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The Reciprocal of MacPherson v. Buick Motor Company

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Abstract: MacPherson v. Buick Motor Company won fame for taking down a privity barrier that stood between consumers and manufacturers of products that cause injury. Privity had offered liability-shelter to remote vendors; MacPherson destroyed that shelter when it held that nonprivy vendees have an entitlement to care and vigilance. In this relation of mutually constituted security and danger, privity and MacPherson are each the other's reciprocal. This article, written to celebrate the centenary of a great decision, explores the reciprocity path that MacPherson helped to build by considering instances of law-mandated care and vigilance that came after it. Broadly worded obligations as provisioned in MacPherson function to support, or at least are consistent with, entitlements and shelters that business entities now receive from American consumers.

Keywords: MacPherson v. Buick Motor Co., Cardozo, tort reform, privity, bailout, automobile, Winterbottom, New York, products liability, negligence

Exactly a hundred years ago, the extraordinary *MacPherson v. Buick Motor Company*[1] changed the law of relationships.[2] It closed a judge-formed gap between consumers and product manufacturers. "The dramatic point of *MacPherson*," according to a text associated with Critical Legal Studies, an academic movement attuned to change in American law, "was to overthrow the traditional private law conception of duty in which one generally owned an obligation only to someone who was not a stranger. Before *MacPherson*, unless there was a legal interaction between the defendant and the plaintiff, there would be no duty."[3]

This characterization may slightly misdescribe what *MacPherson* achieved—its author, Benjamin Cardozo, had carefully cited decisions from New York Court of

1 111 N.E. 1050 (N.Y. 1916).

2 *See* John C.P. Goldberg & Benjamin C. Zipursky, *The Myths* of MacPherson, 9 J. Tort L. 91 (2016) (expounding on "relationality," "relationship sensitivity," and "relationship dependence" as interpretive strands in the decision).

3 David Kairys, The Politics of Law: A Progressive Critique 492 (3d ed. 1998).

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Appeals that had found liability for harms attributed to "negligently manufactured articles, despite absence of privity of contract between injured person and manufacturer"[4]—but the word choices in it about how this decision was received, "dramatic" and "overthrow" very much included, are accurate. Even earlier than 1949, when Edward Levi read it as embodying the common law at its finest,[5] *MacPherson* has enjoyed praise for a wider impact than the contribution I will examine in this Article.[6]

Probably the most famous tribute to *MacPherson* is a phrase by Cardozo himself that the great twentieth-century torts scholar-synthesizer William Prosser enlarged.[7] Cardozo in a decision on the liability of accountants had called privity a "citadel."[8] Prosser moved the metaphor to personal injury law.[9] As he explained in a famed pair of law review articles that addressed the rise of strict liability for defective products,[10] *MacPherson* brought down something mighty that had sheltered product manufacturers from the foreseeable consequences of their negligent actions and omissions. A relationship, again. That which privity had provided to defendants, *MacPherson* took away. That which privity had withheld from injured plaintiffs, *MacPherson* gave.

The citadel of privity had furnished a great deal of protection before it fell.[11] After *MacPherson* destroyed it, "a general rule imposing negligence liability upon any supplier, for remuneration, of any chattel" ensued.[12] Back in its day

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4 Robert Martin Davis, *A Re-Examination of the Doctrine of MacPherson v. Buick and Its Application and Extension in the State of New York*, 24 Fordham L. Rev. 204, 204 (1955).

5 Edward H. Levi, An Introduction to Legal Reasoning 9–27 (1949); for pre-1949 praise, see Carter v. Yardley & Co., 64 N.E. 2d 693, 700 (Mass. 1946) (noting approval of the decision by the American Law Institute, treatises, and legal scholars, as well as the high courts of U.S. states).

6 *See* David G. Owen, Products Liability Law 23–24 (2d ed. 2008) (identifying *MacPherson* as the crucial antecedent of modern American products liability); David A. Strauss, *The Common Law Genius of the Warren Court*, 49 Wm. & Mary L. Rev. 845, 852–56 (2007) (using *MacPherson* to defend the Warren Court as having hewed to the methods of the common law).

7 On Prosser as a scholar who both summarized and altered American tort law law, see Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 Tex. L. Rev. 1539 (1996).

8 Ultramares Corp. v. Touche, 174 N.E. 441, 445 (N.Y. 1932) ("The assault upon the citadel of privity is proceeding in these days apace.").

9 William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099, 1099 (1960)(quoting Cardozo).

10 *See* Prosser, *supra* note 9; William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 Minn. L. Rev. 791 (1966).

11 *See* David W. Peck, Decision at Law 69 (1961) ("Probably no other case has... made as great an impact on industry).

12 Owen, *supra* note 6, at 23 (citing Prosser).

privity had delivered the opposite. Its rule had been no negligence liability for any supplier of any chattel.[13]

So understood, privity and *MacPherson* each indicate the absence of the other. Their binary relation continues to influence tort law, I will argue, even though privity is long dead in personal injury law and *MacPherson* uncontroversially ascendant. "Donald MacPherson" will in this Article stand in for an aggregation of overlapping groups: plaintiffs, consumers, the American public. "Buick Motor Company," for its part, signifies the other side of the liability caption: not just product manufacturers but personal-injury defendants in the aggregate.[14]

As for what "the reciprocal of *MacPherson*" might mean: The reciprocal of a fraction is derived by flipping it over, or inverting it,[15] and by analogy, the reciprocal of *MacPherson v. Buick Company* presented here flips or inverts Cardozo's holding and reasoning.[16] Part I of this Article starts with a characterization of what *MacPherson* imposed. I summarize it as care and vigilance owed *by* an automobile manufacturer, emphasizing the preposition. This care and vigilance as commanded by *MacPherson* benefits the cohort that Donald MacPherson represents, consumers and the public.

Part II inverts this care and vigilance with a preposition shift: "care and vigilance *for* an automobile manufacturer."[17] Whereas in Part I of this Article and in 1916, Buick Motor Company had been the giver and Donald MacPherson the taker of care and vigilance, in Part II, a century later, these renderings have shifted. The American public gives, as well as takes; the American automobile industry takes, as well as gives.

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13 A product supplier could be liable to a dealer, or some other privity-connected retailer, for harms caused by a defect in the product conveyed via contract. Cardozo himself scoffed at the triviality of that prospect. MacPherson v. Buick Motor Company, 111 N.E. 1050, 1053 (N.Y. 1916) ("The dealer was indeed the one person of whom it might be said with some approach to certainty that by him the car would not be used.").

14 On repeat players, the classic source is Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & Soc. Rev. 95, 97–102 (1974).

15 Mark Clark & Cynthia Anfinson, Beginning and Intermediate Algebra: Connecting Concepts Through Applications 26 (2013).

16 For other investigations of mine into reversals, inversions, and reciprocal relations in American tort law, see Anita Bernstein, *Implied Reverse Preemption*, 74 Brook. L. Rev. 699 (2009) (positing that if judges may infer preemption of tort liability, then they also may infer abandonment of preemption); Anita Bernstein, *The 2x2 Matrix of Tort Reform's Distributions*, 60 De Paul L. Rev. 273 (2011) [hereinafter Bernstein, *2x2 Matrix*] (exploring the interplay between predictability and unpredictability in American tort reform). Anita Bernstein, *Reciprocity, Utility, and the Law of Aggression*, 54 Vand. L. Rev. 1 (2001) [hereinafter Bernstein, *Reciprocity*] starts with torts, see *id.* at 12–14, but finds reciprocity pervasively present throughout American legal doctrine.

17 *See infra* Part II.

Reciprocity, a word closely related to reciprocal, can be applied to this inversion: If Buick Motor Company owes a duty to Donald MacPherson, then Donald MacPherson may owe a duty to Buick Motor Company in return. Members of the public do not protect a business corporation from physical impacts caused by a defective wheel, of course, but they can deliver shelters and safeguards. Part II surveys some of what they have furnished for the benefit of the automobile industry.

I continue this reciprocals-and-reciprocity read of *MacPherson* in Part III by considering care and vigilance in behalf of all tort defendants, not just those in one sector. This thesis identifies late twentieth-century tort reform as an heir to privity. Both privity and tort reform extend shelter, solicitude, and tenderness to the defense side, a transfer that *MacPherson* had delivered to plaintiffs. "Donald MacPherson" as a cohort continues to enjoy the release from immunity that *MacPherson* achieved, but it also been reciprocating for the benefit of "Buick Motor Company," automobile manufacturers in particular and repeat-player defendants in general.

1 The holding of *MacPherson*: care and vigilance owed *by* an automobile manufacturer

A review of what *MacPherson* held divides into two sections here: first, what Cardozo's opinion for the court ruled with respect to obligations that the defendant owed to the plaintiff; second, a focus on what was jettisoned when privity fell as a shelter for defendants. In other words, I first describe *MacPherson v. Buick Motor Company* as Donald MacPherson's gain and then describe it as Buick's loss.

1.1 *MacPherson* installs an obligation of care and vigilance

Some manufactured objects are "reasonably certain to place life and limb in peril when negligently made," wrote Cardozo in his opinion for the Court of Appeals.[18] If an object falls into this category, then its manufacturer acquires obligations of care and vigilance. "The manufacturer of this thing of danger is under a duty to make it carefully."[19]

18 *MacPherson*, 111 N.E. at 1053.
19 *Id.*

1.1.1 Shelter for individuals like Donald MacPherson

The care and vigilance that *MacPherson* imposed on manufacturer-sellers made individuals better off in overlapping yet distinct ways. To start, the Cardozo opinion, by noting that Buick Motor Company had put its machine "on the market to be used without inspection" by buyers,[20] implies that non-inspection is an acceptable path for Donald MacPherson and unacceptable for Buick. As a buyer, according to Cardozo, MacPherson had done nothing wrong.[21] Going forward, he and other automobile buyers have permission to relax a little about dangers discoverable by looking for them. Buick may not relax. *Caveat vendor*.

Gains to the MacPherson cohort continue at the level of incentives to safety. One esteemed casebook on products liability, a doctrinal field that *MacPherson* helped to create,[22] explains how recognizing manufacturers' duty of care encourages their investment in preventing some (though not all) the injuries they can anticipate.[23] Once a manufacturer becomes liable for negligence, it has to internalize more of the costs of accidents attributable to preventable, foreseeable dangers in its products. It responds to liability not only by paying damages but trying to make these objects safer.

1.1.2 Prospects for pro-plaintiff expansion ahead

Having jettisoned privity as a safeguard for manufacturers, Cardozo opens the future to their ever-widening responsibility. "The principle that the danger must be imminent does not change, but the things subject to the principle do change," he writes, sounding an ominous note for readers aligned with the defendant side of the litigation caption. "They are whatever the needs of life in a developing civilization require them to be."[24]

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20 *Id.*

21 Donald MacPherson may actually have done wrong. *See* James A. Henderson, Jr., MacPherson v. Buick Motor Co.: *Simplifying the Facts While Reshaping the Law*, *in* Torts Stories 41, 41–45 (Robert L. Rabin & Stephen D. Sugarman eds., 2003) (suggesting that the wheel of the automobile was probably not defective and that MacPherson gave untrustworthy testimony about his accident). I am in Professor Henderson's phrase "simplifying the facts," as did Cardozo.

