

# Applied Jurisprudence: A Case Study of Interpretive Reasoning in *MacPherson v. Buick* and Its Precedents

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*Law is essentially an instrument of reason.*

Edgar Bodenheimer<sup>1</sup>

## INTRODUCTION

Justice Cardozo's opinion in *MacPherson v. Buick Motor Co.*<sup>2</sup> is one of the most influential in our common law. At issue was the plaintiff's right to sue the Buick Motor Company for negligence even though his contract to purchase an automobile had been with the dealer. His injuries occurred when one of the car's wooden wheels collapsed, the basis of his claim being the the manufacturer's failure to make a reasonable inspection. Cardozo's majority determined that a duty had arisen even without privity of contract. His reasoning was based primarily on his interpretation of New York precedent, with a sidelong look at parallel developments in England. He wrote with utmost assurance that the decision and its reasoning were clearly in accordance with the law of the sovereign state of New York.

Chief Justice Bartlett's dissent<sup>3</sup> in *MacPherson* would have denied defendant's duty in the absence of privity. His reasoning was based on an interpretation of mostly the same authority on which Cardozo had relied. Bartlett wrote with the strongest conviction that his conclusions were required by the law. The majority, he clearly believed, had usurped the legislative role. Given Cardozo's assurances, Bartlett's po-

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<sup>1</sup> Bodenheimer, *A Neglected Theory of Legal Reasoning*, 21 J. LEGAL EDUC. 373, 394 (1969).

<sup>2</sup> 217 N.Y. 382, 111 N.E. 1050 (1916).

<sup>3</sup> *Id.* at 395, 111 N.E. at 1055 (Bartlett, C.J., dissenting)

sition must have been that Cardozo's interpretation and reasoning were either badly mistaken or deceptive.

There may be a historical interest in exploring such a disagreement. More importantly to Jurisprudence, this sort of dispute mirrors the kind of debates we witness in contemporary writings. The two judges differed in their interpretations of relevant legal history and how to reason with their interpretations to determine the applicable law. What is not as apparent is that their respective determinations of the law of the case were a function of each judge's view of the nature of law generally,<sup>4</sup> and as a corollary, of the judicial role.<sup>5</sup> We will revisit *MacPherson* and its precedent cases as a study in applied jurisprudence, raising implications for larger debates. Of particular concern is the relationship between interpretation and reasoning in the law.<sup>6</sup>

Edward Levi produced a most provocative study of these cases in his excursus in applied jurisprudence.<sup>7</sup> His study was deemed illustrative of his theory of legal reasoning. True, he set forth no analysis of the nature of law, nor is there any explicit reference to a theory of interpretation *vis-à-vis* the common law. Nonetheless, his essay demonstrates how an interpreter's beliefs about law, legal reasoning, and interpretation are of a piece.<sup>8</sup> Implicit in his study is a view of law he shared with the Legal Realists. Like them, Levi rejected rules and principles as having no decisive significance in the cases. Calling for a much different faith, he shifted his attention to the seemingly more concrete factual statements in the opinions. There he saw a kind of reason-

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<sup>4</sup> Cardozo stated that: "Implicit in every decision where the question is, so to speak, at large, is a philosophy of the origin and aim of law, a philosophy which, however veiled, is in truth the final arbiter." B. CARDOZO, *The Growth of the Law*, in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 185, 197 (M. Hall ed. 1947) [hereafter SELECTED WRITINGS]; see also Ronald Dworkin's reference to "constitutional philosophy," in *The Bork Nomination*, *The N.Y. Rev. of Books*, Aug. 13, 1987, at 3.

<sup>5</sup> Ronald Dworkin has been a major contributor to the debates on these and other issues related to the judicial role. See R. DWORKIN, *LAW'S EMPIRE* (1986) [hereafter R. DWORKIN, *LAW'S EMPIRE*]; R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977) [hereafter R. DWORKIN, *TAKING RIGHTS SERIOUSLY*]. For a critique of *Taking Rights Seriously*, see Bodenheimer, *Hart, Dworkin, and the Problem of Judicial Lawmaking Discretion*, 11 GA. L. REV. 1143 (1977).

<sup>6</sup> See Probert, *Interpretation: Its Relevance in Courts, Criticism and Jurisprudence*, 25 WASHBURN L.J. 1, 17 (1985).

<sup>7</sup> Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501 (1948).

<sup>8</sup> See Gordley, *Legal Reasoning: An Introduction*, 72 CALIF. L. REV. 138 (1984), which seems to include interpretation as part of the task of reasoning.

ing, after all, albeit "imperfect,"<sup>9</sup> by example, from case to case. Levi's work thus demonstrates what any study of cases should show: interpretation of judicial texts is a function of the law-view, that is, the "jurisprudence"<sup>10</sup> of the interpreter.

The Realists, including Levi, and today the Critics,<sup>11</sup> have attested by their works how a reader may rewrite the text she reads.<sup>12</sup> If nothing else, she brings to bear some notion of what she expects or hopes to find. Thus, advocates look for favorable lights in judicial opinions. Novices are notorious rule seekers. She who reads an opinion to write a descriptive abstract has a different slant from the judge who attempts to discern its precedential significance. The importance to the interpreter of the author's intent or motive varies. Usually the judge's voice or persona is largely disregarded.

In this study, however, I attempt to take the judges seriously when they refer to legal precepts and in their display of respective law-views. Perhaps this marks a more certain route to a valid *description* of the nature of legal reasoning as opposed to a motivational study. I also consider seriously the judges' interpretations of precedent material.<sup>13</sup> What this study embraces, then, is not so much legal reasoning in the abstract, but interpretive legal reasoning. After all, the typical judicial opinion offers its reasoning intertwined with interpretation.

