

1997

Continuing Classroom Conversation Beyond the Well-Placed "Whys?"

Bailey Kuklin

Jeffery J. Stemple

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/faculty>



Part of the [Law and Philosophy Commons](#), and the [Torts Commons](#)

Recommended Citation

29 U. Tol. L. Rev. 59 (1997)

This Article is brought to you for free and open access by BrooklynWorks. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of BrooklynWorks.

CONTINUING CLASSROOM CONVERSATION BEYOND THE WELL-PLACED "WHYS?"

Bailey Kuklin and Jeffrey W. Stempel***

"Four well-placed 'whys?' will stop any conversation."

—George Santayana¹

INTRODUCTION

LAWSchool classes regularly prove Santayana's aphorism. Although nearly every law teacher desires to keep discussion focused and forward-moving, there are more than a few moments of thundering silence experienced in the classroom. Most of us adjust to this inevitability by positing some pedagogical virtue to still air and contenting ourselves with the knowledge that conversation-stopping "whys?" are usually delivered by us as teachers rather than the students. Perhaps we are underappreciative of the value discomfiting silence has, but we generally prefer that the conversation continue, that we miss the opportunity to feel simultaneously smug and uncomfortable, and that students be both more reflective and expansive in class.

In our view, much of the "conversation-stopping" occurs because students are insufficiently grounded in the background knowledge necessary to carry a discussion of a case, statute, or problem beyond the four corners of the text under review. This problem is different from the normal absence of legal information that necessarily befalls law students.² The latter problem is to be expected. But less expected, or hoped for, is the typically inadequate briefing on other information useful for studying the law. At the outset of legal education, cases and concepts often strike students as having an air of inevitability that tends to stifle or suppress critical thinking. Judges, after all, normally portray their conclusions as inescapable. Because of this, the proverbially well-placed "why?"—not directly answerable by resorting to the text of the appellate opinion—tends to silence the class. Even in

* Professor of Law, Brooklyn Law School.

** Professor of Law, Florida State University College of Law. We wish to thank Deans Joan Wexler, Don Weidner, Paul LeBel and the faculties of the Brooklyn Law School and Florida State College of Law for assistance and ideas. This article, which was supported by Brooklyn and Florida State research stipends, is dedicated to our students, no matter what they say about us on the evaluation forms.

1. Attributed to George Santayana.

2. For example, a student reading an older tort case on contributory negligence (e.g., *Baker v. Bolton*, 170 Eng. Rep. 1033 (1808)) will be unable to draw specifically upon decisions to the contrary in favor of comparative negligence (e.g., *Li v. Yellow Cab Co.*, 532 P.2d 1226 (Cal. 1975)). Similarly, reading the first negligence case involving a defective product, a student cannot be expected to consider strict liability as an alternative liability regime since the student has yet to encounter such cases and realistically will not be able to "think up" this possibility without first having further experience with tort law (and perhaps a client in need of this liability regime as well).

advanced classes, silence may reverberate if the students have not mastered the resources from which diverse views can be mined.

Although students cannot be expected to begin with enough law and legal history to maintain a critical perspective in the face of the portrayed certainty of assigned cases, students with some background in the underlying factors of the law and some analytic insight can arrive at their own criticisms and assessments once they become confident enough to believe they can. Armed with sufficient tools, students can learn to become the discerning critics that classic legal education has been assumed to produce. Adequately grounded, students can do more than reproduce legal doctrine and internal debates about law, they can learn to advance beyond the conclusory rhetorical force of the cases. They can learn—as can we—to continue meaningful conversation in the face of well-placed “whys?.” Not forever, of course, as the postmodernists insist,³ for ultimately Santayana’s aphorism prevails at a point calling for an active choice rather than a passive, necessary conclusion (e.g., “because the law here subscribes to utilitarian reasoning”). But at this point, the students are in a position to broadly survey the entire legal terrain, if not its as-yet-unlearned structures, perceiving its breadth and depth, and understanding why legal reason ends where it does.

We felt strongly enough about this view to write a book supporting it,⁴ one that contends law today is dramatically molded by our learning regarding ethics, economics, political theory, American government structure, the adversary system, and (not surprisingly) jurisprudential movements.⁵ Therefore, we argue, most legal subjects can be effectively analyzed by reference to this broader learning. Because it reveals the pervasive forces molding the law, making the law more explicable, predictable and coherently moldable, we believe that law schools owe it to their students to ensure that they all are exposed to these basic foundational concepts. Assessing legal outcomes according to only, or even primarily, a decision’s internal consistency and relation to precedent and statute eliminates too much potential for teaching students to become discerning consumers of law rather than merely vessels

3. For a general introduction to postmodernism, see generally CHRISTOPHER NORRIS, *WHAT’S WRONG WITH POSTMODERNISM* 1-48 (1990); STEPHEN TOULMIN, *COSMOPOLIS* 5-44 (1990).

4. See generally BAILEY KUKLIN & JEFFREY W. STEMPEL, *FOUNDATIONS OF THE LAW: AN INTERDISCIPLINARY AND JURISPRUDENTIAL PRIMER* (1994).

5. Which means, of course, that not all of what we regard as key background information is extralegal in traditional thinking. But we here emphasize what falls outside the traditional boundaries. Much important jurisprudential writing is done by nonlawyers (e.g., Rawls). In the end, we subscribe to Stanley Fish’s suggestion that these nontraditional sources be considered part of disciplinary, rather than interdisciplinary, studies:

[The so-called interdisciplinary studies] are engaging in straightforwardly disciplinary tasks that require for their completion information and techniques on loan from other disciplines, or they are working within a particular discipline at a moment when it is expanding into territories hitherto marked as belonging to someone else—participating, that is, in the annexation by English departments of philosophy, psychoanalysis, anthropology, social history, and now, legal theory; or they are in the process of establishing a new discipline, one that takes as its task the analysis of disciplines, the charting of their history and of their ambitions.

STANLEY FISH, *Being Interdisciplinary Is So Very Hard to Do*, in *THERE’S NO SUCH THING AS FREE SPEECH* 231, 242 (1994).

for absorbing legal runoff. In particular, the standard case and problem methods of classroom instruction will be enriched by injecting foundational considerations and critique.⁶

Embracing multidisciplinary perspectives, as an instrument, when closely examining course material cuts two ways. In one direction, the instrument is a microscope through which students will gain deeper insight into the law in general and specific issues. In the other direction, by looking through the instrument from the vantage point of the legal materials, it becomes a telescope through which the students will gain deeper insight into the nature and reach of these multidisciplinary materials. By struggling with the merits of a complex issue, students will better master the tools provided by ethics, economics, political theory, governmental structure, dispute resolution, jurisprudence, etc. Then, the comprehensive study becomes a two-way street. In both directions, the road leads to greater knowledge and understanding.

Of course, saying that one will bring this benefit to the table and doing it are two different things. Even though we modestly believe our book successfully records the essence of what law students should know of this background information, we are left with the nagging question of how to transfer this information from written expositions to student cognition and classroom discourse about cases, legislation, and legal policy.⁷ For the most part, our approach has been annoyingly reminiscent of an athletic shoe advertising slogan in that we have told ourselves and our students to "Just Do It."⁸ When we tried to reduce this aspect of our pedagogy to writing,⁹ we found ourselves taking essentially the same tack. After further experience and reflection, however, our annoyance turned, if not to exuberance, at least to a comfortable resignation.

6. This idea, of course, is not new, but is frequently neglected or forgotten. One of the primary "establishment" legal figures subscribed to the foundational approach.

To sum up. I should put as the content of a good legal education:

- (1) A solid all round cultural training, with the grasp of significant information which such a training involves, but much more with the broadening and deepening of experience and ability to appraise information to which it leads.
- (2) A grasp of the ends of technique of the social sciences—this only; for beyond that what has been taught in their name has been short-lived.
- (3) A grasp of the history and system of the common law, of the outline and ends of the legal order, of the theory and ends of the judicial and administrative processes, and of the history, organization, and standards of the legal profession.
- (4) A thorough grasp of the organization and content of the authoritative legal materials of the time and place and of the technique of developing and applying them.

Roscoe Pound, *What Is a Good Legal Education?*, 19 A.B.A. J. 627, 631 (1933).

7. Or perhaps the converse is true: students may first find multidisciplinary material important to class discussion and thereby more easily absorb the assigned reading of such material.

8. If only we were confident that we were as successful as the advertising slogan! See DONALD A. KATZ, *JUST DO IT: THE NIKE SPIRIT IN THE CORPORATE WORLD* 145-46 (1994) (noting the "just do it" slogan and accompanying ad campaign catches the fancy of the public and enters popular discourse).

9. See generally BAILEY KUKLIN & JEFFREY W. STEMPEL, *TEACHER'S MANUAL TO ACCOMPANY FOUNDATIONS OF THE LAW: AN INTERDISCIPLINARY AND JURISPRUDENTIAL PRIMER* (1994) [hereinafter *TEACHER'S MANUAL*].

Experience and reflection have not shaken our earlier conviction that virtually any legal datum can be placed under the edifying microscope provided by an understanding of foundational factors. Effecting deeper and more critical student understanding does not require dramatic changes in classroom format or course organization. Yet, enriched multidisciplinary consideration of law can occur even as the traditional classroom and, by this time, clinical law school courses, continue to evolve into newer models.

To illustrate these points, we examine a classic case, *MacPherson v. Buick Motor Co.*,¹⁰ found in many casebooks on legal process,¹¹ torts,¹² and products liability.¹³ The opinion, written by the esteemed Benjamin Cardozo,¹⁴ is surely among the most famous and influential in American law.¹⁵ In spite of that,¹⁶ *MacPherson* reads matter-of-factly as though the court is simply situating the instant case in one column of precedent finding liability rather than in another column of precedent finding no liability. If *MacPherson* was not prominently featured in casebooks, the typical student happening upon it in a regional reporter would probably pass it by as unimportant or as flowing obviously from more important precedents. Examining *MacPherson* from new angles, we can highlight both the importance of this "stealth" decision and the tensions within legal policy imbedded in the decision.

Prior to the examination of *MacPherson*, we briefly review the traditional methods of law school teaching and the modern critique. We omit detailing the multidisciplinary considerations, for we have done so elsewhere and believe that our use of them in questioning *MacPherson* indirectly brings out the necessary points. Next, we examine the facts and reasoning of the case, situating it within the existing precedent. But, like Cardozo, we omit policy discussion at this point. Then, we get

10. 111 N.E. 1050 (N.Y. 1916).

11. See, e.g., RUGGERO J. ALDISERT, *THE JUDICIAL PROCESS* 354 (2d ed. 1996); ROBERT N. COVINGTON ET AL., *CASES AND MATERIALS FOR A COURSE ON LEGAL METHODS* 140 (1969); HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 545 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); HARRY W. JONES ET AL., *LEGAL METHOD: CASES AND TEXT MATERIALS* 163 (1980); R. RANDALL KELSO & CHARLES D. KELSO, *STUDYING LAW: AN INTRODUCTION* 92 (1984); STEPHEN B. PRESSER & JAMES S. ZAINALDIN, *LAW AND JURISPRUDENCE IN AMERICAN HISTORY* 860 (3d ed. 1995).

12. See, e.g., GEORGE C. CHRISTIE & JAMES E. MEEKS, *CASES AND MATERIALS ON THE LAW OF TORTS* 579 (2d ed. 1990); RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 733 (6th ed. 1995); MARC A. FRANKLIN & ROBERT L. RABIN, *TORT LAW AND ALTERNATIVES: CASES AND MATERIALS* 473 (6th ed. 1996); MARK F. GRADY, *CASES AND MATERIALS ON TORTS* 317 (1994); JAMES A. HENDERSON, JR. ET AL., *THE TORTS PROCESS* 563 (4th ed. 1994); PAGE KEETON ET AL., *TORT AND ACCIDENT LAW: CASES AND MATERIALS* 635 (2d ed. 1989); JOHN W. WADE ET AL., *PROSSER, WADE AND SCHWARTZ'S CASES AND MATERIALS ON TORTS* 695 (9th ed. 1996).

13. See, e.g., DAVID A. FISCHER & WILLIAM POWERS, JR., *PRODUCTS LIABILITY: CASES AND MATERIALS* 4 (1988); JAMES A. HENDERSON, JR. & AARON D. TWERSKI, *PRODUCTS LIABILITY: PROBLEMS AND PROCESS* 10 (2d ed. 1992); W. PAGE KEETON ET AL., *PRODUCTS LIABILITY AND SAFETY* 48 (2d ed. 1989).

14. See generally RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 74-91 (1990) (explaining that Cardozo is held in "high repute" as one of the most prominent figures in American law).

15. See *id.* at 109 ("*MacPherson* is Cardozo's most important opinion in terms of impact on the law.").

16. Or, perhaps, because of that. See *id.* at 105-13 (discussing that *MacPherson* has been so influential in large part because the style of the opinion portrays the case as nonrevolutionary).

to the heart of the matter by asking the "whys?" that direct attention to the multidisciplinary background topics we have addressed elsewhere. These "whys?" are not all "well-placed" in that an understanding of the legal background will allow the conversation to continue beyond them. Although our exploration is most applicable for legal process, torts, or products liability courses (or a seminar on Cardozo), we believe its methodology can be imported profitably into any law school course. Finally, we offer a few caveats about using the multidisciplinary approach across the curriculum.

I. FRAMEWORKS FOR ASSESSING CLASSROOM MATERIAL

A. *The Traditional Law School Classroom and Modern Change*

Implicit in our discussion is the notion that most law school courses continue to approach teaching based on the Langdell case method in which the bulk of discussion in each class focuses on a few select cases.¹⁷ The professor usually follows what has come to be termed the "modified Socratic style" in which the instructor calls on students to discuss leading or exemplary cases. Even under the "problem method," in which hypotheticals (often based on actual cases) relating to excerpted cases, statutes and other materials are central, the problems are usually addressed as if they were cases under the modified Socratic style. The procedure remains Socratic to the extent that the questioning is designed to elicit from students an analysis of the case or problem, a distillation of the legal principles emerging from it, and the possible applications of these principles to various hypothetical scenarios.

The prevailing procedure differs from that used a generation earlier in that the modern instructor often poses questions to the class as a whole and seeks volunteers, rather than picking a student at random and mercilessly staying with him or her regardless of that student's level of preparation or understanding. In essence, this is a kinder, gentler version of John Osbourne's Professor Kingsfield,¹⁸ but it is

17. Undoubtedly, other cases are touched upon because they are mentioned in the main cases or the notes which follow in the casebook. We do not suggest that during the average law school class the student learns about only two or three cases. We do suggest that most of the class period revolves only around a few cases.

Certainly, students all too frequently act as if the highlighted cases are the be-all-and-end-all of legal education. We know of many students who essentially admit that virtually all of their class preparation time is spent immersing themselves in the major cases slated for class discussion. Some admit to never reading the notes or other coursebook material during the school year.

18. See JOHN OSBOURNE, *THE PAPER CHASE* (1971). As a result of the success of Osbourne's book, a major motion picture, and a short-lived television series based on it, Kingsfield (played irascibly and exquisitely in the movie by the late John Houseman) has for both laypersons and incoming law students become the archetype of the stern, but wise, traditional Socratic professor. More recent personal accounts of law school education have softened Kingsfield around the edges but have continued to reflect the first-year student's anxiety and initial awe at encountering new material of such volume and difficulty. See, e.g., CHRISTOPHER GOODRICH, *ANARCHY AND ELEGANCE: CONFESSIONS OF A JOURNALIST AT YALE LAW SCHOOL* (1991) (reflecting angst even when focusing on the warm and humane Guido Calabresi rather than a Kingsfield-style professor); SCOTT TUROW, *ONE L: A STUDENT'S FIRST YEAR AT HARVARD LAW SCHOOL* (1977) (describing legal education with breathless suspense that fits much better rhetorically with the murder trial plot in his later bestseller, *Presumed Innocent* (1987)).

essentially still the case method with Socratic question-and-answer exposition of the material.

Since the culmination of legal realism's partial conquest of law, traditional Langdellian methods have undergone change. Cases are no longer the sole focus of legal education. The realists moved away from the basic Langdell-style casebook that only contained unabridged appellate opinions. Instead, they edited the main cases and provided some commentary on them, introductory essays to topics, related statutes, and discussion and excerpts from other cases and secondary sources, such as restatements, treatises and law review articles.¹⁹ But even the "new" post-realist casebook retains a core of prominently excerpted appellate opinions—providing the star around which the other materials orbit.

The classrooms reflect the casebooks, or vice versa. Irrespective of the reach of supplemental materials, the focus of most classroom discussion is the prominently excerpted cases or case-like problems. Like B.F. Skinner's birds, students quickly respond to reward incentives and soon learn to touch lightly upon any other assigned material, perhaps skipping it altogether. Some are so candid as to ask us point blank whether they must do the other assigned reading.²⁰

Regarding the tenor of classroom discussion, today's classroom dialogue seems to indicate that the cases are held in less awe than in yesteryear. Certainly, legal scholars no longer speak the language of Langdellian high formalism. But budding lawyers do not spring fully-matured, Athena-like, from the pages of law reviews. They come from society at large, which still holds a simplistic view of the legal system and speaks of the "rule of law" as though it is a cross between a religious talisman and a stop sign: all-powerful and pure, yet easy to see and understand. Each fall, we should not be as surprised as we are to find beginning students expecting to be taught "the law" as though our task was merely to wheel stone tablets into the classroom.

The new law student often, perhaps usually, arrives with a mindset akin to what Roscoe Pound called "mechanical jurisprudence."²¹ Law is largely viewed as a set of rules to be learned and then applied, something like the declension of verbs. But as soon as the rules are challenged or the application becomes exacting, this conception of law fails them. All it takes is a few "whys?" such as, "Why shouldn't a manufacturer be liable for personal injuries caused by its product irrespective of any contractual relationship with the injured party?" or, "Why shouldn't a promise in an advertisement generally be treated as an offer?" Too many students reply to

19. See LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960*, at 92 (1986); Jeffrey W. Stempel, *All Stressed Up But Not Sure Where to Go: Pondering the Teaching of Adversarialism in Law School*, 55 *BROOK. L. REV.* 165, 168-69 (1989) (reviewing STEPHAN A. LANDSMAN, *READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION* (1988)).

20. Although this often punctures our balloon of holding oracular status in the eyes of students, we usually resist the tendency to reply with a snappy Don Rickles/Richard Lewis type answer, such as, "No, we just assigned it to make sure we get kickbacks from the publisher," or "No, this is just part of our way of testing your ability to separate the wheat from the chaff." Eventually, again like Skinner's birds, we learn to make occasional reference in class to the assigned reading to fend off such questions.

21. See Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 *HARV. L. REV.* 489, 489-95 (1912).

such queries with some variation of "Because that's the law." This, obviously, will not do. To grasp what will do, to transcend tautology, to get beyond the bare text of cases and statutes, they must understand what generates and sustains the law.

Ironically, the new students' mechanistic view of the law often accompanies an incipient legal realism. When the veneer of a case is pierced, their first response may be to label all inconsistency with precedent, internal difficulty, or perceived unfairness as the result of personnel on the court, shifting political winds of the Harris Poll variety, or personal quirks of the bench. To the extent it reduces the new students' excessive credulity, this is progress of sorts. However, it misses a key aspect and, for us, the most interesting, edifying aspect of the art and politics of law. It overlooks the differing, quite defensible intellectual and value orientations within and across societies over time.

It seems clear to us that despite the progress of legal education in the twentieth century, too many students are simply not sufficiently versed in the currents energizing the law to intelligently delve much beyond the superficiality of the black letter. That is the bad news. Most of us (old-timers) were in the same boat. The good news is that law students, like everyone else, perform better when given the right equipment. With a basic grounding in the law's undercurrents (law school is not too late for this), we have found that students become better consumers of law. They are able to retain and use the law more effectively while evaluating the legal products with greater sophistication, thereby being better prepared to become law producers as well. At least, this is our wholly unbiased perception based on the essentially traditional and case-dominated courses we have taught (i.e., civil procedure, contracts, insurance, professional responsibility, property, torts, and legal process).

