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### The Moral of MacPherson

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#### Recommended Citation

John C.P. Goldberg and Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. Pa. L. Rev. 1733 (1998)

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# University of Pennsylvania Law Review

FOUNDED 1852

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Formerly  
American Law Register

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VOL. 146

AUGUST 1998

No. 6

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## ARTICLES

### THE MORAL OF *MACPHERSON*

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“[A]lthough ‘we are under a Constitution, the Constitution is what the judges say it is.’”<sup>1</sup>

“There is a duty [of care] if the court says there is a duty; the law [of negligence], like the Constitution, is what we make it.”<sup>2</sup>

## INTRODUCTION

In *Lochner's Legacy*, Cass Sunstein noted that scholars have tended to build their positive and normative theories of constitutional law around a few judicial decisions that are taken to reflect fundamental and progressive transformations of the field.<sup>3</sup> In particular, he argued that much of modern constitutional theory might be described as an attempt to identify the moral in the story of how *West Coast Hotel v. Parrish*<sup>4</sup> rid constitutional law of *Lochner v. New York*<sup>5</sup> and the doctrine of economic substantive due process.<sup>6</sup>

Modern tort theories, particularly modern theories of negligence, have likewise been built around narratives of progress that attribute special significance to certain transformative cases. One of the most important moments in these narratives is the tale of the “assault upon the citadel of priv-

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<sup>1</sup> EDWIN S. CORWIN, *CONSTITUTIONAL REVOLUTION, LTD.* 64 (1941) [hereinafter *CONSTITUTIONAL REVOLUTION*] (quoting CHARLES EVAN HUGHES, *ADDRESSES* 139 (1908)).

<sup>2</sup> William L. Prosser, *Palsgraf Revisited*, 52 *MICH. L. REV.* 1, 15 (1953), reprinted in WILLIAM LLOYD PROSSER, *SELECTED TOPICS ON THE LAW OF TORTS* 191, 213 (1953).

<sup>3</sup> See Cass R. Sunstein, *Lochner's Legacy*, 87 *COLUM. L. REV.* 873, 873 (1987).

<sup>4</sup> 300 U.S. 379, 398-99 (1937) (upholding a minimum wage law against a Due Process Clause challenge).

<sup>5</sup> 198 U.S. 45, 58 (1905) (striking down a law setting the maximum hours worked by bakery employees as violative of the Due Process Clause).

<sup>6</sup> See Sunstein, *supra* note 3, at 873-74; see also James E. Fleming, *Constructing the Substantive Constitution*, 72 *TEX. L. REV.* 211, 211-12 (1993) (noting that the “specter” of *Lochner* continues to haunt constitutional theory).

ity.”<sup>7</sup> In this story, the part of *Lochner* is played by *Winterbottom v. Wright*,<sup>8</sup> the decision that gave birth to the restrictive liability rule that a manufacturer cannot be held liable for injuries caused by its negligently-made products absent privity between it and the plaintiff. The part of *West Coast Hotel*, in turn, is played by *MacPherson v. Buick Motor Co.*,<sup>9</sup> in which then-Judge Cardozo, “wielding a mighty axe, burst over the ramparts, and buried the general [privity] rule under the exception.”<sup>10</sup>

The parallel between constitutional and tort scholarship is more striking than this, however. It is not just that tort scholars, like constitutional scholars, have constructed theories of negligence around interpretations of transformative cases. Rather, many of our most prominent tort scholars have in fact drawn the *same* moral from their analysis of *MacPherson* that the first generation of post-*Lochner* scholars drew from cases like *West Coast Hotel*. Indeed, according to the still-predominant scholarly view, *MacPherson*’s overruling of *Winterbottom* represents the exposure and rejection of the same jurisprudential mistakes that many constitutional scholars writing in the period 1890-1960 attributed to *Lochner*.

According to the latter group—represented by judges and scholars including, for example, Learned Hand and Edwin Corwin—the critical premise of *Lochner* and other substantive due process decisions consisted of a claim by the courts that regulatory legislation posed a set of justiciable questions that could be resolved by applying a concept of constitutional rights.<sup>11</sup> Thus, the courts relied on an ostensibly legal and moral concept—the right to economic liberty—to explain why the Constitution entitled, and indeed obligated the judiciary, to block legislative efforts to protect workers from the perceived risks and costs of industrialization, including economic exploitation. This reliance was *Lochner*’s mistake. Legal scholars—Holmes, in particular—had shown that when judges talked of rights, they did not actually invoke a distinctive kind of concept, but instead were disguising, through rhetoric, their own legislative or policy decisions about

<sup>7</sup> *Ultrameres Corp. v. Touche*, 174 N.E. 441, 445 (N.Y. 1931) (Cardozo, C.J.). See generally William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1099-1102 (1960) (discussing the demise of privity as a limit on tort liability).

<sup>8</sup> 152 Eng. Rep. 402, 403 (Ex. 1842) (denying a cause of action where privity was lacking between the defendant and the injured plaintiff).

<sup>9</sup> 111 N.E. 1050 (N.Y. 1916) (holding that the defendant manufacturer owed a duty of care to the ultimate purchaser despite the absence of privity).

<sup>10</sup> Prosser, *supra* note 7, at 1100.

<sup>11</sup> See *infra* text accompanying notes 175-204 (describing Holmes’s and Corwin’s critiques of rights).

which rules would promote the public good.<sup>12</sup> *West Coast Hotel*, on this view, marked the judiciary's belated concession that its prior interference with economic legislation could not be justified by a claim that it possessed a special competence to enforce rights, but instead amounted to the imposition of its own outdated policy views on a populace that did not share them.<sup>13</sup>

The story tort scholars have told, and continue to tell, about the transition from *Winterbottom* to *MacPherson* bears a remarkable resemblance to the story just told about *Lochner* and *West Coast Hotel*. According to these scholars—who range from Leon Green and William Prosser to Richard Posner and Robert Rabin—the *Winterbottom* court, like the *Lochner* Court, claimed that the doctrine of privity was entailed by an autonomous and judicially-identifiable legal and moral concept—in this case, the concept of duty.<sup>14</sup> Thus, just as the *Lochner* Court held that the notion of rights contained in the doctrine of substantive due process constrained its decision, the *Winterbottom* court concluded that the concept of duty contained in negligence doctrine obliged it to rule that manufacturers could not be held liable for many of the injuries that they caused.<sup>15</sup> Similarly, these tort scholars maintain that the mistake of *Winterbottom* was exactly the mistake of *Lochner*. “Duty,” no less than “right,” is nothing more than a conclusory label for judicial assessments of prudent policy.<sup>16</sup> Finally, just as *West Coast Hotel* marked the judicial renunciation of rights, *MacPherson* marked the judicial renunciation of duty. Thus, according to most mainstream tort scholars, the moral of *MacPherson* is that the contours of negligence typically are, and ought to be, determined by judicial assessments of the public policy implications of permitting or prohibiting liability.<sup>17</sup>

The troubling aspect of the parallel just described is that tort scholars have not yet reconsidered the foregoing account even as many, if not most,

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<sup>12</sup> See *infra* text accompanying notes 205-07 (noting Holmes's and Corwin's claims that judicial invocation of rights serve as a mask for legislative judgments).

<sup>13</sup> See *infra* text accompanying notes 205-07.

<sup>14</sup> See *infra* text accompanying notes 95-106 (discussing scholarly critiques of duty).

<sup>15</sup> See *infra* text accompanying notes 48-63 (describing *Winterbottom*'s analysis of duty in the context of nineteenth and early-twentieth century negligence law); see also *infra* text accompanying notes 95-106 (discussing scholarly critiques of the concept of duty).