22 *See* Owen, *supra* note 6, at 23–24.

23 James A. Henderson, Jr., Aaron D. Twerski, & Douglas A. Kysar, Products Liability: Problems and Process 20–21 (8h ed. 2016).

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

Cardozo takes inspiration from *Heaven v. Pender*, an English appellate decision.[25] Even as foreign exotica or persuasive authority *Heaven* is a strained source for him to choose,[26] because the passage in it that drew his attention states an understanding of duty that extended well past the facts as the parties presented them and apparently did not become law in England upon its publication.[27] In Cardozo's paraphrase, Justice Brett, the Master of the Rolls who wrote for the Court of Appeal in *Heaven*, had declared that the right to sue for negligence "is not to be confined to the immediate buyer. The right, he says, extends to the persons or class or persons for whose use the thing is supplied."[28] Whether a New York manufacturer-defendant would owe a duty of care to these others, Cardozo does not say—opining about these people would be dicta, much like the Brett opinion in *Heaven* itself—but he implies that it would. Future MacPhersons thus might enjoy the shelter of negligence-redress not only if they bought the injurious product themselves, as Donald MacPherson did, but also if they happened to be nearby when the danger ripened.

Cardozo invites the plaintiffs' bar to think about other injured persons who can profit from the death of privity. As long as automobiles continue to contain "seats for three persons,"[29] the next individual lined up to gain from *MacPherson* is the passenger inside a car that crashes due to a defect that manufacturer inspection could have located. From there, "the needs of life in a developing civilization" can generate a duty of care by manufacturers for pedestrians and occupants of other automobiles at risk of harm in a crash.

Yet the end of privity as a limit on redress for personal injury generates more than a bigger aggregation of plaintiffs. By ruling that manufacturers can no longer count on contract principles to keep injured nonprivy claimants out of court, *MacPherson* at least anticipated, and likely spurred, important twentieth-century developments antagonistic to yet distinct from privity. The unenforceability of fine-print disclaimers declared in *Henningsen v. Bloomfield Motors*,[30] for example, along with the liberal alternatives offered to state legislatures in warranty law as provided in the Uniform Commercial Code[31] both follow from

25 11 Q.B.D. 503 (Eng. C.A. 1883).

26 Persuasive authority a source of law that a court is not obliged to follow. *See* Chad Flanders, *Toward a Theory of Persuasive Authority*, 62 Okla. L. Rev. 55, 55 (2010).

27 *See* Jane Stapleton, Product Liability 20 n. 43 (1994) (calling Brett's opinion an "unsuccessful attempt to generalize the duty" in the UK).

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

29 *Id.* at 1053.

30 161 A.2d 69 (N.J. 1960).

31 U.C.C. § 2–318 (providing three options for implementing states to consider, each more generous to plaintiffs than the one preceding it).

MacPherson's rejection of contract as a limit on responsibility. Once manufacturers may no longer use privity to escape responsibility for the foreseeable injuries that their defective products cause, it becomes logical to say that they may not slip a disclaimer into a contract of sale either, nor limit implied warranties through the words they write and buyers sign.

"We have put the source of the obligation where it ought to be. We have put its source in the law," Cardozo declares.[32] Negligence law, that is to say, in place of contract law. *MacPherson* withdraws one category and installs another. Consequences follow.

1.2 The citadel and its fall as reciprocals of each other

Recall the citadel metaphor as penned by Cardozo and expounded on by Prosser.[33] It too contains reciprocity, because a citadel in the sense of bulwark signifies two agendas in opposition to each other. Citadel-builders want to ward off invasion; invaders want the edifice destroyed and out of their way.[34] When citadels thrive, invaders suffer. When a citadel lapses or falls, an invader is better off. Thus the citadel, here privity, amounts to a reciprocal of that which did the invading, Cardozo's decision and analysis.

To consider this binary as foundation for a give-and-take thesis that will be developed later in this Article,[35] imagine a dialogue on three topics present in *MacPherson*. I have prepared it augmenting the perspective of Buick, the loser, by installing Cardozo as only one speaker out of three. The dialogue invites readers to think of the holding as a detriment.

A note about its factual accuracy. Words I've put in the mouth of Buick are mostly imaginary and slightly modernized in tone—but also plausible enough, I trust, to summarize what the company might have thought to say when defending against Donald MacPherson's claim. Dialogue attributed to Cardozo and to Chief Judge Willard Bartlett, by contrast, includes (and also supplements) quotations from their *MacPherson* opinions. I use quotation marks to contain diction that Cardozo and Bartlett wrote, and omit this punctuation whenever the words are mine.

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

33 *See supra* notes 7–8 and accompanying text.

34 *See generally* Bernstein, *Reciprocity*, *supra* note 16 (analyzing aggression as a legal category with reference to reciprocity).

35 *See infra* Parts II and III.

Topic: How to regard the Buick automobile

Cardozo: The Buick of *MacPherson v. Buick Motor Company* is a manufactured object that may be "reasonably certain to place life and limb in peril when negligently made."[36]

Buick: Any such peril is not a manufacturer's responsibility unless the manufacturer expressly agreed to be responsible for it, or unless the object is an inherently dangerous article, which an automobile isn't.[37]

Bartlett: Buick is right. The only exceptions to privity as a shelter "are cases in which the article sold was of such a character that danger to life or limb was involved in the ordinary use thereof."[38] The "learned trial judge" had correctly instructed the jury that the Buick automobile that MacPherson was driving at the time he suffered injury "is not an inherently dangerous vehicle."[39]

Reciprocals commentary: The question of how to regard the automobile that Donald MacPherson was driving when he suffered injury seemed central to counsel in this appeal. In the version of their arguments published in the *New York Reports* version of *MacPherson*, both attorneys focused on "inherently dangerous" to the exclusion of all else. Respondent MacPherson said the automobile was inherently dangerous; appellant Buick said it wasn't.[40] This singular focus suggests that the attorney for Buick, the Detroit litigator William Van Dyke,[41] was implicitly conceding that if the car had been inherently dangerous Buick could be liable in negligence. Conversely, the attorney for MacPherson, Edgar T. Brackett, was conceding that the car had to fit this descriptive label for his client to be owed a duty of care.

Cardozo extinguished the parties' tacit agreement about what mattered most. No longer did a plaintiff have to characterize an injurious product as exceptional by its nature, and no longer could a defendant win by establishing that "inherently dangerous" did not describe the injurious thing. Cardozo

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

37 The Northeastern Reports version of *MacPherson*, which I use in this Article to hew to Bluebook citation convention, omits two paragraphs of arguments by counsel published in the New York Official Reports. The first of them, though unlabeled, appears to come from the attorney for Buick. "An automobile is not an inherently dangerous article," this paragraph begins. MacPherson v. Buick Motor Co., 217 N.Y. 382, 383 (1916). From there,"defendant was not liable to a third party in simple negligence" (which means "negligence as contradistinguished from willful or knowing negligence") or "in a negligence action as distinguished from an action for deceit, fraud or misrepresentation, to third parties not in contractual relations with it." *Id.*

38 *MacPherson*, 111 N.E. at 1055.

39 *Id.*

40 *MacPherson*, 217 N.Y. at 383–84.

41 *See* Henderson, *supra* note 23, at 47 ("Defendant was represented [at trial] by local counsel from Saratoga Springs, of course, but the lawyers who ran the show were from Michigan.").

scrapped a doctrinal label that can be applied or withheld and replaced it with an opportunity for plaintiffs only, writing a rule that is less reciprocal in the sense of mutual or evenhanded. He disrupted a shared understanding about what an injured plaintiff must show for an action to survive.[42]

Topic: A product manufacturer's duty to nonprivy vendees

Buick: Putting aside the "inherently dangerous" category for now, the only duties of a manufacturer arise from contract. Furthermore, these duties relate to the quality of the object rather than the acquisition of an obligation of care. What a manufacturer must do is to live up to the promises, if any, that it made to a promisee.

Cardozo: No. Forget privity: "the manufacturer of this thing is under a duty to make it carefully."[43]

Bartlett: Until the issuance of this decision, the law in New York had been "that the liability of the vendor of a manufactured article for negligence arising out of the existence therein does not extend to strangers injured in consequence of such defects, but is confined to the immediate vendee."[44]

Reciprocals commentary: In his analysis of the *MacPherson* decision, James A. Henderson, Jr. offers a partial defense of the privity barrier that Cardozo's opinion destroyed. Though "the privity rule arguably represented overkill," Professor Henderson contends, it had had virtues. Chief among them was its power to screen out "factually unmanageable product defect claims,[45] a set in which Henderson includes what he characterizes as the questionable case brought by Donald MacPherson himself.[46] Though too blunt an instrument to attain justice, privity as tempered by the "inherently dangerous" exception had nevertheless helped courts reach the right result.[47]

This interpretation of the privity barrier describes it as fair enough some of the time, but on the whole too skewed in favor of defendants. In particular, as

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42 Strauss, *supra* note 6, at 857 ("Cardozo's innovation consisted of making that conclusion, which had been reached inexplicity [sic] in fits and starts, fully explicit."). *But see* Gary T. Schwartz, *Cardozo as Tort Lawmaker*, 49 De Paul L. Rev. 305, 308 n. 24 (1999) (noting that what Cardozo said about "inherently dangerous" was already present in the intermediate-appellate decision of Kahner v. Otis Elevator Co., 89 N.Y.S. 185, 188 (App. Div. 1904), *aff'd without op.*, 76 N.E. 1097 (N.Y. 1905)).

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

44 *Id.* at 1055.

45 Henderson, *supra* note 23, at 59.

46 *Id.* at 41–46.

47 *Id.* at 60–62 (reviewing three precedents that Cardozo discussed in *MacPherson*—the winning-plaintiff *Thomas v. Winchester* and *Devlin v. Smith* and the losing-plaintiff *Losee v. Clute*—to so conclude).

Henderson notes, in the pre-*MacPherson* era a customer could only rarely prove negligence on the part of the sole entity or person with which he was in privity, a retailer.[48] Retailers were entitled to indemnity from manufacturers when they lost, but as a general rule they did not lose,[49] even though no one would disagree with the truism that negligence as manifested in a product defect sometimes causes injury to a consumer. The fall of the citadel can thus be understood as the rectification of an imbalance. During the reign of privity, consumers were owed too little care from manufacturers, even with the help of the "inherently dangerous" exception.

Topic: What about *Winterbottom v. Wright*?[50]

Cardozo: "In England the limits of the rule" [here Cardozo appears to use "the rule" to signify two pro-plaintiff holdings from New York Court of Appeals, *Thomas v. Winchester* and *Devlin v. Smith*] "are still unsettled. Winterbottom v. Wright, 10 M. & W. 109, is often cited."[51]

Yes, *Winterbottom* cuts the other way from how I am ruling now. I can't distinguish it, but let's not forget it was criticized in *Heaven v. Pender*, and by Francis Bohlen too.[52]

Buick: We as a manufacturer thought *Winterbottom* was good persuasive authority. It has never been repudiated by the New York courts. We relied on its holding when we set our prices to dealers and planned our manufacturing operations.

