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# CLASSICAL SOCIAL THEORIES AND THE DOCTRINE OF "ABUSE OF RIGHT"

Shael Herman\*

## I. INTRODUCTION

The writer determined to complain about something had better start with the name. So it is with commentators on the doctrine of "abuse of right." For a good marksman it is an excellent target. Planiol, who opposed the doctrine, called the formula "abusive use of rights" a logomachy, "for if I use my right, my act is licit; and when it is illicit it is because I exceed my right. . ."<sup>1</sup> French writers such as Demogue,<sup>2</sup> Capitant,<sup>3</sup> and Ripert<sup>4</sup> as well as the English scholar Gutteridge<sup>5</sup> doubted the possibility of elaborating a theoretical basis of the doctrine. Even the doctrine's defenders, like parents embarrassed at their child's *faux pas*, have apologized for its clumsy formulation. According to Professor Cueto-Rua, the terms "abuse of right" or "abusive use of right" are baffling, contradictory expressions without clear, definite meaning.<sup>6</sup> To worsen matters, the notion of "abuse of right," as it crosses national boundaries, has undergone judicial and legislative reformulations, sometimes slight and sometimes fundamental. For example, Swiss Civil Code Article 2 prohibits *manifest* abuses of right (*l'abus manifeste d'un droit*). By contrast, German cases involving the "abuse of right" doctrine may arise under the chicane term of Bürgerliches Gesetz-

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1. 2 PLANIOL, CIVIL LAW TREATISE, no. 871 (La. St. L. Inst. transl. 1959); this passage appears in Cueto-Rua, *Abuse of Rights*, 35 LA. L. REV. 965, 974-75 (1975) [hereinafter cited as Cueto-Rua]. I rely in this article upon a variety of arguments and citations from Dr. Cueto-Rua's scholarly essay.

2. See DEMOGUE, 4 TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 363 (1924), cited in Cueto-Rua, *supra* note 1, at 971 n.15.

3. See Capitant, D.P. 1926.3.10, cited in Cueto-Rua, *supra* note 1, at 971 n.15.

4. See G. RIPERT, LA RÈGLE MORALE DANS LES OBLIGATIONS CIVILES 195 (3d ed. 1935); Ripert, *Abus ou relativité des droits*, 49 REV. CRIT. LEG. ET JURISPR. 33, 57 (1929). Both works were cited in Bolgár, *Abuse of Rights in France, Germany and Switzerland: A Survey of a Recent Chapter in Legal Doctrine*, 35 LA. L. REV. 1015, 1017 n.7 (1975) [hereinafter cited as Bolgár]. Like Professor Cueto-Rua, Professor Bolgár has given us an excellent piece with helpful citations and arguments.

5. See Gutteridge, *Abuse of Rights*, 5 C.A.M.B. L.J. 22, 42 (1933), cited in Cueto-Rua, *supra* note 1, at 972 n.15.

6. See Cueto-Rua, *supra* note 1, at 974.

buch (B.G.B.) Article 226,<sup>7</sup> the “*Guten Sitten*” (public policy) clause of Bürgerliches Gesetzbuch Article 826,<sup>8</sup> or the “*Treu und Glauben*” (good faith) clause of Bürgerliches Gesetzbuch Article 242.<sup>9</sup>

A skeptic might ask why anyone would bother to analyze a doctrine when even its name cannot be nailed down. Assuming the Romanist’s viewpoint, is not “innominacy” a sign that the subject is too amorphous for coherent elaboration? Yet Professor Cueto-Rua suggests that “abuse of right” is a serviceable term because legal scholars generally understand it in terms of its referential function.<sup>10</sup> This view is reminiscent of Holdsworth’s account of how English lawyers persisted in arguing cases in French long after 1362, the year in which Parliament enacted a statute requiring that all cases “shall be pleaded, shewed, defended, answered, debated and judged in the English tongue”: the English gentry had “no knowledge nor understanding of that which is said for them. . . .”<sup>11</sup> The medieval English lawyers’ use of French terminology transformed it from a colloquial language changeable by popular usage to a technical language with precise meanings for the legal profession alone. As the phrase “abuse of rights” has acquired a technical meaning among legal scholars, convenience is reason enough to retain the name here, although we shall see that its judicial adoption demands more justification than convenience alone.