<sup>16</sup> See *infra* text accompanying notes 107-18 (describing Prosser's argument that no-duty decisions consist of judges declining to impose liability for policy reasons).

<sup>17</sup> This is the dominant moral, but not the only one, that tort scholars have drawn from decisions like *MacPherson*. Others have argued that the “exposure” of duty as a legal pseudo-concept provides an argument that other actors—legislatures, agencies, or juries—be handed responsibility for making negligence law. See *infra* text accompanying notes 120-24 (comparing Prosser's view that legislatures and administrators are capable of crafting negligence law with Judge Andrews's view that juries should be given this responsibility).

contemporary constitutional scholars have abandoned the parallel account of *Lochner* and its overturning. Even in its heyday, Holmesian skepticism about rights was never fully endorsed by the courts. Moreover, in the last twenty-five years, the rights-skeptical critique of *Lochner* has encountered a vast array of criticism from scholars who have little else in common, and who have widely divergent attitudes toward the particular doctrine of substantive due process, including Sunstein, Bruce Ackerman, Robert Bork, Ronald Dworkin, John Hart Ely, and Laurence Tribe.<sup>18</sup> The problem with the account, each has pointed out, is that *West Coast Hotel* cannot be understood as rejecting rights-based thinking in constitutional law. As demonstrated by court decisions dating from the time of *West Coast Hotel* to the present, rights-based thinking is essential to constitutional law.<sup>19</sup> Rather, the problem with *Lochner* was its unwarranted assumption that certain libertarian conceptions of property and contract rights fixed the proper understanding of rights under the Constitution. Armed with this insight, modern constitutional theorists of all stripes have revitalized rights-based thinking in a manner that attempts to account for the judiciary's special role in our constitutional system, yet renders constitutional law capable of accommodating social change.<sup>20</sup>

Unfortunately, no such reassessment has occurred within the world of tort scholarship. On the contrary, mainstream tort theory has remained deeply Holmesian and deeply antagonistic towards notions of duty. Indeed, with the rise to academic dominance of law and economics,<sup>21</sup> and the recent flurry of legislative efforts at tort reform,<sup>22</sup> tort law is today more than ever

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<sup>18</sup> See *infra* text accompanying notes 238-52 (surveying various theories of rights that endorse rights-based reasoning in constitutional law). We stress the range of scholars who have criticized *Lochner* in order to emphasize that one can accept our parallel argument for the revival of duty analysis in negligence without having to endorse the controversial doctrine of substantive due process, or even the idea of unenumerated rights. See *infra* text accompanying notes 419-21 (arguing that a relational conception of duty in tort law does not face textual or separation-of-powers objections).

<sup>19</sup> See *infra* text accompanying notes 228-36 (noting the difficulty rights-skeptics face in accounting for Supreme Court jurisprudence in the areas of free speech, privacy, and equal protection).

<sup>20</sup> See *infra* text accompanying notes 253-59 (discussing scholars who advocate rights-based thinking and their critiques of *Lochner*).

<sup>21</sup> See Jules L. Coleman, *The Practice of Corrective Justice*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 53, 57 (David G. Owen ed., 1995) (noting that economic analysis of tort law has prevailed in the academy). There have been numerous influential applications of economic analysis to tort law. See generally GUIDO CALABRESI, *THE COST OF ACCIDENTS* (1970); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987); STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* (1987).

<sup>22</sup> See Victor E. Schwartz & Mark A. Behrens, *Federal Product Liability Reform in 1997: History and Public Policy Support Its Enactment Now*, 64 TENN. L. REV. 595, 607-23 (1997)

regarded as raising policy problems that ought not be analyzed in terms of duty-based thinking. Even corrective justice theorists, who have presented powerful and insightful critiques of conventional scholarly accounts of tort law, have focused principally on the duty of repair, and thus have not directly challenged Holmesian skepticism about duty as it relates to the primary conduct of natural and corporate citizens.<sup>23</sup> In short, while rights have been disassociated from *Lochner* and have regained respect in constitutional discourse, duty still carries the stigma of *Winterbottom* in torts.<sup>24</sup>

One might be tempted to conclude that the absence of any such reexamination by tort scholars indicates that in tort law, unlike constitutional law, neither the judiciary nor the academy has any reason to question Holmesian skepticism and the concomitant notion that the contours of negligence ought to be determined by judicial assessments of public policy. Certainly it is fair to say that the scholarly critique of duty and the model of negligence developed around it—particularly as articulated in Prosser's treatise—have been enormously influential. Indeed, the critique was a major force behind the negligence "revolution" effected by the California Supreme Court in decisions such as *Dillon v. Legg*<sup>25</sup> and *Rowland v. Christian*.<sup>26</sup> Nonetheless, the supposition that the "Holmes-Prosser" (or "instrumentalist") model of negligence has proved unproblematic turns out to be quite implausible.

(discussing recent attempts to reform federal products liability law); Philip Shuchman, *Isn't that the Tort Lawyers Are So Right, It's Just that the Tort Reformers Are So Wrong*, 49 RUTGERS L. REV. 485, 488-94 (1997) (discussing recent federal and prior state tort reform efforts).

<sup>23</sup> See *infra* text accompanying notes 142-47 (noting that corrective justice theorists have focused on the duty of repair rather than primary duties of conduct); see also Linda Ross Meyer, *Just The Facts?*, 106 YALE L.J. 1269, 1307 (1997) (reviewing DON DEWEES ET AL., *EXPLORING THE DOMAIN OF ACCIDENT LAW: TAKING THE FACTS SERIOUSLY* (1996)) (claiming that "corrective justice theorists face a serious difficulty in trying to articulate a duty of care that does not dissolve into cost-benefit analysis"). For some of the leading articulations of corrective justice theory, see generally JULES L. COLEMAN, *RISKS AND WRONGS* (1992); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1992).

<sup>24</sup> There are some notable exceptions. See, e.g., Patrick J. Kelley, *Who Decides?: Community Safety Conventions at the Heart of Tort Liability*, 38 CLEV. ST. L. REV. 315, 353-63 (1990) (defending the concept of duty against Holmesian and Realist attacks and linking duty to social norms and conventions).

<sup>25</sup> 441 P.2d 912, 916-17 (Cal. 1968) (in bank) (embracing Prosser's notion that duty is a reflection of policy considerations in finding that a defendant who negligently killed a child could be liable to the child's mother for emotional harm).

<sup>26</sup> 443 P.2d 561, 563-68 (Cal. 1968) (in bank) (employing Prosserian duty analysis to reject traditional distinctions between landowners' duties to trespassers, licensees, and invitees).



As a descriptive legal theory, the model has always had a hard time explaining some of the most basic limitations on negligence liability. These limitations often derive from doctrines that, on their face, raise issues of duty including the existence of a duty to rescue, the duty to take precautions against economic or emotional harm, and the duty of care owed by professionals to nonclients.<sup>27</sup> Faced with these limitations, scholars working within the Holmes-Prosser paradigm have been forced into one of two unenviable positions: either they concede that these doctrinal areas are anomalous,<sup>28</sup> or they develop ad hoc explanations as to why such duty issues are really questions about socially-optimal levels of liability.<sup>29</sup>

At a more basic level, Holmesian skepticism about duty has not merely failed to explain the contours of negligence doctrine. It has rendered problematic the very institution of the common law of torts. According to Prosser, judges are to set the limits of negligence liability by making all-things-considered decisions as to whether it would be good or bad for society to permit such liability. Yet our understanding of the relative strengths and weaknesses of political institutions often leads to the conclusion that the legislative and executive branches are more capable, or at least more appropriate, institutions for making such decisions.<sup>30</sup> Given the predominance of

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<sup>27</sup> See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 356-85 (5th ed. 1984) [hereinafter PROSSER & KEETON] (discussing "limited duty" doctrines); Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 27-40 (1998) (noting duty-based limitations on liability in negligence law).