Although one of the heartening developments in modern legal education is a proliferation of different types of courses and teaching styles, we do not believe this diversity undermines our call for greater use of multidisciplinary foundational grounding and analysis. Indeed, it may work in the opposite direction. To begin with, as noted above, variations of the case method continue to be the focus and fulcrum of legal education. Even in required courses using nontraditional methods, cases still usually form the core of the material though the students may be engaged in practicum activities. Primary authorities also retain their places outside the basic required courses, even in many seminars. But these courses are just as amenable to improvement when students have better tools for processing the legal data. For example, jurisprudential writings assigned in a seminar are as much in need of foundational analysis as are appellate cases. John Rawls,²² Robert Nozick,²³ Ronald Dworkin,²⁴ Catherine MacKinnon,²⁵ Richard Posner,²⁶ and Patricia Williams²⁷ are as

22. See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

23. See, e.g., ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1975).

24. See, e.g., RONALD DWORKIN, *FREEDOM'S LAW* (1996); RONALD DWORKIN, *LAW'S EMPIRE* (1986); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978).

25. See, e.g., CATHERINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989).

26. See, e.g., RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990) [hereinafter POSNER, *JURISPRUDENCE*]; RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985).

27. See, e.g., PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).

subject to scrutiny as are *Marbury v. Madison*,²⁸ *Hawkins v. McGee*,²⁹ *Pennoy v. Neff*,³⁰ or *The Wagon Mound Cases*.³¹ Just like leading cases, acclaimed scholars can be better understood, appreciated, and even criticized by students who have grasped the undercurrents of the law.

Other nontraditional approaches to legal education are also susceptible to multidisciplinary strengthening. Clinics, simulations, research and writing, advanced advocacy, as well as the problem method mentioned above, are among those that would be enriched by a broad perspective. Ethical, economic, political, governmental, structural, historical, sociological, psychological, and jurisprudential currents energize the law from top to bottom, side to side, inside and out. Because alternative approaches to teaching the law must still confront the law itself, one must ultimately grasp the same roots to gain deep understanding from any direction.

Whatever the final reception of documents such as the MacCrate Report,³² which many have read as a call for substantial revisions to legal education,³³ that reception is unlikely to alter legal education so as to diminish the importance of the foundational concepts. Well into the twenty-first century, legal education will still focus on cases, statutes, scholarship, and disputes. Law is both a product and a source of such matter. Even though the modern law school classroom has changed, and will continue to do so, the need for an enriched basis for student understanding remains.

28. 5 U.S. (1 Cranch) 137 (1803).

29. 146 A. 641 (N.H. 1929). This is the memorable "hairy hand" case immortalized in Osbourne's *Paper Chase* and featured in several casebooks.

30. 95 U.S. 714 (1877). This was a controlling case at one time, now advancing an almost extinct view of personal jurisdiction, reprinted in virtually every civil procedure casebook. See, e.g., RICHARD L. MARCUS ET AL., *CIVIL PROCEDURE: A MODERN APPROACH* 667 (2d ed. 1995); JOHN J. COUND ET AL., *CIVIL PROCEDURE: CASES AND MATERIALS* 65 (6th ed. 1993). Well, this may not be a completely extinct view. See *Burnham v. Superior Court*, 495 U.S. 604, 638-39 (1990) (holding personal service of process on defendant within forum state satisfies due process despite defendant's limited contact with forum state).

31. *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g Co. (The Wagon Mound (No. 1))*, 1 App. Cas. 388 (P.C. 1961); *Overseas Tankship (U.K.) Ltd. v. The Miller Steamship Co. (The Wagon Mound (No. 2))*, 1 App. Cas. 617 (P.C. 1967). These mid-20th century Australian cases on the proximate cause element of negligence are found in many torts casebooks. See, e.g., EPSTEIN, *supra* note 12, at 531-42 (6th ed. 1995); WADE, *supra* note 12, at 297-304.

32. AMERICAN BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: *NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM* (1992) [hereinafter MacCrate Report].

33. To some extent, we disagree that the MacCrate Report is a clarion call for massive reform. Good law teaching, even in the large classroom setting, has already been imparting the skills and values endorsed in the MacCrate Report. To the extent the MacCrate Report recommends more hands-on, task-specific legal education designed to build skills and professional judgment, it obviously seeks some shift from traditional classroom teaching to smaller practicum style classes, simulations, and clinics, as well as more emphasis on legal writing and research. But even aggressive implementation of such a system seems to involve not so much a radical revision as an extension of existing educational efforts. Doing it the MacCrate way, however, would probably require a student-faculty ratio thought too luxurious by most law schools.

B. *The Foundational Concepts*

In *Foundations of the Law*, we discuss in a brief and simplified fashion six major areas of background information directly affecting law. In our view, this material is sufficiently central to understanding law and the legal system as to comprise a minimum "legal literacy" for law students.³⁴ We hope to avoid the impression that we encourage rote memorization of it by students. Law school is not a three-year version of "Jeopardy" or "The \$64,000 Question" (although knowing facts worked pretty well for the young Dr. Joyce Brothers as a contestant). Rather, we encourage students to master enough truly essential background material to be astute and discriminating processors of the legal information pouring down on them in law school. While ideally students (and faculty) should be masters of a vast body of knowledge about society and its values, legal education can only provide so much. We believe legal education should, at a minimum, provide an introduction to the most basic and useful building blocks for law study. These topics, in our opinion, are: ethics, economics, political theory, government structure, dispute resolution and the adversary system, and jurisprudence as reflecting the zeitgeist. We will not summarize these topics here for we believe the reader is generally acquainted with them and, if desired, can examine our book and others for expositions. Instead, we will point out many of the highlights of the topics by raising them in context.

II. DIFFERENT VIEWS OF A FAMOUS CATHEDRAL: *MACPHERSON V. BUICK MOTOR CO.*

Closely examining a particular case with the tools of multidisciplinary analysis will illustrate the degree to which increased understanding may flow from broadened foundational knowledge. The case chosen, *MacPherson v. Buick Motor Co.*,³⁵ authored by Judge Benjamin Cardozo, is a classic of the tort-warranty-contract interface in products liability law. Because of Cardozo's mastery of putting new wine in old skins, *MacPherson* reads largely like a routine application of established precedent to somewhat varied facts. But close analysis, using multidisciplinary considerations, reveals *MacPherson* to be a far-reaching landmark. It provides an opening for class discussion of the larger debate about legal liability and, indeed, about the law and the legal process itself. Like the revelations from Monet's paintings at different times of the facade of Rouen Cathedral,³⁶ scrutinizing *MacPherson* from a range of perspectives highlights different facets of the decision.

34. See E.D. HIRSCH, JR., CULTURAL LITERACY 146, 152-219 (1987) (listing people, events, scientific terms and literature that culturally literate Americans should know). We further address the relation of Hirsch's conception of core knowledge to law's foundations in our TEACHER'S MANUAL, *supra* note 9, at 2-5.

35. 111 N.E. 1050 (N.Y. 1916).

36. We echo, of course, the article by Calabresi and Melamed that examines legal entitlements according to the nature of the entitlement. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1127-28 (1972).

A. MacPherson: *The First Quiet Revolution in Products Liability*

Donald MacPherson purchased a Buick automobile from a local dealer. "One of the wheels was made of defective wood, and its spokes crumbled into fragments" as the car "suddenly collapsed" and MacPherson "was thrown out and injured."³⁷ MacPherson sued Buick for personal injuries. Buick argued that, since it had not sold the car directly to MacPherson, the parties were not in privity of contract and, therefore, it was free of liability. In addition, Buick noted that the wheel had been made by a subcontractor, and that this also should insulate Buick from liability, even though, according to the court, there was evidence that the wheel's "defects could have been discovered by reasonable inspection, and that inspection was omitted."³⁸ There was no claim that Buick "knew of the defect and willfully concealed it."³⁹

The plaintiff did not advance his claim as one of fraud or warranty. Rather, *MacPherson* was a "simple" negligence case presenting the difficult issue of whether a manufacturer is liable to a consumer for a defective product when there is no privity between them. The general rule in New York and other states, stemming from the leading case of *Seixas v. Woods*,⁴⁰ which embraced the doctrine of caveat emptor, and was influenced by the English case of *Winterbottom v. Wright*,⁴¹ was that producers were not liable for negligence to third parties.⁴² This was because, under the later reasoning of courts, the producers' "conduct, though negligent, was not likely to result in injury to any one except the purchaser."⁴³ Cardozo's majority opinion, while suggesting that England had backed away from this strict view,⁴⁴ rested its finding for MacPherson on existing New York case law that recognized an exception for certain dangerous products to the rule barring producer liability in the absence of privity.⁴⁵

The New York Court of Appeals paid obeisance to the doctrine of *Winterbottom* in *Thomas v. Winchester*,⁴⁶ even though the doctrine was declared inapplicable under the particular facts of *Thomas*.⁴⁷ Plaintiff Thomas and his wife prevailed in their claims against a drug manufacturer that had affixed an erroneous, misleading label to a poisonous product. The product was ultimately sold to Thomas via a middleman

37. *MacPherson*, 111 N.E. at 1051.

38. *Id.*

39. *Id.*

40. 2 Cai. R. 48 (N.Y. Sup. Ct. 1804).

41. 152 Eng. Rep. 402 (Ex. 1842).

42. 111 N.E. at 1055 (Bartlett, C.J., dissenting) (citing 2 COOLEY ON TORTS 1486 (3d ed. 1906)).

43. *Id.* at 1051.

44. *Id.* at 1052-53. Cardozo cited the more recent British case of *Heaven v. Pender*, L.R., 11 Q.B.D. 503, 510 (1883), which he read as suggesting that England now employs reasonable foreseeability of use by the plaintiff as its touchstone for imposing a duty of due care.

45. MacPherson received a favorable jury verdict at trial, which was affirmed by the appellate division, 145 N.Y.S. 462 (N.Y. App. Div. 1914), before being affirmed by the Court of Appeals per Cardozo's opinion. Consequently, the case posture and underlying notions of civil procedure and adversarialism provided powerful support to MacPherson. See *supra* text accompanying notes 37-43; *infra* text accompanying notes 111-158.

46. 6 N.Y. 397 (1852).

47. In *Thomas*, "[c]ases were cited by way of illustration in which manufacturers were not subject to any duty irrespective of contract." *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1051 (N.Y. 1916).

and a druggist, and consumed by his wife. Cardozo read *Thomas* as embracing an exception to the rule of *Winterbottom* requiring privity because of the extreme danger caused by negligently passing off a deadly poison, which was difficult to discern, as a harmless drug.⁴⁸ In his characterization of *Thomas*, Cardozo authored the analysis that relegated the traditional rule to anachronistic status. Indeed, mislabeled poisons are foreseeably dangerous to ultimate consumers and users, as are the products that later cases found to fall within the *Thomas* exception to *Winterbottom*, but in this day and age, so are a vast number of other products. Further reducing the reach of the traditional rule of *Winterbottom*, or expanding its exception in *Thomas*,⁴⁹ Cardozo added that "[w]e are not required to say whether the chance of injury was always as remote as the distinction assumes. Some of the illustrations [from cases rebuffing the *Thomas* exception] might be rejected today."⁵⁰

Cardozo then launched upon a tour of the dangerous product exception to the general rule of *Winterbottom*.⁵¹ In doing so, Cardozo expressly sought to give readers the view that the law is moving inexorably, though not linearly, toward dismantling the citadel of privity for liability in negligence, noting that more recent cases "evinced a more liberal spirit" of finding their facts to fall within the exception to the rule.⁵² He discussed liability found without privity where the offending items were a scaffold,⁵³ a coffee urn,⁵⁴ aerated water,⁵⁵ a defective building,⁵⁶ an elevator,⁵⁷ and a defective rope.⁵⁸ The reader is subtly persuaded that an automobile has at least as much potential for danger and destruction as these items.⁵⁹ Rejecting the "verbal niceties" of distinctions based on whether the product is "inherently" or "imminently" dangerous (i.e., whether dangerous in all events or merely dangerous when defective), Cardozo summarized the court's holding by saying that the exception to the privity defense is no longer to be "limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of

48. *Id.* at 1051.

49. Cardozo's holding conforms to his later observation: "Hardly a rule of today but may be matched by its opposite of yesterday." BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 26 (1921).

50. *MacPherson*, 111 N.E. at 1051.

51. He also explained away the precedential force of some of the cases following the general rule. See, e.g., *id.* at 1052 (discussing the "criticised" case of *Losee v. Clute*, 51 N.Y. 494 (1873), and "confin[ing] it] to its special facts" because, contrary to the facts of *MacPherson*, the vendor knew that the purchaser had tested the defective boiler in question).

52. *MacPherson*, 111 N.E. at 1052.

53. *Devlin v. Smith*, 89 N.Y. 470 (1882).

54. *Statler v. Ray Mfg. Co.*, 88 N.E. 1063 (N.Y. 1909).

55. *Torgeson v. Schultz*, 84 N.E. 956 (N.Y. 1908).

56. *Burke v. Ireland*, 50 N.Y.S. 369 (N.Y. App. Div. 1898).

57. *Kahner v. Otis Elevator Co.*, 89 N.Y.S. 185 (N.Y. App. Div. 1904).

58. *Davies v. Pelham Hod Elevating Co.*, 20 N.Y.S. 523 (N.Y. Sup. Ct. 1892), *aff'd without opinion*, 41 N.E. 88 (N.Y. 1895).

59. Cardozo made this point explicit a page later: "Beyond all question, the nature of an automobile gives warning of probable danger if its construction is defective. This automobile was designed to go 50 miles an hour. Unless its wheels were sound and strong, injury was almost certain." *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916). However, Cardozo left it to Chief Justice Bartlett to point out in dissent that at the time of the incident the automobile was traveling only 8 miles an hour. See *id.* at 1055 (Bartlett, C.J., dissenting).

destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger."⁶⁰ Of course, as subsequent litigation has shown, and as Cardozo must have suspected, virtually every negligently made product (even children's toys,⁶¹ kitchen appliances,⁶² and clothing⁶³) can be a danger to life and limb under certain circumstances.

Cardozo then clothed in a garb of moderation what essentially amounts to the court's conversion of the exception into the rule, saying MacPherson's victory is "as far as we are required to go for the decision of this case."⁶⁴ Then, he set out the ground rules for the new era:

There must be knowledge of a danger, not merely possible, but probable. It is possible to use almost anything in a way that will make it dangerous if defective. That is not enough to charge the manufacturer with a duty independent of his contract. Whether a given thing is dangerous may be sometimes a question for the court and sometimes a question for the jury. There must also be knowledge that in the usual course of events the danger will be shared by others than the buyer. Such knowledge may often be inferred from the nature of the transaction. But it is possible that even knowledge of the danger and of the use will not always be enough. The proximity or remoteness of the relation is a factor to be considered.⁶⁵

At this point, Cardozo delivered his most memorable rhetoric and the denouement of the issue, but buried it in the middle of the majority opinion. He chose a tort-based scheme of product injury compensation and "closed the sale" on his argument that the modern age requires modification of the traditional reverence for contractual privity:

We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.

[Buick] would have us say that [the dealer] was the one person whom it was under a legal duty to protect. The law does not lead us to so inconsequent a conclusion. Precedents drawn from the days of travel by stagecoach do not fit the conditions of travel to-day. The principle that the danger must be imminent does not change, but the

60. *Id.* at 1053.

61. See, e.g., *Milton Bradley Co. v. Cooper*, 53 S.E.2d 761 (Ga. Ct. App. 1949) (toy torpedo); *Lugo v. LJN Toys, Ltd.*, 552 N.E.2d 162 (N.Y. 1990) (detachable part of a toy doll); *Gittelson v. Gotham Pressed Steel Corp.*, 42 N.Y.S.2d 341 (N.Y. App. Div. 1943) (toy with spring holding a rotator).

62. See, e.g., *Roettig v. Westinghouse Elec. & Mfg. Co.*, 53 F. Supp. 588 (E.D. Mo. 1944) (electric stove); *Hoenig v. Central Stamping Co.*, 6 N.E.2d 415 (N.Y. 1936) (coffee urn); *Nash v. General Electric Co.*, 410 N.E.2d 792 (Ohio Ct. App. 1979) (toaster oven).

63. See, e.g., *Carter v. Joseph Bancroft & Sons*, 360 F. Supp. 1103 (E.D. Pa. 1973) (flammable dress); *Bigham v. J.C. Penney Co.*, 268 N.W.2d 892 (Minn. 1978) (flammable work clothes); *Sherman v. Lowenstein & Sons*, 282 N.Y.S.2d 142 (N.Y. App. Div. 1967) (flammable pajamas).

64. *MacPherson*, 111 N.E. at 1053.

65. *Id.*

things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be.⁶⁶

Cardozo observed that English law had also moved against the sacrosanct privity of *Winterbottom*,⁶⁷ and noted in conclusory terms that Buick in particular was fairly subjected to liability since it was not a mere conduit of component parts. As an automobile manufacturer, "[i]t was responsible for the finished product. It was not at liberty to put the finished product on the market without subjecting the component parts to ordinary and simple tests."⁶⁸

One can imagine why *MacPherson* has been described as "the quietest of revolutionary manifestos, the least unsettling to conservative professional sensibilities" as a consequence of its "pretend[ing] to be restating rather than changing the law."⁶⁹ But Cardozo's skillful rhetoric can hardly be called a massive deception. Chief Justice Bartlett's loud dissent pointed out that the majority holding was more than a mere extension or fine-tuning of precedent, but instead abrogated the general rule and changed a doctrine widely accepted across the United States.⁷⁰ No other judge joined his dissenting vote to absolve Buick of liability. Although it is possible that none of the other four participating judges saw through Cardozo's smokescreen, this is unlikely. They were experienced jurists, not credulous ciphers. The court knew what it was doing.

Cardozo's skillful treatment may have made the holding a less tempting target for opponents (presumably manufacturers, insurers, and political conservatives,⁷¹ this being a group well represented in the halls of power), but it was not a stealth bomb. More likely, the court and the legal community had a pretty good idea of the decision's impact,⁷² but were drawn by Cardozo's analysis because the dissent failed

66. *Id.*

67. *Id.* at 1054.

68. *Id.* at 1055.

69. POSNER, *supra* note 14, at 109. Since then, of course, products liability law has expanded enormously, but largely under a theory not signaled in *MacPherson*. While this leading case was based on negligence, current products liability law centers on warranty (contract). There may be a second silent revolution favoring the curtailment of manufacturer liability. See James A. Henderson, Jr. & Theodore Eisenberg, *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731 (1992).

70. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1055-57 (N.Y. 1916).

71. But would all types of political conservatives have opposed the majority ruling? We think our taxonomy illuminates this issue as well. See *infra* text accompanying notes 108-109.

72. *MacPherson* was identified by the *New York Times* as a significant decision within days of its release on March 14, 1916. See Editorial, *A Decision of Wide Application*, N.Y. TIMES, Mar. 16, 1916, at 12 ("There will be a somewhat apprehensive interest among the owners of more than one great industry in the decision just rendered by the New York Court of Appeals in regard to the responsibilities resting on the manufacturers of automobiles. . . . The rule thus laid down is evidently of wide applicability."); *Holds Makers Liable: Court of Appeals Establishes New Rule in Automobile Case*, N.Y. TIMES, Mar. 15, 1916, at 4 ("Judge Benjamin N. Cardozo, who wrote the prevailing opinion, diverged from the early decisions of the courts in this State and refused to follow the rulings of the United States Circuit Court in actions of a similar nature."). Even without the immediate press coverage, *MacPherson* was, of course, a reported opinion by the highest court of a large and important urbanized state with a substantial and sophisticated bar. Not surprisingly, *MacPherson* began to be cited and deferred to rather rapidly. Within six months, an intermediate appellate opinion cited *MacPherson* and applied its reasoning to sustain a products liability theory against the manufacturer

to offer a principled argument against the decision. The gist of Chief Justice Bartlett's entire objection is that Cardozo is changing the common law. Although that argument may have been more persuasive in the pre-realist era of 1916, it is a weak protest in modern times. The current view is that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."⁷³ Worse yet for Bartlett, the precedent of *Winterbottom* was not all that recent or irresistibly correct. Three-quarters of a century of dominance is a pretty impressive run, but it falls far short of a rule with roots in Roman law.

