIRE 24–25 (1897).

164. REID, *supra* note 129, at 133.

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.

Id. at 133–34. “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.” *Id.* at 145; *see also* WHITE, *supra* note 129, at 124.

165. REID, *supra* note 129, at 339.

166. 54 N.H. 545 (1874).

167. *Id.* at 550–51.

168. *Id.* at 551.

169. 60 N.H. 144, 145 (1880).

including the purposes, old and new, of the parties' use, and upon a comparative assessment of the respective costs and benefits.¹⁷⁰ Justice Doe recognized, with the founder of Germany's "Interests Jurisprudence," Philipp Heck,¹⁷¹ 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 provided the correct and desirable balance.¹⁷²

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.¹⁷³ Rather, the court acknowledged that the question of competition is to be decided by weighing competing social and economic objectives.¹⁷⁴ Justice Elliott profusely elaborated on this new style of reasoning and the judicial philosophy inspiring it.¹⁷⁵ In Justice Elliott's vision, balancing is a corollary of a new organicist notion of law and legal change:

Mr. Justice Black said that "mischievous 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 concrete 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 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

170. *Id.* at 144.

171. PHILIPP HECK, *BEGRIFFSBILDUNG UND INTERESSENJURIPRUDENZ* (1929).

172. *See Green*, 60 N.H. at 145.

173. 119 N.W. 946, 947 (Minn. 1909).

174. *Id.*

175. *Id.*

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 from the evils 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.¹⁷⁶

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.¹⁷⁷ Rather, Scheiber contended that late-nineteenth-century judicial reasoning may be best characterized as an "amalgam" of "instrumentalism" and "formalism."¹⁷⁸ Scheiber's study of post-1865 decisions on property, eminent domain, and resource-allocation law sought to show that instrumentalism was alive and well in the late-nineteenth century.¹⁷⁹ 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.¹⁸⁰

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.¹⁸¹ "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 Langdell.¹⁸² A

176. *Id.* (internal citations omitted).

177. Scheiber, *supra* note 133. Scheiber's article is a response to the discontinuity thesis advanced by William Nelson, who argued that the "instrumental" style of judicial reasoning fell into disfavor after the 1850s and was supplanted by a "formalist" style. See William E. Nelson, *The Impact of the Anti-Slavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974). A significant causal factor explaining this shift is, in Nelson's analysis, the success of anti-slavery jurisprudence. See *id.* 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-oriented jurisprudence reinforced by greater use of precedent. See *id.*

178. Scheiber, *supra* note 133, at 12.

179. *Id.*

180. *Id.*

181. See *infra* notes 182, 184.

182. See Forum, *Once More Unto the Breach: Late Nineteenth Century Jurisprudence Revisited*, 20 LAW & HIST. REV. 541 (2002). See, in particular, Manuel Cahan, *Justice Stephen Field and Free Soil, Free Labor Constitutionalism*, 20 LAW & HIST. REV. 541 (2002); Lewis A. Grossman, *James Coolidge Carter and Mugwump Jurisprudence*, 20 LAW & HIST. REV. 577 (2002) [hereinafter Grossman,

theistically oriented historical jurisprudence that looked at morals and social customs coexisted with and rivaled Langdellian formalist orthodoxy.¹⁸³ Others seek to discard the formalist-realist antithesis. Throughout the formalist age, Brian Tamanaha contends, prevailing understandings of law and of judicial decisionmaking were, in essential respects, as realist as the accounts propounded by later Realists.¹⁸⁴ Most legal professionals were well aware that law is indeterminate, that judges make policy decisions, and that personal predilections may influence judicial outcomes.¹⁸⁵

The examination 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,¹⁸⁶ its style of legal reasoning may be more various than assumed. In circumscribed, though critical, legal subfields, courts resorted to rudimentary 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 on Classical Legal Thought an inner resilience, contributing to its longevity.

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, the “continental drug” fell short of having “very disagreeable after-effects” in the United States.¹⁸⁷ Malice rules and reasonableness tests were deployed to achieve a wide variety of

Mugwump Jurisprudence]; Lewis A. Grossman, *Extending the Revisionist Project*, 20 LAW & HIST. REV. 639 (2002); and Stephen A. Siegel, *The Revision Thickens*, 20 LAW & HIST. REV. 631 (2002).

183. Grossman, *Mugwump Jurisprudence*, *supra* note 182, at 604.

184. Brian Z. Tamanaha, *The Realism of the “Formalist” Age 3* (Aug. 2007) (unpublished manuscript) [hereinafter Tamanaha, *The Realism of the “Formalist”*], available at ssrn.com/abstract=985083. Tamanaha challenges the view that depicts Holmes as a solitary “proto-Realist.” *Id.* By contrast, he argues that the standard account of the “formalist” age is fundamentally wrong; “Prevailing understandings 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.” *Id.* “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. See BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE* 67–90 (2009) [hereinafter TAMANAHA, *BEYOND THE DIVIDE*]. 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.” Tamanaha, *The Realism of the “Formalist,” supra*, at 65; see David J. Seipp, *Formalism and Realism in Fifteenth-Century English Law: Bodies Corporate and Bodies Natural* (July 3, 2007) (unpublished manuscript), available at law.harvard.edu/programs/ames_foundation/BLHCo7/SeippOxfordDraft.pdf.

185. See TAMANAHA, *BEYOND THE DIVIDE*, *supra* note 184.

186. See HORWITZ, *supra* note 45; Kennedy, *supra* note 2, at 21.

187. Gutteridge *supra* note 1, at 44.

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 human energy.”¹⁸⁸ Rather than directly responding to the entrepreneurial class’s 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 maneuverable, 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 socioethical 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.¹⁸⁹

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.¹⁹⁰ 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.¹⁹¹ These critics focused on nonutilitarian elements in riparian water law.¹⁹² 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.¹⁹³ 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 favor new economically profitable uses of water.¹⁹⁴

188. JAMES W. HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 5–6 (1956).

189. See discussion *supra* Part I.A.1–4.

190. HORWITZ, *supra* note 45, at 34–35.

191. Stephen F. Williams, *Transforming American Law: Doubtful Economics Makes Doubtful History*, 25 UCLA L. REV. 1187, 1197–98 (1978).