Bartlett: This case is basically *Winterbottom* west—even though Donald MacPherson was driving a combustion-engine machine when he got hurt and Winterbottom was injured by a horse-drawn coach; even though Buick Motor Company manufactured vehicles in contrast to Wright who maintained them. Here "the defective wheel on an automobile, moving only eight miles an hour, was not any more dangerous to the occupants of the car than a similarly defective wheel would be to the occupants of a carriage drawn by a horse at the same speed"—that is to say, what happened here also happened in *Winterbottom*—"and yet, unless the courts have been all wrong on this question up to the present time, there would be no liability to strangers to the original sale in the case of the horse-drawn carriage."[53]

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48 *Id.* at 59.

49 *Id.*

50 10 M. & W. 109, 152 E.R. 402 (1842) (holding that a defendant who had a contract with the Postmaster General to maintain postal stagecoaches in working order owed no duty of care to a mail deliverer who was injured while driving one of these coaches).

51 *MacPherson*, 111 N.E. at 1054.

52 *See id.*

53 *Id.* at 1056–57.

Reciprocals commentary: To say that abolishing privity "put[s the] source" of a manufacturer's obligation "in the law" does a 180 on an oft-quoted assertion made by one of the authors of *Winterbottom*. Lord Abinger worried about lawlessness: "Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue."[54] A separate opinion in *Winterbottom*, agreeing that the defendant had to prevail, described the vehicle manufacturer's duty as originating "solely from the contract."[55] Judicial authors thus have cast both *MacPherson* and *Winterbottom*, each utterly contrary to the other, as mandated by the law.

In sum: "The citadel of privity" as celebrated in *Winterbottom* and "the fall of the citadel" for which *MacPherson* is famed both delivered and removed shelter. Buick had enjoyed the comfort and ease that *Winterbottom* had provisioned to makers of vehicles. Cardozo reallocated the distribution of security between manufacturers and consumers.

2 The reciprocal of *MacPherson*: care and vigilance *for* an automobile manufacturer

Entities can hold legal rights and entitlements, and negligence doctrine in particular agrees that an individual human defendant can be liable for breaching a duty of care owed to a business-corporation plaintiff.[56] That said, what this Part presents as a reciprocal relation, wherein the cohort identified with Donald MacPherson extends care and vigilance to the cohort identified with Buick Motor Company, is unfamiliar enough to warrant discussion. Two examples of the American automobile industry at the receiving end of solicitude illustrate care and vigilance for an automobile manufacturer. The first example emerges in three decisions by the nation's highest court. The second is the auto bailout of 2008–09, in which two presidents of different parties and the national legislature came together to give the sector a unique benefit rendered through law.

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54 152 E.R. at 406.

55 *Id.* at 405.

56 *See* Greycas, Inc. v. Proud, 826 F.2d 1560 (7th Cir. 1987) (corporate client plaintiff, individual attorney defendant); J'Aire Corp. v. Gregory, 598 P.2d 60 (Cal. 1979) (restaurant business plaintiff, individual contractor defendant).

2.1 Tender decisional law from the United States Supreme Court

Every category of defendant or plaintiff does well at least some of the time in the Supreme Court. One can find decisions that favor politically unpopular groups: accused terrorists, recipients of public assistants, labor unions, criminal defendants, prison inmates. Win some, lose some.

Automobile manufacturers have won most and lost few. My review below does not cherrypick: As litigants, automobile-maker entities fare exceptionally well in the Supreme Court. I have had nothing inconveniently contrary to explain or withhold. These three winning cases are only part of the total of auto-defendant victories,[57] but the doctrinal issues they include—the constitutional law of punitive damages, interpretation of the Federal Rules of Evidence, and preemption—amount to considerable shelter. Inverting Donald MacPherson's win in this respect, the Court has expressed steadfast support for the welfare and safety of this sector.

2.1.1 *BMW of North America, Inc. v. Gore*

Defendants protesting punitive damages awards on constitutional grounds had scored 0 for 3 in the Supreme Court before an automobile manufacturer, the German corporation BMW, won certiorari in 1995.[58, 59] Their first loss occurred in 1989 when a waste disposal business contended that a punitive damages award violated the Eighth Amendment prohibition of excessive fines: the Court ruled that this constitutional clause applied only to "the prosecutorial powers of

57 *See* Honda Motor Co. v. Oberg, 512 U.S. 415 (1994) (invalidating an Oregon law that prohibited judicial review of punitive damages). Having remarked on the absence of anything "inconveniently contrary" in the Supreme Court record, I note a couple of disappointments for the sector. *See* Williamson v. Mazda Motor Co. of America, 562 U.S. 323 (2011) (declining to find preemption in a design defect claim when petitioners had no evidence of intent to displace tort liability); Motor Vehicle Manufacturers Association of America v. State Farm Mut. Automobile Ins. Co., 459 U.S. 987 (1982) (refusing to abandon "arbitrary and capricious" analysis for judging agency action). What petitioners sought in those cases seems extreme enough not to disrupt my conclusion that the sector does very well in this forum, but readers can judge this one for themselves.

58 517 U.S. 559 (1996).

59 Including another case, Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988), would make the tally 0 for 4, but because there the Court ruled against a petitioner on the ground that it had not raised its constitutional claims in state court rather than after reaching the merits of its excessive-fines and due process arguments, I exclude it.

government."[60] Two years later, an $840,000 punitive damages award appeared to trouble the Court more but the petitioner, an insurance company, had to pay it.[61] Next up: a mining business displeased by $10 million in punitive damages for the tort of slander of title. Its constitutional arguments also failed.[62]

In *BMW of North America v. Gore*, the Supreme Court finally met a punitive-damages judgment it could not tolerate. Justice Stevens, writing for the majority, condemned the $2 million award with respect to three due-process "guide-posts."[63] First, $2 million was much higher than the maximum fine BMW could have been compelled to pay for the misconduct at issue. Second, what BMW had done wrong, which was covertly to repaint a new 535i sedan to hide what acid rain had done to the finish, was relatively benign misbehavior. Third, "ratio": two million dollars was "500 times the amount of [Gore's] actual harm as determined by the jury," $4000.[64]

A standard reading of this case law understands *BMW* as incrementalist, a victory for patient entity-defendants that had played a long game.[65] Perhaps. BMW might have petitioned the Supreme Court at the right time, after the right precedents, rather than from the right category of business. It remains correct, however, to note that an automobile manufacturer succeeded on a constitutional claim about punitive damages where petitioners from other sectors had failed, on facts that were not more impressive for it.[66]

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60 Browning-Ferris Industries, Inc. v. Kelco Disposal, 492 U.S. 257 (1989)

61 Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1 (1991).

62 TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993).

63 *BMW*, 517 U.S. at 574–75.

64 *Id.* at 582.

65 *See* Glen R. Whitehead, Note, *BMW* of North America v. Gore: *Is the Supreme Court Initiating Judicial Tort Reform?*, 16 QLR 533, 568 (1997) (noting two key precedents to observe that "*Haslip* suggested that the Constitution offered protection against 'grossly excessive' damages and *TXO* affirmed that recognition"). Justice Stevens remarked in *BMW* that two of the predecessor decisions, *Haslip* and *TXO*, had both identified the ratio of punitive to compensatory damages as constitutionally significant. *BMW*, 517 U.S. at 581. The *Haslip* and *TXO* ratios had been 4 and 10 respectively, numbers much lower than 500, Stevens wrote. *Id.* He had to stretch for his conclusion about a ratio of 10 in *TXO:* Stevens looked ahead to the possibility of more harm if the defendant's nefariousness had succeeded. *Id.*

66 Consider ratio, the "guidepost" in which the Court has taken the most interest, perhaps because it is the easiest to identify. *See* State Farm Mutual Automobile Ins. Co. v. Campbell, 538 U.S. 408, 426 (2003) (analyzing all three guideposts but focusing on ratio to conclude that 145 to 1 was too much); *see also infra* notes 181–82. Apples to apples, the *TXO* ratio is a bit worse—that is to say bigger—than that of *BMW*. Its $19,000 compensatory award is just under five times of what the jury gave Gore as compensation, while its punitives amount is five times bigger. Put another way, 526 is more than the 500 that the Court said in *BMW* was the first ever big-enough number.

2.1.2 *Kumho Tire Co., Ltd. v. Carmichael*

Although the petitioners in *Kumho Tire* manufactured and distributed tires, not automobiles, the injury of this case resembled that of Donald MacPherson: A part failed; a vehicle crashed, and physical harm ensued.[67, 68] The issue before the Court in the case that became known as *Kumho Tire*[69] was whether the trial court had erred as a matter of law when it applied "the *Daubert* standard" to exclude expert testimony that the plaintiff had sought to introduce.[70]

Kumho Tire answered No. Writing for the Court, Justice Breyer concluded that even though the expert witness was an engineer rather than a scientist like the expert in *Daubert*, and even though the appellate court below had concluded that this engineer's testimony relied on "skill- or evidence-based observation" rather than the application of scientific principles, trial judges nonetheless have discretion to use *Daubert* for guidance on expert testimony of this kind.[71]

At one level, *Kumho Tire* looks bland and evenhanded. The trial judge ruled against the plaintiffs on a defense motion to exclude the testimony but then also granted their motion for reconsideration, as if to say they might have a point.[72] The Eleventh Circuit, reversing, held that the trial judge had erred in applying *Daubert* to keep out the testimony, but noted that the exclusion might be defensible through other applications of Rule 702 of the Federal Rules of Evidence.[73] Separate Supreme Court opinions in *Kimho Tire* differed with the majority only on narrow points and expressed little substantive disagreement. Throughout, all of the *Kumho Tire* opinions expressed trust and confidence in trial judges.

The more troubling takeaway, another reciprocal, is non-trust and non-confidence in the jury as factfinder. Whereas *Daubert* had deprived a plaintiff of a questionable reinterpretation of statistical consensus, *Kumho Tire* went

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67 526 U.S. 138 (1999).

68 *See* Carmichael v. Samyang Tires, Inc., 131 F.3d 1422, 1433 (11th Cir. 1997), *rev'd sub. nom.* Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

69 At its trial and appellate levels, the action went by Carmichael v. Samyang Tires, Inc. A defendant named Kumho & Company manufactured the tire at issue; a separate entity defendant, Kumho U.S.A., distributed tires made by Kumho & Company. *See* Carmichael v. Samyang Tires, 923 F. Supp. 1514, 1517 (S.D. Ala. 1996).

70 *See* Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993).

71 *Kumho Tire*, 526 U.S. at 142.

72 *Id.* at 145. On reconsideration, the trial court agreed with the plaintiffs that *Daubert* ought to be applied flexibly, but ruled against them again. *Id.* at 146.

73 *Carmichael*, 131 F.3d at 1436.

further when it prevented lay decision makers from hearing what an engineer-witness had to say about an accident. *Daubert* had not bestowed untrammeled discretion on trial judges; it wrote criteria. Two of them, general acceptance and peer review, have no application to the *Kumho Tire* exclusion decision.[74]

The testimony kept from the jury had its weaknesses, to be sure. Plaintiff's expert "could not say whether the fateful tire had traveled more than 10, or 20, or 30, or 50 thousand miles;" only "6,000 miles was 'about how far' he could 'say with any certainty.'"[75] He did not have a good answer to "how he could differentiate between a tire that actually had been overdeflected and a tire that merely looked as though it had been,"[76] and, Justice Breyer added, he admitted that "he had inspected the tire itself for the first time the morning of his first deposition, only for a few hours. (His initial conclusions were based on photographs.)"[77]

Fair enough: but one wonders why the Court thought this testimony required judicial squelching. Its infirmities are not arcane or subtle. Ordinary skill at cross-examination by the lawyer representing Kumho Tire would have brought its deficiencies to the jury.