Cardozo was right about the large number of exceptions or, perhaps, the single, very large exception. Critics have also ascribed the privity rule and other defenses to the needs of the capitalistic entrepreneurs of the Industrial Revolution.⁷⁴ Even in 1916, judges must have sensed the shifting social ground wrought by labor unrest, immigration, populist attacks on the business order, trust busting (by Republicans, no less), and the Woodrow Wilson presidency, all of which suggested that the business establishment's control over national affairs might be slipping. But *MacPherson* is hardly a radical manifesto, a factor that probably accounts for its acceptance, but relatively uneventful incorporation, into the law.⁷⁵

of a ladder, a device considerably less powerful than an automobile. See *Miller v. Steinfeld*, 160 N.Y.S. 800, 802-03 (N.Y. App. Div. 1916). The *Miller* court not only was aware of *MacPherson*, but also used the prominence of the decision against plaintiff's counsel in dismissing the claim for failure to adequately prove the identity of the purported ladder manufacturer. See *id.* at 803 (stating plaintiff's counsel was "unquestionably familiar" with the *MacPherson* decision).

Three months later, a different intermediate court unanimously affirmed without opinion a claim against a different ladder manufacturer on the "authority" of *MacPherson*. See *Magnusson v. Long Island Ladder & Scaffold Co.*, 162 N.Y.S. 1129 (N.Y. App. Div. 1916). Simultaneously, counsel were citing *MacPherson* as authority before the Court of Appeals, indicating that attorneys with pending tort matters had immediately seized upon the significance of *MacPherson*. See *O'Connor v. Weber*, 114 N.E. 799, 800 (N.Y. 1916) (rejecting the respondent's reliance on *MacPherson* to argue that a meat grinder should have had a hand guard, the Court of Appeals per Cardozo finds the existing design adequately safe as a matter of law.). Within a year, a lower court invoked *MacPherson* to find a simple loaf of bread subject to the *MacPherson* "rule" when the bread contained a nail that broke two teeth of the consumer. See *Freeman v. Schultz Bread Co.*, 163 N.Y.S. 396, 397 (N.Y. Mun. Ct. 1916). Infant formula received the same treatment. See *Rosenbusch v. Ambrosia Milk Corp.*, 168 N.Y.S. 505, 507 (N.Y. App. Div. 1917).

MacPherson was sufficiently prominent that the Second Circuit reversed itself on a product claim in view of *MacPherson* over a strong dissent invoking *res judicata* as a bar to the application of *MacPherson*, no matter how persuasive. See *Johnson v. Cadillac Motor Car Co.*, 261 F. 878, 886 (2d Cir. 1919). In a decade, other jurisdictions were referring to *MacPherson* as a "leading" case. See, e.g., *Martin v. Studebaker Corp.*, 133 A. 384, 385 (N.J. 1926).

73. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

74. See, e.g., P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 467 (1979) (indicating the adoption of the caveat emptor doctrine is an example of the rejection of the "older moralistic ideas" of contract law said to be "outmoded" in the "new political economy" of the early nineteenth century); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 262-63 (1973) (noting in the nineteenth century, "[t]he law developed in a way . . . considered socially desirable . . . [by] fram[ing] rules friendly to the growth of young businesses. . . . The rules put limits on enterprise liability").

75. Part of *MacPherson*'s appeal lies in the limits of its new rule, which generally favored claimants but still provided substantial protections to manufacturers. Many cases citing *MacPherson* as a recently decided case used it to limit manufacturer liability. See, e.g., *O'Connor*, 114 N.E. at 800 (stating despite respondent's reliance on *MacPherson* to argue that a meatgrinder should have a hand guard, the Court of Appeals per Cardozo rejects the argument and finds the existing design adequately

With perfect hindsight, the fall of the citadel of privity seems inevitable. Or is this misleading? Was the outcome of this doctrinal battle really so clear cut? The *MacPherson* opinion stands out as a wonderful example of judicial craft and doctrinal evolution, and has been oft-examined by these criteria.⁷⁶ But one of the amazing things about the opinion is its bare-bones justification. Cardozo relied on the erratic precedential movement toward curbing the restrictions of privity and virtually nothing else. As we shall see, many other bases were available to him, as were available to objectors.

B. Examining *MacPherson* by Foundational Factors

To suggest the riches of case analyses that invoke the full range of multidisciplinary factors, in this section we point down the roads that Cardozo declined to take in *MacPherson* because he found a simple path—what he calls “the rule of analogy”⁷⁷—sufficient to get him where he wanted to go. We say “point down the roads” because we will not take these roads ourselves. Instead, we will raise “well-placed ‘whys?’” that direct the respondent to travel down the roads in search of replies, although, some of our questions are admittedly quite leading. In anticipation of instructors’ hypotheticals that push the question of liability past the issue in *MacPherson*, many of the queries we raise go beyond the particulars of this case. For those who desire more detailed directions, we recommend our road map, *Foundations of the Law*, which charts the terrain we are about to survey indirectly.

1. Ethical Theory and Products Liability Law⁷⁸

Utilitarianism. Would a utilitarian, who elevates the good or utility above justice (i.e., seeks above all the best state of affairs), find overall social benefits in a rule that

safe as a matter of law); *Licari v. Markotos*, 180 N.Y.S. 278, 280 (N.Y. App. Term 1920) (noting *MacPherson* requires that the plaintiff demonstrate the defendant’s lack of care, existence of a defect, and the defendant’s failure to discover the defect); *Rosenfeld v. Albert Smith & Son*, 168 N.Y.S. 214, 220 (N.Y. App. Div. 1917) (declaring that *MacPherson* is inapplicable where component-maker had no reason to believe there would not be further inspections of a device and expected testing of it by the purchaser); *Tipton v. Barnard & Leas Mfg. Co.*, 257 S.W. 791, 797 (Mo. 1924) (indicating the sale of a package of parts to be assembled does not give rise to a products liability claim when the assembling purchaser is injured by a defect).

Cardozo himself cited *MacPherson* both to impose liability and to foreclose it. Compare *Rosebrook v. General Elec. Co.*, 140 N.E. 571, 574 (N.Y. 1923) (imposing liability on manufacturer) and *Glanzer v. Shepard*, 135 N.E. 275, 276 (N.Y. 1922) (imposing liability for losses caused by defective scales) with *Ultramares Corp. v. Touche*, 174 N.E. 441, 445 (N.Y. 1931) (finding no liability for accountant to third parties absent privity, despite *MacPherson* rule) and *H.R. Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896, 897 (N.Y. 1928) (finding no liability for water supplier when water delivery failure impedes firefighting). Although both products liability and professional liability expanded later in the twentieth century, *MacPherson* appears to have been viewed in its era as expanding, but not tearing, the fabric of legal liability.

76. See, e.g., EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 9-25 (1948); KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 430-37 (1960); POSNER, *supra* note 14, at 107-09.

77. See *infra* note 87.

78. See generally KUKLIN & STEMPEL, *supra* note 4, ch. I (Ethical Theory and the Law).

allows parties not in privity to recover in negligence from producers for personal injuries caused by dangerous, defective products? Why would liability give rise to utility gains?⁷⁹

- Although the consumers or users of the products, or the injured bystanders, along with all their family, friends and supporters, would gain wealth and other value from a recovery, is this offset by the losses to the producer as well as its employees, shareholders, suppliers, and their supporters?
- What would be the overall effect on commerce of such a rule? If detrimental, should the injured few be sacrificed for the benefit of society in general? How is this trade-off to be measured?
- Is it relevant that those on the losing side may generally be wealthier than those on the winning side? What if the particular case is an exception to this generalization?
- Would a utilitarian like J.S. Mill, who favors the promotion of justice because it gives people satisfaction,⁸⁰ find that justice is advanced by the rule in *MacPherson*? Would a Millian endorse the rule because, pursuant to the "harm principle,"⁸¹ the injury to MacPherson is seen as an "other-regarding" harm created by Buick and, therefore, sanctionable?

While the court is to resolve the dispute before it by properly considering the individual merits, as in act utilitarianism, how is it to accommodate the generalized concerns that follow from the principle of stare decisis that establishes precedent for materially indistinguishable cases, as in rule utilitarianism?

- Is it better to avoid the rule-utilitarian type of broad principles regarding products liability, and stick to the act-utilitarian type of narrow rules or subrules that encompass only a constricted characterization of the material facts of the case before the court?
- In addressing this last question, is the practice of broadly or narrowly characterizing the material facts a means of finessing or reinforcing the choice to adopt broad or narrow rules?⁸²
- Is Cardozo's view of these issues apparent in *MacPherson* from his methodical discussion of the precedents?

Speaking of good and bad, better and worse, what is the nature of the good to be considered when confronting these liability questions? Happiness? Efficiency? Virtue? Siblinghood? Solidarity? Preference satisfaction? How do these differ in this context?

79. The economic effects of products liability is taken up in the next section, *Products Liability Law and Economics*.

80. See KUKLIN & STEMPEL, *supra* note 4, at 56-57.

81. See *id.* at 57.

82. This line of inquiry suggests the Aristotlean mandate of justice to treat like cases alike and different cases differently. When are cases alike or different?

Are there benefits to the judicial system from the adoption of a general rule of liability, rather than a narrower rule with substantial exceptions? What are these benefits? What are the trade-offs?

- Does the judicial system benefit from the preservation of the privity rule by discouraging litigation and, thereby, reducing the workload of the courts?
- If so, is this benefit to the taxpayers offset by the losses to individual claimants? By losses to society from the decrease in deterrence that follows from the reduced liability of producers? If the concern is the social costs of litigation, should court fees be raised to cover actual costs?

Kantianism. Would a Kantian, who subordinates the good or utility to justice (i.e., places supreme value on doing the right thing), find a rule just that allows parties not in privity to recover in negligence from producers for personal injuries caused by dangerous, defective products? Is it rational to universalize such a liability rule?

- Is it relevant whether the producer could "foresee" the risk to the claimant? If so, how foreseeable must the risk be?
- Should it make a difference whether the harm was personal injury rather than property damage?

Has the injured party been deceived by the producer's assertions of safety, express or implied, as from advertisements? If so, what is wrong with deception in general, or this type of deception in particular?

- Did the claimant rely on the deception (i.e., how would the injured party have acted differently in the absence of the assertions)? Should reliance be required for a cognizable claim?

Did the producer expressly or implicitly promise the injured party that the product was without defect, or, if defective, that it would compensate for injuries? Did the claimant pay consideration for this promise? Should consideration be required in these situations, or should the claimant's reliance on the promise suffice? If so, what was the reliance?

- If the producer explicitly disclaimed any warranty or other liability, should this trump any implied promise to the contrary?
- Is it fair to require the producer to "insure" against product harms, its contrary intention notwithstanding, as a necessary cost of being a producer?
- In such cases, how important is the principle of freedom *from* contract? Is it relevant that the roar of advertisements may drown out the whisper of a contractual disclaimer clause? If so, when is the roar loud enough? Should parties unfamiliar with the contract, such as injured bystanders, be bound by its terms?

Hybrid Theories and "All Things Considered." Insofar as utilitarian and Kantian considerations are in conflict over the circumstances in which a producer should be liable for product injuries, how is this conflict to be resolved?

- Is there a common scale on which these considerations can be commensurate? If not, is the court left without the moral guidance needed to determine close cases?
- What other sources or factors may be looked to for guidance? History? Economics? The personal likes and dislikes of the judge? Whether one party is generally a "good guy" and the other is a "bad guy" and, therefore, deserves to recover or to compensate?
- How "good" or "bad" are MacPherson and Buick? In what way is a fact finder to determine this? How much relative weight is to be given each of these factors?

Distributive Justice. Speaking of good guys and bad guys, how is this quality to be determined? By what standard is their "desert" to be measured? Did MacPherson do anything to "deserve" his injury, or did Buick do anything to "deserve" its liability?

- Insofar as the liability of Buick negatively affects its profitability or even viability, do Buick's employees, suppliers, retailers, and shareholders, as well as their families and supporters, deserve to suffer?
- Does the great effort or labor of Buick in establishing a successful enterprise earn it freedom from liability in this case? Should Buick be exculpated because of the enterprise's substantial contribution to the general welfare of society? Or does Buick owe more to society because it reaped disproportionately the blessings of liberty and the benefits of the social infrastructure created by others, including prior generations?
- Does MacPherson's comparative neediness deserve protection? Or does Buick's substantial wealth obligate it beyond the norm? Is it relevant that Buick may "feel" the monetary loss less than MacPherson would "feel" the monetary gain? What is to be made of MacPherson's and Buick's relative social rank?
- What other material conceptions of justice may be invoked to measure the relative "desert" of the parties?
- If these standards of desert come into conflict, how are they to be balanced? Can fact finders accurately discern and measure the desert of the parties? Will fact finders simply make such determinations based on their own biases?
- Should the redistribution of wealth be a governmental function? If so, in the context of a private lawsuit? Historically, doesn't this kind of governmental power lead to corruption, because of the incompetence, foibles, malice, etc., of the government agents? Are the doleful lessons of the Soviet Union, whereby wealth was to be distributed under the Marxist maxim, "from each according to ability, to each according to need," transferable to a liberal democracy?
- If wealth is to be redistributed by the organs of government, is it accomplished better through the more democratic legislative process, as in tax and spend measures?

Corrective Justice. Does the liability of Buick reflect Aristotle's notion of corrective justice whereby a blameworthy actor is to compensate a party she injures? In light of the fact that Buick purchased the defective wheel from a reputable supplier that had not previously furnished a faulty one, was Buick blameworthy? Under these circumstances, is the failure of Buick to examine or test each wheel blameworthy?

- If Buick's conduct was blameworthy, to what extent? To the extent of the damages recovered by MacPherson? If the blameworthiness equates to a monetary rate less than the recovered compensation, has Buick simply been used by society or MacPherson as a means to its or his own ends?⁸³
- But in this situation of blameless conduct by MacPherson, should he be obliged to absorb his excess losses above Buick's blameworthiness? Why?
- If Buick's blameworthiness is commensurately greater than MacPherson's recovery, has Buick failed to pay its due?
- To step back a moment, does the negligence standard of tort liability actually track the Aristotlean notion of corrective justice? Does strict liability, as under a products liability warranty claim, track Aristotle's position, or, at least, track it better than does a recovery in negligence?
- What other plausible standards of corrective justice exist? In formal terms of corrective justice, what is the most accurate characterization of the standard of negligence? Strict liability?

Does the traditionally sharp theoretical distinction between the notions of corrective and distributive justice fail to account for an overlapping that courts implicitly recognize, especially in certain types of cases such as those involving products liability?

- In general, does the principled recognition or factual application of some common law doctrines, justified in the name of corrective justice, actually attempt to address historical maldistributions of property and wealth?⁸⁴
- In the context of *MacPherson*, does or should the disposition to find enterprise liability stem partially from an intergenerational corrective principle aimed at the beneficiaries of the corporate octopi of the nineteenth century who, as reported by the muckrakers, often accumulated great wealth by practicing a gross overreaching that included force, fraud, advantage-taking, and exploitation?
- Does the long run of the privity defense reflect this dominating influence of enterprises on the legal system?⁸⁵
- Again, if this is all true, should or can the common law courts or even the legislature properly make the necessary corrective judgments? What should they be?

Feminist Moral Theory and Communitarianism. Are the relative equities of MacPherson and Buick properly resolved under the common law practice of fully granting either the claim of the plaintiff or the defense of the defendant?

83. Some of society's likely ends (e.g., economic considerations) are taken up in the next section.

84. Among the claimed wholesale maldistributions are the property rights originating from inequitable or neglected treaties with Native Americans and what some claim were U.S. wars of aggression (e.g., the Spanish-American war).

85. The leading case, as discussed above, is *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Ex. 1842).

- Since the equities are rarely univocal, as in *MacPherson* where substantial arguments support both sides, should the court implement compromises that accommodate the relative merits of both parties' positions, similar to the sharing of losses under the principle of comparative negligence?
- For that matter, should the legal system forcefully resist litigated solutions to disputes altogether and pressure the parties into settling them by face-to-face compromise, as in mediation? Even if Buick had no legal responsibility for MacPherson's personal injuries, should it have offered him some compensation because he was an unfortunate victim of circumstances stemming from Buick's product through no fault of his own?
- As a member of Buick's larger community, and as a person with whom it established an indirect relationship through a chain of contracts linking the producer to the consumer, shouldn't MacPherson be looked upon by Buick as one to be aided rather than one to be defied, legal rights notwithstanding?
- On the other hand, since, among other reasons, Buick's blameworthiness was slight and its contribution to society is great, should MacPherson, for the sake of fraternity and solidarity, temper his claim for complete compensation? Should he write off, at least partially, his injury as a cost of living in modern society?

Ethics and the Legal Process. In a case such as *MacPherson*, which effectively brought down the citadel of privity in negligence claims for products liability, is it incumbent on Cardozo to address the normative trade-offs at stake rather than simply rely on a "survey of the decisions?"⁸⁶ In other words, instead of exclusive reliance on the formalism of what he calls "the rule of analogy or the method of philosophy," whereby "[t]he directive force of a principle may be exerted along the line of logical progression," should Cardozo have looked beyond the "mass of particulars [and] a congeries of judgments on related topics," to the instrumentalism of his "method of sociology," the dominating method in his view, which brings to bear "the directive force of a principle . . . along the lines of justice, morals and social welfare, the *mores* of the day?"⁸⁷

86. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916).

87. These quotations come from Cardozo's discussion of the approaches "to fix[ing] the bounds and the tendencies of development and growth [of a legal principle], to set[ting] the directive force in motion along the right path at the parting of the ways." *CARDOZO, supra* note 49, at 30. He introduced the four methods:

The directive force of a principle may be exerted along the line of logical progression; this I will call the rule of analogy or the method of philosophy; along the line of historical development; this I will call the method of evolution; along the line of the customs of the community; this I will call the method of tradition; along the lines of justice, morals and social welfare, the *mores* of the day; and this I will call the method of sociology.

Id. at 30-31. The first approach, the method of philosophy, is as follows: "Given a mass of particulars, a congeries of judgments on related topics, the principle that unifies and rationalizes them has a tendency, and a legitimate one, to project and extend itself to new cases within the limits of its capacity to unify and rationalize." *Id.* at 31. As evidenced by the decision, Cardozo believed this first approach sufficient to resolve the issue in *MacPherson*. Apparently the method of philosophy points only in this one direction, because, particularly when the directive force of logic points in more than one direction,

- For the edification of the public and the bar, and to discipline judges less gifted than Cardozo, is normative guidance mandated? For that matter, shouldn't even Cardozo, The Great One, have disciplined himself by detailed consideration of the underlying policies to shorten his ultimate normative leap of faith as much as possible, since his own record of judicial decisionmaking was not flawless?⁸⁸

2. *Products Liability Law and Economics*⁸⁹

The Basic Elements. Is permitting the privity defense more efficient than abrogating it or limiting it to "safe" products unlikely to injure third parties?⁹⁰

there must be "the constant checking and testing of philosophy by justice, and of justice by philosophy." *Id.* at 44.

One of the interesting aspects of *MacPherson* is that Cardozo did not resort to support by, or consider objections derived from, any of the other three methods of directing the evolution of the legal principle at stake. Under the second one, the method of evolution, "[t]he tendency of a principle to expand itself to the limit of its logic may be counteracted [or supplemented] by the tendency to confine itself within the limits of its history." *Id.* at 51. There was no counteraction or supplementation in *MacPherson*, or at least, none to be expressed. "Which [of the two] method[s] will predominate in any case, may depend at times upon intuitions of convenience or fitness too subtle to be formulated, too imponderable to be valued, too volatile to be localized or even fully apprehended." *Id.* at 58.