192. *Id.* at 1204.

193. *Id.* at 1198.

194. *Id.*

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.¹⁹⁵ 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 land¹⁹⁶

As his biographer notes, Justice Shaw's words suggest that, at the time when "older rural agrarian-merchant society was evolving [into] a complex industrial one," the reasonable user rule appeared to him as an effective trigger for economic development.¹⁹⁷ 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.

Similar developmental concerns permeate the court's reasoning in *Wheatley v. Baugh*.¹⁹⁸ Chief Justice Lewis held the defendant, a mining company, was not liable for reducing the flow of the subterranean spring which fed the machines of the plaintiff, a neighboring tannery.¹⁹⁹ The defendant, Lewis suggested, was not animated by malice but by the reasonable purpose of working his coal mine.²⁰⁰ Replete with references to continental theories of abuse of rights, the opinion illustrates Lewis's favor for valuable economic activities such as mining. Lewis marshaled an absolutist notion of property rights of continental flavor 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

195. HORWITZ, *supra* note 45, at 31; HURST, *supra* note 188, at 24.

196. 49 Mass. (8 Met.) 466, 476-77 (1844).

197. LEVY, *supra* note 129, at 22.

198. 25 Pa. 528 (1855).

199. *Id.* at 535-36.

200. *Id.*

advantage should give place to that which is perfect, and infinitely the most beneficial to individuals and to the community in general.²⁰¹

On the other hand, critics rightly point to the ambiguous persistence of nonutilitarian concerns in courts' articulation of the new rule.²⁰² While the maximization of growth and productivity were critical concerns driving judges, occasionally "reasonable user" rules were deployed to reach bold distributive outcomes.²⁰³ 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.²⁰⁴ Courts equated "reasonable use" with use on riparian land, thereby severely limiting flexibility in water use.²⁰⁵

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.²⁰⁶ 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.²⁰⁷ The defendant diverted the water in order to sell it for the irrigation of distant lands.²⁰⁸ The Supreme Court of California reversed the decision of the lower court, which had ruled in favor of the defendant.²⁰⁹ Considerations of public policy drove the court's reasoning.²¹⁰ 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.²¹¹ "In short, the members of the community, in the case

201. *Id.* at 535.

202. See Williams, *supra* note 191.

203. See *Katz v. Walkinshaw*, 70 P. 663, 663-64 (Cal. 1902).

204. *Id.*

205. Samuel C. Wiel, *Fifty Years of Water Law*, 16 OR. L. REV. 203, 203 (1937); Samuel C. Wiel, *Theories of Water Law*, 27 HARV. L. REV., 530, 543 (1913-1914).

206. See *Katz*, 70 P. 663.

207. *Id.* at 663-64.

208. *Id.* at 664.

209. *Id.* at 669.

210. *Id.* at 668.

211. *Id.* at 665.

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.

Id.

But the maxim, "Cuius est solum, ejus est usque ad inferos," furnishes a rule of easy application, and saves a 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

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 neighborhood uninhabitable.”²¹²

A similar variety of results—and an analogous tension between the promotion of economical uses of property and the protection of static property—characterize nuisance cases involving questions of malice or reasonableness. In dealing with disputes among residential neighbors, courts relied upon malice rules and reasonableness tests to weigh neighbors’ respective rights to a peaceful enjoyment of their property, favoring quiet habitation, agriculture, and other time-honored uses of the land.

In *Christie v. Davey*, an 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 teacher’s neighbor as a malicious response did amount to a nuisance to be restrained.²¹³ In an 1888 West Virginia case concerning the troublesome cohabitation of two litigious families, the court gauged the reasonableness of the defendant’s right “to enjoy the privileges of a home” and the plaintiffs’ right “to security in their home,” finding that the former had been exercised unreasonably and maliciously.²¹⁴ Conversely, in a Michigan case, the purpose for which the right was exercised excused the defendant’s conduct.²¹⁵ A shed used for coal and wood, although spitefully erected by the defendant so as to shut off some of the neighbor’s light, was not considered a nuisance on account of it serving a useful purpose.²¹⁶

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 neighbors,

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 water courses is greatly changed.

Id. at 666.

²¹² *Id.* at 665.

²¹³ (1892) 1 Ch. 316, 328–29.

²¹⁴ *Medford v. Levy*, 8 S.E. 302, 306 (W. Va. 1888). The defendants’ habit of opening 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 conforming to those of “a neat and tidy housewife.” *Id.* at 304.

²¹⁵ *Kuzniak v. Kozminski*, 65 N.W. 275, 276 (Mich. 1895).

²¹⁶ *Id.*

reasonableness tests soon became a critical tool for protecting “dynamic” property in cases pitting residential landowners against industrial enterprises.²¹⁷ As the century progressed, conflicts between residential or agricultural and industrial uses of land came to comprise a greater portion of courts’ dockets.²¹⁸ “Reasonable user” tests allowed courts to weigh exploitive and conservatory uses of land, often favoring the former.²¹⁹ For the most part, production and manufacturing firms were not found to abuse their rights over the land.²²⁰ In analyzing 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 individuals and communities adversely affected by it.²²¹ Others have posited a looser relationship between courts’ articulation of nuisance and the needs and demands of nascent big industry, pointing to a variety of institutional, procedural, and social factors complicating too easy a deterministic account.²²² 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

217. See, e.g., *St. Helen's Smelting Co. v. Tipping*, (1865) 11 Eng. Rep. 1483, 1485. See generally Joel F. Brenner, *Nuisance Law and the Industrial Revolution*, 3 J. LEGAL STUD. 403 (1974).