<sup>28</sup> See Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 948-54 (1981) (treating no-duty cases as historically-rooted exceptions to the rule of liability for injuries caused by negligence).

<sup>29</sup> See PROSSER & KEETON, *supra* note 27, at 358 (observing that "duty" is explicable as a policy-based limitation of liability); Richard A. Posner, *A Theory of Negligence*, 1 J. LEG. STUD. 29, 38 (1972) (positing a "general rule[] that the defendant owes to those whom he might chance upon and injure a duty to exercise due care," and then explaining limited-duty cases as artifacts of pre-modern law or efficiency-maximizing limitations on liability); see also Zipursky, *supra* note 27, at 40-55 (arguing that instrumentalist accounts of negligence cannot explain an important set of no-duty cases).

<sup>30</sup> Consider, for example, the California Supreme Court's decision in *Kentucky Fried Chicken, Inc. v. Superior Court*, 927 P.2d 1260 (Cal. 1997), in which the majority ruled that a restaurant could not be held liable for injuries to its customers resulting from its refusal to comply with a robber's demands for money. Whatever the merits of the holding, one of the court's main rationales—that imposition of liability would encourage robberies—was utterly unsupported. See *id.* at 1270 ("[W]e are not satisfied that persons who commit armed robbery would not become aware of and be encouraged by the existence of such a duty."). For similar reasoning, see *Boyd v. Racine Currency Exch., Inc.*, 306 N.E.2d 39, 42 (Ill. 1973), which stated that the establishment of a duty to comply with a robber's demands will increase "the risks to invitees upon business premises."

One can certainly argue that courts are sometimes better policymakers than legislatures, or that policy is best made through a "dialogue" between the branches. Cf. Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 653 (1993) (defining the "process of

instrumentalist thinking about negligence, it is therefore not surprising to find legislatures increasingly asserting their prerogative to reshape the traditional domain of tort law.<sup>31</sup>

The Holmes-Prosser model has proved equally inept at generating a framework for analyzing negligence problems. Its core claim—that negligence turns on judicial policy analysis of the costs and benefits of different liability rules—tends to leave judges and juries to decide cases by means of the arbitrary, indeterminate, and doctrinally unstable device of factor balancing.<sup>32</sup> Often defended as an open and honest mode of judging (in contrast to “formal” modes of analysis),<sup>33</sup> balancing methodology in fact obscures the rationale for judicial decisions.<sup>34</sup> In addition, as every torts professor knows, the reduction of negligence to policy analysis threatens to drain the analytic structure from torts. This problem manifests itself in part as a pedagogic problem: sometime in November, usually in conjunction with a discussion of *Palsgraf*<sup>35</sup> and the *Wagon Mound* decisions,<sup>36</sup> first-year torts students are taught that the distinct elements of negligence collapse into an unstructured and indeterminate policy inquiry. Perhaps more importantly, the collapse of “duty,” “breach,” and “proximate cause” into pol-

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judicial review” as an “elaborate discussion between judges and the body politic”). Our point is that the instrumentalist view of negligence law as policy-driven more readily provides an argument for greater legislative jurisdiction over tort law than alternative views.

<sup>31</sup> See Schwartz & Behrens, *supra* note 22, at 597 (recognizing current efforts in tort reform and advocating the formation of new federal product liability law); Shuchman, *supra* note 22, at 485 (noting recent significant efforts of both Congress and the state legislatures to reform tort law).

<sup>32</sup> The California Supreme Court’s decision in *Rowland* is the prototype. See 443 P.2d 561, 564 (Cal. 1968) (in bank) (noting that in order to decide negligence cases, courts must weigh a number of factors, including “the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered an injury, the closeness of the connection between the defendant’s conduct and the injury suffered, [and] the moral blame attached to the defendant’s conduct”).

<sup>33</sup> For an influential statement of this view, see Leon Green, *The Duty Problem in Negligence Cases (Part I)*, 28 COLUM. L. REV. 1014, 1033-44 (1928) (advocating honest multi-factor judicial decision-making over the “mocking emptiness” of formalized tests and rule-based decision-making).

<sup>34</sup> See James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat From the Rule of Law*, 51 IND. L.J. 467, 468 (1976) (noting that “under all the circumstances” tests for liability threaten to degenerate into vacuity). Although we do not believe that policy analysis and balancing tests are irrelevant to negligence law, we are of the view that they ought not to play anything close to the starring role that they have in the Holmes-Prosser model. See *infra* note 418 and text accompanying notes 414-18.

<sup>35</sup> *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928).

<sup>36</sup> *Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. (Wagon Mound No. 2)*, [1967] 1 App. Cas. 617, 644 (P.C.) (appeal taken from Austl.); *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng’g Co. (Wagon Mound No. 1)*, [1961] 1 App. Cas. 388, 426 (P.C.) (appeal taken from Austl.).

icy has caused lawyers and judges basic confusion in briefing and analyzing negligence cases, as well as allocating the respective functions of judge and jury.<sup>37</sup> Excessive reliance on the malleable term “foreseeability”—which now pops up in duty, breach and proximate cause discussions—is symptomatic of the undisciplined nature of the inquiry under the Holmes-Prosper model.<sup>38</sup>

Finally, as a prescriptive theory of negligence, the instrumentalist model leaves a great deal to be desired. In the first place, because ordinary morality employs notions of duty, the model has generated legal conclusions that seem ridiculous, or at least overly demanding and inappropriate.<sup>39</sup> Moreover, by abandoning the psychologically rich notion of duty in favor of a policy- and sanction-driven account, the Holmes-Prosper conception of negligence has undercut the motivation for complying with the law that is built into the concept of duty itself. Both the judges who make the law, and the corporate and individual decision-makers governed by it, having been told for most of this century that tort law is about policy, not duty, now tend to regard tort law as a cost of doing business rather than a collection of obligatory norms.<sup>40</sup> In a like manner, the model has effected an undesirable

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<sup>37</sup> See, e.g., *Weirum v. RKO Gen., Inc.*, 539 P.2d 36, 39-40 (Cal. 1975) (noting that duty is a question of law for the court, while foreseeability, which is a factor in determining duty, is a question of fact for the jury); *McClung v. Delta Square Ltd. Partnership*, 937 S.W.2d 891, 900 (Tenn. 1996) (same).

<sup>38</sup> Compare *Ballard v. Uribe*, 715 P.2d 624, 635 (Cal. 1986) (stating that foreseeability is relevant to duty, breach, and proximate cause analysis), and *Cameron v. Pepin*, 610 A.2d 279, 281-82 (Me. 1992) (stating that foreseeability is relevant to duty and proximate cause analyses), with *Busta v. Columbus Hosp. Corp.*, 916 P.2d 122, 136-37 (Mont. 1996) (stating that foreseeability is relevant to duty analysis, but irrelevant to proximate cause analysis). Compare *McCain v. Florida Power Corp.*, 593 So.2d 500, 502 (Fla. 1992) (stating that foreseeability is different in duty and proximate cause analyses), with *Yonce v. SmithKline Beecham Clinical Lab., Inc.*, 680 A.2d 569, 579 (Md. Ct. Spec. App. 1996) (“[F]oreseeability is an element in the determination of a duty and in the determination of proximate cause and is defined the same in each.”).