Under the third method, the method of tradition, custom has less "creative energy" than in days gone by. *Id.* at 59. "It is . . . not so much in the making of new rules as in the application of old ones that the creative energy of custom most often manifests itself today. General standards of right and duty are established." *Id.* at 62. In *MacPherson*, the old standards of right and duty are disestablished. This must be why Cardozo avoided the method of tradition. But he did not see this avoidance tactic as illegitimate: "[W]hen the social needs demand one settlement rather than another, there are times when we must bend symmetry, ignore history and sacrifice custom in the pursuit of other and larger ends." *Id.* at 65.

The fourth, dominating method, the method of sociology, considers "the welfare of society. The rule that misses its aim cannot permanently justify its existence." *Id.* at 66. When judges "are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance." *Id.* at 67. Cardozo, likely believing it unnecessary, also did not invoke this method in *MacPherson*.

88. For cases in which Cardozo's judgments seem faulty, see *Whiting v. Hudson Trust Co.*, 138 N.E. 33 (N.Y. 1923) (municipality not liable for low water pressure when fire spreads); *H.R. Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896 (N.Y. 1928) (bank not liable for erroneous release of funds to defraud). For strong criticism of the *Moch* opinion, see Warren A. Seavey, *Reliance upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913, 920-21 (1951) (indicating "perhaps his most unsatisfactory opinion in the field of torts"); and for dissatisfaction with *Whiting*, see LLEWELLYN, *supra* note 76, at 441-45 (referring to the second branch of this opinion as a "blooper"). One of our colleagues even attacks one of Cardozo's most famous opinions, *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928), for Cardozo's failure to distinguish duty from proximate cause and to identify the nature of the negligence in question. That we are treading on sacred ground was evidenced by the fact that another colleague, who shall remain nameless, refused to identify any faulty Cardozo opinions for fear it would come back to haunt him in future confirmation hearings.

89. See generally KUKLIN & STEMPEL, *supra* note 4, ch. 2 (Law and Economics).

90. Of course, as suggested above, see *supra* text accompanying notes 35-75, once the first granite block is taken from the citadel of privity, the castle wall begins to come down rapidly. For example, even cotton balls can be dangerous if left in a baby's crib (although the obviousness of the danger may be a defense) and the parties injured may well not be those who purchased the product.

- Defining efficiency by the standard law and economics yardstick of utilitarian wealth maximization,⁹¹ is “the size of the pie” increased by restricting lawsuits according to the privity defense rather than by using the foreseeability test articulated in *MacPherson*?
- By imposing liability on Buick in the absence of a contract directly with MacPherson, was the court disrupting the decentralized market choices manifested in the private bargains struck between Buick and its retail dealer, and between the dealer and MacPherson? If so, is this to be lamented?
- Was the court, as an organ of the government, essentially making a “top down” economic decision, as occurs in a command or centralized economy, regarding the ultimate allocation of resources, thereby overriding the “bottom up” “invisible hand” decisionmaking of classical capitalism between private parties?
- Will producer liability drive away other entrepreneurs and capital from producing automobiles, thereby, keeping car prices artificially high by discouraging competition? Will the market be depressed to the point where economies of scale are lost? To the point where the savings from spreading fixed production costs over a larger output is substantially lost?
- On the other hand, should this economic decision imposing producer liability be made more overtly by a “top down” organ of the government, such as by a regulatory agency? Is this likely to be a better considered decision than that of a court? Or are the administrative costs of an agency decision likely to be greater than that of a common law decision?
- Assuming the imposition of liability on Buick will induce it to produce safer cars, will this significantly reduce the number of accidents and the damage to roads and highways that come from them? Or will drivers simply drive less carefully when they believe cars are safer? Will the savings in maintenance expenditures stimulate various governments to build more roads? If so, is this an overall social benefit?

The Conditions for the Invisible Hand. When MacPherson entered the contract of sale with the Buick automobile dealer, how ideally satisfied were the criteria for the workings of the invisible hand? Did the parties have complete information about the transaction?

- With respect to the issue at hand, did MacPherson correctly anticipate the safety risks involved? Could MacPherson realistically translate into monetary terms this “hidden” cost of purchasing the car? If not, did this mislead MacPherson in his decision whether to opt for other makes of automobiles or alternatives to car ownership?
- What is the effect of the substantial costs in resolving the dispute between Buick and MacPherson on the allocation of resources relating to automobile manufacturing? What is the effect from the government providing highly subsidized courtrooms,

sense to view privity as completely abrogated than to attempt to slice too finely the items that fall within the defense. Consequently, it is no surprise that post-*MacPherson* products liability law moved in that direction.

91. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 1.2 (4th ed. 1992).

judges and other court personnel, etc.? Should the litigating parties, or the party who loses, be required to absorb these costs?

- When contracting, were MacPherson and the Buick dealer in positions to make fully rational choices? Did MacPherson enter the transaction with pre-established preferences that were consciously satisfied, or at least "satisfied,"⁹² by the particular purchase?
- Did Buick's advertising simply provide information to MacPherson, or was it likely that it went beyond that and also unduly affected his preferences by distorting his values through irrelevant subconscious associations triggered by presentations from attractive spokespersons in idealized settings?⁹³
- Insofar as MacPherson was not fully "rational," should the common law take this into account? Might this have been one of the unspoken reasons for Cardozo's decision to find Buick liable under the circumstances?
- Were there substantial transaction costs? What were they? Did the Buick dealer or MacPherson have higher relative transaction costs? Should this be relevant? Was the automobile market highly competitive? Why? Did the transaction between MacPherson and the dealer create externalities? Positive or negative? What were they?
- How would these externalities affect the automobile market? Can they be internalized? How? Does the automobile market consist of undifferentiated products?⁹⁴
- In sum, to the extent that the ideal conditions for the invisible hand were unmet, what was the effect of this shortfall on MacPherson's choice? The general automobile market? Does this warrant governmental imposition of liability for negligence on Buick to parties not in privity?
- Should it be relevant to Buick's liability that some of the shortfalls from the ideal market stemmed from the activities of the presumably independent Buick dealer?

The Goals of the Market Economy. Owing to the imperfections in the market for automobiles, or imperfections encountered by MacPherson and the Buick dealer in the particular transaction, is it likely that the trade in issue was not Pareto superior?⁹⁵ Was it likely to be Kaldor-Hicks efficient?⁹⁶

92. The term "satisfice" was coined by Herbert Simon who states that "[i]n a satisficing model, search terminates when the best offer exceeds an aspiration level that itself adjusts gradually to the value of the offers received so far." Herbert A. Simon, *Rationality as Process and as Product of Thought*, in *MODELS OF BOUNDED RATIONALITY* 444, 453 (1982).

93. For more on the distortions in the consumer marketplace, see Bailey Kuklin, *The Asymmetrical Conditions of Legal Responsibility in the Marketplace*, 44 U. MIAMI L. REV. 893 (1990).

94. "Products are undifferentiated when buyers cannot distinguish among the various sellers' competitive products (they all seem the same), and sellers cannot distinguish the willingness of each buyer to buy, that is, how much above the asking price they would be willing to pay." KUKLIN & STEMPER, *supra* note 4, at 33.

95. "A Pareto superior change is one that makes at least one person better off without making anyone worse off." *Id.* at 33-34. This is distinguished from Pareto optimality, an ideal condition at which trades naturally cease, which "occurs when resources are allocated in such a way that no one is willing to trade further." *Id.* at 33.

96. Kaldor-Hicks efficiency is satisfied "[w]hen the overall gains [from a trade] outweigh the losses." *Id.* at 34.

- In answering these questions, must the court resort to a hypothetical market? How accurate is this device?
- Are there "moralisms" involved to further skew the court's valuations?⁹⁷ What are they?

The Justification of the Market Economy. Might the market imperfections in the transaction between MacPherson and the Buick dealer have been so substantial as to decrease overall utility? Is this evaluation to be made on the basis of costs and benefits at the time of the transaction, or after the unfortunate circumstances leading to MacPherson's injury?

- Even if there was a loss in utility in this case, would this be generally true of automobile purchases? If utility is generally increased by such purchases, does this destroy MacPherson's moral claim to a recovery despite his losing trade?
- Do the market imperfections run afoul of the Kantian theory of justice? Were the parties, MacPherson in particular, in a realistic sense "rational" persons, each recognizing the other as an end in himself by respecting the other's autonomous choice?
- Or do the imperfections in the marketplace (e.g., inadequate information about the costs and risks associated with the ownership of the Buick), undermine the Kantian support for the contract?
- Does the market, in general, satisfy Kantian maxims of justice?
- If it does in general, but not in the case of *MacPherson*, what should the court do about it? Does the court's rule of finding liability for negligently caused personal injuries despite the lack of privity respond to the Kantian demands? Are there better responses?

The Coase Theorem. Is it a cost of purchasing an automobile that occasionally a buyer will be personally injured by a defect resulting from the negligence of the manufacturer, or is it a cost of producing automobiles that occasionally a defect resulting from the negligence of the manufacturer will personally injure a buyer? Why?

- If, despite the consequential inefficiency, the court allowed Buick to maintain the freedom from liability for negligently caused personal injuries to third parties, would future automobile purchasers be in a position to contract around the entitlement by getting Buick to agree to assume such liability?
- Is such an entitlement normally protected by a property, a liability, or an inalienability rule?
- What complications to bargaining around inefficiencies follow from the fact that the purchasers and Buick are not in direct contractual relationships?

97. Moralisms "are public goods that are beyond objective valuation (e.g., some of the aesthetic and moral values supporting environmentalism)." *Id.* at 34.

- Could purchasers as a class be organized to approach Buick en masse regarding the entitlement? Will organizational or transaction costs preclude this tactic? What about free-rider problems?
- Could purchasers as a group effectively obtain the entitlement from Buick by bargaining with the presumably independent Buick dealer? Could individual purchasers obtain the entitlement through the dealer? Even if feasible, is the dealer likely to be willing to bargain with individuals over such a term? Why?
- If there are substantial problems with free bargaining over Buick's entitlement, can the court facilitate the trade by rulings short of the one made in *MacPherson* (i.e., short of simply assigning it outright to the purchaser)?
- Under the rule of *MacPherson*, does Buick confront similar organizational or transactional costs, or the free-rider problems that purchasers would face if the court continued to allocate the entitlement to Buick? Might there be holdout problems?
- Would a simple contractual disclaimer of liability suffice to transfer the entitlement to Buick? If so, should a court refuse to enforce the boilerplate disclaimer? Why? If the court does not enforce the term, the purchaser's entitlement would be said to be protected by what kind of rule?
- What are the distributive consequences of allocating the entitlement to Buick or to purchasers?

Additional Concepts and Principles. Should the justification of the *MacPherson* rule account for other economic considerations, such as those stemming from loss spreading, risk attitudes, moral hazard, the declining marginal utility of wealth, the "deep pocket" concept, interpersonal utility comparisons, risk avoidance, and transaction costs? Do each of these considerations weigh for or against Cardozo's rule? How much weight do they hold under the circumstances? How can one tell?

- Does the rule of *MacPherson* serve the goal of *loss spreading* better than the prior rule? In this current age of ubiquitous automobile insurance, does loss spreading remain a legitimate consideration in these cases? Does this depend on the standard insurance coverage? In your experience, what is it?
- Do the typical *risk attitudes* of an automobile manufacturer and its purchasers affect the analysis of which liability rule is better? What is the risk attitude of a corporate actor? How might the risk attitude of a buyer affect the liability exposure of Buick under the rule of *MacPherson*?
- If buyers as a class are risk averse, would this argue for or against the rule? What if they are risk preferrers? Since an individual's attitude toward risk depends partially on the circumstances, what is the likely effect under the circumstances in *MacPherson*?
- Does *moral hazard* hang over the rule of *MacPherson*? Does it hang over the original rule insulating parties from liability for negligently caused personal injuries to third parties? If it hangs over both rules, where does it hold more weight under the circumstances in issue?
- Under the rule of *MacPherson*, is an automobile buyer likely to become less careful because she is "insured" by Buick for certain types of losses? Will her level of personal care fall all the way down to just above the threshold of contributory negligence because of the "insurance" by Buick? Why?

- If Buick was not liable for any losses to third parties, would its level of care fall? How far? What, if anything, would keep Buick from allowing its level of care from falling through the basement?
- If moral hazard hangs over both rules (i.e., either that manufacturers are completely liable to third parties for product injuries or that they are not liable at all), are there other rules that could eliminate or reduce it? What might they be? Do common law courts ever adopt these types of solutions? Do legislatures? Do private contracting parties?
- Assuming Buick is a wealthier party than MacPherson, does the *declining marginal utility of wealth* support Buick's liability? Since Buick is a corporate actor, in what manner is the supposed human response to differing wealth to be built into the calculus of Buick's relative marginal utility? Is one to compare the wealth of prospective injured parties to the wealth of corporate officers whose incomes depend on profits, individual shareholders, and others who benefit from the corporation's prosperity? How?
- In advancing this "deep pocket" argument, can *interpersonal utility comparisons* be made realistically? Is one person's preference for wealth incommensurable to another person's? In any event, should the comparisons be made case by case or rule by rule?
- Should the numerous exceptions to the commonly accepted observations supporting the declining marginal utility of wealth (e.g., the grasping Scrooge) be sufficient to remove this factor from consideration by a court? By a legislature? Are the utilitarian justifications for the "deep pocket" concept offset by Kantian and other justice counterarguments? What are they? Are there rebuttals to them?
- Does the principle of *risk avoidance* support the rule in *MacPherson*? Is the automobile manufacturer in a better position to avoid the risk of defective wheels and other components than the purchaser? Is the automobile dealer in a better position to avoid the risk than the purchaser? Than the automobile manufacturer?
- If the dealer is in a better position to avoid the risk than the buyer, does this argue that among the four parties involved in *MacPherson* (i.e., the component (wheel) supplier, the automobile manufacturer, the dealer, and the buyer), it should be the dealer who is liable to the buyer since it was the only one in privity of contract with MacPherson?
- Speaking of the wheelmaker, was it the party in the best position to avoid the loss? If so, should it be the only party liable to the buyer, the lack of privity notwithstanding?
- If it is uncertain which of the four parties is in the best position to avoid the risk, which party can best do a cost-benefit analysis of whether the risk should be avoided and, if necessary, "bribe" the best risk avoider?
- By what means can this risk best be avoided? How far can the risk be reduced? Entirely? Even if entirely, is the best risk avoider likely to reduce it that far? As a practical matter, how far will it be reduced?
- If the most efficient response to the risks of injury is through the cooperative behavior of more than one of the parties (e.g., by somewhat more care by the supplier, closer inspection by the manufacturer, and more diligent maintenance by the buyer), will the rule in *MacPherson* encourage this cooperation? Would any other plausible rule do it better?

- Is the buyer in a position to bargain with the dealer, and thereby indirectly with the manufacturer and the supplier, over assuming the liability? Why?
- Are there information, opportunity, and other transaction costs occurring here that do not occur to the same extent when the three commercial enterprises are bargaining over the risk? Does the difference stem partially from the fact that a buyer is essentially involved in a "one-shot" transaction with the dealer, whereas the commercial parties are repeat players, with respect to one another, engaged in ongoing contracts?
- Do the amounts of money involved in the various transactions affect whether the parties will shift the liabilities of the common law rules? Would these problems be overcome if buyers organized as a group to bargain with dealers over the liability for these risks? Is this likely to happen? Why? If not, in deciding what rule to adopt, should the court take this into account? How?

Speaking of *transaction costs*, what forms of them exist in the interactions among the four parties in *MacPherson*? What information costs does MacPherson confront? What information is relevant, or at least important, in deciding whether to buy a particular Buick from this particular dealer, rather than another car or dealer, or even opting for another form of transportation? From where might this information be obtained? How is the information to be evaluated or equated to a monetary amount? What kind of information is involved?

- With respect to a defective wheel, is this an inspection or a search quality?⁹⁸ Why?
- Is it a use quality?⁹⁹ Is it a credence quality?¹⁰⁰ Is it a combination of the three?
- What opportunity costs are there? Could these ever be "negative" costs, as for the consumer who gets pleasure from the process of buying a new car?
- If MacPherson noticed something unusual about one of the wheels, how would he evaluate the dealer's offer "to knock \$10 off the price" if he bought the Buick "as is"? What transaction costs exist in the interactions among the three commercial enterprises? What are their relative magnitudes as against one another and as against the buyer? Should this be a consideration in determining the respective liability rules?

What are the administrative costs in *MacPherson*? Are they fully internalized in the dispute resolution process? If not, should they be? What would be the consequences of making the parties fully internalize these costs? What if only the losing party paid for them all?

98. "Inspection or search qualities are those that can be immediately judged, such as the sharpness of the television picture or the excellence of the perfume fragrance." *Id.* at 42 (emphasis omitted).

99. "Use qualities are those that require time to evaluate, such as the durability or energy consumption of particular goods." *Id.* (emphasis omitted).

100. "Credence qualities are those that are difficult to evaluate even after the passage of time, such as whether all the services of the doctor or lawyer were truly required or whether the car transmission actually needed replacement." *Id.* (emphasis omitted).

- Were the overall administrative costs about the same under the prior rule recognizing the privity defense? Or were they higher since, for all the relative liabilities to be pursued, MacPherson must sue the dealer, who must sue Buick, who must sue the supplier?¹⁰¹
- Does the multiplication of lawsuits create opportunities for strategic behavior as the participants engage in a war of attrition? What might this behavior be? What will be the result? What, if anything, is wrong with it?
- If the dealer is insolvent, does this effectively end MacPherson's chances of recovery?
- What if the party most at fault, say, the wheelmaker, is beyond the reach of the court's jurisdiction?¹⁰² Is this something that MacPherson must worry about? Might mandatory joinder of all entities involved in the Buick incident eliminate some of these additional administrative costs from the piecemeal litigation?¹⁰³ Instead, although the successfully sued dealer may be permitted to seek indemnity from Buick, as a practical matter would it be deterred from doing so for fear of fraying relations with the manufacturer whose products it needs to sell to make a living? If so, is this response to be regretted?
- What if Buick had insisted on a "hold harmless" provision as a condition of doing business with the dealer? Should such a provision be enforced by the courts? In general, then, whether it is the privity defense, a "hold harmless" provision, or any other reason for not pursuing liability back to the manufacturer or supplier, does this effectively allow these parties to externalize on consumers the costs of injuries caused by defective products? So what?
- Would administrative costs be further reduced under a regime of strict products liability? How? If so, are there other trade-offs? What are they?
- Is it really the recognition of strict liability that has triggered the clamorous modern debate over products liability?¹⁰⁴

101. Under the privity rule, a typical consumer injured by a defective product is not, technically, deprived of a legal remedy. She can sue the retailer. If all goes well, the dealer pays a resulting judgment and then sues the manufacturer and obtains indemnity. But all may not go well for the plaintiff. The retailer may go out of business. If the defect was caused by a component part, the manufacturer in turn sues the supplier, who may then sue another supplier, who sues a designer, who sues a testing lab, and so on.

102. See, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 105 (1987) ("[T]he mere awareness on the part of a foreign defendant that the components it manufactured, sold, and delivered outside the United States would reach the forum State in the stream of commerce [does not] constitute[] 'minimum contacts' between the defendant and the forum State such that the exercise of jurisdiction 'does not offend "traditional notions of fair play and substantial justice."')."

103. In modern federal court practice, the three commercial parties might be joined by the plaintiff, brought in by third party claims, or be the subject of cross-claims. But in 1916, this was not a realistic option under New York civil practice.