218. HORWITZ, *supra* note 45, at 37.

219. *Id.* at 40.

220. *Id.* at 41–42.

221. See Brenner, *supra* note 217, at 408. Brenner's thesis is that, “[u]ntil the very end of the eighteenth century the view was strongly held by courts 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 his land.” See John P. S. McLaren, *Nuisance Law and the Industrial Revolution—Some Lessons from Social History*, 3 OXFORD J. LEGAL STUD. 155, 169 (1983) (discussing Brenner's thesis). The predominant thought was that the plaintiff had a preeminent claim to protection; the fact that the defendant had acted reasonably in the circumstances or that her activity was of public utility was considered no defense. *Id.* With the advent of industrialization, and the new relevance and frequency of conflicts between time-honored conservatory uses of land and new exploitive industrial uses, courts' views changed. *Id.* 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. See generally *id.*; Brenner, *supra* note 217.

222. McLaren, *supra* note 221, at 156; see A. E. Dingle, “The Monster Nuisance of All”: *Landowners, Alkali Manufacturers, and Air Pollution, 1828–64*, 35 ECON. HIST. REV. 529, 529–30 (1982).

industrialization.²²³ 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.”²²⁴

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 favor of the latter.²²⁵ 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 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*, the Court of Common Pleas found the defendant not liable for erecting a brick kiln in front of his house and burning a large quantity of bricks, thereby causing a noxious and unwholesome vapor which invaded the plaintiff’s house and garden.²²⁶ The court ruled that no cause of action lies for the reasonable use of a lawful trade in a convenient and proper place, even though someone may suffer inconvenience.²²⁷ 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 neighbourhood, that can bring an action. If that were so,—as has already been observed by the learned counsel for the defendant,—the neighborhood of Birmingham and Wolverhampton and the other great manufacturing towns of England would be full of persons bringing actions for nuisances arising from the carrying on of noxious and offensive trades in their vicinity, to the great injury 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 trade in a convenient and proper place, even though some one may suffer annoyance from its being so carried on.²²⁸

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 of life, and be conducted in

223. See McLaren, *supra* note 221, at 190.

224. *Id.*

225. *Id.* at 170.

226. (1858) 140 Eng. Rep. 1113, 1113 (C.B.).

227. *Id.* at 1114.

228. *Id.*

a reasonable and proper manner, and in a reasonable and proper place.²²⁹

A few years later, the House of Lords' decision in *St. Helen's Smelting Co. v. Tipping*,²³⁰ arguably the most important case of industrial pollution of the era,²³¹ made residential owners' "actions in respect of discomfort virtually impossible in the industrial Midlands and in regions such as Swansea and Cardiff."²³² The activity of the St. Helen's copper smelting company caused large quantities of "noxious gases, vapours, and other noxious matter," which diffused over the plaintiff's land, damaging the vegetation and injuring the cattle.²³³ The House of Lords upheld the Exchequer Chamber's decision that the company was liable for any physical damage but not for the deterioration of the plaintiff's comfort.²³⁴ When the cause was tried before Mr. Justice Mellor at Liverpool in 1863, "[t]he 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 a trade, and whether it was carried on in a reasonable manner.'"²³⁵ 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"²³⁶

A few paragraphs later, Lord Wensleydale neatly spelled out the court's concerns that a more stringent articulation of the reasonableness test would adversely impact 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."²³⁷

Similarly, in the United States, in pollution cases, courts deployed reasonableness tests with an eye toward economic growth, largely disregarding the costs imposed on the victims of development (i.e., workers and residential owners). The impact of nineteenth-century tort

229. *Id.* at 1118 (opinion of Willes, J.).

230. (1865) 11 Eng. Rep. 1483 (H.L.).

231. See Brenner, *supra* note 217, at 413.

232. *Id.* at 413-14.

233. *St. Helen's Smelting Co.*, 11 Eng. Rep. at 1483.

234. *Id.* at 1485.

235. *Id.* at 1484.

236. *Id.* at 1487 (opinion of Lord Cranworth).

237. *Id.* (opinion of Lord Wensleydale).

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.²³⁸ In its most controversial formulation, this thesis claims that the doctrinal development of tort law translated into a “subsidy” to the rising entrepreneurial class. This “subsidy” was coerced from the victims of economic growth and, ultimately, it increased the inequalities of wealth and power in nineteenth-century America.²³⁹ Others have objected that, depending on the industrial sector, the latter thesis is either irrelevant or false.²⁴⁰ Generally speaking, these critics note that evidence of utilitarian or growth-driven judicial reasoning is scant.²⁴¹ Further, records show that the “negligence system was applied with impressive sternness to major industries and that [courts] exhibited a keen concern for victim welfare.”²⁴² 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.

238. This view has been variously articulated, reflecting different methodological approaches and political positions. For example, Hurst argued that the development of nineteenth-century American private law promoted economic growth in that it was shaped by a variety of economic, social, geographical, and technological needs. See HURST, *supra* note 188. More specifically, it reflected: (1) the needs of emerging industry, (2) a broad consensus among the various social groups on a set of shared values, and (3) above all, “the release of individual creative human energy.” *Id.* at 5. These economic and social factors shaped private law, and tort law in particular, in the sense that they exerted “pressure” on law. Hurst assumed a complex notion of historical causation and distinguished between three types of such “pressure”: focused pressure, functional pressure, and inertia. See *id.* Friedman provides a more deterministic and materialist account of the development of nineteenth-century tort law. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (1973). 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 capitalist-entrepreneurs are the winning group. See *id.* at 350. However, the most well-known and controversial formulation of the thesis is due to Horwitz, who 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, promoted industrialization by exempting corporate enterprises from liability for the harm caused by their activity. See HORWITZ, *supra* note 45. This doctrinal shift translated into a subsidy to the entrepreneurial class, coerced from the very victims of industrialization. *Id.*

239. HORWITZ, *supra* note 45.

240. See Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1719–20 (1981).

241. Others have placed emphasis on other factors, such as the litigation costs, that, along with 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 generally Keith N. Hylton, *Litigation Costs and the Economic Theory of Tort Law*, 46 U. MIAMI L. REV. 111 (1991); McLaren, *supra* note 221.