<sup>39</sup> See *Calvillo-Silva v. Home Grocery*, 51 Cal. Rptr. 2d 551, 556 (Ct. App. 1996) (explaining the enactment of legislation to overturn California decisions holding that landowners owe a duty of due care to burglars injured by negligently maintained premises), *aff'd*, 968 P.2d 65 (Cal. 1998); *Camper v. Minor*, 915 S.W.2d 437, 439, 446 (Tenn. 1996) (holding that a negligent driver can be held liable for emotional distress experienced by a second driver who viewed the severely injured driver in the wreckage).

<sup>40</sup> For the classic account of law as liability rules, see O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458-59 (1897). In criticizing the instrumentalist notion that tort law reduces down to a set of liability rules, we do not thereby mean to endorse Professor Weinrib’s equally extreme claim that one must argue for the existence of non-instrumental components of negligence law only on non-instrumental grounds. See WEINRIB, *supra* note 23, at 3-8 (criticizing “functionalist” justifications of tort and contract law and arguing that “the purpose of private law is to be private law”). Rather, we maintain that there are strong conceptual and instrumentalist arguments for the retention of a non-instrumentalist concept of duty in negligence law, and that both sorts of argument are appropriate to negligence analysis.

flattening of the legal landscape.<sup>41</sup> We are told that we must act reasonably to avoid foreseeable harms, but have little sense of what this actually means, and are losing our feel for whom we should be taking care not to injure.

In sum, the failure to question the reigning model of negligence cannot be traced to the unqualified success of the model built on Holmesian duty-skepticism. Rather, it is a testament to the fact that duty-skepticism has achieved the status of orthodoxy, and thus has resisted scrutiny. Our goal in this paper is to provide grounds for questioning prevailing orthodoxy by re-considering the soundness of the original assault on duty. Such a project will strike some as a misguided effort to raise the dead. As the recent development of constitutional scholarship demonstrates, however, an examination of whether the problems we face today are due in part to a past conceptual wrong turn can prove to be a fruitful enterprise.

Taking our cue from the course of constitutional scholarship, we aim to point to an alternative approach to negligence by telling a different story about the progress marked by *MacPherson*—a story that provides a basis for the resuscitation of a workable concept of duty in negligence. *MacPherson*, we argue, should be understood as a case affirming, rather than renouncing, the centrality of duty in negligence law.<sup>42</sup> Much in the manner of modern constitutional law and theory, Cardozo's opinion recognized that the problem with *Winterbottom* was not its invocation of the notion of duty, but its rigid and regressive interpretation of that concept. A manufacturer's duties of care, he rightly argued, are not owed only to those with whom the manufacturer has contracted. Businesses, like individuals, owe a broad range of obligations to others to take care not to injure them, duties that derive from social and legal norms outside of contract law. Indeed, as Cardozo explained, it is precisely because a manufacturer has a duty to be vigilant against loss of life or limb to the consumer that liability will be imposed when its negligence causes such injury.

Duty, therefore, is not rejected in *MacPherson*. It is the core of *MacPherson*. This is because Cardozo viewed negligence law as embodying moral principles that contemplate a set of civil obligations we owe one another.<sup>43</sup> As Cardozo emphasized in *MacPherson* and elsewhere, one central

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<sup>41</sup> Cf. George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 962-64 (1985) (describing "flat" legal reasoning typified by overemphasis on the concept of reasonableness).

<sup>42</sup> See *infra* text accompanying notes 321-48 (analyzing Cardozo's employment of a relational notion of duty in negligence law).

<sup>43</sup> See John C.P. Goldberg, Note, *Community and the Common Law Judge: Reconstructing Cardozo's Theoretical Writings*, 65 N.Y.U. L. REV. 1324, 1334 (1990) ("Cardozo described the common law doctrine of negligence as a judicial attempt to capture within a juridical concept a range of obligations which members of his society believed individuals owed

task of the courts is to elaborate those obligations in a manner that meshes with modern understandings and modern problems; to articulate the set of obligations that matches, roughly, what citizens believe about the care they owe one another. He thus believed that one could deploy the concept of duty in negligence law in a manner that was progressive and pragmatic without being an instrumentalist. That, we shall argue, is the true moral of *MacPherson*.

The positive aim of this Article is to further articulate this moral by outlining what a satisfactory account of the concept of the duty of due care might look like. Such an account, we argue, must take note of three aspects of the concept of duty as it is found in Cardozo's analysis and elsewhere in the common law of negligence. First, it must conceive of duty as *relational*, that is, as owed by specific defendants or classes of defendants to specific plaintiffs or classes of plaintiffs, rather than by each individual to the world at large.<sup>44</sup> Second, it must conceive of duty as *relationship-sensitive*, as opposed to abstract, transcendental, or context-independent. Third, it must conceive of duty as a *non-instrumental* (or deontological) concept by taking seriously the idea that "duty" carries with it a notion of obligatory force. In our view, an account of duty that adequately captures these three ideas is not only intelligible, but essential to the articulation of any satisfactory descriptive and prescriptive account of the tort of negligence.

Part I presents and analyzes the narrative that leading scholars have constructed around *MacPherson*. Using Prosser as a spokesperson for mainstream modern tort scholarship, this Part first reconstructs the duty-skeptical arguments developed by Holmes and later elaborated by Prosser, Green, and others, and articulates the philosophical premises from which that critique proceeds. It then demonstrates how leading tort scholars from Prosser to Posner have read *MacPherson* as both evidence of, and authority for, duty-skepticism and the embrace of a policy-driven or instrumentalist account of negligence. Part I concludes with a brief assessment of the impact of the Holmes-Prosser model on modern tort law and scholarship.

Part II discusses the development of constitutional scholarship. The bulk of this Part is devoted to demonstrating that early post-*Lochner* constitutional scholarship relied for its critique of *Lochner* and rights discourse on the same reductionistic, Holmesian conception of law and normative dis-

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one another in their private interactions.”).

<sup>44</sup> One of us has already argued in related contexts that the duties of negligence law, and tort law generally, are best understood as relational in structure. See Zipursky, *supra* note 27, at 59-60 (distinguishing between relational and non-relational norms, and arguing that tort law is made up of relational norms); see also Arthur Ripstein & Benjamin C. Zipursky, *Corrective Justice in an Age of Mass Torts*, in *PHILOSOPHY AND U.S. TORT LAW* (Gerald Postema ed., forthcoming 1999).

course that tort scholars used as the basis of their critique of *Winterbottom* and duty. In Part II.D, however, we note that most modern constitutional theories have diverged from modern tort theory by reintroducing rights analysis into constitutional law.

Part III seeks to complete the analogy between tort and constitutional scholarship by explaining how the reinvigoration of rights-based thinking developed in part out of a broader rethinking of the possibilities for normative reasoning, and, with it, the rejection of the Holmesian idea that reductive forms of instrumentalism provide the only respectable form of such reasoning. To demonstrate that these same philosophical considerations support the rejection of wholesale instrumentalism in tort law and a corresponding revival of a notion of duty, we revisit and rebut the influential anti-duty arguments presented by Prosser in his treatise.

Having established the philosophical viability of duty, we turn in Part IV to the task of outlining the positive case for the concept of duty in negligence law and scholarship. Part IV.A argues that *MacPherson* should indeed be regarded as a testament to sound thinking about negligence, but not because it embraces Holmes-Prosser duty-skepticism. In fact, we argue, duty-skeptics have a good deal of trouble making sense of Cardozo's opinion. The great virtue of *MacPherson*, it turns out, was not its rejection of duty, but its rejection of *Winterbottom*'s narrow and static account of duty in favor of a more sophisticated, context-sensitive understanding. Building on this analysis, Part IV.B sketches our "relational" conception of duty in negligence law and offers reasons for believing that it captures important and attractive aspects of negligence doctrine that are not easily explained on the Holmes-Prosser model. This conception, we suggest, can more easily accommodate the diverse body of negligence case law, more adequately explain the courts' institutional role in deciding duty questions, better lay a foundation for a stable and manageable negligence law, more comfortably mesh with our common sense understanding of how we are obligated to act toward one another, and more sensibly integrate social change into negligence law. Finally, we redeploy the constitutional analogy to suggest that, just as rights are central to constitutional law because of the ways in which they constrain state decision-making, so duties are central to negligence law because of the ways in which they frame the daily decisions of individual citizens.