## I. THE JUSTICES AND *Winchester*

Pivotal in the disagreement between Cardozo and Bartlett was the proper interpretation of the leading New York precedent, *Thomas v. Winchester*.<sup>14</sup> In *Winchester*, defendant, through several intermediaries,

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<sup>9</sup> See Levi, *supra* note 7, at 503.

<sup>10</sup> See reference to judges' "jurisprudence" in THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 44 (V. Blasi ed. 1983); to Rehnquist's jurisprudence in Denvir, *Justice Rehnquist and Constitutional Interpretation*, 34 HASTINGS L.J. 1011, 1049 (1983); and to Bork's jurisprudence in The Wash. Post Nat'l Weekly, Sept. 21, 1987, at 14; and The Nat'l. L.J., July 20, 1987, at 38.

<sup>11</sup> See *Critical Legal Studies Symposium*, 36 STAN. L. REV. 1 (1984).

<sup>12</sup> See S. FISH, IS THERE A TEXT IN THIS CLASS? (1980); THE READER IN THE TEXT: ESSAYS ON AUDIENCE AND INTERPRETATION (S. Suleiman & J. Crosman eds. 1980); Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982).

<sup>13</sup> Dworkin says of his latest book that it "takes up the internal, participants' point of view . . . from the judge's viewpoint." R. DWORKIN, LAW'S EMPIRE, *supra* note 5, at 14; and that it pays "special attention to lawyers' doctrinal arguments about what the law is." *Id.* at 12. Judges, he claims, are "obsessive" in examining "past doctrine, trying to chart its place in the law as a whole." *Id.* at 132.

<sup>14</sup> 6 N.Y. 397, 57 Am. Dec. 455 (1852).

had distributed a toxic chemical, belladonna, mislabeled as dandelion extract, causing plaintiff extreme illness. According to Bartlett, the *Winchester* court granted plaintiff's remedy despite lack of privity, as an *exception* to the general rule first established in England in *Winterbottom v. Wright*.<sup>15</sup> In Bartlett's view, then, that no-duty rule entered new work via *Winchester*, remaining ever since as a mandate.

Indeed, *Winterbottom* was treated as the dominant authority by Bartlett. In that case, there also had been several intermediaries and a plaintiff injured in a fashion similar to the *MacPherson* plaintiff — by a horse-drawn coach with a defective wheel. Bartlett stressed Lord Abinger's oft quoted warning in *Winterbottom*, that if duty were imposed, there would follow "the most absurd and outrageous consequences to which I can see no limit."<sup>16</sup> The *Winchester* exception was justified, as Bartlett saw it, on the ground that belladonna was inherently dangerous, even when distributed with care, unlike the earlier mail coach and now a Buick. Since *Winchester*, other cases had fallen within the exception, but none had supplanted the rule of *Winterbottom*.

In a remarkably different interpretation, Cardozo saw *Winchester* as creating no mere exception. Rather, it had established New York's general rule!<sup>17</sup> Its opinion distinguished the *Winterbottom*-type case as involving situations in which injury was not likely to occur to anyone but the immediate buyer. On the other hand, however removed the belladonna victim was transactionally from the supplier, she was the one person who was likely to be injured because of the mislabeling. Implicit in that distinction, as Cardozo saw it, lay a controlling principle that was now decisive of *MacPherson*. Despite a subsequent narrow construction or two, the principle had survived intact to propel a generally expanding rule out of the horse-and-buggy era. Now it included a Buick with a defective wheel as a "thing of danger." The defendant's duty arose not out of contract, but out of the law via the *Winchester* principle.

Of course, these conflicting pieces of interpretive reasoning are themselves subject to widely varying evaluations. Motivational analysis could regard the two views as the result merely of differing weighings of the competing interests of suppliers and consumers. Such values these judges may well have had. Yet if we take their explicit justifications

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<sup>15</sup> 10 M. & W. 109, 152 Eng. Rep. 402 (1842).

<sup>16</sup> *MacPherson*, 217 N.Y. at 397, 111 N.E. at 1055 (Bartlett, C.J., dissenting).

<sup>17</sup> *Id.* at 385, 111 N.E. at 1051. Cardozo treated *Winterbottom* as establishing at best the "unsettled" English rule. *Id.* at 392, 111 N.E. at 1054.

seriously, their interpretations appear to be derivative as well of rather different views of the common law. Bartlett seems in his opinion to be primarily rule oriented, positivistically inclined. Cardozo is famed for a more open-ended approach.<sup>18</sup> Here, he worked within a complexity of legal precepts. Rules and principles are seen to operate in tandem in such a way, as he said, to be responsive to "the needs of life in a developing civilization."<sup>19</sup> Yet above it all, he seemed most committed to the principle he had discovered in *Winchester*.

## II. EXAMINATION OF THE SOURCES

No skeptic could take such ostensible reasoning seriously. To Levi it was "window dressing."<sup>20</sup> He believed that the cases upon which Cardozo and Bartlett relied were grouped within continuously changing categories under the guise of "some overall rule."<sup>21</sup> The duty cases involved a gun, belladonna, scaffolds, a coffee urn, and a bottle of aerated water. While Bartlett would have maintained the pre-*MacPherson* categories intact, in Levi's view, Cardozo simply renamed and enlarged the duty categorizer in response to "social change."

Still, given Bartlett's law-view and faith, his interpretation of *Winchester* and its successors was within reason. *Winterbottom* and Abinger's worrisome caveat<sup>22</sup> loomed large, requiring exceptional circumstances to overcome. Just such an occasion arose in *Winchester*, at least to an interpreter of Bartlett's inclinations. Justice Ruggles had been clear in *Winchester* that if any wrongdoing demanded duty, mislabeling belladonna as a harmless potion certainly did. That was absolutely no way to conduct such a business. It was actually criminal. The tenor of the opinion exhibits no less than judicial outrage at the thought of immunity.<sup>23</sup> Subsequent relevant cases all referred to *Winchester*, often literally invoking its principle.<sup>24</sup> Those that followed its holding

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<sup>18</sup> See E. BODENHEIMER, JURISPRUDENCE 121-22 (rev. ed. 1974).