Kumho Tire necessarily generates "more trial review and undoubtedly more exclusions," in the words of one critical reader, "leaving the jury with less information and significantly impacting the jury's responsibility as the trier of fact."[78] Although the shift of power from juries effected by *Kumho Tire* probably has a more severe impact on criminal defendants who want to present novel expert evidence to a jury,[79] the first group of litigants to suffer from the suppression it approved were individuals who, in this respect resembling Donald MacPherson, had claimed that a bad component caused them to be hurt while riding in a motor vehicle.[80] The resemblance ends at the binary that occupies this Article: Unlike Donald MacPherson, the Carmichael family lost; unlike Buick Motor Company, the manufacturer-defendant of *Kumho Tire* won.

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74 *See* Mark Lewis & Mark Kitrick, Kumho Tire Co. v. Carmichael: *Blowout from the Overinflation of* Daubert v. Merrell Dow Pharmaceuticals, 31 U. Tol. L. Rev. 79, 88 (1999).

75 *Kumho Tire*, 526 U.S. at 154–55.

76 *Id.* at 155.

77 *Id.*

78 Jeffrey M. Schumm, Note, *Precious Little Guidance to the "Gatekeepers" Regarding Admissibility of Nonscientific Evidence: An Analysis of* Kumho Tire Co. v. Carmichael, 27 Fla. St. U. L. Rev. 865, 891 (2000).

79 *Id.*

80 *See* Carmichael v. Samyang Tires, Inc., 923 F. Supp. 1514, 1516 (S.D. Ala. 1996) (naming members of the extended Carmichael family, six of whom were ejected from a minivan when the tire failed).

2.1.3 *Geier v. American Honda Motor Company, Inc.*

Geier made decisional law on preemption, a doctrinal category with multiple meanings. This Article uses the term in the sense of immunity from state tort law.[81] For automobile-manufacturer tort defendants, preemption functions as an affirmative defense against claims of design defect. When making preemption arguments, they claim that even if the design of their automobile was defective and caused the plaintiff to suffer injury, they cannot be liable because a federal statute installed regulation in place of liability as a route to fulfilling the intent of Congress. The statute that most often fits this contention of theirs is the National Traffic and Motor Vehicle Safety Act of 1966.[82]

Alexis Geier complained about the absence of passive restraints in the Honda Accord she had been driving when she suffered injury. At the time of manufacture, this design choice by Honda was permitted under the governing federal regulation, Standard 208. The Court, in a 5–4 decision, concluded that Standard 208 preempted Geier's design defect claim because

> [i]n effect, petitioners' tort action depends upon its claim that manufacturers had a duty to install an airbag when they manufactured in the 1987 Honda Accord. Such a state law—i.e. a rule of state tort law imposing such a duty—by its terms would have required manufacturers of all similar cars to install airbags.... It thereby would have presented an obstacle to the variety and mix of devices that the federal regulators sought.[83]

This reading of the interplay between a safety regulation and tort liability is at odds with a key sentence in the Safety Act, its savings clause: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law."[84] Honda's position was that its compliance with Standard 208 did indeed exempt it from liability under common law. The *Geier* Court agreed, notwithstanding the explicit rejection of this stance in the statute.

Like *BMW*, *Geier* featured a win for an auto manufacturer in a doctrinal category where other entity litigants had fared less well. Numerous businesses—a cigarette manufacturer, a railroad, a medical device maker—also fended off tort liability using preemption in the Supreme Court, but never when the statute at issue had expressly preserved common law remedies.[85] This win did not stop

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81 529 U.S. 861 (2000).
82 Pub. L. No. 89–563, 80 Stat. 718 (1966).
83 *Geier*, 529 U.S. at 881.
84 *Id.* at 895 (Stevens, J., dissenting).
85 *Id.* at 897–98.

with judicial rejection of what Congress had provided with the apparent goal of protecting consumers. A white paper by the Center for Progressive Reform contends that whereas the *Geier* result can be defended with evidence that the U.S. Department of Transportation had decided not to mandate the design feature at issue because regulators believed that mandating it was not likely to maximize safety—they had concluded that greater safety would ensue from the experience of a range of restraints—more typically, an auto-safety regulation will lack any such record of conscious expert judgment. Nonetheless automobile manufacturers have treated *Geier* "as an open invitation to make preemption claims in every automobile safety lawsuit that implicates a federal safety standard."[86] Sometimes they prevail.[87]

The Supreme Court in 2011 rolled back some of its "open invitation" with *Williamson v. Mazda Motor Co. of America*,[88] a unanimous opinion by the author of *Geier*. Justice Breyer in *Williamson* distinguished tort liability for another automobile design feature, simple lap belts rather than shoulder belts on rear inner seats, from the claim of Alexis Geier, who had tried to blame a manufacturer for omitting a design feature that regulators had deliberately refused to mandate.[89] While *Williamson* represents a loss for the sector, the Court's reprieve from a savings clause is a judicial gift that in the lower courts keeps on giving.[90]

2.2 The extraordinary bailout of 2008–09

The American automobile industry in the United States has received law-based solicitude from the legislative and executive branches of the federal constitutional order, not just the judiciary. This second example arose when Chrysler and General Motors, two large American automobile manufacturers, sought

86 *The Truth About Torts: Regulatory Preemption at the National Highway Traffic Safety Administration*, July 2008, at 3 (2008) http://www.progressivereform.org/articles/NHTSA_Preemption_804.pdf

87 *Id.* at 4 (reviewing lower court decisions).

88 562 U.S. 323 (2011).

89 *Id.* at 326. The two claims are different, according to the Court, because whereas the Department of Transportation wished to encourage diversity on the passive-restraints issue through *Geier*'s Standard 208, the reason for its neutrality on simple lap belts on rear inner seats was a simple concern about cost-effectiveness. No need for tort liability to be preempted. *Id.* at 335.

90 *See supra* note 87 and accompanying text.

rescue from new law. Congress and the President put together a taxpayer-funded bailout to benefit these two for-profit businesses.[91]

2.2.1 A large transfer payment in a stingy time

A bailout may be understood as a gift: "recipients have no entitlement to a bailout," as Anthony Casey and Eric Posner explain, "yet they receive one anyway."[92] Some bailout transfers end up repaid, but American taxpayers footed the bill for this one.

In November 2008, the chief executive officers of the automobile Big Three—Chrysler, General Motors, and Ford—went to Washington to request what they called a bridge loan from Congress.[93] By then the global financial crisis was underway, but these businesses, crushed under "long-term falling market share, compounded by a massive short-term drop in aggregate demand, with large fixed costs,"[94] would have been in deep trouble even if the larger economy were in good health.

The financial crisis proved expedient for needy automakers. Although in late 2008 Congress could not agree quickly on a bailout for the sector, and the presidency was in transition, funds from the Troubled Asset Relief Program had recently become available by the passage of the Emergency Economic Stabilization Act. With participation from both the Bush and Obama administrations, the government made stopgap loans to GM and Chrysler sufficient to keep the two companies operating in the short run.[95] About $17.4 billion went directly to them,[96] with more than $3 billion loaned to related entities that served as financing arms for the two automakers.[97]

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91 *See generally* Paul Ingrassia, Crash Course: The American Automobile Industry's Road to Bankruptcy and Bailout—and Beyond (2011).

92 Anthony J. Casey & Eric A. Posner, *A Framework for Bailout Regulation*, 91 Notre Dame L. Rev. 479, 481–82 (2015).

93 Austan D. Goolsbee & Alan B. Krueger, *A Retrospective Look at Rescuing and Restructuring Chrysler and General Motors*, 29 J. Econ. Perspectives 3, 5 (2015). The executives' request drew prompt mockery on Saturday Night Live. *See* https://djkonservo.wordpress.com/2008/11/24/saturday-night-live-cspan-auto-bailout-skit/.

94 *Id.* at 7.

95 *See* A&D Auto Sales, Inc. v. U.S., 748 F.3d 1142, 1148 (Fed. Cir. 2015) (describing early stages of the bailout). Of the Big Three, Ford was alone in receiving no direct bailout appropriations. *See* Ingrassia, *supra* note 90, at 273 (praising Ford's management for not needing this rescue).

96 *Id.*

97 Goolsbee & Krueger, *supra* note 93, at 7.

More payments ensued, a portion of them in the form of federally owned shares of General Motors. The government ultimately invested about $80 billion to save the two companies,[98] both of which filed for bankruptcy in 2009.[99] By the time the bailout ended in late 2014, it had cost American taxpayers $16.6 billion.[100] Characterization of this transfer as "extraordinary" and a "large" amount need not rely on the absolute size of this number; bigness exists only in context.[101] Consider a few contrasts that show how this sector received unusual care and tenderness.

The first contrast is to the most (in)famous American bailout of that era, a high-priced rescue of imperiled banks. Casey and Posner, summarizing an American policy consensus, note that financial institutions "provide a better case for bailouts than non-financial institutions do."[102] This conventional wisdom is especially widely accepted when the financial institution that asks for rescue is solvent: but even an insolvent one does more to help the economy than a non-financial institution with the bailout funds it takes, because financial institutions spread credit directly to other entities that need money to survive.[103]

In this mainstream perspective, then, Wall Street was a better candidate for taxpayer cash than Detroit. Yet Detroit got more and Wall Street less as measured in red versus black ink on the federal ledger. Unlike the auto bailout, which caused the aforementioned loss of $16.6 billion to taxpayers, the bank bailout made a profit: As the United States Treasury announced in late 2014, summing up the two side by side, Wall Street rescue interventions generated a gain of $372 billion from interest payments and the sale of bank stocks.[104] Treasury's spin on the auto bailout called the outcome profitable only in the sense of jobs saved.[105] In other words, bailing out banks can be praised as the

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98 Casey & Posner, *supra* note 92, at 516.

99 Goolsbee & Krueger, *supra* note 93, at 13.

100 Conn Carroll, *It's Official: Taxpayers Lost $16.6 Billion on the Auto Bailout*, Townhall, Feb. 4, 2015 http://beta.townhall.com/tipsheet/conncarroll/2015/02/04/its-official-the-auto-bailout-cost-taxpayers-166-billion-n1952771 (reviewing data published in a TARP Special Inspector General report released in January 2015, after the government had sold its shares of Ally Financial, a GM affiliate).

101 *See* Anita Bernstein, *Civil Rights* Violations = *Broken Windows: De Minimis Curet Lex*, 62 FLA. L. REV. 895, 898 (2010).

102 Casey & Posner, *supra* note 92, at 522.

103 *See id.* at 522–23.

104 Jonathan Weisman, *U.S. Declares Bank and Auto Bailouts Over, and Profitable*, N.Y. TIMES, Dec. 19, 2014 http://www.nytimes.com/2014/12/20/business/us-signals-end-of-bailouts-of-auto makers-and-wall-street.html.