### I. MACPHERSON AND MODERN TORTS SCHOLARSHIP

In this Part, we will present and analyze the conceptual and normative progress that tort scholars have attributed to *MacPherson*. In so doing, we

aim to articulate the premises and substance of what we have called the Holmes-Prosser or instrumentalist model of negligence.

### A. Winterbottom as a "No-Duty" Decision

#### 1. Duty as an Element of Negligence

To understand the scholarly assault on *Winterbottom* and the subsequent embrace of *MacPherson*, one must first appreciate the place of these two decisions within the doctrinal context of nineteenth and early-twentieth century negligence law. Negligence emerged in the mid-nineteenth century as courts and commentators struggled to rationalize the diversity of actions recognized under the common law.<sup>45</sup> Commentators, in particular, went about this task by trying to distill from the case law a compendium of tort

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<sup>45</sup> On the standard historical account, the emergence of negligence is associated with the increasing volume of so-called "running-down" cases—carriage and ship accidents. See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 466-67 (3d ed. 1990) (discussing reasons for the explosion in the number of running down cases in the late eighteenth century); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 88 (1977) (explaining that the running down cases, the first to involve joint actors, inevitably led courts to shift attention to issues of fault); M.J. PRICHARD, *SCOTT V. SHEPHERD* (1773) AND THE EMERGENCE OF THE TORT OF NEGLIGENCE 26-33 (Selden Soc'y 1976) (describing the transition from recognizing a duty of care owed by stagecoachmen and ship navigators to recognizing other cases of negligence). Unfortunately, this association has caused many historians to superimpose onto the historical emergence of the negligence tort a particular and contestable description of the tort, a description we attribute to Holmes. See *infra* text accompanying notes 76-88 (detailing Holmes's theory of torts). On Holmes's "non-relational" account, an actor commits the tort whenever he acts unreasonably (toward anybody) and thereby causes injury (to anybody). Because these historians have, perhaps unwittingly, accepted the Holmesian account, they have falsely assumed that the tort of negligence must conform to Holmes's description. They have therefore misleadingly asserted that the running down cases are the source of the modern tort of negligence not merely in the sense that courts started using the term "negligence" to refer to a distinct cause of action soon after they began hearing a large volume of those cases, but because the imposition of liability in cases involving accidents between strangers logically presupposed the Holmesian idea that the negligence cause of action is structured around a non-relational, "general," "generic," or "universal" duty of care. See BAKER, *supra*, at 468-70; HORWITZ, *supra*, at 88-89; G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 12-13 (1985); Rabin, *supra* note 28, at 945-47.

In our view, the imposition of liability in the "running-down" cases did not in fact presuppose the embrace of Holmes's universal duty of care. See *infra* text accompanying notes 345-48 (discussing how Cardozo's opinions in *Palsgraf* and *MacPherson* reveal a relational account of duty that encompasses duties owed to strangers). These scholars have thus erred by conflating the emergence of the negligence cause of action—which did in fact occur in the mid-nineteenth century—with the emergence of the particular and contested theory of negligence articulated by Holmes, which was not explicitly embraced by any court until the middle decades of the twentieth century. In so doing, they have given unwarranted credibility to an argument that the Holmesian account of negligence is the "original," "true," or "authentic" account of the tort. See *infra* text accompanying notes 102-04 (discussing Winfield's claim that early common law embraced a non-relational theory of duty).

actions broken down into analytic elements.<sup>46</sup> Thus, as it was first systematized in the latter part of the nineteenth century, the tort of negligence was typically defined in terms of the four elements still recited in modern casebooks: duty, breach, cause (in fact and proximate), and damages.<sup>47</sup>

The first element—duty—was designed to capture a long-standing feature of many trespass and case actions.<sup>48</sup> Since the time those actions were distinguished in the late fourteenth century, suits brought under either heading tended to be available only against defendants who, by virtue of voluntary acts and/or customary norms, stood in certain relationships with the plaintiff.<sup>49</sup> Courts and treatise writers captured this aspect of the cases by requiring the plaintiff to prove that the defendant owed the plaintiff a duty of care. As one treatise writer noted, for a negligence action to proceed, “it must of course be clearly proved that the law imposes upon the defendant the duty which he is charged with neglecting.”<sup>50</sup> Likewise, another explained that, to make out a claim, the “plaintiff must state and prove facts sufficient to show what the duty is, and that the defendant owes it to him.”<sup>51</sup>

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<sup>46</sup> See WHITE, *supra* note 45, at 12-19 (discussing the academic search for the organizing principles of tort law).

<sup>47</sup> See C.G. ADDISON, *THE LAW OF TORTS* 17, 22 (2d ed. 1872) (identifying the elements of negligence as duty, breach of duty, proximate cause, and injury); 1 THOMAS G. SHEARMAN & AMASA A. REDFIELD, *A TREATISE ON THE LAW OF NEGLIGENCE* § 5, at 4 (5th ed. 1898) (listing the elements of negligence as a legal duty to use care, a breach of that duty, damage to the plaintiff, a natural and continuous sequence connecting the breach of duty with the damage, and the absence of an distinct intention to produce the precise damage); FRANCIS WHARTON, *A TREATISE ON THE LAW OF NEGLIGENCE* § 3, at 3 (1874) (listing the elements of negligence as inadvertence, duty, imperfection in the discharge of a duty, and an injury to another or the public, as a natural and ordinary sequence). Other variations appeared in scholarly literature from the turn of the century. See Frances Bohlen, *The Basis of Affirmative Obligations in the Law of Tort*, 53 AM. L. REG. 209, 209 (1905) (noting that the elements of negligence are “a duty of care, a breach of that duty by negligent act or omission, and injury naturally resulting therefrom”). Leon Green reported in 1928 that a version of this formula had been “rather widely adopted.” Green, *supra* note 33, at 1022. But see RESTATEMENT (FIRST) OF TORTS § 281 (1934) (defining the elements of a negligence action roughly as follows: (a) plaintiff has an interest that is protected against unintentional invasion; (b) defendant engages in conduct that is negligent with respect to that interest or some other similar interest; (c) the conduct legally causes an invasion of plaintiff’s interest; (d) plaintiff is not contributorily negligent).

<sup>48</sup> Although we believe that the treatise writers were correct in identifying duty as a requirement built into the causes of action that eventually came to be known as negligence, we also believe it is somewhat misleading to describe duty as a formal “element” that must be pleaded and proved by the plaintiff in making out her *prima facie* case. For convenience, however, we will from time to time refer to duty as an element of negligence.

<sup>49</sup> See PRICHARD, *supra* note 45, at 30-31 (“In the field of relationship negligence the assertion by the plaintiff of a duty on the defendant is as old as the action on the case itself.”).

<sup>50</sup> ADDISON, *supra* note 47, at 17-18 (citation omitted); see also 1 SHEARMAN & REDFIELD, *supra* note 47, § 8, at 6 (“If there is no duty, there can be no negligence.”).

<sup>51</sup> 1 SHEARMAN & REDFIELD, *supra* note 47, § 8, at 7 (footnotes omitted).