242. Schwartz, *supra* note 240, at 1720.

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 courts usually deployed balancing tests to deny plaintiffs injunctive relief or damages.²⁴³ 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 that a judgment in favor of the plaintiff would exert on economic life. Courts' judgments of reasonableness portray a constant preoccupation with economic growth and a tendency toward "domino-effect" thinking. Typically, a judgment granting injunctive or damage relief was seen as starting 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 the decline of industrial cities and the deprivation of the benefits of urban life.²⁴⁴

Pennsylvania Coal Co. v. Sanderson, the last episode of a protracted dispute among residential owners and a coal mining company, is exemplary of courts' attitudes.²⁴⁵ The defendant, the Pennsylvania Coal Company, released large volumes of mine water into the stream flowing through the Sandersons' land, thereby polluting the water to such an extent as to render it totally unfit for domestic or agricultural purposes.²⁴⁶ The Supreme Court of Pennsylvania did not find the defendant to have abused its property rights, declining to award damages to the Sandersons.²⁴⁷ In the court's analysis, "reasonable use" was equated with "ordinary and natural use."²⁴⁸ The defendant, the court asserted, being the owners of a lot of coal land, had the right to the "natural use and enjoyment" of their property.²⁴⁹ Since coal mining in the ordinary and usual form is the "natural use" of coal land, the court concluded that any damage resulting from such natural use is, in the absence of negligence or malice, *damnum absque injuria*.²⁵⁰ 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:

243. Christine Rosen, *Differing Perceptions of the Value of Pollution Abatement Across Time and Place: Balancing Doctrine in Pollution Nuisance Law, 1840-1906*, 11 LAW & HIST. REV. 303, 313-14 (1993).

244. *Id.* at 318-20.

245. 6 A. 453 (Pa. 1886). For an extensive discussion of the *Sanderson* case, see Bone, *supra* note 22, at 1160-70.

246. *Sanderson*, 6 A. at 454.

247. *Id.* at 464-65.

248. *Id.* at 456.

249. *Id.*

250. *Id.* at 457.

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.²⁵¹

A few years later, the Supreme Court of Pennsylvania embarked on a bolder argumentation. In *Robb v. Carnegie Bros.*, 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.²⁵² 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 the defendants' property.²⁵³ The court distinguished the case from *Sanderson*: Since the land in question was not coal land, the court reasoned that the injury resulted from the defendants' decision to devote their land to the burning of coal mined elsewhere, rather than from the natural use of their land.²⁵⁴ However, Justice Williams found the selection of the location reasonable and proper.²⁵⁵ The court's discussion of the measure of the damages illustrates its developmental concerns:

The plaintiff's farm is 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, and many thousands of men are employed about, its production. It has been largely

251. *Id.* at 455. Similarly, in the *Huckenstine's Appeal*, 70 Pa. 102, 108 (1872), the court reversed the decision of the lower court, which had issued an injunction preventing the defendant from burning bricks, thereby causing injury and annoyance to the plaintiff. The defendant's use of his land, the court asserted, was a reasonable one, the land having upon it a deposit of fine brick clay which could be made into bricks for profit if this was done near the pit from which the clay was taken. *Id.* at 106. In *Doellner v. Tynan*, 38 How. Pr. 176, at *4 (N.Y. Sup. Ct. 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 that an action "does not lie for a reasonable use of my right, though it be of annoyance of another." *Id.* The court dismissed the plaintiffs' injury as mere annoyance and noted the usefulness of the blacksmith trade in urban life. *Id.* at *6. In *Rhodes v. Dunbar*, 57 Pa. 274, 285, 289 (1868), the defendants owned a mill that produced shavings, chips, and saw dust. The material used in it was highly flammable, rendering it dangerous to buildings in the vicinity. *Id.* In May 1866 the mill burned, injuring many houses in the neighborhood. *Id.* The plaintiffs sought to prevent the defendants from rebuilding the mill. *Id.* Chief Justice Thompson conceded that the species of property in question was extra-hazardous, but claimed that if carried on reasonably, the business could not be a nuisance. *Id.* Justice Thompson discussed at length the benefits and the problems of modern urban life. *Id.*

252. 22 A. 649, 650 (Pa. 1891).

253. *Id.*

254. *Id.* at 650-51.

255. *Id.* at 651.

instrumental in the development, growth, and general prosperity of the region. The plaintiff shares the general benefits . . . of these works near him These considerations should be borne in mind in adjusting the damages, if any have been sustained²⁵⁶

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 scope of market competition. Most instances of interference involved employment contracts or sales contracts, thereby calling upon 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."²⁵⁷

In cases involving business competition, reasonableness tests and malice rules were useful for governing and for stirring economic life because they limited the sphere of fair and permissible market competition. In *Dunshee v. Standard Oil Co.*, 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."²⁵⁸ The plaintiff, who sold 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.²⁵⁹ 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.²⁶⁰ The court found that the defendant had transgressed the bounds of legitimate competition.²⁶¹ While the defendant, the court conceded, had the right to establish a retail oil business and to send its agents over the same routes covered by the plaintiff, defendant ought to have exercised such right reasonably and without malice.²⁶² 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

256. *Id.* at 653.

257. PROSSER, *supra* note 86, at 927.

258. 132 N.W. 371, 374 (Iowa 1911).