One theme of this essay is that debate about the meaning of the doctrine and the desirability of its application is generated by conflicting views of human nature and social responsibility. Stated briefly, “abuse of right” occupies the intersection of positive law and morals. These broad assertions are unsusceptible of empirical proof. But they are true in the sense that they explain why this essay is an unsuccessful search for a coherent framework by which to analyze the doctrine of “abuse of right.”

When the adoption of a doctrine is discussed, the debaters should do more than assert that it is a good idea because this or that legal system follows it. I believe that my own efforts to elaborate a theoretical basis are worth recounting for the same reasons that social scientists report conclusions on null hypotheses. First, such a report prevents the self delusion that a

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7. “The exercise of a right is unlawful, if its purpose can only be to cause damage to another.” (Forrester transl. 1975)

8. “A person who wilfully causes damage to another in a manner contrary to public policy is bound to compensate the other for the damage.” (Forrester transl. 1975)

9. “The debtor is bound to effect performance according to the requirements of good faith, giving consideration to common usage.” (Forrester transl. 1975)

10. See Cueto-Rua, *supra* note 1, at 976.

11. 2 HOLDSWORTH, HISTORY OF ENGLISH LAW 477-78 (1927).

doctrine is "valid" though we have little information about its consequences. Second, the failure may challenge another writer, as Josserand's and Planiol's assertions challenged me, to produce a coherent theoretical analysis of the doctrine. Third, the failure to lay a coherent foundation underscores the conclusion that there is little if any agreement about such basic notions of a legal system as *value* and *society*.

In this essay I explore the implications of the views of three theorists: Planiol, a principal antagonist of the doctrine; Josserand, the doctrine's chief proponent; and Robert Paul Wolff, an American philosopher whose writings on value and society supplied many of the insights which appear hereafter. Each writer's view is analyzed in light of the celebrated *Clément-Bayard* case. Repetition of the facts in successive contexts is intended to bring into sharp relief the contrasts among the theories as well as their inherent flaws.

## II. THE LIBERAL SLOGAN: LE DROIT CESSE OÙ L'ABUS COMMENCE<sup>12</sup>

Any analysis of the doctrine of "abuse of right" must take into account Planiol's highly individualistic remark: "The law stops where the abuse begins."<sup>13</sup> Professor Bolgár correctly interprets Planiol's phrase to mean that "there can be no abuse of rights if they were exercised within the limits of the law that granted these rights."<sup>14</sup> Planiol's statement, presumably a product of a formalistic approach to codal interpretation, necessarily implies that all acts must be classified strictly as licit or illicit; the latter class creates liability while the former does not. In this view, liability cannot arise from a right holder's malice, cruelty, or egoism as long as he does not exceed his right.<sup>15</sup>

Planiol's view is rooted in the philosophy of classical individualistic liberalism, which has dominated laissez-faire economic theory. Classical liberal theorists such as Mill contrast self-regarding or private actions belonging to an inner sphere with other-regarding or public actions belonging to a public sphere.<sup>16</sup> In his private sphere, the individual is portrayed as

12. See text at note 1, *supra*.

13. 2 M. PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL (11th ed. 1939), n°871, cited in Bolgár, *supra* note 4, at 1016 n.5.

14. Bolgár, *supra* note 4, at 1016.

15. This highly individualistic view is echoed in several key English decisions cited in Cueto-Rua, *supra* note 1, at 967-68.

16. For the general sketch of liberal thought, see J. BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart ed. 1970); J.S. MILL, ON LIBERTY (1859) [hereinafter cited as MILL]. Less apparent, although equally important, is my reliance on the treatment of utilitarianism in J. RAWLS, A THEORY OF JUSTICE (1971).

the inhabitant of a sanctuary within which he may think as he wishes and act as he chooses so long as he does not invade the sanctuaries of his fellow citizens. In this social model, the rule of law acts as a fence assuring each citizen's private domain against invasion by both physical trespasses and psychological annoyances such as interference with his moral and theological sentiments. In the private sector, there is never any justification for society to meddle. However, the state *may* invade the individual's *public* sector, but only when another is harmed and then only on the condition that a utilitarian justification for the intrusion can be supplied.<sup>17</sup> Here "utilitarian justification" means that society can take action toward an individual only to promote the greatest happiness for the greatest number.