<sup>19</sup> *MacPherson*, 217 N.Y. at 391, 111 N.E. at 1053.

<sup>20</sup> See Levi, *supra* note 7, at 507.

<sup>21</sup> Levi states that: "[T]here will be the attempt to escape to some overall rule which can be said to have always operated and which will make the reasoning look deductive. The rule will be useless." *Id.*

<sup>22</sup> See *supra* text accompanying note 16.

<sup>23</sup> The Court stated that "although the defendant *Winchester* may not be answerable criminally for the negligence of his agent, there can be no doubt of his liability in a civil action." *Winchester*, 6 N.Y. at 409. "The defendant's negligence put human life in imminent danger. Can it be said that there is no duty on the part of the defendant to avoid the creation of that danger by the exercise of greater caution?" *Id.*

<sup>24</sup> See *Loop v. Litchfield*, 42 N.Y. 351, 1 Am. Rep. 543 (1870) (referred to the

involved products that threatened not just imminent injury, but great bodily harm or death. Bartlett wrote in the majority in one of those cases in which an exploding bottle of aerated water cost the plaintiff an eye.<sup>25</sup>

However, there was more to *Winchester* than perhaps Bartlett could see. Given Cardozo's deep sensitivity to history and process, the other grounds of *Winchester* would loom larger to him. Justice Ruggles' interpretation of relevant legal history produced two lines of cases. In one, the negligence of the defendant was always remote, as in *Winterbottom*. In the other line of cases, defendants were not exclusively suppliers, and their negligence threatened bodily injury in a larger radius. For example, when the owner of a horse and cart left them unattended in the highway, he would be liable to *anyone* injured by his negligence.<sup>26</sup> The supplier of belladonna in *Winchester* fell within this second line of cases. Since his business was to supply oral medications that would reach consumers,<sup>27</sup> his contract with any intermediary was irrelevant. Had he *donated* his mislabeled product to the dealer, his duty would have been the same. The duty arose out of an activity that no contract could immunize.

Thus, it was Ruggles' entire reasoning that opened the door for Cardozo's seemingly expansive interpretation and supported his extensive reference to Justice Brett's even more expansive dictum in *Heaven v. Pender*,<sup>28</sup> an English case. Brett would have grounded duty essentially on foreseeability. Subject to modifications, said Cardozo, Brett's formu-

principle but denied duty); *Losee v. Clute* 51 N.Y. 494, 10 Am. Rep. 638 (1873) (same); *Coughtry v. Globe Woolen Co.*, 56 N.Y. 124, 15 Am. Rep. 387 (1874) (found duty out of a principle based on the "distinction" in *Winchester*); *Torgeson v. Schultz*, 192 N.Y. 156, 84 N.E. 956 (1908) (referred to the principle and doctrine of *Winchester*); see also *Kuelling v. Roderick Lean Mfg. Co.*, 183 N.Y. 78, 75 N.E. 1098 (1905); *Statler v. George A. Ray Mfg. Co.*, 195 N.Y. 478, 88 N.E. 1063 (1909).

<sup>25</sup> *Torgeson*, 192 N.Y. at 156, 84 N.E. at 956.

<sup>26</sup> Citing *Lynch v. Nurdin*, 113 Eng. Rep. 1041, 1 Ad. & Ellis, N.S. 29 (1841); *Illidge v. Goodwin*, 5 Car. & Payne 190 (1834).

<sup>27</sup> Over a decade prior to *MacPherson*, Francis Bohlen wrote of *Winchester*:

Now the extraordinary thing is that this has been thought a novel principle. It was because of the nature of his business . . . that the defendant was liable. This liability was as old as the Common Law . . . based on the "obligation of every artificer to exercise his art right and truly as he ought."

Bohlen, *The Basis of Affirmative Obligations in the Law of Torts*, 53 U. PA. L. REV. 337, 361 (1905). Cardozo's awareness of that article is evidenced by his citation to it on another point. See *MacPherson*, 217 N.Y. at 389, 111 N.E. at 1052.

<sup>28</sup> 11 Q.B.D. 503 (1883).

lations, at least in its “underlying principles” had become the law of New York. If so, Ruggles of *Winchester* had set the stage. Furthermore, the subsequent cases did seem, as Cardozo maintained, to have established an expanding duty-without-privity trend. Cardozo made much of one of those cases, apparently because like the case bearing Brett’s dictum, it involved a defective scaffolding causing death to workmen.<sup>29</sup> Yet its facts demanded duty every bit as much as *Winchester*.<sup>30</sup> More indicative of the duty-extending trend were the exploding products cases, a soda bottle<sup>31</sup> and a coffee urn.<sup>32</sup> Neither, said Cardozo, “was an implement whose normal function is destruction.”<sup>33</sup> It was Chief Justice Bartlett himself, remember, who had written otherwise in the exploding soda bottle case.<sup>34</sup>

### III. CARDOZO’S REFLECTIONS

In another place, Cardozo commented specifically on *MacPherson*. He said it had not been clear whether the law of the case existed in advance of the decision. Judgment on that point, he said, “will depend on the varying estimates of the nexus between the conclusion and existing principles and precedent.”<sup>35</sup> If the conclusion he referred to in *MacPherson* included a Buick as a “thing of danger,”<sup>36</sup> that fit quite comfortably within a reasonable interpretation of existing principle and precedent. Whereas Bartlett compared the Buick traveling eight miles per hour with a horse-driven wagon, Cardozo compared its potential speed of fifty miles per hour with a locomotive.<sup>37</sup> In that vein, Cardozo might even have accepted the existing categorization as had Bartlett in the soda bottle case.<sup>38</sup>

Others besides Bartlett have questioned Cardozo’s more general con-

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<sup>29</sup> *Devlin v. Smith*, 89 N.Y. 470, 42 Am. Rep. 311 (1882).