105 *Id.*

choice of a rational investor motivated to maximize the wealth recorded in its ledgers. Extending care and support to the auto industry caused loss on this axis rather than gain. The losing investor felt good about its choice anyway, and celebrated it.[106]

A second contrast is present between billions in government funds and an ambient stinginess at the time. Economists Austan Goolsbee and Alan Krueger, looking back in 2015 on their work inside the Obama administration at the height of the financial crisis, observed how difficult it had been in 2008–09 to do stimulus spending of any kind. With respect to the auto bailout, Goolsbee and Krueger place the newly inaugurated President at the spend-y end of a guarded spectrum: Obama and his team wanted to send money to Detroit but were opposed to "bailing out failed companies or having the government own a majority stake in a major private company."[107] They insisted that as a condition for federal largesse GM and Chrysler had to operate more prudently.[108] Their posture was maximally generous at the time. Republican members of Congress stood united in opposition to all stimulus spending.[109] Public opinion fell between the two, with both the larger stimulus and the auto bailout drawing mixed reviews in polls.[110] Money was short, in short.

Departures from the bailout norm went on to favor the sector. First, the federal government took stock in General Motors rather than the more frequently chosen bailout technology, loan guarantees. Debt has to be repaid whereas the equity holding that GM received promised nothing to the United States in return.[111] Second, although Congress had appropriated funds to assuage the financial crisis in the Emergency Economic Stabilization Act and thus participated in the transfer that automakers received, it was not involved in its particulars, which were negotiated in secret and later presented in bankruptcy proceedings as a fait accompli.[112] Indeed, when Congress was first asked to bail

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106 I elaborate on this personification of post-bailout political discourse below. *See infra* Part II.B.2.

107 Goolsbee & Krueger, *supra* note 93, at 22.

108 *See generally* Ingrassia, *supra* note 91.

109 *See* Michael Grunwald, The New New Deal: The Hidden Story of Change in the Obama Era (2012).

110 *See* Pew Research Center, Auto Bailout Now Backed, Stimulus Divisive, Feb. 23, 2012 http://www.people-press.org/2012/02/23/auto-bailout-now-backed-stimulus-divisive/ (summarizing poll results from 2009 to 2012). The auto bailout became more popular later. *See infra* notes 123–25 and accompanying text.

111 Casey & Posner, *supra* note 92, at 521. On equity as better than debt from the standpoint of a helped recipient, see Anita Bernstein, *Pecuniary Reparations Following National Crisis: A Convergence of Tort Theory, Microfinance, and Gender Equality*, 31 U. Pa. J. Int'l L. 1, 38 (2009).

112 Casey & Posner, *supra* note 92, at 521.

out the automobile industry in 2008, it did not do so.[113] Legislative rejection did not stop the sector from receiving billions that it did not have to pay back.

For a third contrast, consider what the automobile sector—in peril all over the world—received outside the United States. Europe responded very differently at both its national and supranational levels. The continent is known for having rejected stimulus spending in response to the global financial crisis, a choice that observers understand to have prolonged the downturn there.[114] Aid for European auto manufacturers hewed to this larger pattern. Bailout transfers to the sector were limited to two cash-for-clunkers programs in Germany and Italy along with loan guarantees by national governments and the European Union,[115] which, as just remarked, are less generous to recipients than the taxpayer-funded equity investment that General Motors received.[116] During the 2008–09 crisis, no other country or region in the world bailed out its automakers at the American level.[117]

2.2.2 The bailout understood as mutual aid and connection

For purposes of this retrospective on *MacPherson* a century later, what matters most about the auto bailout is what might be thought of as mutuality in its reception. Even though taxpayers were left holding a multi-billion dollar bag, a widely shared consensus characterizes this transfer of money as a source of gain rather than loss for the United States.[118]

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113 *Id.*

114 Martin McKee et al., *Austerity: A Failed Experiment on the People of Europe*, 12 Clinical Med. 346, 349 (2012) (noting consequences for public health); Yannis Stavrakakis, *Beyond the Spirits of Capitalism? Prohibition, Enjoyment, and Social Change*, 33 Cardozo L. Rev. 2289, 2290 (2012) (quoting Paul Krugman's characterization of the European response as "The Beatings Must Continue").

115 Dan Strumpf, How Does the U.S. Auto Bailout Compare With Others?, Mar. 17, 2009 http://www.manufacturing.net/article/2009/03/how-does-us-auto-bailout-compare-others

116 *See supra* note 111.

117 China is a partial exception. Its automobile industry is not mature enough to be bailed out of anything, but the national government made large investments in the sector during this time period. *See* Usha C.V. Haley, *Putting the Pedal to the Metal*, Econ. Pol'y Inst., Jan. 31, 2012 http://www.epi.org/publication/bp316-china-auto-parts-industry/

118 I don't disagree; I approve of job-saving bailouts. *See generally* Anita Bernstein, *Just Jobs*, 45 U. Bal. L. Rev. 209 (2016). Nor are multiplier effects, which spread beneficial consequences beyond the direct recipient of a transfer, see Enrico Moretti, *Local Multipliers*, 100 Am. Econ. Rev. 373 (2010), lost on me. These defenses of the auto bailout do not explain why for-profit corporations had to receive this transfer, however: a national government can inject money

Let us return for a moment to Wall Street. Its bailout earned money for the federal government, but also sowed division. The rise of the Tea Party on the right and Occupy Wall Street on the left united in loathing this rescue.[119] Even after the government noted the taxpayers' $372 billion gain, blood lay on the floor. One politician voted out of office in 2010 linked the rescue of banks to an increase in partisanship, where Democrats and Republicans became less able to work together in Congress.[120] For ordinary people, argues the journalist Matt Taibbi, gain to taxpayers matters little because this bailout committed them to "permanent, blind support of an ungovernable, unregulatable, hyperconcentrated new financial system that exacerbates the greed and inquality that caused the crash, and forces Wall Street banks like Goldman Sachs and Citigroup to increase risk rather than reduce it."[121] Speaking more moderately, Senator Elizabeth Warren noted in 2014 that bailing out Wall Street doled out assistance selectively, transferring wealth to banks that had sold mortgage-backed assets and loaned money but not to individuals who lost their homes in the same crisis.[122]

The auto bailout, by contrast, won approval as "we're all in this together," an exercise of national-level mutual aid and connection. This reception admittedly did take time. According to a contemporary NBC News/Wall Street Journal poll, a majority of respondents answered Disapprove to a question about loans and financial assistance to automobile manufacturers, and a larger majority disapproved of rescue in the form of temporary federal ownership of General Motors stock.[123] By the 2012 presidential election, however, the bailout had strengthened President Obama's popularity enough to deliver the swing state Ohio.[124] In 2015 Obama described the measure as a bet that had "paid off for America, because the American auto industry is back."[125]

Further vitality in presidential politics continues for this long-concluded federal intervention. As this Article goes to press, the Democratic Party has not

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into its domestic economy through public-works programs. *See* Bernstein, *supra*, at 215–17, 233–35.

119 Weisman, *supra* note 104.

120 *Id.*

121 Matt Taibbi, *Secrets and Lies of the Bailout*, Rolling Stone, Jan. 2013. http://www.rollingstone.com/politics/news/secret-and-lies-of-the-bailout-20130104

122 *Quoted in* Weisman, *supra* note 104.

123 This poll took place in June 2009 and surveyed 1,000 adults. http://www.pollingreport.com/business2.htm

124 Keith Lang, *Obama: Auto Bailout 'Was the Right Thing to Do,'* The Hill, Jan. 17, 2015 http://thehill.com/policy/transportation/228836-obama-auto-bailout-was-the-right-thing-to-do

125 *Id.*

yet chosen its 2016 nominee, and two rivals compete over which of them better supported the bailout while serving in the United States Senate. Both of them had voted for stand-alone legislation aimed only at rescuing the auto industry. When Republican opposition killed that measure, the Senate voted to release about $350 billion in bailout funds to the financial sector with the understanding that $4 billion would go to Detroit as a temporary fix; Hillary Clinton joined the voters that approved this revised bill and Bernie Sanders opposed it as Wall Street welfare.[126] Disagreement, in short, but not about the goodness of rescuing this industry. This agreement aligns with a 2012 Pew opinion poll that found majority approval of the bailout. One characterization of it that referenced "7.25 million people who are grateful for the stability that Obama's plan brought, and who are paying taxes and buying stuff to help the economy."[127] Mutual aid.

3 How tort reform stretches care and vigilance to defendants beyond the automobile sector

Anyone still reading this far is well versed in the subject of American tort reform. Its stances, slogans, doctrines, legislation, and wish lists have received attention from torts-minded readers for decades.[128] In this Part, my review of tort reform developments looks at these familiar policy arguments and innovations through the "reciprocal" lens of this Article.

This perspective is fresh, as neither side of the binary nor the work of any outside observer has focused on mutuality in the tort reform effort.[129] Antipathy

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126 *Who is Right in the Sanders-Clinton Auto Bailout Brawl?* Wash. Post, Mar. 10, 2016 https://www.washingtonpost.com/opinions/who-is-right-in-the-sanders-clinton-auto-bailout-brawl/2016/03/10/1b723574-e6f5-11e5-bc08-3e03a5b41910_story.html?postshare = 1791457714757249&tid = ss_fb

127 David Kiley, *As Obama Takes Victory Lap Over Auto Industry Rescue, Here Are the Lessons of the Bailout*, Forbes, Jan. 20, 2016 http://www.forbes.com/sites/davidkiley5/2016/01/20/obamas-takes-victory-lap-over-auto-industry-rescue/2/#2889fd0a5877

128 Perhaps for even longer than *MacPherson* has been around. *See* Rachel M. Janutis, *The Struggle Over Tort Reform and the Overlooked Legacy of the Progressives*, 39 Akron L. Rev. 943 (2006) (arguing that the core belief of tort reform—that is, too much civil recourse is a bad thing—dates back to Progressive sources of the nineteenth century).

129 I include my own work in this generalization about an omission in the literature, but I came close to filling the gap when I found support for both predictability and unpredictability in both the plaintiff and defendant sides of the tort reform binary. *See* Bernstein, *2x2 Matrix*, *supra* note 16, at 284–87.

is easier to see and hear. Proponents of tort reform have cast their views as "common sense" and corrections of wasteful error, while critics have been impugning reformers' motives for almost as long as the movement has existed. Antagonists contend that tort reform pushes to advance the interests of defendants at the expense of plaintiffs.[130]

Here, as elsewhere, I bypass the binary merits of this debate.[131] In its place I make a narrower point: Tort reform advocates argue for what they want with reference to a wider constituency. When they contend that tort reform leaves consumers, patients, and the general public better off, they describe American civil justice in reciprocal terms. The care and vigilance that these advocates seek for the defense cohort urges the public to look ahead to think about risks and consequences, just as Cardozo told Buick Motor Company to do. Below I group together illustrations of care and vigilance for corporate defendants that combine rhetorical or verbal comfort with favorable substance written into statutory and judge-made law.