Grounds for establishing the existence of a duty of care tracked the traditional contours of the common law causes of action. In some instances, the plaintiff could establish a duty of care by virtue of the defendant's undertaking to provide plaintiff with a service: for example, by providing medical treatment to the plaintiff or acting as a bailee for the plaintiff's goods.<sup>52</sup> In others, the defendant was held to be engaged in an activity that generated a duty of care owed to any member of the general public who availed himself of the defendant's services, regardless of the existence of a specific undertaking.<sup>53</sup> In this class of cases fell certain personal injury and property damage actions against innkeepers and common carriers. In still others, the claim was that the plaintiff enjoyed a certain status vis-à-vis the defendant; for example, the plaintiff was a social guest or customer of the defendant and was thus owed care while on the defendant's property.<sup>54</sup> In some instances, duty could be established by appealing to broadly defined customary principles of conduct, such as the principle that a property owner ought not use his property so as to injure another. For example, it was on the basis of the neighbor-neighbor relationship that the court in *Vaughan v. Menlove* rejected defendant Menlove's claim that he had no duty to exercise reasonable care in building his hay rick so as to prevent fire damage to Vaughan's adjoining property.<sup>55</sup> Finally, the courts recognized that, even in the absence of any business or social relationship, certain basic duties of care were owed by one individual to another: that is, that stranger-stranger was a salient category of relationship for purposes of determining the existence of a cause of action. Thus, for example, courts were prepared to hold liable individuals whose activities in public spaces foreseeably injured others.<sup>56</sup>

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<sup>52</sup> See *Wickstrom v. Swanson*, 120 N.W. 1090, 1090-91 (Minn. 1909) (finding a bailee liable based on either contract or tort); *Gillette v. Tucker*, 65 N.E. 865, 870 (Ohio 1902) (imposing liability on a surgeon based on his performance of an operation); *Phillips v. Hughes Bros.*, 33 S.W. 157, 157 (Tex. Civ. App. 1895, no writ) (finding a bailee liable for damage to leased property).

<sup>53</sup> See *Zabron v. Cunard S.S. Co.*, 131 N.W. 18, 20-21 (Iowa 1911) (acknowledging the defendant's common-carrier duty to the plaintiff, but denying recovery because the plaintiff claimed only emotional harm unaccompanied by physical impact or injury); *Lyttle v. Denny*, 71 A. 841, 842 (Pa. 1909) (holding an innkeeper liable to guests).

<sup>54</sup> See *Graham v. Joseph H. Bauland Co.*, 89 N.Y.S. 595, 596 (App. Div. 1904) (finding a duty owed by a department store to its customers); *Brown v. Stevens*, 99 N.W. 12, 13-14 (Mich. 1904) (finding a duty to store customers); *Pennsylvania Co. v. Gallagher*, 40 Ohio St. 637, 644 (1884) (holding that a negligent railroad owes a duty to the son of the employee of another railroad when the son is assisting the employee in repairing a freight car).

<sup>55</sup> 132 Eng. Rep. 490, 492-94 (C.P. 1837) (finding that tort duty of care rests on the established principle that a man must use his property so as not to injure others).

<sup>56</sup> A famous early instance of such liability is found in *Mitchil v. Alestree*, 86 Eng. Rep. 190 (K.B. 1676), which held the defendant liable for injuries resulting from his attempt to

The much-cited 1883 opinion of M.R. Brett (later Lord Esher) in *Heaven v. Pender* attempted to induce from these cases a general description of the conditions that would suffice to establish the duty of care necessary for the imposition of negligence liability. In Brett's formulation, a defendant owed a duty of due care to the plaintiff whenever he was

by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other . . . .<sup>57</sup>

Roughly forty years later, in *Donoghue v. Stevenson*, Lord Atkin famously offered his own rendition of Brett's test.<sup>58</sup> According to Atkin, the duty of care was owed to one's "neighbours," whom he defined as persons "so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question."<sup>59</sup>

Just as they identified various bases for the duty of care, so courts and treatise writers by the same token held that negligence actions ought to be dismissed where duty was lacking. Thus, negligence claims were dismissed if the plaintiff failed to allege an undertaking by defendant, if the plaintiff complaining of injury on defendant's land had the status of a mere trespasser, if the plaintiff's injury bore only a remote relation to the defendant's negligence, or if the plaintiff suffered a type of harm (such as pure emotional distress) against which defendant was not required to guard.<sup>60</sup> In each of these cases, the courts continued to treat duty as an independent component of the negligence tort: they assumed that the defendant had acted unreasonably, and that this failure proximately caused harm to the plaintiff, but

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train an unruly horse in a public space.

<sup>57</sup> 11 Q.B.D. 503, 509 (Eng. C.A. 1883).

<sup>58</sup> See 1932 App. Cas. 562 (appeal taken from Sess.).

<sup>59</sup> *Id.* at 580. For criticism of the *Heaven* and *Donoghue* formulations, see *infra* notes 310-14 and accompanying text.

<sup>60</sup> See *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 308-09 (1927) (holding that a "tortfeasor [is not] liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong"); *Carrington v. Louisville & N. R.R.*, 6 So. 910, 911 (Ala. 1889) (finding no duty to a trespasser absent a reason to expect his presence); *Byrd v. English*, 43 S.E. 419, 420-21 (Ga. 1903) (denying recovery for purely economic harm due to a third party's negligence); *Zabron v. Cunard S.S. Co.*, 131 N.W. 18, 20-21 (Iowa 1911) (denying recovery because the plaintiff claimed only emotional harm unaccompanied by physical impact or injury); *Magar v. Hammond*, 88 N.Y.S. 796, 798 (App. Div. 1904) (limiting a landowner's duty to trespassers to insuring that custodians do not treat trespassers "wantonly [or] maliciously, or inflict willful injury"), *rev'd*, 76 N.E. 474 (N.Y. 1906).

they denied liability nonetheless on the ground that plaintiff failed to establish that defendant owed a duty not to act unreasonably toward him.

## 2. From *Winterbottom* to *MacPherson*

With this conceptual and doctrinal backdrop in mind, one can better understand the place of *Winterbottom* and its progeny. *Winterbottom* was a classic “no-duty” decision holding that certain types of plaintiffs could not recover, even if they proved that they had been harmed by the fault of certain defendants. Indeed, in the minds of many modern tort scholars, it constitutes perhaps the single most important instance of the genre.

*Winterbottom* was decided in 1842 by the Court of Exchequer.<sup>61</sup> The defendant was under contract with the English Postmaster-General to provide and maintain a coach for use in delivering mail. The plaintiff, a coachman employed by another contractor with the Postmaster-General, was rendered lame when the coach collapsed on him. The plaintiff sued on a claim that defendant had failed to maintain the coach in proper condition. Assuming for purposes of the decision that the defendant had acted unreasonably, the Barons unanimously ruled that the plaintiff had failed to state a claim.<sup>62</sup> In their view, the defendant’s obligation to maintain the coaches was owed only to the Postmaster, not to the plaintiff. The defendant had made no undertaking to provide services directly to the plaintiff, and was not engaged in the sort of activity that courts had previously recognized as carrying with it a duty of care to strangers. Thus, the defendant owed the plaintiff no duty of care sounding in tort. In the absence of a tort duty, the only possible remaining basis for the plaintiff’s action was contract. Because there was no privity between the plaintiff and the defendant, however, the plaintiff could not establish that the defendant had voluntarily assumed an obligation of care to the plaintiff.<sup>63</sup>

*Winterbottom*’s dual holding—that the plaintiff could establish neither a tort nor a contract duty of care—generated the infamous “privity” rule. Persons injured by negligently-made products or negligently-provided services generally could not recover for those injuries if they were not the immediate purchaser of the product or service. Although subject to certain excep-

<sup>61</sup> 152 Eng. Rep. 402 (Ex. Ch. 1842).