<sup>30</sup> Reference to this case involved another relevant principle according to Cardozo, relating to defendant’s implicit invitation to buyers to use the product. *MacPherson*, 217 N.Y. at 393, 111 N.E. at 1054.

<sup>31</sup> *Torgeson v. Schultz*, 192 N.Y. 156, 84 N.E. 956 (1908).

<sup>32</sup> *Statler v. George A. Ray Mfg.*, 195 N.Y. 478, 88 N.E. 1063 (1909).

<sup>33</sup> *MacPherson*, 217 N.Y. at 387, 111 N.E. at 1052.

<sup>34</sup> *Torgeson*, 192 N.Y. at 161, 84 N.E. at 958. The product that exploded was a siphon bottle of aerated water, charged at a pressure of 125 pounds per square inch.

<sup>35</sup> *SELECTED WRITINGS*, *supra* note 4, at 185, 203.

<sup>36</sup> *MacPherson*, 217 N.Y. at 391, 111 N.E. at 1053.

<sup>37</sup> *Id. Cf. D. PECK, DECISION AT LAW* 42 (1960) (reporting that plaintiff testified to a 15 m.p.h. speed while other witnesses testified to 30 m.p.h.).

<sup>38</sup> *Torgeson*, 192 N.Y. at 156, 84 N.E. at 956; *see H. HART & A. SACKS, THE LEGAL PROCESS* 576 (1958).

clusions seen, perhaps, as tantamount to an abolition of the privity requirement in the products area.<sup>39</sup> Yet the genius of Cardozo's opinion lies as much as anywhere in the equivocation of its language, leaving it to subsequent interpreters to define *MacPherson's* reach.<sup>40</sup> Even if the privity gate had been opened wide, there were other barriers in the judicial arena, as the early returns in subsequent New York cases demonstrated.<sup>41</sup> It remained to the courts, for instance, to define the *scope* of resulting duty. Lord Abinger's concern for the undue burden on contractors could still influence the judicial calculus. Cardozo seemed to hedge that bet. Further, he reminded us that causal limitations remained available. So it was, to the master of the total array of law with its complex of precepts, definitions, tests, and perhaps implicit policies, the *MacPherson* move was far from being as revolutionary as

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<sup>39</sup> The evaluations of this judicial rorschach have been widely varied. *See, e.g.*, G. CHRISTIE, *CASE AND MATERIALS ON THE LAW OF TORTS* 599 (1983) ("textbook illustration" of refusal to "accept responsibility for a potentially controversial opinion"); G. GILMORE, *THE AGES OF AMERICAN LAW* 75 (1977) (no one else would have found liability); H. JONES, J. KERNOCHAN & A. MURPHY, *CASEBOOK ON LEGAL METHOD, TEACHER'S MANUAL* 18 (1980) ("It is arguable that it did not in fact move the law very far") [hereafter H. JONES]; R. POSNER, *TORT LAW: CASES AND MATERIALS, TEACHERS' MANUAL* 126 (1982) ("a brilliant decision," but Bartlett had the better of it in terms of precedent); W. PROSSER & W. KEETON, *PROSSER AND KEETON ON TORTS* 683 (5th ed. 1984) ("Its effect was to make the exception swallow the rule"); *see also* Bohlen, *Liability of Manufacturers to Persons Other Than Their Immediate Vendees*, 45 *LAW Q. REV.* 343, 359 (1929) (he "cut through all the superficialities and absurdities"); Davis, *The Future of Judge Made Public Law in England*, 61 *COLUM. L. REV.* 201, 216 n.34 (1961) (one of those very rare cases in which it may be necessary to violate the "structural integrity of prior case law"); Friedmann, *Legal Philosophy and Judicial Law-Making*, 61 *COLUM. L. REV.* 821, 843 (1961) (properly creative law-making but "perhaps debatable"); Rabin, *The Historical Role of the Fault Principle: A Reinterpretation*, 15 *GA. L. REV.* 925, 937 (1981) ("artfully manipulative" arguing that the fault principle was not dominant at that time); Richmond, *The Development of Duty: Langridge to Palsgraf*, 31 *ST. LOUIS U.L.J.* 903, 934 (1987) (it substantially expanded the concept of duty); *id.* at 940 (it dissolved the privity requirement); Seavey, *Mr. Justice Cardozo and the Law of Torts*, 52 *HARV. L. REV.* 372, 379 (1938) ("Cardozo's logic . . . could not be refuted"); Traynor, *Reasoning in a Circle of Law*, 56 *VA. L. REV.* 739, 743 (1970) ("[T]he most cautious thing he can do is take the initiative in throwing chaos to the winds").

<sup>40</sup> Gilmore referred to Cardozo's opinions generally: "[L]ess gifted lower court judges were frequently at a loss to understand what they were being told." G. GILMORE, *supra* note 39, at 75.

<sup>41</sup> *See* Note, *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 (1955) [hereafter, Note, *Re-examination*] (discussing the narrow interpretation of *MacPherson*); *see also* Levi, *supra* note 6, at 517 (Levi's discussion of the immediate aftermath).

Bartlett would have it. Its significance lay more in its potential for influence on subsequent interpreters, in its call to abandon the arbitrariness of the privity no-duty immunity.<sup>42</sup>

#### IV. THE STOCK OF PRINCIPLES

Even if Cardozo was not clear beyond doubt that the law *required* his conclusions, he was still sure he was acting within the law. In yet another reference to *MacPherson*, he later stated that

[e]ven when the conclusion . . . is in doubt, . . . there is little doubt that the conclusion will be drawn from a stock of principles and rules which will be treated as invested with legal obligation. The court will not roam at large, and light upon one conclusion or another as the result of favor or caprice. This stock of rules and principles is what for most purposes we mean by law.<sup>43</sup>

Ronald Dworkin could well draw on these words in support of his own jurisprudence.<sup>44</sup> He, too, relies heavily on principles in his distinctive countermove to those other jurists who would grant too much unfettered discretion to judges. Like Cardozo, Dworkin believes judges are obligated to search out and seriously consider principles embedded in the law.<sup>45</sup> In "hard cases" those principles exhibit a moral dimension of justice or fairness. As Cardozo's later reflections revealed, *MacPherson* was for him just that sort of case — "hard" because the law was not clear, but not completely indeterminate. However, *MacPherson* may not be a flawless reference for Dworkin. There is, after all, that suggestion of openness to utilitarian considerations, social need.