104. There are, of course, many additional questions raised by the prospect of strict liability—fairness, for one. Furthermore, some commentators argue that a regime of strict products liability induces no more care by the manufacturer than one of negligence, but merely adds to the manufacturer's cost of doing business without any attendant social benefit. See, e.g., JULES L. COLEMAN, *RISKS AND WRONGS* 412-15 (1992); R. McKean, *Products Liability: Implications of Some Changing Property Rights*, in *THE ECONOMICS OF PROPERTY RIGHTS* 49, 58-59 (Eirik G. Furubotn & Svetozar Pejovich eds., 1974); Walter Y. Oi, *The Economics of Product Safety*, 4 *BELL J. ECON. & MGMT. SCI.* 3 (1973). For the suggestion that strict liability might lead to less quality control than

Does the automobile market, or the market for Buick automobiles, involve *economic rents*?¹⁰⁵ Why? If so, what are the consequences? Should the court then be more willing to impose liability for injuries on the manufacturer?

- Was Buick likely to have engaged in rent-seeking?¹⁰⁶ How might this be done?
- Will the rule in *MacPherson* facilitate rent-seeking?

Along with the considerations of risk avoidance and transaction costs, are there other important factors in deciding whether the rule in *MacPherson* advances the goal of *cost minimization or social efficiency*? In other words, will the rule result in consumers getting more of what they want for less?

- Once the citadel of privity is seen as threatened, will manufacturers raise the price of their products to fund the increasing costs of products liability litigation and victim compensation?
- Will whole new lines of insurance and carriers emerge with their own accompanying administrative costs and needs for profits, thus resulting in higher final costs to the consumer? Or will these additional costs in the form of higher price tags for consumer products be offset by the reduced costs of private consumer insurance, savings from safer products, lowered consumer information costs, diminished moral hazard by producers, etc.? How is a court or legislature to determine this?
- What types of interests are affected by the rule in *MacPherson*? Liberty interests? Equality interests? Want satisfactions?
- How important is it that some consumers will be compensated who would otherwise be left destitute? Should this aim be sought through the regulation of the private market rather than through direct government compensation? In other words, should this coverage be paid for by manufacturers in the form of lower profits, and by other consumers in the form "safety taxes" through higher product price tags?¹⁰⁷
- What are the externalities in the consumer market? Can they be internalized? How elastic is the market in automobiles? In producing automobiles, what are the returns to scale?
- How regulated is this particular market? Is this market dominated by a monopoly or an oligopoly? If so, what are the likely consequences? Insofar as the market is dominated, will the rule in *MacPherson* have beneficial effects? Are there barriers to entry into this market? What are they? What are the answers to these questions with respect to the other markets reached by the rule in *MacPherson*?

negligence liability, see JAMES A. HENDERSON, JR. & AARON D. TWERSKI, *PRODUCTS LIABILITY: PROBLEMS AND PROCESS* 17-19 (2d ed. 1992).

105. Economic rents accrue when "the market price of a product is not governed by its production cost." KUKLIN & STEMPEL, *supra* note 4, at 43.

106. Rent-seeking occurs when a "scarcity . . . [is] artificially created, as where a producer seeks to reduce competition by restrictive, government regulation." *Id.*

107. John Rawls's veil of ignorance can be invoked. If we knew the risk of injury from defective products, but not whether we would be among the injured, would we opt to pay more for the product to allow suit for recovery if we were among the injured? See RAWLS, *supra* note 22, at 136-42 (discussing "The Veil of Ignorance").

- In response to these questions, is it feasible for the court to adopt one rule for the market in automobiles and another rule for additional markets in similarly dangerous products (e.g., for pleasure boats or farm equipment), in which the various factors cut against the rule in *MacPherson*?

Is the private litigation system really the best mechanism for compensating sufferers of product-related injuries under theories of either tort, contract, or warranty?

- Would a system of mandatory, first-party insurance, or of a mandatory manufacturers' insurance fund, put more compensation dollars in the pockets of sufferers? But would such a regime fail to effectively deter careless, if not negligent, behavior by producers? Might this be overcome by providing for criminal or other public prosecution of manufacturers who are unreasonably careless in making products?
- Yet, as a practical matter, are public agencies too often swamped with enforcement demands and, therefore, unable to pursue a high percentage of legitimate opportunities for regulation? Might the manufacturers "capture" the public regulators and thereby avoid mandated supervision?¹⁰⁸ Are public entities too vulnerable to political or social pressures, resulting in suppressed prosecutions against powerful manufacturers?
- Under a regime of private tort and contract litigation, where any disgruntled injured party may invoke the judiciary—a body of decisionmakers with considerable job security in the federal system—are the undue pressures on the public regulatory scheme avoided? In other words, without private enforcement, would a sufficient number of manufacturers be held accountable?
- Or will private enforcement lead to overreaching by litigants seeking unjustified, but economic, settlements of frivolous lawsuits? On the other hand, will injured consumers be able to afford adequate representation or resist if a manufacturer engages in a litigation war of attrition?

Are the answers to all the questions in this section of little or no use to rational judicial decisionmaking because of *the theory of second best*?¹⁰⁹ Do the many economic factors interrelate in such complicated ways that, to be predictive, consideration of one of them must simultaneously account for the virtually infinite number of ripple effects on all the others?

- Or, to load the question, since some decision is unavoidable, is this proposed capitulation to the complexity of reality, particularly human interactive reality, simply a timid surrender to human passions undisciplined by impartial analysis?

108. For the "capture theory" of public regulation, see George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

109. "Under the theory of second best, . . . [t]he 'second-best' state of affairs will not track closely the first best in all ways but one. Instead, it will usually depart in several respects." KUKLIN & STEMPEL, *supra* note 4, at 44.

The Usefulness of Economic Analysis of Law. How useful is this economic analysis of *MacPherson*? Since the conditions for the ideal market of the invisible hand are never fully met, is this merely a dry academic exercise without value to the real world? Is economic analysis at least better than nothing, or does this way of putting it unduly disparage its true predictive power?

- Are any other analytical tools more useful?
- What is the role of matters of justice, including corrective and distributive justice?
- Does the recognition of the privity defense effectively shift wealth from the injured consumers to manufacturers? How are these considerations to be weighed against the economic ones? Are there others to be weighed? How are these to be compared to, and balanced against, the imperfect tool of economic analysis?

3. *Political Philosophy and Products Liability Law*¹¹⁰

Libertarian. What would be the basic stance of a libertarian toward the rule in *MacPherson*, one of approval or disapproval? Why?

- What libertarian interests are thwarted or invaded by the rule? In what manner does this occur?
- Are any libertarian interests protected by the rule? If a libertarian disapproves of the rule, would she accept a modification of it short of complete overruling? What might this be?
- Are the likely libertarian objections grounded in utilitarian reasoning? Kantian reasoning?

Does a libertarian object to the rule in *MacPherson* because it was adopted by a common law court? Is the common law adoption of the rule a reflection of its perceived origin in the natural law, in other words, a recognition by the court that the underlying principle of liability follows from natural reason, independent of positive rules? Does a libertarian object in theory to natural law principles? If not, would the particular principle of liability adopted in *MacPherson* be one that is acceptable? Would it be acceptable if the rule was enacted by legislation? Why?

- When might a libertarian not oppose the rule? Would it suffice if all the members of society consent to the rule? Must they actually consent? What if their elected representatives consent on their behalf? For that matter, do all libertarians welcome the notion of elected representatives? If not, what is the range of libertarian thought

110. See *id.* ch. 3 (Political Philosophy and Law). We believe it is useful for law students to become familiar with the broad outlines of Western political thought. For this reason our book surveys its history, primarily by examining the philosophy of leading thinkers. See *id.* at 48-63. But generally, the application of the theory is best done, we believe, by focusing on particular issues from the vantage points taken by typical members at various locations on the political spectrum (i.e., libertarian, conservative, liberal and communitarian). While it can be an interesting exercise to ponder what Aquinas or Rousseau would say about products liability law, few law school courses have the luxury to engage in it.

on this issue? Would some libertarians approve of the rule if it is simply demonstrated that all rational or reasonable persons would consent?

- Because MacPherson entered the contract of purchase with the Buick dealer apparently without any warranty coverage for the defect in issue, would a libertarian insist that he be denied a remedy since, in this regard, he failed to take care of himself? Is it apt to say that he was "responsible" for this failure? If MacPherson sought warranty coverage from Buick or the dealer, would he be likely to obtain it at this time in history? If not, was he "responsible" for this failure?
- If warranty coverage was unobtainable, what else could MacPherson have done to protect himself? Are alternative solutions likely to be as efficient as a warranty? If not, does this affect the question of his responsibility for failing to protect himself? Would a libertarian assert that because MacPherson failed to protect himself, he "deserved" to lose any claims against the wheelmaker, Buick, and the dealer? By what standards of "desert" would this assertion be defensible? By what standards would this assertion be rejected?

Conservative. Would a *Lockean conservative*, who closely circumscribes the reach of the government for the sake of protecting individual liberty, approve of the rule in *MacPherson*? Why? Does the rule invade anyone's liberty? If so, in what manner?

- Is the court's exercise of power in granting relief to MacPherson likely to further such exercises? Is this the road to a corrupt judiciary? In what way might the court become corrupt? Will the court, upon exercising greater power, be tempted to abuse it? How might this abuse be manifested?
- Do these answers depend on the quality of the judiciary? Would a Lockean be satisfied with expanded judicial powers after adopting methods of assuring a highly competent judiciary? What methods could be adopted?
- Would the Lockean advance similar objections if the rule in *MacPherson* is adopted by the legislative branch? Why? How would the objections differ?

Would a *Smithean conservative*, who, in accordance with the views of Adam Smith, commonly prefers efficiency to liberty (usually best accomplished by allowing individual parties the unfettered freedom of contract), approve of the rule in *MacPherson*? Why?

- Is this one of the instances in which the market does not operate efficiently and, therefore, government intervention must be considered? What argues against its efficient operation? What argues for it?
- Insofar as there is inefficiency, is government intervention likely to overcome it? What might the government do? Can the courts or the legislature do it better?
- Does the rule in *MacPherson* improve efficiency? In light of the litigation, was it efficient for MacPherson and Buick in this case? Is this controlling for the Smithean?
- Are there other rules that would better increase efficiency? What are they? In order to meet the needs of efficient dispute resolution, should the rule in *MacPherson* now

be treated as settled? Is it clearly delineated? Easily applied? What are possible improvements?

- Should the rule be subject to modification through private agreement by the parties? Why?
- Because these questions are difficult to answer, does the rule simply reflect the middle class values of the court, rather than the values or preferences of the parties? Was Buick's liberty unduly impinged? MacPherson's? Is overall societal satisfaction advanced or hindered?
- If overall satisfaction is increased by the rule, but Buick's or MacPherson's liberty is also impinged by it, would a Smithean still prefer it? To answer this, must satisfaction and liberty be quantified and then weighed against one another? While satisfaction might be quantified in theory in terms of overall wealth, as Posner would have it,¹¹¹ can the notion of liberty be coherently quantified? If so, how? If it cannot be quantified, what would a Smithean do when trade-offs are confronted? Refuse the trade-off in principle by always favoring either efficiency or liberty? Which one?
- Does the rule in *MacPherson* involve a trade-off? Is it a compromise? Are there better compromises? What are they? Why are they better?
- Would a Smithean adopt the rule for the sake of possible redistributive consequences (i.e., because it appears to shift wealth from the class of producers and merchants to the class of poorer consumers)? Why? If not, does the Smithean reject altogether the governmental function of redistribution? When, if ever, is it appropriate?

Would a *Burkean conservative*, who is a traditionalist like Edmund Burke, valuing the conservation of the inherited wisdom of society and wary of the unpredictable repercussions of change, approve of the rule in *MacPherson*?

- Is it acceptable as simply a natural, evolutionary accretion to the pre-existing law? Or would Cardozo's expansion of existing precedent be considered a departure from tradition, if not in the rule itself, then in the further move from contract to tort (status), from privity to foreseeability, from exception to rule, possibly even in further greasing the skids for a move from negligence to strict liability?
- In general, is the doctrine of stare decisis based on Burkean reasoning? Or would a Burkean sanctify precedent beyond the standard of stare decisis (i.e., that precedent is *generally* binding)?
- Would a Burkean prefer the common law to a powerful legislature since the common law evolves in incremental steps, not the potentially dramatic, less predictable ones within legislative prerogatives? Or does the rule in *MacPherson* consummate a change in the law too rapid to avoid the disruption of social traditions and values?
- When are social traditions and values disrupted? Looking back over the state of society since *MacPherson*, has the rule ultimately met Burkean aims? If not, how has it failed? If so, would a Burkean now object to a return to pre-*MacPherson* rules?
- Does the rule represent a significant transformation of society, from one that, under caveat emptor, values the rugged individualism of those who take care of

111. See POSNER, JURISPRUDENCE, *supra* note 26, ch. 12.

themselves, to one that, under caveat venditor, values the security obtained from the assured confidence in the products one purchases? Is this a fair characterization of the transformation, if any? How else might it be characterized?

- Insofar as the characterization is fair, would a Burkean object to the nature of the transformation, the fact that there was a transformation, or the rapidity of the transformation? If the latter, in whole or in part, how might a slower transformation take place? Are the courts the proper engine of such cautious change? The legislature? Both? Neither?
- If a conservative values the promotion of community over individualism, but is distrustful of designed transformation, is it possible for this person to approve of movement from an individualistic to a communitarian society? Does the rule in *MacPherson* reflect such a movement? What type of movement, if any, would be acceptable?

Do these three strains of conservatism come out on the same side of the rule in *MacPherson*? To summarize, which approve and which disapprove? If they diverge, if not here, then in the assessment of other legal rules, is it possible for a single political party to hold itself out as "the" conservative party? How?

Liberal. Would a welfare state liberal applaud the rule in *MacPherson*?

- As a Rawlsian liberal behind the veil of ignorance, would a rational person opt for the rule? Why? Does the rule reflect the sort of legal regime that would emerge from a Rawlsian town meeting in that it considers the safety interests of individuals and promotes a rule that will enhance this while properly limiting the wealth differential between manufacturers and consumers, at least those consumers who are unlucky enough to be injured by a defective automobile? Does it align with the liberal's view of desert?
- Or would the liberal assert that MacPherson deserved to remain without a remedy because, for one possible reason, he failed to better protect himself? To generalize, under what standards of desert would it be concluded that MacPherson did not deserve relief and under what standards that he did deserve relief? Which of these standards are liberty-oriented and which are equality-oriented? The liberal subscribes to which ones?
- If the liberal standards of desert cut both ways in this case, which predominate? Or do questions of MacPherson's desert play no role in the issue of the case? Do questions of Buick's desert play a role? If so, what standards of desert argue for and against Buick's liability? What about the deserts of the Buick dealer and the wheelmaker?
- Would a liberal favor the rule in *MacPherson* because of its perceived redistributive effects from producers and merchants to consumers? Would a liberal embrace the rule for this reason alone? On what justification? Or would a liberal prefer that the legislature enact, rather than the court adopt, redistributive measures? Why?
- If the purchase contract in *MacPherson* included a broad liability disclaimer clause, are the shortfalls from the ideal market reason enough for the liberal to intervene and override the clause? Is the liberal more or less willing to do this than the Smithean conservative? To what extent would the liberal take into account the economic consequences of the rule?

- Might a liberal accept the rule of liability on the ground that she believes it is good for MacPherson to have its protections? Why? Would it make a difference that MacPherson also believed it was good for himself? What would be the conclusion if some consumers disagreed?

Communitarian. What is the position of a communitarian regarding the rule in *MacPherson*? In this context, is it possible to ascribe a single position to communitarians? If not, what is the range of potential positions? Why might they differ?

- Does a communitarian have the same concern as the liberal over whether the rule is actually good for consumers or is perceived by them to be so? Why?
- Do communitarian standards of justice play a role in the issue in *MacPherson*? If so, what are they? How are they justified or derived? Is justice based on theories of desert in the eyes of a communitarian? Why?
- Under the communitarian visions, should MacPherson, Buick, the dealer, or the wheelmaker be ultimately responsible for the loss? Why? What are the relative responsibilities (i.e., what if the party ultimately responsible is judgment proof)? What community or communities are involved in the rule of liability?
- If more than one community is affected, how is their relative priority to be determined if one community's interests must bow to another's? Is it the identity of the particular community that counts, or the community's interests at stake, or both? How are these to be balanced? Should the courts or the legislature do the balancing?

In sum, which political orientations and variations would favor the rule in *MacPherson*? Which ones would oppose the rule? Which ones provide no clear guidance?

4. *American Governmental Structure: Its Impact on Products Liability Law*¹¹²

Constitutional Structure. While ordinarily one does not think of an automobile accident or product liability litigation as raising issues of constitutional law, is this impression a form of misplaced snobbery or undue reverence to matters of the constitution? Do cases come to mind in which rather ordinary litigation has created significant constitutional precedent?¹¹³ Does not *MacPherson* exemplify the reality that constitutional issues and the impact of political structure pervade virtually every legal question? Can it be said that many of the prior questions turn on issues regarding society's allocation of decisionmaking authority?

112. See generally KUKLIN & STEMPEL, *supra* note 4, ch. 4 (American Government Structure: Its Impact on Law).

113. See, e.g., *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980) (announcing major retrenchment in expanding notions of personal jurisdiction and Due Process Clause that had dominated court decisions during the post-war era in a case arising from an automobile accident); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (ruling that indigent criminal defendants are entitled to counsel provided by state where conviction poses risk of incarceration). For an interesting retelling of this last case, see ANTHONY LEWIS, *GIDEON'S TRUMPET* (1964).

Federalism. Although the political theorists previously discussed had strong views regarding the embrace or avoidance of change, the role of the market, and the ideal degree of governmental authority over the individual, were they not remarkably silent on questions of whether proper government authority should be centered at a local, state, or national level? Did this perhaps result from their European backgrounds, where a significant degree of national authority seems to be assumed (everywhere but Switzerland, we suppose)?

- Is the developed concept of federalism a substantial contribution to world political theory made by the American framers and their ideological descendants? Are states' rights an American notion at root? Chauvinism aside, is it a concept about which to brag?
- In the context of *MacPherson*, how did the American version of "Our Federalism" expand or limit Cardozo's options in deciding the case?¹¹⁴ Would Cardozo have been equally as likely to grasp the baton for change if he had been subject to a nationwide body of products liability law decided from the U.S. Supreme Court on down?
- If one posits that national and unified doctrinal standards are harder to sway, is this good or bad? What about the notion that states should be permitted to be "laboratories" of a sort that experiment with different legal rules and subsystems?¹¹⁵
- Does the Brandeisian notion of state-by-state experimentation make any sense when the product under review is intimately tied to interstate commerce, marketed and used nationally? Why should Buick be subject to a different legal regime in New York than in other jurisdictions? Does this pose only problems in principle for manufacturers, or are there concrete examples of unacceptably high costs associated with a state-by-state regime of products liability?
- Can manufacturers satisfactorily avoid the costs of differing state requirements by simply complying with the most stringent state rule everywhere? Does it make a difference whether the various state requirements are based on rules or standards? What is the distinction between these two concepts?
- Why have efforts (backed vigorously by the national business community) to legislate national products liability law failed thus far? Can this be attributed only to the power of the plaintiff's trial bar, which generally opposes such efforts not so much on Brandeisian grounds as because the national standards favored by the business lobby are generally less favorable to plaintiffs than those applying in virtually every state?
- Is it surprising that important public policy issues in America tend to turn on considerations of whose ox is getting gored rather than on a serious and reflective debate regarding the optimal means of regulating manufactured products?
- But, political cynicism aside, does the divergence of existing judicial precedent (which largely adheres to *MacPherson*-like analyses of product defect and liability

114. The famous phrase "Our Federalism" is from Justice Black in *Younger v. Harris*, 401 U.S. 37, 38 (1971).

115. The recommendation of the virtues of state "laboratories" is associated with Justice Brandeis's dissent in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310-11 (1932) (Brandeis, J., dissenting).

issues) and the most prominent examples of legislative "reform" say something significant about the relevant competence of legislators and judges (which is also a separation of powers issue) and about the relative competence of state and federal authorities (which is a federalism issue)?¹¹⁶

*Separation of Powers.*¹¹⁷ While separation of powers issues are normally most prominent when a court is asked to rule on matters affecting a statute (the product of the legislature) or the executive's enforcement or disregard of a statutory or constitutional provision, can the seemingly private and common law-driven case of *MacPherson* be assessed according to separation of powers analysis?