In the liberal view, society itself is the intersection of all individuals' public spheres. Society is envisioned as a market place where everyone pursues his private goals to the greatest extent compatible with analogous pursuits by others. As in any market place, each individual is his own best judge of what is good for him, and something is good *because he has chosen it*, not because it has intrinsic worth.

It is evident that the liberal theory of the state rests on a conception of human nature. In its most primitive, hedonistic form, men are conceived as rationally calculating maximizers of pleasure and minimizers of pain. The good is equated with the pleasant, the bad with the painful; and the state's task is to achieve the greatest happiness or good for the greatest number. Rationality is thus reduced to a calculating prudence. If this theory of egoism is accurate, then each individual in pursuit of his private ends must

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The sources of inspiration for this article are R. P. WOLFF, *THE POVERTY OF LIBERALISM* (1969) [hereinafter cited as WOLFF]; R.P. WOLFF, B. MOORE & H. MARCUSE, *A CRITIQUE OF PURE TOLERANCE* (1965) [hereinafter cited as WOLFF, MOORE & MARCUSE].

17. MILL, *supra* note 16, at 21-22: "[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise or even right. These are good reasons for remonstrating with him or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him, must be calculated to produce evil to some one else. The only part of the conduct of any one, for which he is amenable to society is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign."

view others as mere instruments. Wolff has illustrated the foregoing postulates of liberal theory with graphic descriptions of human consciousness:

As I formulate my desires and weigh the most prudent means for satisfying them, I discover that the actions of other persons, bent upon similar lonely quests, may affect the outcome of my enterprise. In some cases, they threaten me; in others the possibility exists of a mutually beneficial cooperation. I adjust my plans accordingly, perhaps even entering into quite intricate and enduring alliances with other individuals. But always I seek my own pleasure (or happiness—the shift from one to the other is not of very great significance in liberal theory, although Mill makes much of it). For me, other persons are obstacles to be overcome or resources to be exploited—always means, that is to say, and never ends in themselves. To speak fancifully, it is as though society were an enclosed space in which float a number of spherical balloons filled with an expanding gas. Each balloon increases in size until its surface meets the surface of the other balloons; then it stops growing and adjusts to its surroundings. Justice in such a society could only mean the protection of each balloon's interior (Mill's private sphere) and the equal apportionment of space to all. What took place within an individual would be no business of the others.<sup>18</sup>

This is a stark vision of society, if "society" means anything at all. Liberal theory arguably sacrifices a coherent definition of society in favor of a coherent description of the individual. Society is seen as a collection of individual centers of consciousness, each pursuing its own gratification and confronting the others as beings standing over against the self—that is, as objects. As classical liberalism assumes all values are private values to be privately sought, society emerges as an "aggregation of Robinson Crusoes who have left their islands of private value merely for the instrumental benefit of increasing their enjoyment through mutually beneficial exchange."<sup>19</sup>

### III. THE CLÉMENT-BAYARD CASE IN A LIBERAL FRAMEWORK

With this vision of liberal society in mind, we turn to the celebrated Clément-Bayard affair.<sup>20</sup> In that case, one Coquerel had erected on his land large fences topped by tall spikes, which endangered the dirigibles of the

18. WOLFF, MOORE & MARCUSE, *supra* note 16, at 28.

19. WOLFF, *supra* note 16, at 172.

20. Req., August 3, 1915, D.P.III.1917.1.79; a longer account of the facts appears in Cueto-Rua at 981.

adjoining landowner, Clément-Bayard, whenever they passed through the airspace above Coquerel's tract. In fact, one dirigible had already been pierced by a spike when Clément-Bayard filed suit asking that Coquerel be ordered to remove the spikes and to pay damages. Coquerel answered that he had erected the spikes for private economic advantage, *i.e.*, to encourage the plaintiff to pay him a handsome profit for his land. He further asserted that his malice toward Clément-Bayard was only an incidental motive. The court ordered the removal of the spikes and fences on the following rationale:

If it is permissible for the proprietor of an estate to seek the highest possible price, and if the speculation itself is a perfectly licit act, it still may be done only if the means used to realize [the profit] are not illegitimate and inspired exclusively by a malicious intention.<sup>21</sup> (translation by author)

In accordance with liberal doctrine, the court did not deny the legitimacy of Coquerel's private quest for financial gain ("the speculation . . . a perfectly licit act"). If Coquerel, like a lonely Robinson Crusoe, could legitimately satisfy his economic appetite so long as he stayed on his island of private value, then what justified the court's assumption that it could legitimately assess his private malice toward Clément-Bayard? Indeed, Coquerel arguably acted at all times within his own private sphere because Clément-Bayard's damages, either real or threatened, resulted from passing *his* dirigibles across Coquerel's land while Coquerel remained passive. If these arguments are correct, then the court's intrusion into the defendant's private domain was unwarranted.