259. *Id.* at 372.

260. *Id.*

261. *Id.*

262. *Id.* at 374.

consequences, justifying the worst wrongs upon the theory that 'it is business.'"²⁶³ Fortunately, Justice Weaver added:

there has for many years been a distinct and growing 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.²⁶⁴

Justice Weaver'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."²⁶⁵ Contracts were conceptualized as a form of intangible property to be protected.²⁶⁶ In *Jones v. Leslie*, the Supreme Court of Washington deployed a subjective notion of malice, defined as wanton malevolence, to protect the weaker contractual party.²⁶⁷ Significantly, however, the court's effort to "correct" the balance of power between the stronger party (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 it is fundamental 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 is an injury to the public, for it tends to produce pauperism and crime.²⁶⁸

²⁶³. *Id.* at 372.

²⁶⁴. *Id.*

²⁶⁵. Note, *supra* note 83, at 1511.

²⁶⁶. See *id.*; see also *Jones v. Leslie*, 112 P. 81, 84 (Wash. 1910); *Huskie v. Griffin*, 74 A. 595 (N.H. 1909).

²⁶⁷. 112 P. at 84.

²⁶⁸. *Id.* at 82.

Similarly, in *Huskie v. Griffin*, the Supreme Court of New Hampshire'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.²⁶⁹ The issue presented, the court noted, was "that of the existence and extent of what has come to be known as the right to an 'open market,'" a right "inherent in the idea of Anglo-Saxon liberty."²⁷⁰ Far from being an absolute right, the right to an open market is to be exercised with respect to the equal rights 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.²⁷¹

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 union interference with employment relations, courts' commitment to ensuring fairness and to protecting weaker contractual parties often translated into an effort at stifling unions' energetic activism.

A prolific literature has shed light on the powerful attack mounted against organized labor by courts alarmed by the economic power of nationally organized trade unions and state federations.²⁷² The burgeoning of new types of collective action, such as secondary boycotts, sympathy strikes, and recognition strikes, called for a prompt legal response.²⁷³ The doctrine of "malice" was part of such response. A study of the reorientation of labor law between 1886 and 1895 has shown that the concept of "malice" proved critical to constraining labor's ability to use concerted action.²⁷⁴ The interloper union was often found to have

269. 74 A. 595.

270. *Id.* at 596-97.

271. *Id.* at 598 ("One may not interfere with his neighbor'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 the 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 always 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.'" (quoting *Plant v. Woods*, 57 N.E. 1011, 1014 (Mass. 1900)).

272. See generally DANIEL R. ERNST, *LAWYERS AGAINST LABOR: FROM INDIVIDUAL RIGHTS TO CORPORATE LIBERALISM* (1995); WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (President & Fellows of Harvard Coll. 1991) (1989).

273. FORBATH, *supra* note 272.

274. Hurvitz, *supra* note 122, at 331-33.

acted maliciously rather than in the pursuit of free competition.²⁷⁵ In a similar vein, an analysis of late-nineteenth-century labor decisions in Massachusetts and Illinois has described how courts consistently relied on a circular, and apparently neutral, notion of “malice” to assert unions’ rights in the abstract while negating them in practice.²⁷⁶ Judges “refer[red] 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’s actions were not legally justified.”²⁷⁷

A widely known case of obstruction and interference with employment relations, *Walker v. Cronin*, exemplifies the use of “malice” to curb labor’s action.²⁷⁸ The defendant union agent, 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 jobs.²⁷⁹ 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.²⁸⁰ The question around which the case revolved was whether the defendant union had maliciously exercised its right to freely compete for better conditions.²⁸¹ 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 defendant’s efforts to induce the shoemakers to abandon their jobs were seen as being driven by the arbitrary and malicious purpose of causing disturbance and economic loss rather than as instrumental to broader labor objectives.²⁸² The court concluded:

Every one has a right 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

275. *Id.*

276. Ellen M. Kelman, *American Labor Law and Legal Formalism: How Legal Logic Shaped and Vitiates the Rights of American Workers*, 58 ST. JOHN’S L. REV. 1, 32 (1983).

277. *Id.*

278. 107 Mass. 555 (1871).

279. *Id.* at 556–57.

280. *Id.* at 557.

281. *See id.* at 564.

282. *See id.* at 559.

justification of any right, that is, acts of a stranger, resulting in like loss or damage, might be actionable].²⁸³

In *Vegelahn v. Guntner*, the Supreme Court of Massachusetts examined the reasonableness of the means employed by the defendants.²⁸⁴ The court found them to fall outside the compass of permissible competition, which amounted to an unlawful combination to injure the employer.²⁸⁵ 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.²⁸⁶ The employer filed a bill for an injunction restraining the workers from picketing and obstructing.²⁸⁷ Again, the critical question was whether the defendants had maliciously exercised their right to freely communicate in a public space—the sidewalk in front of the employer's premises—to improve their labor conditions.²⁸⁸ 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 affected 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.²⁸⁹

In his widely quoted dissent, Justice Holmes investigated the possible malicious nature of the defendants' combination, and he reached the opposite conclusion.²⁹⁰ 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.²⁹¹ However, Justice Holmes noted, "free competition means combination, and that the organization of the world,

283. *Id.* at 564.

284. 44 N.E. 1077, 1077 (Mass. 1896) (finding defendants interfered with 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").

285. *Id.*

286. *Id.*

287. *Id.* at 1078.

288. This was later held to be free speech. See *Thornhill v. Alabama*, 310 U.S. 88, 101-03 (1940).

289. *Vegelahn*, 44 N.E. at 1077-78.