3.1 Favorable substance: a summary

State statutes installed a pro-defendant tort shift comparable to what *MacPherson* achieved in the other direction a hundred years ago. To describe what this movement has achieved, I rely on empirical work by Ronen Avraham, whose *Database of State Tort Law Reforms* reports and follows measures codified around the United States.[132] These materials amply support the endeavor that Professor Avraham notes in his *Database* abstract: to "increase our understanding of tort reform's impacts on our lives."[133]

Avraham confirms that all fifty states have enacted tort reform. A spreadsheet appended to the *Database* names eleven categories of this initiative.[134] The first three *Database* categories are variations on caps on damages, divided by

130 *See* Michael L. Rustad, *The Endless Campaign: How the Tort Reformers Successfully and Incessantly Market Their Groupthink to the Rest of Us*, in Materials on Tort Reform 33 (Andrew F. Popper ed., 2010); Robert W. Higgason, *Media Reviews*, Houston Lawyer, Nov.-Dec. 2003, at 48 (quoting the plaintiffs' lawyer Joe Jamail: "Tort reform? That's a misnomer. It's really 'tort deform.'").

131 *See* Bernstein, *2x2 Matrix*, *supra* note 16.

132 Ronen Avraham, Database of State Tort Law Reforms (DSTLR 5th) (Univ. of Tex. Sch. of Law, Law & Econ. Research Paper No. e555 2014), available at http://ssrn.com/abstract=902711

133 *Id.* at 2.

134 Ronen Avraham, *DSTLR 5th 1980–2012*, University of Texas Law, https://law.utexas.edu/faculty/ravraham/dstlr.php (last visited April 24, 2016).

what type of damages they limit: first noneconomic, second punitive, and third "total." The fourth category is "split recovery reform," whereby plaintiffs have to share their awards with state governmental units. Fifth: abrogation of the collateral source rule. Sixth: "punitive evidence reform" that compels plaintiffs to meet a higher evidentiary standard to recover punitive damages. Seventh: "periodic payments reform," which encourages or compels courts to order damages paid in stages, rather than all at once, after a plaintiff prevails. Eighth: limits on how large a percentage a contingent-fee lawyer may charge. Ninth: "joint and several liability reform," or legislation that changes the common law rule that any defendant found liable is responsible for the entire award. Tenth is the creation of patient compensation funds; eleventh is comparative fault reform.[135]

The first seven categories along with the ninth unambiguously make plaintiffs worse off. Limits on contingent fees, the eighth category, can be understood as good for plaintiffs at the expense of their attorneys, but this measure has support from only the defendant side of the binary.[136] Categories ten and eleven can benefit both sides: A patient compensation fund provides excess insurance for medical malpractice claims, which both a patient plaintiff and a physician defendant might welcome, and reform of comparative fault can (at least in principle if not often in fact) move in any direction, both pro-plaintiff and pro-defendant. Ambiguity in three out of eleven categories notwithstanding, the sum of "tort reform's impacts on our lives"[137] overwhelmingly favors the defendant side of the binary.

The remainder of this Part focuses on tort-reform expository prose, a telling complement to tort reform as legal change.

3.2 Reducing financial burdens on corporations and defense-side entities

One good way to protect a sector of the for-profit economy is to look out for its bottom line. Favorable government action will almost never entirely eliminate risk for a business, but it helps. It not only lessens financial peril in material terms but delivers a message of support. *We have your back*, the recipient of that largesse can reasonably hear.

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135 *Id.*

136 Elihu Inselbuch, *Contingent Fees and Tort Reform: A Reassessment and Reality Check*, 64 L. & Contemp. Probs. 175, 179–80 (2001).

137 Avraham, *supra* note 133.

3.2.1 "The tort tax" called harmful to American society

For tort reformers, the consequences of civil liability burden repeat players directly and everyone else indirectly.[138] One category of repeat player that has occupied this Article, the product manufacturer, will want shelter from liability for itself, as we have seen.[139] Its self-interest is buttressed by external supports: Tort reform spokespersons observe that when this sector enjoys shelter, gains also follow for the public,[140] a reciprocal advantage. Writing about drug liability in particular, the pharmaceutical law scholar Lars Noah sorts these less direct effects into two broad promises: "innovation," which will brighten life for consumers in the future, and "access," their continuing opportunity to buy goods the sector has already supplied.[141] Tort liability threatens both, says the tort reform movement. Less liability will make these gains stronger.

Another strand in tort reform writing contends that tort liability deprives consumers not only of innovation and access but also safety. More than thirty years ago, Peter Huber challenged the truism that liability deters risky conduct and thereby enhances safety by arguing that judges and jurors have a bias against some new technologies.[142] Innovations look dangerous to these decision-makers even when they are safer than the "cottage industries, wood stoves, transportation by car, or exposure to natural toxins or pathogens" they superseded.[143] Joanna Shepherd supports this contention by reporting evidence that when liability costs go up, increases in the accidental death rate follow.[144]

Medical malpractice offers a well-documented example of tort reform accompanied and strengthened by tocsins about these kinds of harm—less innovation, less access, less safety. Of all the medical specialties, obstetrics continues to draw particular attention. "[I]n surveys," according to one law

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138 Jim Copland, *The Tort Tax*, Wall St. J., June 11, 2003, at A16.

139 *See supra* Parts I and II.

140 Michael Rustad makes this point in negative terms: The tort reform movement has contended that "windfall awards won in court" for the small number of lucky exploiter-plaintiffs burden us all. Rustad, *supra* note 131 (also quoting the quoting of an insurance company advertisement by Joanne Doroshow: "The jury smiles when they made the award. They didn't know it was coming out of their own pockets.").

141 Lars Noah, *Platitudes About "Product Stewardship" in Torts: Continuing Drug Research and Education*, 15 Mich. Telecomm. & Tech. L. Rev. 359, 359 (2009).

142 Peter Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 Colum. L. Rev. 277 (1985).

143 *Id.* at 278.

144 Joanna M. Shepherd, *Products Liability and Economic Activity: An Empirical Analysis of Tort Reform's Impact on Businesses, Employment, and Production*, 66 Vand. L. Rev. 257, 287 (2013).

review article, "large shares of ob-gyns consistently report practicing defensive medicine, limiting the scope of their practice, stopping obstetrics, stopping high-risk obstetrics, or planning to relocate due to liability pressures."[145] Let us examine through our reciprocity lens these five named responses to the risk of being hauled into court.

Defensive medicine may appear benign, or even helpful to an individual patient, but it is expensive. One magazine article quotes a Gallup estimate of its annual cost as $650 billion a year, one health-care dollar in four—a bill that patients and taxpayers have to pick up.[146] The other four responses, to the extent they really occur (the list references subjective "surveys" rather than data like numbers of active medical licenses), function to deprive patients of medical care on the ground.[147]

Note the reciprocity theme in these survey responses. The ob-gyn respondent-protestor is saying (if the reader will permit me one last scripting of dialogue[148]) *Ease up because that boot of yours is not just on my neck: it's on yours too. Too much liability and I have no choice but to inflict suffering on the patient population. I'll practice defensive medicine to ward off malpractice actions and send you the bill. I'll limit the scope of my practice—that means putting my time into less urgently needed services, which is safer for me and more dangerous for you. When I leave town because I can't live with this much liability here, who will take care of you?*[149]

3.2.2 Us against the world

According to an oft-repeated tort reform contention, liability imposes a unique hindrance on American businesses in the international marketplace: Whereas their foreign counterparts enjoy a positive liability climate in their homelands, businesses based in the United States are taxed with the detriment of American civil justice. How exactly this 'home court disadvantage' works is unclear.

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145 Jessica W. Reyes & Rene Reyes, *The Effects of Malpractice Liability on Obstetrics and Gynecology:* Taking the Measure of a Crisis, 47 N. Eng. L. Rev. 315, 317 (2012).

146 Hal Sherz & Wayne Oliver, *Defensive Medicine: A Cure Worse Than the Disease*, Forbes, Aug. 27, 2013 http://www.forbes.com/sites/realspin/2013/08/27/defensive-medicine-a-cure-worse-than-the-disease/#7880d838358f

147 Reyes & Reyes, *supra* note 146, at 317 ("Thus, ob-gyns claim that the malpractice environment has not only affected doctors by reducing their incomes; it has also affected patients by reducing the supply of physicians and access to care.").

148 *See supra* Part I.B.2.

149 *See supra* note 140 and accompanying text.

Deborah La Fetra writes that "uncontrolled tort liability hampers American businesses' ability to compete in the global market," but offers no theory about which antecedents lead to which results.[150] "A survey of senior executives found that a majority believed that "the U.S. civil justice system significantly hampers the ability of U.S. companies to compete with Japanese and European companies," reports Frank Cross, also relaying no theory about where or how.[151]

"The litigious society" construct functions somewhat better when used to explain concerns about foreign investment: Perhaps the United States has lost investment cash because wealthy foreigners do not want to worry about the effect of liability on their returns.[152] More information about this misgiving seems needed, however, given the truism that the rule of the law, which includes civil liability for actionable wrongs, lures transnational investment capital.[153]

Expressing general support for the competitiveness concern, George Priest surveys the key difficulties in measuring it.[154] Empirical claims about greater burdens for American business need—and lack—fundamental information: how much these burdens cost, where they come from, and what conditions their foreign counterpart businesses face. Priest concludes that "the various popular criticisms of the effect of modern liability on trade competitiveness are grossly imprecise."[155]

Various criticisms about competitiveness are "popular" not only in the sense of "accessible," I think, but also "likeable." Our *MacPherson* reciprocity lens aids analysis here. Tort reformers may not have the data to show where and how much an American retail manufacturer, for example, faces costs that its foreign competitors do not have to pay, but they can juxtapose Us against Them. Persons in the Donald MacPherson cohort of consumer-plaintiffs and the public know that different nations have their own legal regimes and that the tribalism (or call it patriotism, nationalism, xenophobia) that they bring to debates about law and politics probably has a counterpart on the other side of the national

150 Deborah J. La Fetra, *Freedom, Responsibility, and Risk: Fundamental Principles Supporting Tort Reform*, 36 Ind. L. Rev. 645 (2003).

151 Frank B. Cross, *Tort Law and the American Economy*, 96 Minn. L. Rev. 28, 44 (2011).

152 *Id.*

153 Robert Pritchard, Economic Development, Foreign Investment and the Law: Issues of Private Sector Involvement, Foreign Investment and the Rule of Law in a New Era (1996).

154 George L. Priest, *Lawyers, Liability, and Law Reform: Effects on American Economic Growth and Trade Competitiveness*, 71 Denv. U. L. Rev. 115, 140–42 (1993).

155 *Id.* at 150.

boundary. One can expect a foreign adversary to install advantage for its national home team. And so it is understandable that American senior executives will say they believe that American civil justice burdens them unfairly against their European and Japanese competitors,[156] no matter the facts. A sense of injustice arises early in a person's consciousness and stays in place.[157] Once tort reformers can tap into this fundamental by putting their complaint into binary-reciprocal terms—with adversaries on the other side who are literally foreign, no less—they have a keeper.

3.3 Actuarial predictability for businesses

Solicitude for business includes more than attention to the cash bottom line. Offering another category of comfort for tort defendants, reformers seek to expand the comfort of actuarial predictability. What I mean by actuarial predictability is the lessening of liability risks.

Legislatures and courts alike cooperate with this agenda; theorists supply rationales. This effort increases peace of mind on the defense side by assuring businesses that they can count on shelter. Like most of the material considered in this Article, this gain represents a loss. Making the future safer for defendants means diminution of opportunity for plaintiffs just as making automobiles safer for Donald MacPherson burdened the Buick Motor Company.