Even so, Cardozo's ultimate appeal seems more to have been to a moral dimension of tort law, to a principle, or even an ideal that had a continuing influence over the years. Warren Seavey stated it this way:

<sup>42</sup> See discussion of the longer-range impact of the opinion in W. PROSSER & W. KEETON, *supra* note 39, at 682-84; James, *Scope of Duty in Negligence Cases*, 47 NW. U.L. REV. 778, 798-800 (1953); Seavey, *supra* note 39, at 376-79

<sup>43</sup> SELECTED WRITINGS, *supra* note 4, at 185, 204.

<sup>44</sup> R. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 5, at 111-23; R. DWORKIN, *A MATTER OF PRINCIPLE* (1985). "Law as integrity supposes that people are entitled to a coherent and principled extension of past political decisions even when judges profoundly disagree about what this means." R. DWORKIN, *LAW'S EMPIRE*, *supra* note 5, at 134.

<sup>45</sup> Whether a judge is *obligated* to give weight to principles may be considered a matter of judicial role rather than law, strictly speaking, but for our purposes it is a dimension of the judge's jurisprudence. It is arguable that the role of a judge is itself assigned by the law. Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, ch. 1 in RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE (M. Cohen ed. 1983).

"A person has a duty not to permit his activities . . . to create an undue risk of harm to any protected interest of another."<sup>46</sup> So strong was that fault principle of compensation,<sup>47</sup> it permitted Cardozo to ignore Bartlett's own appeal to Lord Abinger's floodgate argument in *Winterbottom*.<sup>48</sup> However, that principle continues to protect various activities against the chilling effect or destructive economic burden even of claimed negligence, particularly if physical injury is not involved.<sup>49</sup>

In any event, Cardozo seemed to see principles everywhere,<sup>50</sup> just as Dworkin said is true for all who believe.<sup>51</sup> The principles come in varying shapes and sizes and at varying levels of abstraction and generality. *They are special kinds of reasons* that justify specific decisions and the rules thus generated. Some reside in the almost invisible "stock" of the law. Thus, one should not be unjustly enriched at the expense of another; nor should one profit from her own wrong. A principle may be so pervasive that it has continuing and obligatory influence even without mention. The principle of treating like cases alike is of that sort, a norm of legal justice.<sup>52</sup> There are thought to be fundamental principles regarding the ends of law generally,<sup>53</sup> such as the preservation of social

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<sup>46</sup> Seavey, *Principles of Torts*, 56 HARV. L. REV. 72, 87 (1942).

<sup>47</sup> Rabin argues that the fault principle was not dominant. See Rabin, *supra* note 39, at 926; but see *supra* note 27.

<sup>48</sup> See *supra* text accompanying note 16.

<sup>49</sup> The *Winterbottom* principle continues to have great weight with respect to privity and lawyers' duty to nonclients. See Probert & Hendricks, *Lawyer Malpractice: Duty Relationships Beyond Contract*, 55 NOTRE DAME L. REV. 708, 711 (1980) (discussing *Ultramares Corp. v. Touche, Niven & Co.*, 255 N.Y. 170, 179, 174 N.E. 441, 444 (1931) in which Cardozo immunized accountants against claims by nonclients with his own version of the *Winterbottom* principle; a contrary holding would entail "liability in an indeterminate amount for an indeterminate time to an indeterminate class.>").

<sup>50</sup> Cardozo stated that: "The study of the law is thus seen to be the study of principles of order." SELECTED WRITINGS, *supra* note 4, at 202. He also spoke of a "conception of law as a body of rules and principles and standards," *id.* at 208-09, and "I find lying around loose . . . a vast conglomeration of principles and rules and customs and usages and moralities." *Id.* at 18. According to G.E. White, Cardozo treated tort law as "a bundle of creatively derived general principles capable of continued creative development." G.E. WHITE, TORT LAW IN AMERICA 137 (1980); see also *supra* text accompanying note 43.

<sup>51</sup> R. DWORKIN, TAKING RIGHTS SERIOUSLY 28 (1977).

<sup>52</sup> Thus the analogy is a basic ingredient of legal reasoning, as discussed in Richards, *Rules, Policies and Neutral Principles: The Search for Legitimacy in Common Law and Constitutional Adjudication*, 11 GA. L. REV. 1069, 1076-78 (1977). Cf. Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 641, 648 (1923) ("The doctrine of precedents . . . is not a legal precept at all. It is a traditional technique."). Surely Pound missed the turn.

<sup>53</sup> "Law is the expression of a principle of order to which men must conform . . . if friction and waste are to be avoided." SELECTED WRITINGS, *supra* note 4, at 248.

harmony; the guarantee that every right should have a remedy; or fundamental principles of a particular field of law, such as the fault principle of compensation in torts.<sup>54</sup> Some principles are identified with particular cases, like the strict liability principle of *Rylands v. Fletcher*.<sup>55</sup> They may be identified most closely with a mass of cases such as the principle of economic risk allocation in the products liability area.

At the other end of the spectrum are principles that lie next to or overlap rules. Actually, a casual speaker or even a judge may not carefully distinguish between rules and principles.<sup>56</sup> A proposition that sounds like a mandate and yet is ambiguous or in some other way entails discretion in its application is just as well called a principle. One that would define the scope of duty in negligence law or the extent of liability in terms of reasonable foreseeability is like that.<sup>57</sup> They are all *reasons* for decisions that in one sense lie in the stock of law, but in another sense are subject to articulation, derivation, or extrapolation from legal materials by techniques and strategies of interpretive reasoning.