To continue the analysis, however, let us assume that the court's intrusion was proper because Coquerel's act, as the cause of Clément-Bayard's loss, fell into his public sphere. (As already suggested, this is a difficult leap because Clément-Bayard's damages could easily be viewed as a result of *his* venturing into Coquerel's airspace.) Even with this assumption, the court must still show that its assessment of Coquerel's acts can be justified on a utilitarian basis, *i.e.*, that its decision against Coquerel would increase the total happiness of society, defined as the sum of all pleasures of all individuals. To reach this decision in a methodologically proper way, the court must inventory the redistributions of pain and pleasure resulting to the parties and the state. Naturally, Coquerel would be sadder for he would

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21. "[S] 'il est loisible au propriétaire d'un fonds de chercher à en tirer le meilleur parti possible, et si la speculation est par elle-même et en elle-même un acte parfaitement licite, ce n'est qu'à la condition que les moyens employés pour la réaliser ne soient pas . . . illégitimes et inspirés exclusivement par une intention malicieuse.'"

lose his prospective profit as well as the price of demolishing the spikes, the chance to torment Clément-Bayard, and his time and money in vain litigation. Clément-Bayard would be happier, of course, for he would no longer be tormented; but the degree of his happiness could not be assessed unless the success of his dirigible operation could be forecast accurately. In addition to the redistribution of pains and pleasures to the parties, the court must inventory public costs and benefits, *i.e.*, tax dollars spent to entertain the prolonged litigation, costs of supervision of the execution of judicial orders, and the potential (though questionable) benefit to be derived generally from Clément-Bayard's dirigible operation. By now, it should be clear that a judge must engage in a great deal of guesswork to assign units of pleasure and pain to all parties concerned. This technique of utilitarian justification, integral to the liberal view, is inherently unstable, and the calculations are nearly impossible.

To demonstrate this instability let us change only one fact in the Clément-Bayard case. Assume that there were already tall sharp objects on Coquerel's land before Clément-Bayard opened his dirigible hangar. Confronted with this single chronological change, the court could not have figured its pain-pleasure calculus. The utilitarian justification for invasion of Coquerel's public sphere would disappear even though all other physical and psychological factors including Coquerel's malice and greed remained constant. Coquerel's greed would be cancelled out by Clément-Bayard's own economic appetite. Coquerel's malice would be "outweighed" by Clément-Bayard's stupidity in believing that a court would order demolition of pre-existing objects. We can readily see that a court must engage in an activity besides a mechanical pleasure-pain inventory if minor factual modifications such as this could lead to Coquerel's victory. But the decision does not disclose the nature of that other activity.

To bring into focus the inadequacy of utilitarian justification, let us now assume that Coquerel admitted that he indeed had erected the spikes out of malice but claimed that the spikes were actually radio aerials indispensable to a scientific experiment which could lead directly to a valuable patentable invention for himself and incidentally to a significant breakthrough for everyone. In effect, Coquerel would justify his spite in the name of scientific progress. He would also point out that Clément-Bayard was likewise infected by greed and incidentally anticipated some social value from his dirigibles. Coquerel could then claim that, as his intentions were not "exclusively malicious"<sup>22</sup> (in the court's own terms), he should not be

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22. See text at note 21, *supra*; compare BGB art. 226, note 7, *supra*.

penalized. Planiol's strict classification of conduct into licit and illicit acts would fortify Coquerel's position.

#### IV. THE CONSERVATIVE VIEW: JOSSERAND'S THEORY OF RELATIVE RIGHT AND ITS APPLICATION TO CLÉMENT-BAYARD

As the leading French proponent of the doctrine of "abuse of right," Louis Josserand elaborated a position nearly diametrically opposed to that of Planiol. In *DE L'ESPRIT DES DROITS ET DE LEUR RELATIVITÉ: THÉORIE DITE DE L'ABUS DES DROITS*, Josserand maintained that the legislator has conferred rights upon individuals with specific social aims in mind. In his view, rights are relative, not absolute. Against Planiol's licit-illicit distinction, a product of formal application of a codal norm, Josserand argued that a right must be determined by a functional reading of the code. Consequently, the state should sanction a right only to the extent that its exercise conforms with its social purpose.