290. See *id.* at 1081-83 (Holmes, J., dissenting).

291. *Id.*

now going on so fast, means an ever increasing might and scope of combination.”²⁹²

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 *Moore & Co. v. Bricklayers' Union*, 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.”²⁹³ Justice Taft concluded that the defendant’s purpose, when assessed in light of the “normal operation of the right to labor” (i.e., the securing of worker’s wages and employment terms), appeared malicious. Such a 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.²⁹⁴ Justice Taft’s opinion is riddled with anxiety. Boycotts, a new and effective form of organized action, 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.²⁹⁵ Others have analyzed the imaginative metaphorical language developed by judges to deal with boycott cases.²⁹⁶ 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*:

If a large body of irresponsible men demand and receive power outside of law, over and above 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.²⁹⁷

Although less inventive than Justice 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

292. *Id.* at 1081.

293. 10 Ohio Dec. Reprint 665, 673 (1889).

294. *Id.*

295. See, e.g., ERNST, *supra* note 272.

296. See, e.g., GARY MINDA, *BOYCOTT IN AMERICA: HOW IMAGINATION AND IDEOLOGY SHAPE THE LEGAL MIND* (1999).

297. 8 A. 890, 894 (Conn. 1887).

to the prosperity of the community, and subversive of the peace and good order of society.”²⁹⁸

Did the equivalents of abuse of rights operate as dangerous “social 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, the abuse of rights equivalents were used to allocate and shift roles and costs between the various actors of the nineteenth century’s 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.²⁹⁹

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 proponents against critics of the doctrine, Anglo-American legal scholarship showed tepid interest for the continental *quenelle*. 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.³⁰⁰ Similarly, in the 1910 issue of the *Harvard Law Review*, F. P. Walton of McGill University accurately laid out the main positions in the French debate, contrasting the different

298. *Moore & Co.*, Ohio Dec. Reprint at 675 (quoting *Crump v. Commonwealth*, 6 S.E. 620 (Va. 1888)).

299. See Bone, *supra* note 22.

300. Ames, *supra* note 72, at 417.

articulations of the doctrine by Josserand, Saleilles, Charmont, and Esmein.³⁰¹

Further, “malice” was at the center of a vibrant transatlantic conversation. Michael Taggart suggests in his study of *Bradford v. Pickles* that for a twenty-year period spanning the turn of the twentieth century, 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.”³⁰² 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 (as an alternative to Classical Legal Thought), and, ultimately, the choice between competing models of socioeconomic 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 reorganization 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 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, they argued that there are instances in which individuals are permitted to exercise their rights maliciously or unreasonably, even if others are injured. The question of “malice” is the question of defining these instances and is, ultimately, a question of policy.

301. F. P. Walton, *Motive as an Element of Torts in the Civil Law and in the Common Law*, 22 HARV. L. REV. 501, 502 (1909).

302. TAGGART, *supra* note 38, at 167; see RICHARD A. COSGROVE, *OUR LADY THE COMMON LAW: AN ANGLO-AMERICAN LEGAL COMMUNITY, 1870–1930* (1987). 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 World War I, and then declined until about 1930, when it ceased to attract loyalty on either side of the Atlantic. See *id.*; TAGGART, *supra* note 38.

In an article on malicious torts published in 1884, Henry Terry integrated malice in a conceptual scheme that reflected the most sophisticated analytical tradition.³⁰³ Terry's scheme sought to show that there is a general duty not to act maliciously that is subject to exceptions motivated by reasons of policy and justice.³⁰⁴ 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; instead, the answers depend 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.³⁰⁵ 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. He outlined a threefold classification of legal duties: peremptory duties, duties of reasonableness, and duties of intention.³⁰⁶ Duties of intention 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.³⁰⁷ Malice means an intention to cause harm or damage to another, the harm or damage as such being the very thing desired.³⁰⁸

Further, Terry distinguished between two types of rights.³⁰⁹ Permissive rights are liberties to act or to refrain from acting. However, there is no corresponding duty on others not to interfere with permissive rights.³¹⁰ Protected rights, on the other hand, describe the legal condition of a person for whom the law protects a condition of fact by imposing duties on others.³¹¹ 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.³¹² In rights of pecuniary condition the protected condition of fact is the holding of value or purchasing power in some form.

303. Henry T. Terry, *Malicious Torts*, 20 LAW Q. REV. 10 (1904).

304. *Id.* at 10-12.

305. *Id.* at 10.

306. *Id.* at 11.

307. *Id.* at 11-12.

308. *Id.* at 12.

309. *Id.* at 12-13.

310. *Id.*

311. *Id.* at 13-14.

312. *Id.* at 14-15.

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.³¹³

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 element in the cause of action, and the questions will arise, what is malice? and what is the legal duty as to malicious conduct?³¹⁴

However, even in this hypothesis, Terry added, malice might be irrelevant, the question being whether there is any exception to that duty.³¹⁵ There may be good reasons why a particular class of cases should be excepted out of the general rule; the applicability of these exceptions “is to be decided upon grounds of justice or policy special to each class of cases.”³¹⁶

To sum up: when malice is alleged, the question 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. This depends not on any theory of malice, but on considerations of justice and policy.³¹⁷

A decade later, the appearance of Holmes’s article *Privilege, Malice and Intent* marked a shift in the conceptualization of malice.³¹⁸ Holmes’s conceptualization of malice further developed Terry’s idea that, in certain 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.”³¹⁹ Holmes’s 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 by according malice a central role. Holmes’s 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

313. *Id.* at 15.

314. *Id.* at 20.

315. *See id.* at 23–24.

316. *Id.* at 24.

317. *Id.* at 26.