<sup>62</sup> See *id.* at 405 (“[T]he breach of the defendant’s duty [was] his omission to keep the carriage in a safe condition . . . but if a duty to the plaintiff be intended (and in that sense the word is evidently used), there was none.”).

<sup>63</sup> See Vernon Palmer, *Why Privity Entered Tort—An Historical Reexamination of Winterbottom v. Wright*, 27 AM. J. LEGAL HIST. 85, 92 (1983) (noting that in *Winterbottom* “plaintiffs were not owed a duty in contract which could be converted into a tort”).

tions,<sup>64</sup> the privity rule operated for the next seventy-five years<sup>65</sup> as a significant limitation on liability for negligently-manufactured products.<sup>66</sup> In 1916, however, the New York Court of Appeals decided *MacPherson*. MacPherson had purchased a car manufactured by Buick from a dealer. One of the car's wheels collapsed while MacPherson was driving, causing him serious injury. MacPherson sued Buick, arguing that Buick was negligent in failing to use adequate care in inspecting the car. As presented to the Court of Appeals, Buick's failure to take reasonable care was presumed. Thus, according to the court, "[t]he question to be determined is whether the defendant owed a duty of care and [vigilance] to any one but the [dealer]."<sup>67</sup>

MacPherson argued that a motor car capable of moving at fifty-five miles per hour fell within the exception to the privity rule for "inherently dangerous" products, and that its manufacturer therefore owed a duty of care to ultimate purchasers and end-users.<sup>68</sup> Buick countered that its product did not fall within the exception, which was reserved for products such as guns

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<sup>64</sup> The most important of these was the exception for "imminently dangerous" products. See EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 9-20 (1949) (discussing case law). A leading application of this exception was *Thomas v. Winchester*, 6 N.Y. 397, 409-11 (1852), which held that a maker of poison owed a duty to ultimate consumers to take care not to mislabel its products. Some courts extended this exception to food and other ingestibles. For one such instance, which also provides an interesting application of *res ipsa loquitur*, see *Pillars v. R.J. Reynolds Tobacco Co.*, 78 So. 365 (Miss. 1918). "[I]f [human] toes are found in chewing tobacco, it seems to us that somebody has been very careless." *Id.* at 366. Courts sometimes struggled in determining whether to apply the privity rule or one of its exceptions. Compare *Devlin v. Smith*, 89 N.Y. 470, 477-78 (1882) (scaffolding inherently dangerous), with *Loose v. Clute*, 51 N.Y. 494, 496-97 (1873) (defective boiler not inherently dangerous).

<sup>65</sup> See RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 732, 739-40 (6th ed. 1995) ("During the nineteenth century, *Winterbottom v. Wright* was a leading case not only in England but also in the United States.").

<sup>66</sup> For a representative application of *Winterbottom's* no-duty reasoning, see *Lebourdais v. Vitrified Wheel Co.*, 80 N.E. 482, 482 (Mass. 1907), holding that a plaintiff injured by a defective emery wheel cannot recover despite the defendant manufacturer's presumed lack of care, as "[t]he manufacturer of an article of merchandise . . . ordinarily is not responsible in damages to those who may receive injuries caused by its defective construction, but to whom he sustains no contractual relations, although by the exercise of reasonable diligence he should have known of the defect." See also *Curtain v. Somerset*, 21 A. 244, 244-45 (Pa. 1891) (holding that a contractor who completed a building is not liable to a third person who sustains injuries caused by defective construction); *Collis v. Selden*, 3 L.R.-C.P. 495, 496-97 (1868) (holding that the plaintiff, injured by a falling fixture which was hung by the defendant in a guest house, could not recover for failure to establish that the defendant owed the plaintiff a duty of care).

<sup>67</sup> *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1051 (N.Y. 1916). The actual text in this passage contains the typographical error "vigilance." *Id.*

<sup>68</sup> See *id.* at 1053; see *supra* note 64 (discussing the exception for "inherently dangerous" products).

and poisons.<sup>69</sup> Writing for the five-judge majority, Cardozo chose to downplay the distinction between types of products: any product, he said, that "is reasonably certain to place life and limb in peril when negligently made . . . is then a thing of danger."<sup>70</sup> Precedent, he maintained, supported the principle that each manufacturer owes a duty of due care to users of its products when the manufacturer knows, or reasonably should know, that consumers will use the product without inspection and will probably be hurt by the product if it is negligently made.<sup>71</sup>

As Chief Judge Willard Bartlett pointed out in dissent, Cardozo's opinion, although moderate and lawyerly in tone, was revolutionary in result. It effectively overruled *Winterbottom* by replacing the principle that product manufacturers' negligence liability should be determined by contract with the principle that they owe a duty of care to end-users.<sup>72</sup> Cardozo's opinion seemed to acknowledge as much in one of its more resonant passages:

We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.<sup>73</sup>

The subsequent direction of case law confirmed Bartlett's assessment: within a few years, almost every American jurisdiction had embraced *MacPherson's* "overruling" of *Winterbottom*.<sup>74</sup>

### B. *Holmes, Prosser, and the Academic Assault on Duty*

At the time it was decided, *MacPherson* received the hearty approval of tort scholars who, led by Frances Bohlen, had been calling for the restriction or elimination of the privity rule for some time.<sup>75</sup> Scholars writing subse-

<sup>69</sup> See *MacPherson*, 111 N.E. at 1052.

<sup>70</sup> *Id.* at 1053.

<sup>71</sup> See *id.* ("We are dealing now with the liability of the manufacturer of the finished product, who puts it on the market to be used without inspection by his customers. If he is negligent, where danger is to be foreseen, a liability will follow.")

<sup>72</sup> *Id.* at 1056-57 (Bartlett, C.J., dissenting) (noting that "absence of such liability [for negligence on the part of the original vendor] was the very point actually decided in the English case of *Winterbottom v. Wright*").

<sup>73</sup> *Id.* at 1053.

<sup>74</sup> See Prosser, *supra* note 7, at 1100-02 ("During the succeeding years this decision swept the country, and with the barely possible but highly unlikely exceptions of Mississippi and Virginia, no American jurisdiction now refuses to accept it.")

<sup>75</sup> See Warren A. Seavey, *Mr. Justice Cardozo and the Law of Torts*, 52 HARV. L. REV. 372, 378 (1939). Cardozo cited Bohlen extensively in his opinion. See *MacPherson*, 111 N.E. at 1053-54. One of the opinion's most effective passages is, moreover, an unattributed paraphrase of a passage from Bohlen. Compare *MacPherson*, 111 N.E. at 1053 ("The dealer

quent to the decision have gone further. In their view, the importance of *MacPherson* is not only doctrinal but also theoretical. *MacPherson*, they argue, rejected not only the privity rule, but the conceptual foundation of that rule, namely the idea that “duty” constitutes an autonomous component of the negligence tort. Indeed, as we discuss in Part I.C, *infra*, *MacPherson* is often treated as an emblem of the courts’ realization of this conceptual breakthrough in the law. But first, let us turn to the scholarly account of duty and negligence law that undergirds this reading of the decision.

### 1. Holmes on Torts

Modern American negligence theory has been shaped as much by the work of two scholars as any: Oliver Wendell Holmes, Jr. and William L. Prosser. Indeed, the critique of duty described at the outset of this Article is probably given one of its clearest, most concise treatments in Prosser’s treatise.<sup>76</sup> That text, in turn, derives in large part from Holmes’s work. In this and later sections, we trace the assault on duty from its Holmesian origins through its major expositor, Prosser, to its present place in negligence theory and doctrine.