When Levi wrote of "window dressing," he demeaned one of the most frequent, if not most important, kind of legally derived principles. Expressions which from a skeptical perspective appear transient and indeterminate categorizers may from another perspective have a more rational function. Concepts like "inherent" or "imminent" danger can serve as low-order working precepts that are instruments in a more complex process of interpretive reasoning. A similar process is involved in justifying or discerning the explicit or implicit rationale for distinguishing one case or group of cases from another, or for treating them alike.<sup>58</sup> Thus, both the stranger and the baby-sitter are morally obligated to save the baby from drowning, but currently only the baby-sitter owes a legal duty.<sup>59</sup> The difference, we may say, is that there is a

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<sup>54</sup> Discussed at length in Rabin, *supra* note 39, at 925.

<sup>55</sup> L.R. 3 H.L. 330 (1868).

<sup>56</sup> This practice is criticized in Stone, *From Principles to Principles*, 97 *LAW Q. REV.* 224, 227-28 (1981). Among definitions for "principle" is "a rule of conduct." *NEW 20TH CENTURY DICTIONARY UNABRIDGED* 1431 (2d ed. 1979). A definition for "rule" is "a fixed principle that determines conduct." *Id.* at 1585.

<sup>57</sup> See Stone, *The Way of a Judge with a Principle — A Tribute to Professor Chaim Perelman*, 12 *N. KY. L.J.* 537 (1985).

<sup>58</sup> See Richards, *supra* note 52, at 1076-78.

<sup>59</sup> See generally F. HARPER, F. JAMES & O. GRAY, *THE LAW OF TORTS* § 18.6, at 718-25 (2d ed. 1986).

“special relationship” between the baby-sitter and the baby. The plug may be pulled on the respirator providing the irreversibly comatose person with oxygen,<sup>60</sup> but a poison pill may not be given to the terminally ill and suffering patient. The former is passive, a matter of letting the person die; the latter is active termination. In these illustrations and *Winchester*, the categorizers serve not only as expressions of justification, but also as line-drawing devices. They mark the barriers against the flood of claims or the “slippery slope” that lie in the uncertainty that is the future.

In *Winchester* Justice Ruggles referred to such a principle to justify his distinction between the duty cases and the no-duty cases.<sup>61</sup> The principle was not articulated, at best left to inference in reference to a case from England.<sup>62</sup> Cardozo used the same strategy in his reference to the *Winchester* principle.<sup>63</sup> He also referred to a *Winchester* rule, again not stating what it was. This precept in blank approach seems deliberate. Further, the principle was said to remain constant over many years, but the rule did not, being a function of the changing *application* of the principle. “[T]he things subject to the principle do change,” although they always involve imminent danger to those in plaintiff’s position.<sup>64</sup>

To the Realist this sort of approach must seem even worse than the transient and indeterminate categorizers. At best, it must seem like fictionalizing, manipulative “nonsense on stilts.” Actually, while this in blank approach does need justifying, good sense can be made of it. If the strategy is attuned to the perspective that produces it, then it may actually withstand the Levi-type skepticism that satisfactory reasoning is not possible by means of indeterminate and shifting premises.

The reference to this sort of principle, this fundamental kind of legal reasoning, whether in blank or partially articulated, rests on an as-

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<sup>60</sup> The historically leading case is *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976) (approving father of comatose woman as guardian and authorizing removal of daughter’s respirator after approval by family doctors), followed by *In re Conroy*, 486 A.2d 1209 (1985) (holding that “artificial nourishment” might be withheld from a person at the very edge of a nonsentient life).

<sup>61</sup> *Thomas v. Winchester*, 6 N.Y. 397, 410 (1852).

<sup>62</sup> The case referred to as an additional ground for finding duty was *Longmeid v. Holliday*, 6 Law and Equity 562 (1852).

<sup>63</sup> Cardozo stated that: “The distinction was said to be that their conduct, though negligent, was not likely to result in injury to anyone except the purchaser. . . . The principle of the distinction is for present purposes the important thing.” *MacPherson*, 217 N.Y. at 385, 111 N.E. at 1051.

<sup>64</sup> *Id.* at 391, 111 N.E. at 1053.

sumption that involves an element of faith. Perhaps all assumptions do. It seems to work, at least for those who believe or take it seriously, as subject to manipulation, as of course it is. The assumption is that the basic decision, distinctions, and comparisons that it explains, or could explain, are correct.<sup>65</sup> The correctness of the decision may seem, at least to its proponents, to be "self evident," or have an intuitive appeal so that full articulation is not necessary. *Winchester* was this sort of case probably for most everyone. *MacPherson* may not have been, but retrospectively it seems to be, which suggests the way this sort of reasoning can work over time.

So Ruggles' distinction between the duty and the no-duty cases did not have to be perfect or completely worked out, although the assumption is that it could be.<sup>66</sup> The judicial tradition is to leave some room for future developments so that it is desirable to leave an open end for the growth of the law in response to changing conditions and further experience. Like the hypothesis in science, the "principle," however stated, is subject to reformulation when more of the "facts are in."<sup>67</sup> Until then, it has a kind of presumptive validity subject to rebuttal and rethinking. A degree of indeterminacy leaves room for movement. From this viewpoint, ambiguity, to a degree, is not a weakness, it is just a necessity.<sup>68</sup>

It may even be from a viewpoint like Cardozo's, for instance, that what seems ambiguous to the skeptic is not at all ambiguous. This type of principle is not categorical, to be used in some deductive fashion.