- Though much of the current rhetoric of law and democracy enshrines the legislature and raises fears about "government by judiciary," do recent events surrounding debates about products liability tend to belie the conventional wisdom? Is it relevant to the debate that courts have generally followed the tradition of *MacPherson*, which most lawyers (and certainly most legal academicians) regard as a well-reasoned opinion and a sensible regime of liability for manufacturers?
- What is to be made of the fact that, on the one hand, courts have applied legal doctrines such as the collateral source rule (banning mention of insurance during products liability trials) and joint-and-several liability (placing the "deep pocket" manufacturer who is five percent at fault potentially on the hook for a victim's entire damages judgment), while, on the other hand, legislative initiatives on the subject have a decidedly more pro-manufacturer slant? Does this mean that legislatures are simply too eager to please the business community (which funds political campaigns and keeps mobilized a vast army of lobbyists)? Or does it mean that judges are hopelessly unaware of the economic realities and difficulties facing manufacturers? But are not most state judges (even the great Cardozo) the products of a rather political process of appointment and retention election or of full-fledged political election?
- Although this is not, strictly speaking, a separation of powers issue, should the relative merits of different judicial selection schemes affect the debate about judicial

116. Yes, we know we are pointing out the obvious, but sometimes seemingly "obvious" points are lost upon not only law students, but also upon experienced practitioners. One of us once saw an assistant state attorney general arguing a case before the U.S. Supreme Court interrupted with the helpful but nonetheless embarrassing (assuming the attorney realized what was happening) interjection of Justice Stevens: "Counsel, that's your separation of powers argument that you're making, not your due process argument. Your due process argument posits . . ."

The upbraided advocate was not necessarily a bad lawyer; he just lost sight of the legal classification schema in the heat of oral argument. Do these types of errors provide anything more meaningful than a law professor's opportunity to "Monday morning quarterback" real counsel trying to do business with real cases and litigants? Or are the classification schema important? For example, when might it matter more that a law under review poses separation of powers problems than that it poses due process problems? Or should due process concerns, being grounded in individual rights and natural law, always take precedent over the more socially constructed positive law standards of separation of powers?

117. Whereas federalism tends to focus on the apt division of state and national authority, separation of powers refers to the division of policy-making authority among the executive, legislative, and judicial branches. See KUKLIN & STEMPEL, *supra* note 4, at 81-83, 86-88.

activism versus legislative change? Would a purely elected judiciary put it in closer touch with "the people?" Is this good or bad? Or would a purely elected judiciary simply bring to the bench the unseemly elements associated with conventional elective politics (e.g., fund raising, electioneering, media frenzy, distortion, negative campaigning, and influence peddling)?

- Even so, is the sometimes carnival atmosphere attending legislative and executive selection worth enduring in order to subject judges to more popular control? Or are fame and popularity all that matters for judicial selection subject to popular approval? In light of the example of Justice Alan Page, who was elected to the Minnesota Supreme Court in 1992 largely on the strength of his high name recognition and "hero" status as a former professional football player (NFL MVP in 1972 as a defensive tackle for—you guessed it—the Minnesota Vikings), should there be more or less public input into the judicial selection process?¹¹⁸
- Why have courts generally been creators (or hospitable receptors of the creative arguments of counsel) for products liability rules generally favorable to plaintiffs? Does this suggest that perhaps direct democracy in judicial selection is not an unalloyed blessing, as it might simply give commercial interests more control over yet another branch of government? Or is the plaintiff's trial bar the interest group most likely to benefit from more active judicial elections? Can lessons be learned from the experiences in Texas and Pennsylvania, to take two well-known examples, where special interests—particularly lawyers who generally represent personal injury plaintiffs—have been active and successful in promoting judicial candidates, resulting in criticism of these systems and their resulting case law?¹¹⁹ Which interest groups are generally less able to protect themselves in the political arena? Or do these considerations simply provide support for more elitist "merit" selection, removing judges from politics by at least a degree?
- Whatever the method of selection, should judges have life tenure? Or should life tenure accompany only a merit selection system such as that found in the federal

118. See *Alan Page Turns Up a Winner at the Polls*, N.Y. TIMES, Nov. 5, 1992, at 29. By raising this question, we should make the obvious point that we are not criticizing Justice Page in particular. One of us who is a member of the Minnesota Bar, continues to follow that state law and generally has been favorably impressed with Justice Page's performance. But Page also had substantial legal experience as an attorney in a prestigious Minneapolis firm and in the office of the State Attorney General. Page might just as easily have ridden his name recognition to the Supreme Court without having ever practiced law a day in his life. Is this not an uneasy endorsement of more "democracy" in judicial selection? It has been suggested that, in order to avoid the influence on elections of irrelevant fame, those in vocations beginning with "A" should be constitutionally disqualified from office. While this would take care of athletes, actors and astronauts, it would also apply to attorneys (but not lawyers?).

119. See, e.g., Charles G. Geyh, *Highlighting a Low Point on a High Court: Some Thoughts on the Removal of Pennsylvania Supreme Court Justice Rolf Larsen and the Limits of Judicial Self-Regulation*, 68 TEMPLE L. REV. 1041, 1062-76 (1995) (suggesting advantages of the federal system over the state system of selection and removal of judges); Bridget E. Montgomery & Christopher C. Conner, *Partisan Elections: The Albatross of Pennsylvania's Appellate Judiciary*, 98 DICK. L. REV. 1, 16 n.98, 17 n.99 (1993) (noting the organized plaintiff's bar, and large contributors to judicial elections, are among the special interests opposing merit selection of judges in Pennsylvania); Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 20-22 (1995) (indicating Texas personal injury lawyers, on one side, and insurance defense bar, on the other, are large contributors, among other special interests, to judicial election candidates).

court system? Is this sort of job security necessary to permit judges to objectively decide important tort cases such as *MacPherson*? Or is the sort of insulation found in the federal system necessary only when a judge faces truly "hot" contemporary issues such as abortion rights, assisted suicide, or same sex marriage? Do the "hottest" issues usually end up in federal court rather than state court? Is this changing? If so, should this affect the judicial selection processes?

- Would the federal judges in the South during the 1950s and 1960s have so vigorously enforced the mandate of *Brown v. Board of Education*¹²⁰ had they not held lifetime appointments?¹²¹ Is it relevant that, as appears to be the case, one can find more examples of state judges and justices generally ignoring or undermining *Brown* than one can find of federal judges? Or does the answer lie more in the sociology of the respective benches than in the impact of judicial job security and separation of powers?

Standing. Since *MacPherson* was concretely injured in a manner directly traceable to the defective wheel, and his claim could be aptly satisfied through the traditional judicial process and award of monetary damages, is there any real question whether he had standing?

- Why should the system await a *MacPherson* before deciding the questions presented in *MacPherson*? Should safety curmudgeons (the 1916 version of Ralph Nader) be able to argue for manufacturer liability without privity of contract or direct harm?
- What about associational standing? Should this be sufficient even when the association is created in order to bring particular claims (e.g., the "New York Association of Potential Victims of Defective Component Products")?
- Does fastidious adherence to the standing doctrine only make sense in the cases that usually result in significant judicial opinions—where the plaintiff (individual or associational) attempts to use the courts to affect a law or policy of the legislative and executive branches, cases where the separation of powers rationale for standing doctrine is truly implicated? Or is this an artificial distinction? Is a case like *MacPherson* not just as important for purposes of regulating society as a case like *Allen v. Wright*,¹²² in which the Supreme Court denied standing to a group seeking to challenge the Internal Revenue Service's determination that certain allegedly discriminatory schools qualified as charitable organizations? If so, should there be more significant restrictions on standing in so-called "private law" litigation such as *MacPherson*?
- Does the recent argument by one legal scholar—that the standing doctrine serves an important purpose in limiting the ability of activist litigants from picking too carefully and strategically the cases that will get to a court of last resort concerning a particular issue—have any bearing on private litigants like *MacPherson*?¹²³ Is

120. 347 U.S. 483 (1954).

121. See generally JACK BASS, *UNLIKELY HEROES* (1981).

122. 468 U.S. 737 (1984).

123. See Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309, 327-30 (1995); Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309, 1401-12 (1996).

there any hint that MacPherson, like the "victims" of contraceptive meddling in *Griswold v. Connecticut*,¹²⁴ positioned himself to have a wheel-related injury so that he could challenge the parameters of early twentieth century products liability doctrine?

Justiciability and Related Doctrines. While justiciability and its cousins raise many of the same issues as to standing, separation of powers, and the political, ethical, and economic issues previously discussed, are there any substantial grounds for the court in *MacPherson* to refuse to rule on the merits of the case particularly for lack of justiciability?

- To what extent are courts the most appropriate vehicle for creating and enforcing a national products liability policy?
- Even if a request for a revision of products liability policy comes clothed in a traditional lawsuit seeking traditional legal relief, should courts modify justiciability doctrine to resist deciding such suits? Do courts with a strong view of stare decisis do just that by adhering so tightly to past precedents, which in *MacPherson's* case would have resulted in a denial of relief and the likely shift of the development of products liability law from the judiciary to the legislature?

Ripeness, Mootness, Political Question. Even though these three aspects of the justiciability doctrine raise issues usually more apt for cases aimed at government policy or conduct rather than private activity, do they have any role to play in private litigation? In the particular case of *MacPherson*?

- In light of the immature development of the market in, and law of, automobiles at the time *MacPherson* came up on appeal, should the court have declined to rule on the grounds of ripeness? How might a mootness issue arise?¹²⁵ Did the case raise a political question?

124. 381 U.S. 479 (1965).

125. In *DeFunis v. Odegaard*, 416 U.S. 312 (1974), the Court dismissed as moot a law school applicant's challenge to a University of Washington School of Law affirmative action program on the ground that applicant DeFunis ultimately was accepted into law school and was proceeding toward obtaining his degree. Consequently, his complaint about unfairly being denied admission to law school because a minority group member was shoehorned in ahead of him was "moot." Moreover, it was not "capable of repetition yet evading review" like the complaint raised by Norma McCorvey, better known as Jane Roe of *Roe v. Wade*, 410 U.S. 113 (1973), who obtained an abortion outside of Texas during the pendency of her lawsuit, because Roe might get pregnant again while DeFunis would presumably not want to attend law school a second time (although, I suppose, law faculty can be accused of this error in judgment). The Court then waited five years to take and decide the more famous affirmative action case *Regents v. Bakke*, 438 U.S. 265 (1978), which struck down the University of California medical school's affirmative action program that had denied Alan Bakke admission (Bakke, unlike DeFunis, failed to come in off the waiting list or attend another medical school). Perhaps more important, *Bakke*, particularly Justice Powell's concurring opinion, provided a blueprint for educational institutions seeking to adopt constitutionally permissible affirmative action programs, a blueprint under siege at this time. See *Hopwood v. University of Texas College of Law*, 84 F.3d 720 (5th Cir. 1996). What exactly, if anything, was gained by this five-year delay (except perhaps the Supreme Court's ability to lie low on the issue for awhile)?

- Do cases like these involving such important social issues suggest that the mootness and ripeness doctrines need to be substantially revised or eliminated? Or do they instead confirm the thesis that such doctrines act to prohibit courts and interested litigants from "picking and choosing" too carefully the cases upon which ideological stands shall be made?

*Checks and Balances.*¹²⁶ Is Cardozo's decision in *MacPherson* subject to adequate checking and balancing by the legislature?

- Do courts, legislatures, or executives have the upper hand in the "game" of policy dialogue that determines the final shape of state and national policy? For example, does a court's ability to apply law (including legislation supposedly overruling an earlier decision) give it the power to effectively insert the last word notwithstanding legislative disagreement with the court's first word? Or are judges too upright for that? Or is statutory language too nonmalleable for that? Or, ultimately, do executives control the public policy through agenda-setting, veto power (particularly if line-item veto comes to pass), and the appointment of judges (where judges are not elected)?
- Does the typical discussion about court-legislature colloquy oversimplify the legislative process? Should a sophisticated discussion consider the complexities of the legislative process as where, for example, the New York State Assembly might have violently disagreed with Cardozo's decision in *MacPherson* while the New York Senate might have been sufficiently indifferent or favorable to prevent legislative overruling?¹²⁷ What about the prospect of a key committee chair blocking such legislation, or the governor vetoing the anti-*MacPherson* bill? Do these possibilities put checks and balances on the judiciary in a different light?
- Does the relative power and access of the litigants to the judicial and political processes provide a legitimate factor for courts to consider when deciding close cases? Or would this approach simply put courts in the position of playing Robin Hood, always favoring the less powerful party in close cases?

Individual Rights. Can one think of *MacPherson* as a towering individual rights decision in the same sense as great cases, whether agreed with or not, such as *Gideon*

126. To avoid the misclassification problem that might prompt upbraiding from the reader, we note that separation of powers refers to the spheres of authority enjoyed by the various branches, while checks and balances refers to the sharing of authority over a topic and the manner in which the branches, acting within their properly circumscribed roles, can act to prevent one another from controlling an area of law.

127. In actuality, the legislature appears to have been receptive to the *MacPherson* opinion. In 1924, a statute was enacted essentially codifying the *MacPherson* analysis. See *Feitelberg v. Matuson*, 208 N.Y.S. 786 (N.Y. Mun. Ct. 1925) (noting that ch. 534, Laws of 1924, added new section 282-e to the New York Highway Law codifying the concept of strict products liability for unreasonable danger despite absence of privity).

v. *Wainwright*,¹²⁸ *Baker v. Carr*,¹²⁹ *Brown v. Board of Education*,¹³⁰ and *Roe v. Wade*?¹³¹

- Notwithstanding its less obvious civil rights or political context, can one credibly characterize *MacPherson* as a case with significant constitutional rights questions? For *MacPherson*? For Buick? For both? For others waiting in the wings? Why?
- What constitutional or quasi-constitutional rights can one find lurking in *MacPherson*? Due process for the injured consumer? For the manufacturer?
- Is it stretching the Contract Clause to argue that Buick should have some degree of protection for its contractual expectations and that decisions like *MacPherson* effectively "impair" the operation of contract?

5. *Products Liability Law, Dispute Resolution, and the Adversary System*¹³²

Adversarialism. In light of the fact that *MacPherson* did not magically descend on the Court of Appeals as a package tied with a metaphorical bow, but rather resulted from contested litigation by attorneys who framed and argued the issues, developed the facts, and sought in different ways to persuade the three courts that heard the matter, do the majority and dissenting opinions suggest whether the attorneys representing the two sides did a good job?

- In particular, does it appear that *MacPherson*'s lawyer, Edgar T. Brackett, did his job well? What, if anything, supports this conclusion? What, if anything, cuts the other way?
- When *MacPherson* came to consult with Brackett and retain his services, what would you, in Brackett's position, have wanted to know about *MacPherson*'s injury in order to determine whether there was a decent case?
- Under the known circumstances, would it have been worthwhile for you to take the case even if *MacPherson* had a good claim under the law? Is this a pertinent question?
- Do lawyers have responsibilities that supersede this inquiry? Should they have? What are the pros and cons? If the claim is questionable under the law, how would you decide whether to pursue it? What are the relevant factors? What additional facts would you want to know before deciding whether to take the case?
- If *MacPherson* could not obtain representation by a lawyer as able as Brackett, would he be better off with no lawyer rather than a mediocre one? In light of his chances of recovery and his investment of time, emotion, and money (through hourly

128. 372 U.S. 335 (1963) (requiring the state to provide counsel to indigents facing serious criminal charges).

129. 369 U.S. 186 (1962) (requiring reapportionment consistent with the "one person/one vote" principle to correct severe malapportionment in the state legislature).

130. 347 U.S. 483 (1954).

131. 410 U.S. 113 (1973).

132. See generally KUKLIN & STEMPEL, *supra* note 4, ch. 5 (Law, Dispute Resolution, and the Adversary System).

fees, costs and expenses, or both), is he worse off with a mediocre lawyer than with dropping his claim?

- Do cost-benefit analyses of this type always control the decision by a harmed party to pursue a claim? What else might influence the decision? Should the law accept these other motives as legitimate? Why? If not, what can be done to prevent them from actuating the lawsuit?
- If MacPherson decided to represent himself, would he, as a pro se plaintiff, have any realistic chance of winning? Why? If not, what can be done about this? Should anything be done?
- Would it be prudent for Brackett to take the case on a contingency fee basis?
- What percentage of the recovery would be reasonable as a fee? As revealed in the mass media, one-third is the standard contingency rate; what's so magical about this percentage? Is this the standard rate because of laziness (lawyers use a rule of thumb because their peers do), uncertainty (lawyers are insecure about their ability to handicap a particular case), experience (as a general matter, the one-third convention seems to even out the wins and losses and permit lawyers to earn a living), or efficiency (by following the convention, lawyers can spend more time litigating the merits)?
- Why does the contingent fee not vary more according to the actual merits of the claim and the odds of winning the case? Since Brackett was taking on a settled rule of law, would he have acted improperly if he insisted on two-thirds of the recovery? If, instead, MacPherson had been the automobile dealer and had been injured relocating the Buick on his sales lot, his privity allowing him to sue Buick directly for negligence and to win easily, would a fairer contingency fee be ten or fifteen percent?
- What does fairness have to do with these questions?
- Should Brackett take the case on an hourly rate? Why not, as long as MacPherson can pay the bill? Would this have the perverse incentive of tempting Brackett to bloat the hours or perform in a lackluster manner?
- In defense of the contingency fee, does the fact that a contingency lawyer must win to eat tend to focus her mind? Or does this tempt her to cut corners and bend the rules?
- On the other hand, is it the fact that unless MacPherson is an upper-middle class auto owner (and in 1914, the date of the accident, perhaps all auto owners were upper-middle class or higher), an offer of hourly fee representation amounts to no effective representation?
- Which fee arrangement is better for MacPherson? For Brackett? For society? Why? How would the trade-offs, if any, be balanced?
- What hourly rate in today's dollars would be appropriate? How would an attorney arrive at this rate? Would these be apt considerations: office overhead, staff salaries, employee benefits, associate salaries, amortized capital expense (including the human capital of the lawyer's legal training and experience), malpractice premiums, library costs, bar memberships, opportunity costs, and the lawyer's net income goal? What other factors are relevant? How would you decide what dollar rate to put on each of these items?
- Based on your calculations of attorney costs, are current legal fees too high? Too low?

Of the three most obvious defendants—the auto dealer, Buick, and the wheelmaker—who should Brackett sue? Why?

- Can the three potential defendants be sued separately? If so, might the result in the first trial be determinative of key issues in the actions against the other defendants?¹³³
- Would a dismissal, summary judgment, or judgment notwithstanding the verdict in favor of Buick preclude MacPherson from pursuing a claim against the dealer or the wheelmaker? What if Buick had won a jury verdict? Would this be an issue preclusion defense for the dealer and the wheelmaker?¹³⁴ Conversely, could MacPherson use a favorable verdict to bind the dealer and wheelmaker to liability?¹³⁵
- When Brackett, who presumably knew the general rule of the privity defense for manufacturers, decided to fight the harder fight by taking on Buick, was it because the dealer was insolvent or uninsured? Or did he simply want a deeper pocket, one more likely to inspire the jury to impose a large award? If the latter consideration motivated Brackett, is this legitimate? Why? If not, what can be done about it?