Applying Josserand's thesis to the Clément-Bayard case, we find that Article 544 of the Code Napoleon is the main legislative text requiring interpretation:

Ownership is the right to enjoy and to dispose of things in the most absolute manner, provided they are not used in a manner prohibited by law or regulations. (translation by author)

As we shall see, both parties justifiably regarded Article 544 as the basis for their claims. Presumably the court did not find the sort of positive prohibition against Coquerel's actions which Article 544 requires. On the contrary, the court regarded Coquerel's speculation as "perfectly licit." Coquerel could undeniably claim that he was enjoying his land in a "most absolute" (though unneighborly) manner. In this case even the most insightful judge could not derive the "true" social purpose of Article 544, which attempts an accommodation of competing interests among which the judge cannot make an informed choice. Josserand's notion of "social purpose," seemingly a guide for the court, is as flawed as the liberal approach, though in different ways. His thesis can stand only if we can be convinced that: (1) the legislator, in defining rights, had specific social aims in mind; (2) the social purposes of rights are objectively knowable and constant; and (3) the purposes embodied in the rights can be derived from the legislation even when the words of the legislation provide no clue concerning its social purpose.

Empirical data cannot be marshalled in support of these propositions.

Either we know them *a priori* or we do not. If the judge claimed to know the law's social purpose, he would imperil his neutral posture for he must openly acknowledge that he understood social needs in ways inaccessible to laymen and even lawyers. His process of divining the law's "true purpose" would force him in many instances to disregard the letter of a statute in favor of its spirit. While "divination" accurately might describe the undisclosed judicial process in the Clément-Bayard case, we cannot know that with certainty. All we do know is that the court resorted to the unsupported assertion that Coquerel's spikes were absolutely without utility.

#### V. LIBERAL AND CONSERVATIVE IDEOLOGIES CONTRASTED

Josserand's theory of social purpose shatters precisely when it must be strong; his notion of the general welfare is unclear because he does not show that values or purposes can be other than purely personal. A liberal theorist might dismiss Josserand's view as naive because he has assumed that society is qualitatively distinct from the sum of individual wills. But to dismiss Josserand so quickly would be wrong. His view, consistent with a view of community expounded by Burke and Durkheim, derives from the ancient and fundamental insight of Aristotle's *Politics* that men are by nature social beings intended to live in a political community bound together by rational discourse and shared values. As Aristotle stated:

The proof that the state is a creation of nature and prior to the individual is that the individual, when isolated, is not self-sufficing; and, therefore, he is like a part in relation to the whole. But he who is unable to live in society, or who has no need because he is sufficient for himself, must be either a beast or a god: he is no part of a state.<sup>23</sup>

According to conservative theorists, liberalism makes the mistake of supposing that man is no more than a combination of the bestial and the angelic, the passionate and the rational. Although prudence and passion may combine to make the liberal theorist's rational pleasure maximizer, they do not make a man, whose specific mode of existence is social. In opposition to the liberal portrait of men as unsociable Robinson Crusoes doomed to solitude, conservative theorists argue that the involvement of people with each other is a strength, not a threat.

#### VI. WOLFF'S EXPLANATION OF THE SOCIAL GOOD

Although surrounded by liberal theorists, Wolff claims that the key to

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23. ARISTOTLE, *Politics* (Jowett transl.), in 2 THE WORKS OF ARISTOTLE 446 (Ross ed. 1952).

understanding the general good is "community."<sup>24</sup> To allay the liberal's fear that "community" entails the totalitarian postulation of an imaginary "group mind" with its own interests and goals, Wolff builds his theory of community upon a distinction between private and interpersonal values, which liberalism does not account for. In the process of developing this distinction, Wolff provides a bridge between the views of Josseland and Planiol and incidentally offers some interesting insights into the Clément-Bayard case.