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<sup>65</sup> Bodenheimer states that "[a] whole course of decisions will gradually mark out the outer limits of a legal principle left indeterminate by the first decision attempting to give it form." E. BODENHEIMER, *supra* note 18, at 439; *see also* Stone, *supra* note 58, at 541 (discussing mental disturbance cases in which a line is to be drawn case-by-case on the basis of a principle carrying an embedded "fact-value complex," *i.e.*, reasonable foreseeability is the blank term open to changing conditions).

<sup>66</sup> Dworkin states that "[t]he best x interpretation of some line of cases may be in a principle that has never been recognized explicitly but that nevertheless offers a brilliant account of the actual decisions, showing them in a better light than ever before." R. DWORKIN, *LAW'S EMPIRE*, *supra* note 5, at 247-48 (citing by way of example Cardozo's opinion in *Hynes v. N.Y. Cent. R.R. Co.*, 231 N.Y. 229, 131 N.E. 898 (1921)).

<sup>67</sup> "What we hand down in our judgments is an hypothesis." Cardozo, *Law and Literature*, 52 *HARV. L. REV.* 471, 478 (1939).

<sup>68</sup> See discussion of ambiguities in legal reasoning as an opening for the "creative element in the judicial process. . . . Legal reasoning by virtue of its own logic is able to absorb new social theories when resolving the ambiguities of a particular case." W. FRIEDMANN, *LEGAL THEORY* 468-69 (5th ed. 1967). Levi was making this same point, but at the expense of the ostensible reasoning. *See* Levi, *supra* note 7, at 506-19.

One applies a principle because it seems right, because its association with a result adds to the persuasiveness of the total reasoning or presentation. They belong together because the process of interpretive reasoning has set the basis for the conjunction.

Consider again the illustration of the drowning baby. As the "category" of special relationships that give rise to duty continues to expand, I expect that one day the stranger under certain circumstances will be said to have a duty to save the baby. If so, it will not be by deduction from the principle that those in special relationships have a duty. That principle as presently stated does not have sufficient explanatory power to expand it to strangers. It becomes necessary to engage in reformulation and search for the better explanation of the cases that previously have been tagged "special relationships." It is not so much that those cases somehow have involved some stronger moral duty, but that they provide situations in which the line can be drawn to prevent "absurd" (undesired) consequences. The appropriate stranger case, then, would involve one who is uniquely situated to give the aid with no risk to herself. It seems correct to me to say, as Cardozo in effect did in *MacPherson*, that there is a principle over these cases that is pushing for fulfillment.<sup>69</sup> A figure of speech, yes, but it serves well to help structure the nature of legal interpretive reasoning.

### CONCLUSION

There is still value in the Levi viewpoint. While his is not a theory of reasoning but of interpretation, it is nonetheless important for that purpose. On the one side, it serves as an antidote to an idealism that proves not sufficiently sensitive to the potentials of rhetorical manipulation. On the other side, it tempers the excesses of a radical skepticism that would tend to make every opinion not an instrument of reason, but a mere rationalization of the ad hoc decision. It is lacking, however, if it is actually meant to be a generalized description of explicit judicial practices in justifying decisions. It slights the judges' explanation of interpretations basic to their arguments. Because these strands are so interwoven with the other portions of the opinions, I believe it more de-

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<sup>69</sup> Bodenheimer suggests that if an "American judge . . . would convert into a legal obligation the moral duty to help a person in obvious peril of life, . . . this might be considered justifiable by the professional and lay community." Bodenheimer, *Hart, Dworkin, and the Problem of Judicial Law-Making Discretion*, 11 GA. L. REV. 1143, 1168-69 (1977). It would involve, he states, only a small broadening of legal principle: "[T]o respect the life and bodily integrity of one's fellow human beings." *Id.*; see also Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980).

scriptively oriented to speak of interpretive reasoning. Cases like the *MacPherson*-ending series take on a richer significance in that light.

Those cases are not necessarily illustrative of all common-law cases although Levi seems to suggest that they are. They are most relevant to cases in which judges explicitly rely predominantly on precedential materials and precepts. Accordingly, when we restore the normative elements to Levi's truncated analysis, we have a more powerful theory aimed to discern what judges actually say they are doing in their opinions and also to determine if judges are actually doing what they say. Both uses have been demonstrated in my study of the *MacPherson* series, revealing, for instance, the explicit strategies of Cardozo and Bartlett and the legitimacy of their conclusions tested against their implicit assumptions.

Essential to an investigation designed to discover judicial strategies of interpretation and reasoning is an explication of the law-view or jurisprudence that the judges assume. A study of *MacPherson* and the preceding cases reveals that the judges used a complex of strategies. They did indeed locate relevant precedent that generated factual characterizations to be used in the very kinds of comparisons and distinctions that Levi emphasized. Actually, this level also involves interpretation, which the Buick-coach comparison by Cardozo and Bartlett so strikingly demonstrates.<sup>70</sup> All prior judges also searched for and reasoned with relevant rules, principles, and other such propositions to associate with the factual characterizations. Neither the factual nor the normative dimension is historically meaningful without the other.

However, there is even more subtlety and variability to the several opinions, as *Winchester* and Cardozo's opinion in *MacPherson* best illustrate. When the language of rules and principles is used, an investigator would do well to be sensitive to the different kinds of rules and principles that judges derive from historical material — or perhaps assume in light of collective experience. For instance, one judge's rule may be another's principle, or a judge may, after all, engage in what we see as principled reasoning or the doctrine of rules without labeling their reasonings.<sup>71</sup> The neutral investigator would be sensitive to these

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<sup>70</sup> See *supra* notes 36-37 and accompanying text.

<sup>71</sup> Much of legal reasoning does not involve explicit reference to rules or principles. Outside of formal presentations, there is a spontaneity to "law talk," which may be interpreted as assuming rules, principles, and so on, but not necessarily. See W. PROBERT, *LAW, LANGUAGE AND COMMUNICATION* (1972). "Fact talk" in judicial opinions is arguably part of the reasoning and may itself be "principled." What we call mixed questions of law and fact, like "imminent danger" and "reasonably foreseeable," stand in the transitional area between loftier principles and value laden fact statements.

ambiguities but moderately tolerant as well, lest she drop off into a frustrated skepticism, which deeper exploration could help to dispel.