Would you agree that once the battle was joined, Brackett performed admirably in light of the facts that he hurdled a demurrer from Buick at the trial court level and then presented the case with enough force to obtain a plaintiff's verdict?¹³⁶

- Although Cardozo's opinion states the evidence of Buick's negligence offhandedly, how would you, in Brackett's position, have obtained the evidence? Would you suppose this was more difficult at the time because the case was litigated more than twenty years before the 1938 Federal Rules of Civil Procedure established a broad right to discovery in civil actions at law?¹³⁷ Did Brackett get the information through investigation, such as by witness interviews and phone calls? What if a Buick plant manager offered him the information for a fee? Should he pay it? Should he report

133. Under the facts as described in the Court of Appeals opinion, the answer must surely be "no."

134. Not necessarily, it depends on the basis for the decision (presuming it can be discerned) and the subsequent court's degree of generality in defining what occurred in the first trial. See FLEMING JAMES, JR. ET AL., *CIVIL PROCEDURE* §§ 11.7–11.22 (4th ed. 1992).

135. Again, the answer is dependent on a number of factors, particularly whether Buick fought the case on the merits of the defense raised by the others. See *id.* §§ 11.23–11.26.

136. After prevailing at trial, Brackett defended the verdict on appeal to the Third Department and won before again successfully defending the verdict before the Court of Appeals. Judge Posner has characterized the brief as an "excellent" one with a "passionate, populist" tone. See POSNER, *supra* note 14, at 109. As an aside, we are, quite frankly, surprised that Posner would characterize a populist tract as excellent in view of his general unreceptive attitude toward populism. He later praises Cardozo's opinion precisely because it does not replicate Brackett's rhetoric. See *id.* Presumably, however, Judge Posner saw nonpopulist strengths in the brief as well and recognized that the populist emphasis may have been persuasive to the court even though Cardozo did not incorporate it into the *MacPherson* opinion. Brackett not only argued the doctrinal limits of the privity rule and exceptions to it, but also made an appeal to the court's notions of operating efficiency and fair access to the courts. See Brief of Respondent at 21–24, *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916).

137. Of course, those federal procedural rules do not control state pretrial practice, even though the 1938 Federal Rules have influenced the states.

it? If so, to whom? Under prevailing rules of professional responsibility, is Brackett even allowed to talk to the manager without Buick's lawyer having an opportunity to attend?

- How much was the verdict?¹³⁸ Was this fact important to the Court of Appeals in making its legal ruling? Why? Is it important knowledge for a litigator? Why?
- In sum, what hurdles faced Brackett when he sought compensation for MacPherson?¹³⁹ In deciding whether to sue the dealer alone, must he worry about the dealer who cannot pay or who has a practical immunity from an adequate jury award because of local community sentiment? Is the jury really going to stick it to Friendly Frank's Auto, sponsor of the little league teams for more than twenty years, for a bad car made by Buick?¹⁴⁰ To generalize, what of the pragmatic issue finessed by Cardozo in *MacPherson*: should liability for injuries by defective products "be left to contract (or to the doctrine, loosely contractual, of implied indemnity) or made a task for tort law?"¹⁴¹ Are the practical reasons for choosing tort brought to the surface in the *MacPherson* opinion?¹⁴²

Is it possible to tell whether Buick's counsel, William Van Dyke, performed well? As well as Brackett?¹⁴³ If Van Dyke had not performed well, would the case have turned out differently? If not, how might it have differed?

- Does *MacPherson* support the proposition that the legal system depends on having good lawyers fairly present the issues to the court? Despite the characterization of American legal education as largely a cult of the judge, would even Cardozo have needed to await a better case for launching the twentieth century's products liability revolution had the lawyers poorly prepared and presented the controversy? If Brackett had been a rotten lawyer, would Cardozo have been able to act *sua sponte* to exhume good legal arguments from a dead brief and oral argument?
- In this regard, what are the limits to the judge's power at the appellate level? Is this essentially a moot question because, if MacPherson's lawyer had not been competent, the case would never have made it to the Court of Appeals due to a

138. Cardozo does not say.

139. The administrative costs, risks, and strategic behavior are suggested by the textual questions, *supra* part II.B.2.

140. These factors, including the administrative costs raised above, were discussed in Brackett's brief with a length and sophistication unusual for the time. See Brief of Respondent at 21-24. Remember that the Brandeis Brief in *Muller v. Oregon*, 208 U.S. 412 (1908), which was considered a revolutionary marshaling of policy arguments and supporting sources, was less than a decade old. Recall, too, that for all its fame, the Brandeis Brief is what we would now regard as a crude, verbose, unsubstantiated attempt at injecting social science policy concerns into legal doctrine. Measured against this background, Brackett's use of these arguments becomes even more impressive.

141. POSNER, *supra* note 14, at 108-09.

142. See *id.* at 109.

143. A review of the available record suggests that Buick's counsel, William Van Dyke, was no slouch, although his brief is less impressive, and the case outcome suggests that Brackett bested him in other aspects of the case as well. See Brief of Appellant, *MacPherson*, 111 N.E. 1050. One hates to criticize a lawyer who cannot fire back. But, let's be brutally honest, a lawyer on the side of the clear majority rule (privity) who loses at trial, in the Appellate Division, and only gets one vote in the Court of Appeals has been whipped.

probable dismissal, a defense verdict, a failure to timely appeal, removal from the system by a cheap settlement, etc.?¹⁴⁴ Could the incompetence of MacPherson's counsel have been redeemed by the lower courts that heard the case?¹⁴⁵ What are the limits to their powers in this regard?

- Are most real world trial judges simply too swamped by their caseloads to play Sir Galahad and rescue errant counsel? If Brackett had not been an able lawyer, is it likely that *MacPherson* would have turned out quite differently, along with the entire law of defective products?
- What if, without a precedent-setting case in *MacPherson*, the leading case came down at a time of greater ideological conservatism, strain on national resources, or dissatisfaction with litigation claims? Would the law of products liability have been forever changed by this?

Professional Responsibility. How might the outcome of the case have differed if Van Dyke or Buick had violated professional ethics? For example, what if Buick workers were coached to claim to have inspected the wheel and found no discernible flaw? What if Buick had forged records?

- If Buick initiated the posited coverup itself, would Van Dyke be negligent for failing to ferret it out? Or would his ethical concerns be triggered only if he stumbled onto the plot? Once Van Dyke knows of the deception, by whatever means, can he reveal it to the opposition or the court? Must he reveal it? Does any interpretation of the Model Code of Professional Responsibility or the Model Rules of Professional Conduct permit Van Dyke to withdraw from representation and say nothing?
- Is the dependence of the adversary system on the vigilance and tenacity of plaintiff's counsel to expose defense shenanigans, and vice versa, a misplaced hope? Is unethical practice more or less likely to occur in a system administered by an inquisitorial judge under the European model?
- Would it have been unethical solicitation if Brackett was happening by when the Buick wheel collapsed and, after rushing to MacPherson's aide, Brackett gave him a business card and apprised him of his right to sue? Should it be? What if Brackett also claimed to be, and was, the best plaintiff's tort lawyer in the state? What if he accompanied MacPherson to the hospital and frequently called on him to check on his progress? Do these facts make our hypothetical Brackett's behavior better or worse? Why?
- What exactly was the bar seeking to accomplish with its restrictions on soliciting and advertising? Was it pure self-interest? Which situation is better: the one at the turn of the century before MacPherson's injury when the profession was not closely

144. Of course, in the two-way street of adversarialism, a good deal of this hypothesizing depends on the caliber of defense counsel as well, who must make at least adequate dismissal motions, trial presentation, or settlement offers to terminate even the case championed by a lawyer buffoon.

145. See, e.g., Martha Minow, *The Judgment of Solomon and the Experience of Justice*, in *THE STRUCTURE OF PROCEDURE* 447, 449 (Robert M. Cover & Owen M. Fiss eds., 1979) (discussing the biblical story of Solomon's judgment as an example of active judicial intervention that broke an adversarial logjam to unearth the truth); Abraham Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1296 (1976) (discussing a judge's discretionary power and opportunity to shape litigation process and case relief).

regulated, or the one seventy-five years later in which Brackett could buy a thirty-second spot on television to tout his services?

- What if Brackett had advertised in the newspaper or by handbills and MacPherson had responded? Does this form of self-promotion differ all that greatly from "Buick-chasing?" In responding to these questions of professional responsibility, what moral principles are involved? How?¹⁴⁶

Alternative Dispute Resolution (ADR). To return to the point where the injured Donald MacPherson first limped into the law office, in light of the state of the law in 1914, should Brackett have attempted to resolve the claim short of litigation? Because ADR was still unnamed in 1914, would we say that it was nonexistent?¹⁴⁷ Or would we surmise that settlement was then the leading form of ADR, just as it is today?¹⁴⁸

- Do you support the procedures today implemented by the courts that fuse adjudication and ADR, such as the summary jury trial and appointment of settlement masters?¹⁴⁹ Why?
- In Brackett's position, would you have written a demand letter to the dealer and Buick seeking an informal compensation agreement for MacPherson? Is this wise or futile? Do ethical precepts and the spirit (if not the precise letter) of the 1993 amendments to the Federal Rules of Civil Procedure¹⁵⁰ require counsel to explore settlement before filing a complaint or initiating an ADR device such as arbitration?
- How would you have attempted to settle? Is a shot across the figurative bow of Buick the best way to produce a serious offer, or is more diplomacy in order? Should Brackett have stressed to Buick and its dealer the probable adverse publicity

146. See generally Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Code*, 6 GEO. J. LEGAL ETHICS 241 (1992); Geoffrey C. Hazard et al., *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1083 (1983); Russell G. Pearce et al., Project, *An Assessment of Alternative Strategies for Increasing Access to Legal Services*, 90 YALE L.J. 122 (1980).

147. Certainly ADR was not the booming field of today that finds mandatory stock exchange arbitration, a large and growing American Arbitration Association, and a plethora of other private judging, arbitration, and mediation services. The move to ADR has become sufficiently strong that at least one law firm is now insisting that all employees, even the associates, sign employment contracts providing for mandatory arbitration of employment disputes. See Mark Curriden, *Sign it, Alston & Bird Staff Told*, A.B.A. J., Aug. 1994, at 25.

148. It appears to have been just as prevalent in 1914 as it is today. According to one reviewer, available evidence suggests that cases settle at a rate of about 90% plus, irrespective of the devices employed by courts and the litigants to seek nonadjudicative resolution of matters. See Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 488 n.19 (1985) ("[T]here is no empirical evidence that settlement rates have changed in response to increased settlement conference activity. Settlement rates of about 90% are remarkably constant in civil litigation, criminal cases, and family cases.") (citing Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious Society*, 31 UCLA L. REV. 4 (1984)).

149. For a more comprehensive review of popular forms of ADR, see ROGER S. HAYDOCK ET AL., *FUNDAMENTALS OF PRETRIAL LITIGATION* §§ 26-31 (3d ed. 1994).

150. See, e.g., FED. R. CIV. P. 11, 16, 26(a) (effective Dec. 1, 1993) (requiring candid pleading, mandatory negotiations, and mandatory early disclosure of basic case information as well as increased expert witness disclosure).

resulting from the case even if the defense of privity (or other defenses) is successful? Is this type of "graymail" improper? In any case, is it imprudent because it raises the temperature of the litigation, possibly prompting Buick to engage in a war of attrition against the smaller plaintiff?

- What remedies should MacPherson pursue? Although the law's default mechanism is a monetary award, are there advantages to the greater flexibility of settlement? If so, what are they? Are there disadvantages? Would MacPherson prefer less compensation for lost income or pain and suffering in return for Buick's commitment to provide medical care, physical therapy, medication and, if necessary, nursing care to him throughout his life?
- What if MacPherson had been a social activist in the Ralph Nader mold who preferred less of a personal remedy in return for Buick's commitment to adopt safer manufacturing and testing procedures? Would it have been proper for him to insist that Buick change wheel suppliers? If so, would the supplier have had a claim against MacPherson for tortious interference with contractual relations, or did the nature of the negotiation immunize MacPherson from such a claim?
- What means of ADR, if any, would best have served MacPherson? Because Buick would be unlikely to agree to it, is it bad strategy to seek a method of ADR that is too favorable? What lines in the sand would you draw that, if crossed, would prompt you to litigate full speed ahead?
- Would MacPherson have been attracted to arbitration because of speed or reduced legal fees? Under the circumstance that arbitrators need not strictly follow the law, would MacPherson be better off with arbitrators liberated from the precedential force of *Winterbottom v. Wright* and the privity of contract defense? Or is it more likely that only a prestigious bench such as the Court of Appeals would be likely to feel self-confident enough to change the law or find MacPherson's case an exception to the general rule?
- If MacPherson's sale agreement contained an arbitration clause, would it have been enforceable? By Buick as well as the dealer? Should it be? Should MacPherson be wary enough of arbitration to fight the clause in court?¹⁵¹
- Does the virtue to MacPherson of an arbitration clause depend on the named arbitrators, say, a group of auto executives rather than a panel from the American Arbitration Association? Might this affect the enforceability of the clause?
- What are the advantages and disadvantages of mediation for MacPherson? For Buick?
- Would you suppose that mediation provides a less adversarial, but structured, mode of interaction more likely to produce flexible agreements? But might mediation's informality work to the detriment of disputants with less sophistication and power? Might Buick or the dealer take advantage of MacPherson in a mediation?
- What would you want to know about the mediator? About MacPherson's background, education, socioeconomic status, or personality? Are these concerns mitigated or eliminated if an attorney represents MacPherson during the mediation,

151. While the common law did not mandate specific enforcement of predispute arbitration agreements, this changed dramatically with the passage of the Federal Arbitration Act of 1926, 9 U.S.C. §§ 1-15 (1988). But even prior to the Act, most courts would enforce a postdispute arbitration agreement such as that contemplated in our reworking of the *MacPherson* facts.

particularly a good attorney like Brackett? But what if MacPherson had a weak lawyer? Would you conclude that the realities of adversarialism, lawyering skills, and law office economics affect the case even if it is not litigated?

- Would you favor hybrid or judicially annexed dispute resolution methods, such as use of a court-appointed settlement master, court-annexed arbitration, or the summary jury trial? Why? How much does the local bench matter?

Federalism. Although *MacPherson* is obviously not a case about federalism or court allocation of functions, is its path and outcome nevertheless influenced by the overarching infrastructure of the legal system? Are the issues in *MacPherson* generally state or federal matters? Although the sphere of federal lawmaking has steadily increased since the New Deal, does it appear that the core common law and private law subjects remain largely committed to the states (and to state courts) rather than the federal government? Why, despite the best efforts of the manufacturing community, has Congress continued to resist enacting a nationwide products liability act?¹⁵²

- Even though the legal landscape was more tilted toward state lawmaking in 1916 than it is today, and, consequently, the privity defense interposed by Buick, although widely accepted, was not by any means a national rule, what effect would you suppose ensued from the advent of better official state reporting and West Publishing's regional case reporter system in the 1880s?
- As the state courts and practicing bar became increasingly conversant in the law of other states, would the rules, though still set locally, compete Darwinian-like in the national "market" for acceptance by the legal profession?
- If so, what is the standard of "fitness" for a rule? Why might certain states and courts be more influential than others? Does it depend on the state's economy? For example, was it relevant that the New York Court of Appeals was located in the nation's dominant commercial state? Is the quality of the court's personnel influential? How is this determined? Is a single outstanding judge enough to make the entire court influential?
- Against this backdrop, would you suppose that it is probably not surprising that *MacPherson* came to be influential? Would it have been equally influential if adopted by a lesser court from a noncommercial state? Do you think that Cardozo was anticipating its pervasive influence when he wrote the opinion? If so, would he still have focused mainly on New York law? Why did he refer extensively to English law? To undermine the continued influence of *Winterbottom v. Wright*? Why was this English case influential? Was it because much of New York common law was imported from England, particularly during the colonial period and early years of statehood? Could we say that looking at English precedent was the functional equivalent of looking at older New York cases?

152. The drive for such an act is perhaps the legacy of the unanticipated success of *MacPherson*, as products liability claims are now regarded by many as too frequent, too lucrative for plaintiffs, and too expensive for business. Ironically, the 1990s finds conservative political interests in the unusual role of advocating more federal government control of American life. Which kind(s) of conservatives favor this federal control—Lockeans, Smitheans, or Burkeans?

- What motivated Cardozo to cite cases cutting against the rule of *MacPherson* from another state¹⁵³ and from the federal system?¹⁵⁴ Since the two federal cases found an automobile not to be an inherently dangerous product falling within an exception to the privity defense, were they cited simply as strawmen for Cardozo's telling response that "[w]e think that injury to others is to be foreseen not merely as a possibility, but as an almost inevitable result," citing Professor Bohlen's "trenchant criticism" of the federal cases?¹⁵⁵ Indeed, was Cardozo engaging in subtle argumentation to portray *MacPherson* as a routine case since he characterized one of the federal cases as finding that New York law was to the contrary.¹⁵⁶
- Because *MacPherson* expands a consumer's right of action against the manufacturer, is the opinion more likely to be persuasive if it displays an awareness of noncontrolling contrary case law and effectively refutes it? Was Cardozo refuting the federal cases since, as a practical matter, they were persuasive to many observers because of the prestige of federal courts? Was Cardozo, then, by painting the federal cases as mistaken in their benign view of an automobile's potential for damage, increasing the chances for *MacPherson*'s acceptance in other jurisdictions and its enthusiastic following in lower New York courts?¹⁵⁷
- Is the additional fame of Cardozo as the author of *MacPherson* misplaced? Although Cardozo is traditionally painted as the legal pioneer behind *MacPherson*

153. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916) (citing *Hayes v. Hyde Park*, 27 N.E. 522 (Mass. 1891)).

154. *Id.* at 1053-54 (citing *Cadillac Motor Car Co. v. Johnson*, 221 F. 801 (8th Cir. 1915) and *Huset v. J.I. Case Threshing Mach. Co.*, 120 F. 865 (8th Cir. 1903)). Cardozo quickly cites a Kentucky Supreme Court case to the contrary, *Olds Motor Works v. Shaffer*, 140 S.W. 1047 (Ky. 1911). *Id.* at 1054.

155. *MacPherson*, 111 N.E. at 1054 (citing Francis H. Bohlen, *The Basis of Affirmative Obligations in the Law of Torts*, 44 AM. LAW. REG. (N.S.) 337, 351 (1905) [53 U. PA. L. REV. 337, 351] (citation corrected)).

156. *See id.* at 1054 ("Indeed Judge Sanborn [of the Eighth Circuit] concedes that his view is not to be reconciled with our decision in *Devlin v. Smith* (supra). The doctrine of that decision has now become the settled law of this state, and we have no desire to depart from it.").

157. Although we again illustrate the obvious for experienced lawyers, students will profit from learning that the decreed law of a high court or legislature is enforced with varying degrees of enthusiasm by lower courts, many of whom may even actively resist changes in doctrine that they have come to know and love (or at least respect).

A ready example emerges from civil procedure, where many courts gave—at best—a grudging reception to the new liberalized pleading standards embodied in the 1938 Federal Rules of Civil Procedure. The rear guard action of the lower courts was arguably not stamped out until nearly two decades later when the Supreme Court issued *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (noting court should not dismiss a complaint for failure to state a claim unless it is clear "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief").

Today, observers argue that lower courts have moved back toward more stringent pleading standards despite the continued ostensible hegemony of *Conley*. *See, e.g.*, Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 435-37 (1986). In fact, the most recent Supreme Court caselaw has largely upheld the liberal pleading ethos of the 1938 Rules. *See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993). But in 1995, Congress enacted legislation codifying stringent pleading requirements for certain securities fraud claims. *See Private Securities Litigation Reform Act of 1995*, Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.). Students are usually surprised to find the justice system is considerably less vertically integrated and controlled than they had been led to believe by doctrine.

and the fall of the citadel of privity,¹⁵⁸ is this overgenerous to him in light of the fact that MacPherson's claim for an expanded reach of tort law was accepted by both the trial court and the intermediate appellate court that heard the case?