Assuming momentarily the role of a liberal theorist, Wolff describes a simple private value as a

*possible object of interest whose definition makes essential reference to the occurrence of a state of consciousness in exactly one person. For example, suppose that I want the warm feeling that comes from a sip of brandy. The definition of the object of my interest would be "the warm feeling that comes from a sip of brandy". . . there is an essential reference here to a state of consciousness, namely that warm feeling.*<sup>25</sup>

But, argues Wolff, an inventory of all private values does not exhaust the universe of values. For example:

[S]uppose that Jones hates Smith and wants to see him suffer. What precisely is the object of Jones' interest? It would *not* be correct to answer, Smith's pain, for what Jones wants is to *see* (i.e. to know about) Smith's suffering. Jones' goal . . . then, is *His knowing that Smith is suffering*. This definition is not reducible to a private value; it is really an *interpersonal value because it is a possible object of interest whose definition makes essential reference to a thought about another person's state of consciousness.*<sup>26</sup>

And if Jones wants Smith to know that he enjoys seeing him suffer, the result is a reciprocal state of awareness among two persons. By postulating a reciprocity of awareness, Wolff establishes the foundation for a category of values outside the liberal universe of purely personal ones. And if some values are interpersonal, not purely personal, then there is an untapped reservoir of *social values which may be possible objects of the public interest*.

Wolff then distinguishes three kinds of community which can be parts of the public or social interest: *affective community*, the reciprocal con-

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24. See generally WOLFF, *supra* note 16, at 162-95.

25. *Id.* at 170.

26. *Id.* at 174-76 (quote and paraphrase).

sciousness of a shared culture and history; *productive community*, a reciprocal satisfaction in men's coming to know each other through cooperation in collective productive activity; and *rational community*, in which each member of society must recognize his fellow citizens as rational moral agents and must freely acknowledge their right (and his) to reciprocal equality in political dialogue. Against the liberal view that a free society is good as a *means* to the efficient satisfaction of private interests, Wolff urges that a free society is a good as an end in itself.<sup>27</sup>

Taking the notion of "productive community" as illustrative of his thesis, Wolff argues that when a group of workers builds a car, their satisfaction is not wholly in the product or profit of their labor. They can derive satisfaction specifically from working with each other in pursuit of a common goal or in production of a collective product. Playing in an orchestra, for example, yields more than an individual wage or an audience's applause. There is a real, present satisfaction in playing in concert with others—a reciprocity of awareness. Liberal and conservative views of society can be seen in terms of contrasting metaphors: in the former, society is viewed as a combative market place; in the latter, society has the potential for a pleasurable reciprocity of awareness yielded by playing together. Drives toward virtuosity must yield to the harmonious function of the whole. In Josserand's legal terms, rights and duties become relativized.

This relativization of rights may not be especially palatable to liberal theorists. But at least the liberal theorist's reduction of society to the sum of individual wills is impossible in the face of Wolff's postulation of interpersonal values.

#### VII. THE CLÉMENT-BAYARD CASE IN WOLFF'S ANALYTIC FRAMEWORK

By now, one despairs of ever finding a methodologically sound approach to the Clément-Bayard case, and I do not claim that Wolff's value distinction provides the whole answer. Yet, Wolff's analytic framework deserves attention precisely because his private-interpersonal distinction in value supplies a basis for a notion of public interest absent in the liberal conception. In the Clément-Bayard case, Coquerel's desire for the greatest possible profit from selling his estate would fit Wolff's definition of a *simple value* because his desired economic gain is an object of interest essentially referring to his own conscious sense of greed. While his hard bargaining might incidentally irritate Clément-Bayard, thereby affecting the con-

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27. *Id.* at 185-95.

sciousness of the latter, Coquerel's dominant objective is Clément-Bayard's money. Even if Clément-Bayard were dead, Coquerel could presumably satisfy his conscious greed by selling his land to Clément-Bayard's heirs.

Unlike his greed, Coquerel's malice toward Clément-Bayard is not a simple private value: it involves Coquerel's state of consciousness as well as Clément-Bayard's state of consciousness. Presumably Coquerel hates Clément-Bayard and wants to see Clément-Bayard suffer. It would not be correct to characterize Coquerel's object as Clément-Bayard's pain because Coquerel wants to *know* that Clément-Bayard is suffering. Coquerel's goal is *his knowing that his tall spikes* torment Clément-Bayard. This definition of value is qualitatively different from a simple private value because it makes essential reference to states of consciousness in two persons, Coquerel's knowing and Clément-Bayard's suffering. Coquerel's consciousness participates in Clément-Bayard's consciousness. In fact, if Coquerel wants Clément-Bayard to know that he enjoys witnessing the latter's suffering, then Clément-Bayard's consciousness also participates in that of Coquerel. In Wolff's scheme, Coquerel's malice is really an *interpersonal* value.