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

319. *Id.* at 3.

fault.³²⁰ The general purpose of the law of torts, Holmes argued, is to secure a man against certain forms of harm, not because they are wrong but because they are harms.³²¹ 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.³²² The continuum was organized according to the degree of foreseeability of the harm, rather than on any subjective notion of fault.³²³ 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. Malicious torts were assimilated into the broader category of intentional torts. Holmes noted that there were certain harmful acts which may be 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.³²⁴

Privileged malicious acts and strict liability functioned as the two extremes that proved the irrelevance of any subjective moral standard of liability:

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.³²⁵

The echo of Holmes's 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 to Holmes, warning him that “[y]ou will recognize in my armoury some weapons of your own forging.”³²⁶ Pollock's distinction between causes of action based on intentional conduct, negligent conduct, and strict liability mirrored Holmes's continuum.³²⁷ Further, similar to Terry and Holmes, he emphasized the range of situations in which injury is legally permitted without

320. *Id.*; Oliver Wendell Holmes, Jr., *The Theory of Torts*, 7 AM. L. REV. 652 (1873) [hereinafter Holmes, *Theory of Torts*]; see OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 77–163 (Boston: Little, Brown & Co. 1881) [hereinafter HOLMES, *COMMON LAW*].

321. Holmes, *Theory of Torts*, *supra* note 320, at 652–55.

322. *Id.* at 654.

323. *Id.* at 653.

324. HOLMES, *COMMON LAW*, *supra* note 320, at 144–45.

325. *Id.* at 145.

326. FREDERICK POLLOCK, *THE LAW OF TORTS*, at vii (1887).

327. *Id.* at 7–17.

compensation.³²⁸ 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 if it causes damages.”³²⁹ 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.³³⁰

By the 1890s, Holmes had revised his conceptual structure of tort law, hanging 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*.³³¹ 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 liability; still in other cases, the actor may even intend to do the harm and yet not have to answer for it.³³² “[T]he 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.”³³³ When acting with just cause, the actor is privileged to inflict the damage.³³⁴ Motive affects claims of privilege.³³⁵ Actual 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.³³⁶ Two years later, in his famous dissent in *Vegelhan v. Guntner*, Holmes restated the gist of the problem of malice.³³⁷ In countless instances, Holmes noted, “the law warrants the intentional infliction of temporal damages because it regards it justified.”³³⁸ The true grounds of justification, he continued, “are considerations of policy and

328. See *id.* at 21–46, 129–38.

329. *Id.* at 130.

330. *Id.* at 21–46, 129–38.

331. See Holmes, *supra* note 318.

332. *Id.* at 4–5.

333. *Id.* at 3.

334. *Id.*

335. See *id.* at 5–7.

336. *Id.* at 3.

337. 44 N.E. 1077, 1080 (Mass. 1896) (Holmes, J., dissenting).

338. *Id.*

of social advantage . . . Propositions as to public policy rarely are unanimously accepted . . . ”³³⁹

While at the conceptual level, the debate on malicious torts was 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 presented American jurists with the task of modifying and attuning their reasoning techniques.³⁴⁰ 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, including logical deduction and rudimentary forms of policy analysis that we have seen deployed by the courts, were to be abandoned or refined. Terry, Holmes, Ames, and 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. Leatham* . . . 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 questions 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 fact arising out the new and complicated conditions of modern life. . . . [T]he 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

339. *Id.*

340. 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. See Gordon Stoner, *Influence of Social and Economic Ideals on the Law of Malicious Torts*, 8 MICH. L. REV. 468 (1910). 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 noted, were best equipped for this daunting task. *Id.* at 469. Quoting Justice Park in *Mirehouse v. Rennel*, Stoner argued that English common lawyers aim at “uniformity, consistency and certainty.” *Id.* Their mode of reasoning consisted of the mechanical application of rules derived from judicial precedents, and their ultimate goals were the rigor and coherence of legal science. *Id.* Justice Park’s words are contrasted with Justice Elliott’s bold organicist act of faith in *Tuttle v. Buck*. See *id.* at 478. (citing *Tuttle v. Buck*, 119 N.W. 946, 947 (Minn. 1909)). American courts, Stoner suggested, aimed to adapt to social needs rather than uniformity and consistency. See *id.* 470. Their reasoning techniques and their familiarity with policy questions enable them to facilitate law’s constant adaptation to changing conditions. *Id.*

engage in, which must be based on broad considerations of justice and policy, with little help from precedents or theory.³⁴¹

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 out that questions of privilege and malice call for analytic choices among alternative considerations of policy or justice.³⁴² 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.³⁴³ 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 favor. 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, 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 defendant 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.³⁴⁴

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,³⁴⁵ Holmes envisaged his theory of intentional tort as a crucial tool for governing industrial warfare, furthering the cause of peaceful trade

341. Terry, *supra* note 303, at 26.

342. Holmes, *supra* note 318.

343. Duncan Kennedy & Marie Claire Belleau, *Le place de René Demogue dans la généalogie dépensée juridique contemporaine*, 56 REVUE INTERDISCIPLINAIRE D’ÉTUDES JURIDIQUES 163 (2006).

344. Holmes, *supra* note 318, at 6.

345. See 44 N.E. 1077, 1081 (Mass. 1896) (Holmes, J., dissenting).

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 explored the question of justification, attuning the scheme of intentional tort to recent labor cases.³⁴⁶ Smith set forth four requisites for the validity of “just cause or excuse” in labor cases: pertinence, reasonable fitness, proportionality, and direct conduct.³⁴⁷ First, “[t]here must be a conflict of interest between plaintiff and defendant as to the subject matter in regard to which the damage is done.”³⁴⁸ Second, “[t]he damaging act must be reasonably calculated to substantially advance the interest of the defendant.”³⁴⁹ Third, the resulting damage must be proportional to the benefit to the defendant.³⁵⁰ Fourth, “the justification must be confined to those cases where [the] defendant uses only his own conduct as a lever,” rather than an outsider’s conduct.³⁵¹

Upon closer inspection, Smith’s fourfold guide to justification is a restrictive approach to certain sophisticated forms of labor struggle, such as secondary boycott, because the direct conduct requirement rules out any labor activity that relies on a third party. While Smith notes that the right to abstain from work is absolute, it cannot be used to induce a third person to take action damaging to the plaintiff. Moreover, the reasonable fitness and proportionality requirements 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.³⁵²