- Does this undeserved glory stem from the conventional law school wisdom, not entirely disinterested, positing that great innovations or breaks with tradition originate from the high appellate courts and the great progressive, academically oriented judges?¹⁵⁹
- Is it closer to the truth to suggest that legal change builds from the ground up, invisible hand-like, more than it is decreed from the top down?
- Or would you conclude that if the legal topography of New York in the period between 1914-16 was so favorable to consumers injured by defective products that a lawyer, a trial judge, intermediate judges, and a nearly unanimous Court of Appeals saw privity as no barrier to MacPherson's claim, that perhaps the case was almost as unrevolutionary as Cardozo's opinion made out?¹⁶⁰

6. *Historical, Jurisprudential, and Multidisciplinary Influences on Products Liability Law*¹⁶¹

To situate Cardozo's opinion in *MacPherson* in the context of the history of jurisprudence,¹⁶² can it be seen as one that rejects formalism in fact, while

158. And, of course, with this article, we are becoming part of that traditional Cardozo cult.

159. As his later opinions such as *Palsgraf* and *Ultramares* suggest, Cardozo may not have been such a strong progressive after all. See, e.g., POSNER, *supra* note 14, at 109-24 (just as Holmes was not the liberal painted by his First Amendment dissents). But Cardozo was certainly academic in bent. He was active in the American Law Institute, kept abreast of scholarly commentary, and frequently cited it in his opinions. See *id.* at 132-34. When asked to deliver the prestigious Storrs lectures at Yale, he responded with what became *The Nature of the Judicial Process*.

160. For example, while criticizing the federal cases finding an automobile not to be inherently dangerous, Cardozo took pains to argue that his opinion did not change principles of law but simply applied them more realistically to automobiles and modern life. See *MacPherson*, 111 N.E. at 1054.

161. See generally KUKLIN & STEMPEL, *supra* note 4, ch. 6 (Historical, Jurisprudential, and Multidisciplinary Influences on Law).

162. Beginning law students cannot be expected to come to law school knowing enough about the jurisprudential trends of the late nineteenth and early twentieth centuries to discuss the following questions in class. In our view, a quick crash course in the intellectual history of modern jurisprudence and some "spoon-feeding" of background information will quickly enable students to see what is at work in *MacPherson* and other cases in which various world views of law compete for acceptance by the legal system.

The various schools of jurisprudence could also be termed "paradigms" of law, although this is perhaps stretching the notion of what constitutes a paradigm as the term was used in Thomas Kuhn's classic work *The Structure of Scientific Revolutions*. However, as applied to periods of strong legal cohesion around a controlling adjudication model or jurisprudential theory, "paradigm" may be the apt word. According to Kuhn, a controlling paradigm exists in a discipline when its practitioners generally agree about underlying axioms and most research activity in the discipline is devoted to determining significant facts, matching facts with theory, and further articulating accepted theory. In addition, the discipline is dominated by a set method of training and entry into the profession and a clear group of decisionmakers determining what constitutes "correct" science. See THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 25-35 (2d ed. 1970).

In modern law, the degree of variance among legal elites and the popularity of somewhat

simultaneously giving lip service to formalism in principle?¹⁶³ What about the opinion supports your conclusion? Could one defend the proposition that the opinion is also an example of the fusion and application of pre-realist realism and Roscoe Pound's sociological jurisprudence?¹⁶⁴ If so, how?

- Although courts exist, in the main, to resolve disputes, what other functions do they serve?
- For that matter, even when resolving disputes, does every court case involve a significant or close legal issue or the opportunity to amend doctrine or favor one or more of several competing legal approaches?¹⁶⁵ If not, what makes a case routine? Is *MacPherson* one of them? To the extent that it is not, in the context of the major schools of legal thought, how would you assess Cardozo's choices and, perhaps, his rhetorical blurring of those choices?
- In assessing *MacPherson* from the vantage points of the three commonly accepted notions of what constitutes jurisprudence—a theory of law, a theory of legal interpretation, or a theory of adjudication¹⁶⁶—how germane to understanding the particular case is the “what is law?” prong of jurisprudence? Is this prong germane to the general issues surrounding contracts, torts, or products liability law? If so, how? What are the basic sources of these legal subjects? Does Cardozo attend to any of these sources in *MacPherson*? Does he neglect any? If so, should he have invoked the missing ones? Why? Does it always improve the persuasive force of an opinion to muster the entire range of the sources of law? When, if ever, might it not?
- How do the sources of law in the common law system compare to the sources in the civil law system? Why does our society accept the common law system of court-made law for important issues such as products liability?
- Would we be better off adopting the civil law approach, at least in part? Why? Could Cardozo have done this in writing *MacPherson*? If private law in the common law system is to some extent “what the judges say it is,” then why did Cardozo style his opinion in such a constrained manner? Was it merely to be politically persuasive? Or is there something about our sources of law that demands this sort of incremental deference to the past or, at least, that requires judges to pretend to have such reverence for precedent?¹⁶⁷ What might this be?

nonfundamentalist jurisprudence, such as critical legal studies and feminist theory, makes today's eclectic jurisprudence something short of a full-fledged paradigm. See Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 695-705 (1993). But the Langdellian high formalism, sociological jurisprudence, legal realism, and Harvard Legal Process School that chronologically surround *MacPherson* are close to fitting the Kuhn criteria but for the seemingly inevitable arguments that occur between legal elites.

163. For a discussion of formalism, see KUKLIN & STEMPEL, *supra* note 4, at 143-45, 147-50.

164. See *id.* at 150-53.

165. Cardozo answered in the negative. See CARDOZO, *supra* note 49, at 164-65.

166. See KUKLIN & STEMPEL, *supra* note 4, at 140.

167. Cardozo may not have been feigning his respect for precedent despite his sugar coating on the reach of *MacPherson*. In assessing Cardozo, Posner concludes that the “vast majority of his opinions apply established principles without altering them. . . . [*MacPherson*] and a few others are generative opinions, but the total number is small.” POSNER, *supra* note 14, at 126.

- Would you say that jurisprudence as a theory of interpretation has relatively less immediate importance for contract and tort law, as well as the *MacPherson* decision? Is it irrelevant? Why? When is it most relevant? Is it important to the daily practice of the law? If so, how?
- Does the identification of Cardozo's *MacPherson* methodology, both the ostensible method and the hidden approaches, bring us to the third prong of jurisprudence: a theory of adjudication? Based on *MacPherson*, how would you characterize Cardozo's interpretive style? His ground rules for adjudication? Is his general style one of functionalism or instrumentalism, just as the *MacPherson* opinion is below the surface? What supports this? Is there evidence in *MacPherson* to the contrary?
- Could you muster as evidence against his formalism the observation that Cardozo was not comparing the Buick to coffee urns, poison, and aerated water according to technical criteria on the similarity of the offending products because, if he was, he would have concluded that the privity defense is not a bar to a third party's negligence action only when the product causing injury involves dangerous liquid? Would a formalist conclude that since *MacPherson* was injured by a collapsing wheel, rather than a spouting, defective radiator, he would not qualify under the exception to the privity rule?
- Is this extreme approach to classifying and comparing precedent absurd? Does it bespeak the type of high formalism that was such an inviting target for the legal realists (as well as Holmes and Pound)?¹⁶⁸ Though this example may be particularly outlandish,¹⁶⁹ does it suggest why formalism fell from fashion? In light of this example, would you conclude that Cardozo's approach to interpreting facts is functional or instrumentalist: he does not worry about what the products excepted from the privity rule look, smell, or taste like, instead he worries about whether they have qualities that facilitate injuries when they are defectively produced? Then, does his interpretative template extend to the big picture (primarily here the operational distinctions between products, cases, and situations), rather than to a matching of laundry lists of similarities that may be misleading or irrelevant?¹⁷⁰

168. See KUKLIN & STEMPEL, *supra* note 4, at 147-57.

169. But not too far from some case realities. In *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), the Supreme Court per Justice Rehnquist (joined by five other justices) concludes that discrimination against workers on the basis of pregnancy does not violate the gender discrimination ban of Title VII because only women get pregnant, therefore pregnancy discrimination does not involve disparate treatment of the sexes. Congress was as unimpressed with this formalism as were the realists with Langdell and Beale. The Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076, was soon passed to override *Gilbert*.

170. In the main, most of the jurisprudential action in a first-year course of study focuses on the nature of adjudication: not so much the approaches of courts in interpreting precedent, statutes or other texts, but rather the manner in which they decide disputes. There are exceptions even in the first year. Constitutional law may have a heavy interpretative slant. So, too, could contracts courses or any class closely examining a statute. A course in legal process may explicitly raise these jurisprudential concerns. Most commonly, however, courses stress the rules and method of decision more than the interpretive approach at work. This is the primary reason the case method is used, and this will surely be the emphasis in a legal process, contracts, or torts class examining *MacPherson*. From this jurisprudential vantage point, *MacPherson* provides an interesting example of a court employing a mixture of jurisprudential schools on both the surface and subterranean levels.

- Did Cardozo stress natural law? Did he make any reference to it? If so, where? Would you say that, at a minimum, his opinion proceeded from unstated natural law or natural rights assumptions about an injured party's right to compensation, the general limits of tort law, or the utility of contract for ordering legal relationships? Does this latter assumption implicitly adopt a natural law view of the value of private autonomy and personal decisionmaking?
- If Cardozo was a high formalist in the Langdell/Beale tradition, how would he have approached the decision in *MacPherson*? Would he have erected a stronger version of the privity citadel at the outset of the case and then, almost deductively, applied the rule to the facts of the case? How would he have coped with the precedential exceptions to the rule?
- To go back a moment, can Cardozo's tack of acknowledging, indeed, paying homage to, the rule while emphasizing the long-standing exceptions that appear to be growing with the proliferation of modern, potentially dangerous products, be viewed as a more moderate and flexible formalism?¹⁷¹ Or is it better seen as an example of the Holmesian proto-legal realism?¹⁷²
- Or is *MacPherson* even better seen as employing, both on the surface and below, Roscoe Pound's Sociological Jurisprudence, which focuses on the actual effects of legal rules in action as well as efforts to make law a more effective part of a progressive social policy?¹⁷³ Does this explain Cardozo's tactic of expressly recognizing the privity defense principle while finding that it would work unjustly when applied to the instant case unless the wheel's collapse was sited within the exceptions to the privity rule, like poison, coffee urns, aerated water, and scaffolding? Pursuant to what he perceived to be a progressive social policy, did he analogize automobiles to the dangers of a former era and then seek, self-consciously, to mold the legal rule and exceptions to fit with current technology?
- Below the surface, does it seem that Cardozo was driven by all the explicit policy factors noted in Brackett's brief for *MacPherson*, but unmentioned in the opinion: externalities; inefficiency; high transaction costs; an undeserved favoritism to manufacturers over consumers that brings attendant unfairness, wealth transfer, and greater risk to safety? Was Cardozo, right from Pound's playbook, implicitly balancing these social effects and the parties' particular interests against the legal system's interest in retaining a precedent, even though it may have been more in tune with an earlier era of custom-made goods when buyers were as able to inspect for defects as were the artisans they patronized?
- To return to Cardozo's theory of judicial decisionmaking as detailed in his famous tract, *The Nature of the Judicial Process*,¹⁷⁴ does *MacPherson* reveal Cardozo as the restrained Poundite that he seemed to portray himself as in the book? Reexamining parts of his taxonomy, is "the rule of analogy or the method of philosophy," whereby "[t]he directive force of a principle may be exerted along the line of logical

171. See *supra* text accompanying notes 51-68.

172. See KUKLIN & STEMPEL, *supra* note 4, at 150-51 (discussing Holmes).

173. See *id.* at 151-53.

174. See *supra* note 87 and accompanying text.

progression,"¹⁷⁵ essentially a formalistic approach tempered by flexibility regarding the categorization and use of precedent?

- Was his preferred "method of sociology," which in his view vied for dominance in judicial decisionmaking with the method of philosophy by embracing "the directive force of a principle . . . along the lines of justice, morals and social welfare, the *mores* of the day,"¹⁷⁶ essentially Pound's Sociological Jurisprudence infused with significant elements of legal realism?
- Might this preferred method of his be described as a functionalism or instrumentalism that seeks to give legal rules functional utility for addressing real life problems?¹⁷⁷ Or, as seen in the *MacPherson* opinion, is there something more in this approach in that Cardozo was willing to change or amend the rules altogether where functional construction or application alone could not serve the social policy goals of enlightened law?¹⁷⁸
- Even though the formalist method has "a certain presumption in its favor,"¹⁷⁹ does the *MacPherson* opinion reveal that, in Cardozo's view, the priority of this first method is overcome by historical (evolutionary) developments, community customs, and factors of "justice, morals and social welfare."¹⁸⁰
- Is the issue of the case one for which, because no amount of flexibility or wisdom in wielding the general rule is adequate to the task of fair resolution, the general rule must change according to the dictate that, in these situations when "[a]ll is fluid and changeable," the judge "must then fashion law for the litigants before him?"¹⁸¹ Where, if at all, did Cardozo make out these arguments for rejecting the formalistic priority? If he did not make them out, why not?
- Did his statement of the facts of the case, along with his characterization of the facts of the cases he cites as authority point irresistibly toward this conclusion that a formalistic resolution would not do? In other words, did he load the factual characterizations in the opinion so strongly that the normative aspects, and the judicial decisionmaking ones, become apparent and persuasive to the careful reader?

175. See KUKLIN & STEMPEL, *supra* note 4, at 151-53.

176. See *id.*

177. According to Cardozo: "[T]he social value of a rule has become a test of growing power and importance. This truth is powerfully driven home to the lawyers of this country in the writings of Dean Pound." CARDOZO, *supra* note 49, at 73. Cardozo then quoted Pound as noting that "[p]erhaps the most significant advance in the modern science of law is the change from the analytical to the functional attitude" and that the emerging test for measuring judicial wisdom has shifted from "the content of the precept and the existence of the remedy to the effect of the precept in action and the availability and efficiency of the remedy to attain the ends for which the precept was devised." *Id.*

178. According to Cardozo:

In this perpetual flux [of law], the problem which confronts the judge is in reality a twofold one: he must first extract from the precedents the underlying principle, the *ratio decidendi*; he must then determine the path or direction along which the principle is to move and develop, if it is not to wither and die.

Id. at 28.

179. *Id.* at 31.

180. *Id.*

181. *Id.* at 21, 28.

Is spin-doctoring a legitimate tactic in judicial decisionmaking? Or should a judge be more explicit for the better edification of the bench and bar?

- Even though Cardozo's influential tract and the *MacPherson* opinion are clearly products of their era in their close resemblances to Pound, can they also be made out as harbingers of the future by viewing them (with the benefit of 20-20 hindsight, of course) as anticipating a good deal of legal realism,¹⁸² the Hart & Sacks Harvard Legal Process approach,¹⁸³ the modern "Fundamental Rights" school of natural law,¹⁸⁴ law and economics,¹⁸⁵ the law and society movement,¹⁸⁶ Schauer's kinder, gentler formalism,¹⁸⁷ and even critical legal studies?¹⁸⁸
- To continue to make out Cardozo as a fountain of most subsequent jurisprudential movements, could one reasonably insist that, although feminist jurisprudence did not exist when Cardozo wrote or decided cases, his textured and contextual approach for *The Nature of the Judicial Process* and the *MacPherson* case places him comfortably close to that school of thought as well?
- In short, is Cardozo's high standing in legal history explained in part by his eclectic pragmatism as a jurisprudential scholar and judge?¹⁸⁹ By seeming to have something

182. Judges are shaped by "forces which they do not recognize and cannot name" that "have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs" which in close cases "must determine where choice shall fall." *Id.* at 12. "I have grown to see that the process in its highest reaches is not discovery, but creation. . . ." *Id.* at 166.

183. The legal process approach was thought to constrain judges and reduce the realist revolution's potential for producing arbitrary outcomes or a jurisprudence of personal policy preference. Cardozo was in sync with the Hart & Sacks methodology in that he acknowledged legislative supremacy and a constrained judicial role where rules could be functionally interpreted to result in acceptable case outcomes. *See id.* at 14-18.

184. *See id.* at 134-35 (stressing the importance of morality and justice in law). *See also* KUKLIN & STEMPEL, *supra* note 4, at 164-67. Many writing in this school deny they subscribe to a natural law jurisprudence, but in our view only a modern version of natural law thinking can sustain the claim of these authors, particularly Ronald Dworkin, to have deduced objectively correct answers to value-laden constitutional and policy questions absent majority indications of agreement with their conclusions.

185. Cardozo identified with the utilitarian cause and portrayed the adjudication process as one of virtually constant cost-benefit analysis. *See* CARDOZO, *supra* note 49, at 112-23.

186. *See* KUKLIN & STEMPEL, *supra* note 4, at 171-72.

187. *See generally* Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988). But Cardozo was not championing high formalism. He stressed in his masterpiece that the common law method of reasoning is inductive rather than deductive and that case holdings must not follow rules so slavishly as to produce unfair outcomes. *See* CARDOZO, *supra* note 49, at 22-23, 150-51, 160-63.

188. "We are tending more and more toward an appreciation of the truth that, after all, there are few rules; there are chiefly standards and degrees." CARDOZO, *supra* note 49, at 161. Cardozo probably would not have been awarded a Crit membership card, however. A few pages earlier, he defended traditional reliance on precedent, saying "I think adherence to precedent should be the rule and not the exception," largely on grounds of streamlining the judicial burden and making himself, in retrospect, seem a law and economics trailblazer. *Id.* at 149. For the trail followers, see Lewis A. Kornhauser, *An Economic Perspective on Stare Decisis*, 65 CHI.-KENT L. REV. 63 (1989); Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93 (1989); William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249 (1976).

189. *See* POSNER, *supra* note 14, at 132 (identifying Cardozo's lasting strong reputation as primarily the result of skillful judicial rhetoric, pragmatism, realism, instrumentalism, and antiformalism).

for everybody, even six decades after he wrote *The Nature of the Judicial Process*, should his reputation be downgraded as a mere "cut-and-paste" eclectic? Or is his approach deep and subtle, and worthy of earning him continued respect from the various jurisprudential constituencies upon which he anachronistically, presciently draws?

To summarize, does the *MacPherson* opinion illustrate the multifaceted jurisprudential side of Cardozo? Or does it merely reflect one or two of his devices? Would there be too much reading between the lines to advance the case on one of his opinions that is not only clothed in a post-Landellian style of formality and deference to precedent, and the not yet articulated legal process style of constrained judicial activism, but also loaded with implicit use of sociological jurisprudence, legal realism, economic analysis, and a modern, hybrid pragmatist/practical reason approach to both deciding the particular case and articulating a sensible legal policy rule for the future? Had Cardozo been trapped in any one jurisprudential approach, would *MacPherson* have come out differently?¹⁹⁰

CONCLUSION

In this essay, we have tried to demonstrate in a sustained manner the efficacy and general educational value of the multidisciplinary and foundational examination of law school materials. We have not pushed our particular illustration to its limits, for other possible lines of inquiry are available, but most of them stray from the details of the case beyond the point of this demonstrative exercise and into the many diverse threads of the law's seamless web. There are times and places in legal education for continued pursuit of the threads, but this essay is not one of them.

While our illustration relied on a leading judicial opinion, we believe the study of other legal authorities and the use of diverse teaching approaches will be enriched by the broadened and deepened analysis advanced. We have not recited the means by which these perspectives may be introduced and developed, or which of them may be appropriate for particular topics, courses, curricula or students, for we believe these academic decisions are best left to individual professors and depend on their interests and knowledge. Yet we believe a basic understanding is not difficult to achieve and offers beneficial uses in virtually any law school setting without requiring dramatic reorganization of course format.

Although extratextual consideration of the law has been a part of legal education since at least the sociological jurisprudence and legal realist movements, we end by reasserting our view that providing sustained background information to students and regular use of that foundational information are helpful means of both enhancing the study of law and preparing students for practicing law in a world where law, policy, and values are interwoven.

190. As another example of a multifaceted jurisprudential analysis of a case, see KUKLIN & STEMPEL, *supra* note 4, at 185-90 (examining a hypothetical gender discrimination case and likely outcomes according to different jurisprudential schools).