3.3.1 The unpredictability theme in *MacPherson*

The pre-*MacPherson* regime of privity plus "imminently dangerous" had meant unpredictability for consumers injured by defective products. They could not know until a judge ruled whether any item would qualify for the pro-plaintiff label or fail to qualify and leave them barred by the untampered privity rule.[158] Perhaps some products can never earn the imminently dangerous label,[159] but most of them invite debate.

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156 *See supra* text accompanying note 151.

157 *See* Edmond Cahn, The Sense of Injustice: An Anthropocentric View of Law (2d ed. 1964); Bernstein, *Reciprocity*, *supra* note 16, at 45.

158 *See* Strauss, *supra* note 6 (noting varied outcomes).

159 "Nerf Tiddlywinks," suggests one torts scholar. Joseph H. King, Jr., *Exculpatory Agreements for Volunteers in Youth Activities—The Alternative to "Nerf" Tiddlywinks*, 53 Ohio St. L.J. 683 (1992).

MacPherson itself illustrates unpredictability through reasonable-minds-can-differ debatability. Quoth Cardozo: "This automobile was designed to go 50 miles an hour. Unless its wheels were sound and strong, injury was almost certain."[160] Contrast Bartlett in dissent: The defective wheel was "not any more dangerous to the occupants of the car than a similarly defective wheel would be to the occupants of a carriage drawn by a horse."[161]

While it shifted the law in favor of plaintiffs, *MacPherson* did little to increase predictability for them. They can still lose on the same familiar grounds: every element of the negligence prima facie case presents a chance for a defendant to beat a plaintiff in court. Nor have those who speak for them pushed for more predictability in the law. The tort reform-imperative reviewed here has no counterpart—or reciprocal, if you like—on the plaintiff side.

3.3.2 How the law increases predictability for defendants: Statutory and judicial comforts

Whereas most of the examples of tort reform achievements surveyed in this Article meet the needs of repeat-player defendants generally,[162] some legal developments give comfort on the predictability front in particular. Codified examples of the boon of enhanced predictability include statutes of repose and statutes of limitation. Of the two, statutes of repose are simpler to apply, almost self-enforcing, while statutes of limitation enlist judges to interpret them in harder cases.

Understood in the personal-injury context of this Article, the two are alike in that both cut off the amount of time that an injured person has to bring a tort action. A statute of limitation imposes a deadline that starts from the time the injury occurred. The deadline of a statute of repose starts when the defendant acted: as used in products liability, the statute-of-repose clock starts to tick when a manufacturer delivers the product. Both types of statute can extinguish otherwise good claims, denying compensation for harms that might be severe.

Discoursing on both types of shelter, Justice Anthony Kennedy has written that statutes of repose "effect a legislative judgment that a defendant should 'be free of liability after the legislatively determined period of time,'" citing the encyclopedia *Corpus Juris Secundum*.[163] Legislatures who enact statutes of

160 *MacPherson*, 111 N.E. at 1053.
161 *Id.* at 1056–57.
162 *See supra* Part III.A.
163 CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2183 (2014).

repose do not explain why a defendant "should be free" from liability for the risk that a person will be injured. After all, an individual enjoys no freedom from the risk itself.

This maneuver resembles the legal fresh start for insolvent individuals and businesses, Kennedy continued: "Like a discharge in bankruptcy, a statute of repose can be said to provide a fresh start or freedom from liability."[164] Unlike a discharge in bankruptcy, of course, a statute of repose sheds its blessings on a recipient that has shown nothing to qualify for this generosity. It imposes no criteria for entitlement to its protections other than the passage of time, and it lacks a transparent rationale.

Whereas statutes of repose that protect product manufacturers are on the books in only in a minority of states—one 2006 survey counted the number at 19[165]—all jurisdictions in the United States have codified statutes of limitation for personal injury actions. Almost thirty years ago, Michael Green spotted the central trouble with them. In the past, Professor Green explains, statutes of limitation did their job of "resolving factual disputes before witnesses disappeared and memories faded irreparably."[166]

These laws still cover "snapshot torts" well enough,[167] but whenever the scientific record needed for a conclusion about causation is at issue, statutes of limitation add perversity to liability. Instead of increasing accuracy in court, as they do when an action rests on frail human testimony, these statutes force plaintiffs to choose between waiting for good evidence, during which time their claims can go stale, on the one hand, or filing before the data come in and thereby cluttering the courts with less reliable claims of fact, on the other.[168] "Time of discovery" as a judge-made toll on the statute of limitations opens realms of costly debate about what the plaintiff knew and when she should have known it.[169] Meanwhile, the passage of time makes a conclusion about causation stronger, not weaker. Corporate records remain in place; data storage stays robust; human knowledge grows.

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164 *Id.*

165 Francis P. Manchisi & Lorraine E.J. Gallgher, A Nationwide Survey of Statutes of Repose, March 2006 http://www.wilsonelser.com/files/repository/NatlSurveyRepose_March2006.pdf

166 Michael D. Green, *The Paradox of Statutes of Limitations in Toxic Substances Litigation*, 76 Cal. L. Rev. 965, 972 (1988).

167 *Id.* at 972–73.

168 *See id.* at 986–87.

169 *Id. at* 983. *Cf.* Michael J. Kaufman & John M. Wunderlich, *Leave Time for Trouble: The Limitations Periods Under the Securities Law*, 40 J. Corp. L. 143, 144 (2014) (identifying the same problem in securities litigation).

"[P]roviding repose for corporate entities for whom managing ongoing litigation is part of the ordinary course of business," Green continues, "is neither a compelling nor attainable goal."[170] This sentence hones in on what both kinds of statutes give to defendants without satisfactory explanation: repose, or what a leading dictionary defines as "[r]elief or respite from exertion, toil, trouble, or excitement,[171] is comfort. This respite is present in statutes of limitation too, not just statutes that have repose in their name. The two codified comforts expand predictability for one side of personal injury litigation at the expense of the other.

Judges also protect what the old citadel of privity used to guard when they honor contracts that shield defendants from the risk of liability. In our post-*MacPherson* era, a product manufacturer cannot fend off liability by pointing backward to the absence of a contractual relation. Other types of contracts, however—those that look forward—enlarge its safe space. Repeat-player insistence that consumers give up their access to courts and submit to arbitration of disputes is one example of the forward-looking contract that, like the privity rule, favors Buick Motor Company at the expense of Donald MacPherson.[172]

Confidentiality clauses in settlement agreements offer another example, one that fits more closely with the personal-injury focus of this Article. When a defendant settles a claim via payment conditioned on secrecy about not only the amount conveyed but the nature of the dispute, it can stave off Donald MacPhersons of the future by silencing one Donald MacPherson at the moment. Lawyers too have been silenced by confidentiality clauses,[173] even though legal ethicists have condemned this tactic as contrary to rules of professional responsibility if silence does not advance the interests of a plaintiff client.[174] Although

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170 Green, *supra* note 166, at 971.

171 XIII Oxford English Dictionary 653 (2d ed. 1989).

172 *See* Shelly Smith, *Mandatory Arbitration Clauses in Consumer Contracts: Consumer Protection and the Circumvention of the Judicial System*, 50 De Paul L. Rev. 1191 (2001).

173 "Although plaintiffs and defendants are typically required to sign these settlement agreements, lawyers rarely sign them." David Grossbaum, Can You Keep a Secret? The Ethical and Practical Issues of Confidential Settlement Agreements, http://www.attorneys-advantage.com/sites/ATTORNEYS/rm/qh/Pages/Can-You-Keep-a-Secret-The-Ethical-and-Practical-Issues-of-Confidential-Settlement-Agreements.aspx. The author continues: "Even if the lawyers do not sign these agreements, defendants may argue that the lawyer, as an agent of the plaintiff, is bound by the confidentiality clause." *See also* National Consumer Law Center, *Tips for Handling the Issue of Confidentiality in Settlement*, June 2015 https://www.nclc.org/images/pdf/other_consumer_issues/litigation-tools/practice-tips-for_attorneys.pdf (noting that judges and mediators sometimes pressure plaintiffs to accept confidentiality clauses).

174 The principal provision of the Model Rules of Professional Responsibility on point is Rule 5.6, "Restriction on Right to Practice." Condemnations of the tactic include American Bar

it is impossible to know how much repose these clauses achieve in fact, decisional law suggests that a shelter-minded defendant can buy a degree of predictable security for its future.[175]

3.3.3 Fairness invoked to enlarge defense-side predictability

Objections to unpredictability occupy a subset of the literature that criticizes punitive damages, much but not all of it published in the contemporary tort-reform era.[176] Punitive-damages writings of the last couple of decades work with Supreme Court decisional law that crossed our path earlier in this Article.[177] Critics can call this redress contrary to procedural justice without focusing on the predictability problem they raise, using other arguments instead,[178] but unpredictability has always been a big bow in the due-process objections quiver.

The Court itself has elevated this concern above other criticisms of punitive damages. *Exxon Shipping Co. v. Baker*[179] acknowledged that punitive damages as

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Association Op. 00–417 (2000); D.C. Bar Ethics Op. 335 (2006); Richard Zitrin, *The Case Against Secret Settlements (Or, What You Don't Know Can Hurt You)*, 2 J. Inst. Study Legal Ethics 115, 115–117 (1999) (proposing new blackletter in the Model Rules).

175 *See* Amos v. Comm'r, 86 T.C.M. (C.C.H.) 663 (2003) (interpreting a settlement as a payment by the defendant, a celebrated athlete, to assure silence by the plaintiff about what had happened to him, not recompense for any physical injury). For a recent example outside of personal injury law that could encourage physically injured plaintiffs to keep silent, see Gulliver Schools, Inc. v. Snay, 137 So.3d 1045 (Fla. Dist. App. 2014) (holding that a settling defendant need not pay the $80,000 it had agreed to tender in settlement of an age discrimination claim). *Gulliver Schools* featured a memorably blatant breach of contractual confidentiality: the plaintiff's daughter informed her 1200 Facebook friends that "Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT." *Id.* at 1046. This case may be of interest because its jurisdiction takes an unusually strong stance against defendants' attaining secrecy through settlement agreements. *See* Fla. Stat. Ann. 69.081(4) ("Any portion of an agreement or contract which has the purpose or effect of concealing... any information which may be useful to members of the public in protecting themselves from injury... is void, contract to public policy, and may not be enforced").

176 Scholarship by Thomas Colby relays both historical and contemporary criticism of punitive damages. Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 Minn. L. Rev. 583, 613–32 (2003) (summarizing past works); Thomas B. Colby, *Clearing the Smoke from Philip Morris v. Williams: The Past, Present, and Future of Punitive Damages*, 118 Yale L.J. 392 (2008).

177 *See supra* Part II.A.1.

178 *See, e.g.*, Martin H. Redish & Andrew L. Mathews, *Why Punitive Damages Are Unconstitutional*, 53 Emory L.J. 1, 52 (2004) (objecting to the "vesting of coercive public power in self-interested private actors").