With that kind of tolerance in mind, let me suggest one more turn from a rhetorical perspective. What this study has in effect suggested is that a neutral investigator-interpreter can adopt a participant-observer sort of role. She moves "inside" the author's perspective by taking it seriously. She may also move into and out of differing perspectives, as ought to be done, say, in comparing the Cardozo and Bartlett opinions in *MacPherson*. Then there is the "outside" perspective where perhaps Levi stood.<sup>72</sup> However, from that vantage point it is not necessary to conclude that judges' normative references are illusory. Rather, what they or other interpreters call rules and principles, for instance, may be approached in terms of their communicative functions. In that vein, there is no need to reject them as meaningless because they are not really knowable in the manner of the positivists' inclination. Their function is as a part of the total reasoning judges employ in opinions. To speak of principles is to give a special weight to the reasons and the justifications that can be derived from appropriate sources.<sup>73</sup> Of course, an investigator could be overly enthusiastic about the use of the concepts of rules and principles, either as interpretive or rhetorical strategies, and overlook the richer complexity of legal reasoning.

Of the several functions of a judicial opinion, predominant is the purpose to justify the decision, correlatively to provide some degree of guidance for the future. Accordingly, a writer may design an opinion to be persuasive, usually that the decision was required by or appropriate within the parameters of precedent and legal precepts, or on occasion that it is within the acceptable and legitimate sources of law. What is persuasive in these situations has varied over the years; styles have

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See J. Stone's discussion of "reasonably foreseeable" in Stone, *supra* note 57, at 537; and Stone, *supra* note 56, at 224.

<sup>72</sup> The text's analysis is not a reversion to mere pluralism or relativism. For related thinking, see Dworkin's reference to the "internal participants'" point of view. R. DWORKIN, *LAW'S EMPIRE*, *supra* note 5, at 12; see also Fletcher, *Two Modes of Legal Thought*, 90 *YALE L.J.* 970, 1002 (1981); Friedman, *Two Faces of Law*, 1984 *Wis. L. REV.* 13 (1984).

<sup>73</sup> Bodenheimer paints a striking picture of principles and other material of law as it merges with other social phenomena, pointing there to an area of inchoate or embryonic law. This kind of law remains secreted in the inner recesses of the social order until it suddenly leaps into open consciousness through an act of explicit judicial adoption. When this occurs, it should be viewed as a creative . . . act of judicial cognition rather than as an example of lawmaking by fiat.

Bodenheimer, *supra* note 69, at 1169-70.

changed. Thus today, Cardozo would have been free and probably well advised to include references to justice or policy as a means of arguing the appropriate ends of tort law as later products cases have done.<sup>74</sup> There is no lack of allegiance to any of the concepts to point out that references to principle, policy, values, or justice *may*, at least on certain occasions and in the context of acceptable reasoning, be functional equivalents.<sup>75</sup> Whether reference to justice instead of legal principle is persuasive is of course dependent on how well it is done and the reader's jurisprudence. Whether such a translation is tenable is a matter of interpretation of the subject text. Certainly it is tenable in *Winchester* and Cardozo's opinion in *MacPherson*, for instance in Cardozo's reference to the principles underlying Brett's dictum in *Heaven v. Pender*.<sup>76</sup> Such translations (colorizations?) would show just how illustrative those cases are today of judicial interpretive reasoning generally.<sup>77</sup>

In any event, on several occasions Professor Bodenheimer has reminded us of a lost art. We may, as he tells us, be profitably instructed by looking at judicial reasoning, not just in its moments of formal proof, but in its continuing display of a broader dialectical reasoning and search for the best answers to difficult problems.<sup>78</sup> Cardozo's opinion in *MacPherson*, perhaps as it now reads, certainly as it might be faithfully translated, stands up very well indeed in the light of reason,

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<sup>74</sup> See, e.g., *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960). *Henningsen* implied warranty without privity based "upon 'the demands of social justice.'" *Id.* at 364, 161 A.2d at 83 (quoting from a case that preceded *MacPherson*: *Mazetti v. Armour & Co.*, 75 Wash. 622, 624, 135 P. 633, 635 (1913)); *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 63, 27 Cal. Rptr. 697, 701, 377 P.2d 897, 901 (1963) (strict tort liability without privity based on various precedent and their reasonings, summarized as having the purpose of allocating the costs of injuries to manufacturers). This sounds in policy, but of course it sounds just as well in principle, as a continuing counterweight to the *Winterbottom* protective-of-enterprise principle or policy.

<sup>75</sup> See also Stone, *supra* note 57, at 542. These concepts are not symbolically or effectively equivalent, but they are all concepts that *may* be used in pursuit of the good of society or humanity.

<sup>76</sup> See *supra* note 28 and accompanying text. In *Moyer v. Graham*, 285 So. 2d 397 (Fla. 1973), the court applied the "humanitarian principle" of *MacPherson* in aid of the rejection of the privity requirement in a case involving purely economic damage.

<sup>77</sup> Part of the series of cases prior to *MacPherson* are used today in H. JONES, *supra* note 39.

<sup>78</sup> E. BODENHEIMER, *supra* note 18, at 392-97; Bodenheimer, *supra* note 1, at 392-95; Bodenheimer, *Perelman's Contribution to Legal Methodology*, 12 N. KY. L.J. 391 (1985); see also C. PERELMAN & L. OLBRECHTS-TYTEC, *THE NEW RHETORIC* (1969); *Symposium: A Tribute to Chaim Perelman*, 12 N. KY. L.J. 391 (1985).

at least to those who believe in reason. In the end, it is a matter of faith.