To fill out the series of possible values, there must be one illustration of a value which is both private and interpersonal. Suppose Coquerel can show a genuine possibility that his tall spikes will lead to a scientific breakthrough. Coquerel's purely personal value is the profit derived from a patentable invention; but assuming he is a philanthropist toward everyone except Clément-Bayard, the interpersonal value lies in his knowing that he has made others happy. To use Wolff's approach to value, a court, instead of adding all individual pleasures together in conformity with liberal theory, would have to separate the private values from the interpersonal (or social) values, perhaps adding them in separate columns. In this state of affairs, the utilitarian calculus would become ludicrous, for how could a court assign a value to the pleasure Coquerel derives from Clément-Bayard's suffering?

The establishment of a category of interpersonal values is the first step toward a judicial recognition of public interest qualitatively different from the liberal definition of public interest as the sum of all individuals' private interests. The doctrine of "abuse of right" arguably recognizes the existence of real social values, *i.e.*, objects of the public interest whose actualization is appropriately identified as the public good.

But is there a methodologically sound way to identify these objects of public interest? Wolff does not take us this far. The judge, confronting again the facts of the Clément-Bayard case, faces the unhappy task of *simply asserting or denying* that Coquerel's malice is an interpersonal value

antagonistic to the affective community.

By contrast, a court might characterize Clément-Bayard's prospective advances in aviation as a positive contribution to the productive community. But here Wolff's approach collapses, for the judge would also have to recognize the avarice of both Coquerel and Clément-Bayard, the former because he sought the best price for his land and the latter because he sought profit from his dirigible operation. If both parties suffered from the same private need for gain, the judge would be in a quandary for he must decide whose greed to prefer. By means of hypothetical facts (*i.e.*, that Coquerel's tall spikes were already erected when Clément-Bayard began his dirigible operation, that Coquerel's tall spikes were really radio aerials important to a significant scientific experience),<sup>28</sup> I have tried to show the perils of stating this judicial preference. Given these additional facts, a judge might ignore the question of the parties' greed altogether and apply some maxim such as "leave the parties as you find them" or "first in time, first in right." Unable to forecast scientific progress, he might decide in the name of social stability to protect the party who (fortuitously?) began his experiment first.

#### VIII. CONCLUSION

Neither Josserand, Planiol nor Wolff provides a methodologically sound approach to identifying the objects of public interest, although Wolff's explanation of public interest may explain how the Clément-Bayard case was actually decided. Faced with the problem of human greed, the court collides head-on with the central philosophical problem presented by the doctrine of "abuse of right": reconciliation of individual freedom with community cohesion.

The liberal view, by premising human conduct on the satisfaction of private value, accounts for the human antagonism of private wills. It underscores individuality, a basic aspect of human nature. But liberal theory fails to account for the human impulse toward sociability, and thus it fails to account for social stability. As Unger suggests, "in liberal society every collective agreement and every allocation of power are ultimately experienced as fragile and even illegitimate."<sup>29</sup> All socially stable patterns—from marriage to national allegiance—are seen in flux.

In contrast to the liberal view, the conservative view of community espoused by Josserand and Wolff draws vitality from sociability, another fundamental aspect of human nature. But the conservative theory fails to

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28. See text at note 22, *supra*.

29. R. UNGER, *LAW IN MODERN SOCIETY* 264 (1976).

account for change and conflict among competing individual wills, and it does not explain why this conflict is a permanent feature of our experience. In a sense, this essay confirms the doubts of those who opposed the "abuse of right" doctrine on the ground that its theoretical foundations could not be elaborated. But it is important to keep in mind the suggested reason for this failure: the radical incoherence of our conceptions of value and society. Such concepts require much deeper analysis than they have generally received in legal scholarship. Although I have not elaborated the doctrine here, perhaps this essay can serve as a challenge to another writer to do so. And perhaps it can provide food for thought to the judge or legislator called upon to adopt the doctrine of "abuse of right."