179 554 U.S. 471 (2008).

awarded are not excessive: writing for the Court, Justice Souter observed that "by most accounts the median ratio of punitive to compensatory awards remains less than 1:1."[180] Nor do juries choose this extraordinary measure in too many cases.[181] Instead, the "real problem ... is the stark unpredictability of punitive awards. Courts of law are concerned with fairness as consistency..." and "the spread between high and low individual awards" is inconsistent with due process, the Court concluded.[182] One scholarly review of *Exxon Shipping* agrees: Due process, Jill Wieber Lens concludes, entitles a defendant to "notice of the likely amount of the punitive award."[183]

Another tort reform priority, the modification of apportionment rules to limit a defendant's liability obligation to the fraction of responsibility ascribed to it, also combines predictability and fairness concerns. Joint liability adds unpredictability to the concerns of a defendant in two undeniable ways. Both the ultimate outcome (i. e. liability or not) and the magnitude of damages that the plaintiff will claim depend on behaviors of others that the concerned defendant may be unable even to identify, let alone control.[184] In addition, if tort reformers are correct to say that meritless personal injury claims are too easy to pursue, then joint liability increases unpredictability by encouraging a plaintiff to include remote deep-pocket entities as defendants simply because they are solvent.[185]

'Unpredictability is unfair' will resonate with observers who ever felt ambushed by unexpected bad news. It is commonplace, I think, to experience an unwanted surprise as an injury in itself, beyond whatever substantive detriment occurred.[186] Even though no person or entity is entitled categorically to shelter from detriments that it cannot predict, tort reformers' quest for predictability speaks to universal human experience. We can relate.

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180 *Id.* at 497–98.

181 *Id.* at 498.

182 *Id.*

183 Jill W. Lens, *Procedural Due Process and Predictable Punitive Damage Awards*, 2012 BYU L. Rev. 1, 29.

184 Kenneth S. Abraham, *Making Sense of the Liability Crisis*, 48 Ohio St. L.J. 399, 407 (1987).

185 Claire E. Krumlauf, *Ohio's New Modified Joint and Several Liability Laws: A Fair Compromise for Competing Parties and Public Policy Interests*, 53 Clev. St. L. Rev. 333, 355–56 (2005–06) (reporting tort reformers' contentions).

186 At law school faculty meetings, I can attest, objections to an outcome are sometimes attacked on procedural grounds by colleagues who also happen not to like the result. "But that's lawyers taking refuge in legalism," one might respond. Maybe so: but the same unpredictability that tort reformers denounce exists also in settings that people seek out and even pay for: lotteries, casino tables, race tracks, stage auditions, dating sites, day trading. *See* Bernstein, *2x2 Matrix*, *supra* note 16, at 273–74 (describing unpredictability as something human beings both dread and desire).

3.4 Shelter from juries' whims

The reciprocal thesis offers insight into a long-held antipathy that pervades the tort reform movement. Numerous initiatives and accomplishments of tort reform can be understood as disempowerment of the jury. If, as I have contended, tort reform's priority is shelter and security for prospective defendants, then reformers move toward this goal by keeping this cohort safer from the vagaries, whims, opacity, and emotion-and-unreason that it has ascribed to jury decision-making.

Vagaries, whims and so on are indeed present in the jury, as they are in all human beings and institutions. One need not be a tort reformer to feel discomfort about the power that an assemblage of untrained strangers holds to resolve disputes in the United States, even when one knows that most resolutions occur away from these lay panels. Laura Gaston Dooley, writing mostly in praise of the civil jury, argues that it "has a bipolar presence in the popular consciousness," as it is perceived as a democratic institution and a "cultural icon" but also "reviled" as arbitrary.[187] To legal scholars and the popular media alike, juries manifest irrationality.[188] Researchers who study juries report sound decision-making overall but also deficient comprehension of material that jurors may not have encountered before, such as expert evidence or legalistic, technical instructions from a judge.[189]

Perhaps a scarier jury-trait than ignorance or irrationality, from the vantage point of a repeat player or tort reformer that thinks it cherishes predictability,[190] is emotion.[191] Whether juries make decisions with more emotion and less reason than judges has been debated.[192] The trope of the mushy manipulable jury has particular force in personal injury litigation, where human plaintiffs pursue

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187 Laura G. Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 Cornell L. Rev. 325, 325 (2005).

188 *Id.* at 329–330.

189 Ilya Somin, *Jury Ignorance and Political Ignorance*, 55 Wm. & Mary L. Rev. 1167, 1180–84 (2014).

190 *See* Bernstein, *2x2 Matrix*, *supra* note 16, at 284 (gathering examples of tort reformers' taste for unpredictability as well as predictability).

191 *See* John Denove, *Juries Aren't Just Emotional Pushovers*, L.A. Times, July 6, 2000 http://articles.latimes.com/2000/jul/06/local/me-48339 (adverting to the tort-reform trope).

192 Simulations have explored how juries resolve disputes that involve punitive damages. *Compare id.* (noting Department of Justice research that suggests judges are more inclined than juries to award them) *with* Mark Klugheit, *"Where the Rubber Meets the Road": Theoretical Justifications vs. Practical Outcomes in Punitive Damages Litigation*, 52 Syr. L. Rev. 803, 809–10 (2002) (noting research at the University of Chicago that attributes "emotions," "irrationality," and "erratic and unpredictable verdicts" to juries that decide punitive damages claims).

money by ascribing responsibility for their harm to an unhurt, solvent, and usually non-human defendant.

If jurors rely on emotion to determine who wins and loses and how much money to award, then conditions valorized as contrary to emotion (including reason, the rule of law, and treating like cases alike) hold too little power in court and outcomes are not predictable enough. Elsewhere I have argued that emotion in personal injury law does more than merely tilt results in favor of hurt persons. The winsome plaintiff who tugs at heartstrings to reach into a defendant's wallet takes advantage of sympathy, but so do other participants in personal injury litigation: men at the expense of women, for example.[193] Yet as long as emotion is understood as prejudiced in favor of injured plaintiffs, tort reformers will demand shelter from it.

Consequently most tort reform initiatives function to limit the power of the civil jury. Reforms grant immunity from jury adjudication from classes of defendants; limit the amount of money a jury can choose to award; substitute other deciders for lay jurors; and revise rules of evidence to lessen what a jury can hear and determine.[194] Their disempowerment means more security for defendants.

4 Conclusion

Over its first hundred years as a force in American jurisprudence, *MacPherson v. Buick Motor Company* installed reversals, undoings, and inversions that continue to evolve. The *MacPherson* opinion written by Benjamin Cardozo is famed mainly for only one reversal: the destruction of a barrier that had kept manufacturers safe from responsibility for harms that product defects caused to consumers, a collapse labeled the Fall of the Citadel.[195] Following *MacPherson*, a manufacturer owes a duty of care to nonprivy vendees.

Though exceptionally grand and famous, *MacPherson* is not singular in its effects: it functions within relationships. In this Article, I connected this case to an array of other changes in American law. Just as nonprivy vendees received care and vigilance from the decisional authority of *MacPherson*, automobile

193 Anita Bernstein, *Fellow-Feeling and Gender in the Law of Personal Injury*, 18 J. L. & Pol'y 295, 303 (2009); *see also* Anita Bernstein, *Gender in Asbestos Law*: Cui Bono? Cui Pacat? 88 Tul. L. Rev. 1211, 1227–36 (2014) (reporting gender bias in how judges resolve claims for emotional distress and medical monitoring).

194 *See supra* Part III.A.

195 *See supra* note 10.

manufacturers in the United States went on to gain solicitude from the law, including but not limited to tort-liability advantages. At a more general plane, the repeat players of personal injury law continue to receive care and vigilance via tort reform.

Tort reform frames what it endeavors to enact as good for everybody, not just the entities that will fare better in court after it gets what it wants.[196] One can perceive this characterization of its agenda as cynical or dishonest manipulation of a duped public.[197] Understood in relation to *MacPherson*, however, the tort reform posture becomes less one-sided.

As was noted, Cardozo wrote in *MacPherson* that the law will and should propound rules that "are whatever the needs of life in a developing civilization require them to be."[198] This sentence of his spoke directly to one narrow point, the obsolescence of "imminently dangerous" as a device that withholds privity-shelter from a minority of manufacturer defendants. But his "whatever" invited a bigger reform agenda. Resembling in this respect its English precursor *Heaven v. Pender*, which had ruled only that a plaintiff's claim survived yet became known for its ruminations on what generates a duty of care,[199] *MacPherson* encouraged readers to consider the next frontier of obligations and entitlements.

After it ceased to enjoy privity, Buick Motor Company had to think about the foreseeable consequences of inattention to the state of the wheels on its cars. In personified terms, this entity had to ask itself, *Whose wellbeing am I putting at risk through my actions and omissions, and in what way*? Answers to that question do not stay frozen after 1916 because the "needs of life in a developing civilization" necessarily change. Decisional law would later compel automakers to investigate design features that Cardozo never heard of, such as airbags,[200] rollover propensity,[201] and fiberglass rather than steel as a rooftop material.[202] Liability for the design of a self-driving car probably lies ahead.[203] Automakers

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196 *See supra* Part III.

197 *See* Rustad, *supra* note 130.

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

199 *See supra* notes 25, 28 and accompanying text.

200 Before *Geier*, see *supra* Part II.A.3, several state court decisions had permitted plaintiffs to claim that the omission of an airbag constituted a design defect. *See* Owen, *supra* note 6, at 1146 (citing cases).

201 Campbell v. Fawber, 975 F. Supp. 2d 485, 499 (M.D. Pa. 2013); McCathern v. Toyota Motor Corp., 985 P.2d 201 (Or. App. 1999).

202 *See* Reed v. Chrysler Corp., 494 N.W. 2d 224 (Iowa 1992).

203 Jeffrey R. Zohn, *When Robots Attack: How Should the Law Handle Self-Driving Cars That Cause Damages*, 2015 U. Ill. J.L. Tech. & Pol'y 475–78 (discussing the risk-utility and consumer expectations tests).

have auto-specific technology to consider: but if *MacPherson* stands for anything, it stands for the destruction of old assurances that one categorically need not worry about one's duty of care. Buick had to think about the consequences of its actions and omissions. So do we all.

Whose wellbeing am I putting at risk through my actions and omissions, and in what way? In telling Buick to ponder that question or pay for neglecting it, *MacPherson* made consumers better off while lessening the wellbeing of automakers but it also invited payback for the favor. The fall of privity, I have argued in this Article, has reciprocals in late twentieth-century legal changes that extended care and vigilance to the automobile sector, a set of outcomes paid for directly by losers—Ira Gore, the Carmichael family, Alexis Geier—and indirectly by consumers.[204] Statutory law also looks out for the welfare of "Buick Motor Company," and not only through tort reform. "Donald MacPherson" paid for the 2008–09 auto bailout, an initiative that harkens back to *MacPherson* in that its planners, the President of the United States included, put the consequences of actions and omissions at the center of their work.[205]

Principles stay constant, as Cardozo wrote, but they also evolve to meet "the needs of life in a developing civilization."[206] The prospect of recognizing not just human consumers but also entities as recipients of care and vigilance is present in a great decision that gave an enduring care-and-vigilance entitlement to the plaintiff side. Taking down the barrier that once separated injurers from the persons they hurt installed change that continues as *MacPherson v. Buick Motor Company* enters its second century.

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204 *See supra* Part II.A.

205 *See* Goolsbee & Krueger, *supra* note 93.

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