Ultimately, the debate over malicious torts grew into a broader clash over different models of socio-economic development and power

346. Jeremiah Smith, *Crucial Issues in Labor Litigation I*, 20 HARV. L. REV. 253 (1907). It is impossible to have any clear discussion of the crucial labor cases, he contended, unless “we either discard certain ambiguous expressions altogether or distinctly indicate the meaning intended to be affixed to them.” *Id.* at 255. 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. *Id.* at 256–57. While intent is often material to the question of the defendant’s liability, “the cases where motive is material are comparatively rare.” *Id.* at 259. Smith quotes Ames’s articulation of the doctrine of intentional tort as an accurate representation of the law: In Ames’s words,

“The willful causing of damage to another by a positive act, whether by one 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; . . .”

Id. at 263 (alteration in original) (quoting Ames, *supra* note 72, at 412).

347. Smith, *Crucial Issues II*, *supra* note 131, at 361–62.

348. *Id.* at 361.

349. *Id.*

350. *Id.*

351. *Id.* at 361–62.

352. *Id.* at 362.

relations among social actors. Gordon Stoner noted in 1909 that judicial decisions and juristic conceptualizations in the area of malicious torts reflect changes in the public opinion, registering variations in political, economic, and ethics ideas.³⁵³ Stoner's survey of different lines of cases involving business competition, boycotts, and closed shops evinced a marked shift in thinking. Rather than focusing on individualistic thinking committed to absolute rights and freedom of action, courts adopted a social outlook that weighed individual rights against societal welfare. Stoner was eager to denounce the asymmetry between courts' treatment of malice in labor cases and cases involving business competition.³⁵⁴ 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), while disregarding the ultimate motive (i.e., the result which the actor wishes to effect not by the act itself but as part of a broader strategy).³⁵⁵

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 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.³⁵⁶

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 prices 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.³⁵⁷

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.³⁵⁸ While fear of an increase in labor power leads

353. Stoner, *supra* note 340, at 479.

354. *Id.* at 475–77.

355. *Id.*

356. *Id.* at 479–80.

357. *Id.* at 480.

358. *See id.*

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 is evidenced in 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.³⁵⁹

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 of competition, and the principle of equality before the law. 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 was clear that the competitive system is threatened from many quarters.³⁶⁰ Courts' treatment of unions' malicious competitive activity posed the greatest danger to individual freedom and industrial liberty. The doctrine of the closed shop was being surreptitiously established and the courts seemed to be abdicating their task of "protecting the freedom of the individual against the oppression of the combination."³⁶¹ Unionizing and boycotting, Wyman claimed, pose a despotic and tyrannical threat to individual liberty, their efficacy resting on the overpowering force of numbers.³⁶² 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 for the lowest wages, unionizing means less efficient services and increasing wages. In a crescendo of anxiety, Wyman warned 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."³⁶³

CONCLUSION

The story of abuse of rights in the United States speaks to contemporary private lawyers called to rethink the nature and role of private law in the era of postnational sovereignty and the crisis of social

359. Wm. Draper Lewis, *The Closed Market, the Union Shop, and the Common Law*, 18 HARV. L. REV. 444, 447 (1905).

360. Bruce Wyman, *The Maintenance of the Open Shop*, 17 GREEN BAG 21, 21 (1905).

361. *Id.*

362. *Id.* at 25.

363. Wyman, *supra* note 21, at 221.

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.³⁶⁴ Others have 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.³⁶⁵ This Article suggests that comparative law may help foster private lawyers' imagination by casting light on the potentialities and limits of the revival of abuse of rights as a tool for redressing distributive inequalities.

The examination of American nineteenth-century abuse of rights theories and cases, I believe, provides contemporary reformers with two cautionary tales. 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 private law.

Second, abuse of rights may fail to deliver progressive distributive outcomes. In the nineteenth and early-twentieth century, American cases show that abuse of rights resulted in highly diverse and ambiguous outcomes, and only occasionally redressed distributive asymmetries.

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-democratic compromise. Called to simultaneously ensure market efficiency and nonexploitative distributive outcomes, private law was re-organized according to a binary structure "rights/will + corrective." Abuse of rights, good faith, unconscionability, and the labor contract

364. See, e.g., UNGER, *supra* note 10.

365. Cf. Waldron, *supra* note 10, at 510 (finding "unconvincing Unger's description of the way legal analysis can become a catalyst for change of the institutional imagination of society").

were conceived as “correctives” allowing the effective enjoyment of rights and mitigating the most blatant distributive inequalities.³⁶⁶

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 private³⁶⁷ (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.³⁶⁸ A “freedom-promoting” private law, capable of expanding the set of viable options an individual faces and of redressing 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.³⁶⁹

366. The “un-making” of private law is described by Jay M. Feinman, *Un-Making Law: The Classical Revival in the Common Law*, 28 SEATTLE U. L. REV. 1 (2004).

367. On the developments of twentieth-century private law, see Daniela Caruso, *Private Law and State-Making in the Age of Globalization*, N.Y.U. J. INT’L L. & POL. (2006); Daniela Caruso, *The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration*, 3 EUR. L.J. 3 (1997); 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, *Semantics of European Law*, 5 EUR. L.J. 114 (1999); and Peer Zumbansen, *The Law of Society: Governance Through Contract*, 14 IND. J. GLOBAL LEGAL STUD. 191 (2007).

368. See Yochai Benkler, *Freedom in the Commons: Towards a Political Economy of Information*, 52 DUKE L.J. 1245 (2003); James Boyle, *The New Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33 (2003); Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237 (2005); UNGER, *supra* note 10.

369. Purdy, *supra* note 368, at 1238–41.