Holmes’s theory of torts was animated by his historicism, his legal positivism, and his acceptance of the political and economic theories of classical liberalism. For Holmes, as for Sir Henry Maine, the story of modern history was in large part the story of the evolution from “status to contract”: the waning of organic or hierarchical notions of community and

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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.”), with Bohlen, *supra* note 47, at 351-52 (“[T]he dealer is the only person who cannot be expected to sustain any physical injury if [the product] be defective.”).

<sup>76</sup> See WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 29-31, at 172-82 (1941) [hereinafter HANDBOOK] (explicating the author’s conception of duty). The first edition of Prosser’s treatise was published in 1941. Subsequent editions have reorganized the discussions of duty and related concepts, but have not changed the substance of the discussion. See *infra* note 109 (noting that the duty element of the four part negligence test is largely unchanged in recent editions of Prosser’s work). For convenience of reference, we will provide parallel citations to the current edition of the treatise. See PROSSER & KEETON, *supra* note 27.

It may seem odd that we focus our analysis on a “handbook” that purports merely to organize black-letter law. However, Prosser’s treatise is worthy of close examination for several reasons. First, it is important simply because of its huge influence on lawyerly and judicial understandings of duty and other basic features of negligence law. Second, it accurately embodies the “received wisdom” about duty passed down from leading tort scholars, including Holmes and Leon Green. Finally, it is a prolonged and highly effective brief on behalf of an instrumentalist understanding of negligence. In this regard, it is important to heed Professor White’s observation that Prosser possessed an uncanny ability to couch strong, controversial arguments within seemingly non-controversial statements of doctrine. See WHITE, *supra* note 45, at 162-63.

caste, the weakening of religion, tradition, and custom, and the reorganization of society around voluntary individual transactions grounded exclusively in the pursuit of worldly goods and ends.<sup>77</sup> Holmes's positivism flowed from this social theory. Modern law should not be understood as grounded in religious or moral laws, nor as an organic expression of tradition, but instead ought to be conceived of as a set of directives formulated and enforced by individual officials (judges) on behalf of the State and in furtherance of the State's own regulatory purposes. This understanding was the upshot of Holmes's tireless effort to establish that modern law aimed "to transcend moral and reach external standards,"<sup>78</sup> standards which derived from what, in any given era or epoch, was "understood to be convenient."<sup>79</sup> Holmes's understanding of the movement of history also reinforced his commitment to classical liberalism, a commitment which in turn led him to argue that the substantive standards set by modern law would and should afford individuals a broad sphere of liberty of action while simultaneously protecting them from excessive interference with their security and liberty. Thus, for example, he argued that modern common law generally rejected strict liability as unduly hampering individual freedom and initiative.<sup>80</sup>

In the strongest version of Holmes's theory of law, these three elements—historicism, legal positivism, and classical liberalism—coalesced into a claim that modern common law courts had settled on a single legal principle that would, when applied by the courts in specific instances, pro-

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<sup>77</sup> See HENRY SUMNER MAINE, *ANCIENT LAW* 165 (1871) ("[W]e may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract*."); see also OLIVER WENDELL HOLMES, *THE COMMON LAW* 10-17 (Mark DeWolfe Howe ed., Little, Brown & Co. 1963) (1881) (explaining that the modern doctrine of respondeat superior is a vestige of ancient status- and vengeance-based law). Holmes clearly read Maine, although he denied that Maine influenced him. See FREDERIC ROGERS KELLOGG, *THE FORMATIVE ESSAYS OF JUSTICE HOLMES: THE MAKING OF AN AMERICAN LEGAL PHILOSOPHY* 12 (1984) (quoting Holmes as stating, "I don't think Maine had anything to do with [the ideas set forth in *The Common Law*] except to feed the philosophic passion").

<sup>78</sup> HOLMES, *supra* note 77, at 135.

<sup>79</sup> *Id.* at 2.

<sup>80</sup> See *id.* at 95-96 ("As action cannot be avoided, and tends to the public good, there is obviously no policy in throwing the hazard of what is at once desirable and inevitable upon the actor."). But see DAVID ROSENBERG, *THE HIDDEN HOLMES: HIS THEORY OF TORTS IN HISTORY* 98-123 (1995) (arguing that Holmes believed that the unifying principle of common liability was not unreasonableness but foreseeability, and hence that Holmes endorsed, in principle, strict liability for foreseeable harms). It would be neither possible nor appropriate to provide a full response to Rosenberg's claim here. In our view, he misconstrues Holmes's acknowledgement that the need for clear, categorical, per se rules of negligence would sometimes generate de facto instances of strict liability as if it were an endorsement of the principle of strict liability. See HOLMES, *supra* note 77, at 162-63 (conceding that the need for concrete rules of negligence will cause the law to impose liability in cases in which there is no actual fault, but emphasizing that the law does not thereby adopt the principle of strict liability).

vide the average citizen with adequate security while at the same time permitting him a broad realm of freedom of action. This was the principle that each citizen is obliged to act with reasonable prudence. Thus, whether a legal action alleged a civil or criminal wrong, a tort or contract claim, or an intentional or negligent act, the governing legal principle, and therefore the basic precondition of liability, was always the same: the plaintiff had to prove that particular facts existed at the time the defendant acted such that a man of ordinary experience and prudence could have foreseen and taken steps to avoid the type of harm realized.<sup>81</sup> Given such proof of unreasonableness, liability could attach, notwithstanding that the defendant's wrong was neither intentional, nor knowing, nor a violation of religious, moral, or customary norms.<sup>82</sup>

Holmes's understanding of the law of torts reflected this theoretical commitment. In his view, tort law, like all common law, was essentially regulatory; it was a device that the state employed to advance a particular set of public goals—in this case, the goals of deterring harmful conduct and indemnifying citizens for invasions of their security.<sup>83</sup> Furthermore, tort law, like all common law, sought to achieve those goals by means of simple directives from courts instructing citizens to behave reasonably, or rather by a series of situation-specific directives that applied the general reasonableness principle to recurring categories of conduct.<sup>84</sup> The major distinction between tort and criminal law was that tort law enforced the directive to act reasonably by ordering defendants who violated it to indemnify victims of harms caused by their violations.

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<sup>81</sup> See HOLMES, *supra* note 77, at 75-76, 106-07 (observing that the common law contains a general theory of liability based on the failure to act as would a reasonable, prudent man).

<sup>82</sup> In his later writings, Holmes refined his account of negligence by introducing the idea that courts sometimes ought to immunize defendants from liability for their unreasonable acts when necessary to promote public policy. See Holmes, *supra* note 40, at 471 (“[T]he law regards the infliction of temporal damage by a responsible person as actionable . . . except in cases where upon special grounds of policy the law refuses to protect the plaintiff or grants a privilege to the defendant.”); Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 2-3, 9-10 (1894) (“[W]hether, and how far, a privilege shall be allowed is a question of policy.”); *infra* note 111 (arguing that Prosser's policy inquiry echoes that made implicitly by Holmes).

<sup>83</sup> See HOLMES, *supra* note 77, at 144 (“Be the exceptions more or less numerous, the general purpose of the law of torts is to secure a man indemnity against certain forms of harm to person, reputation, or estate, at the hands of his neighbors, not because they are wrong, but because they are harms.”).

<sup>84</sup> See *id.* at 111 (“[T]he featureless generality, that the defendant was bound to use such care as a prudent man would do under the circumstances, ought to be continually giving place to the specific one, that he was bound to use this or that precaution under these or those circumstances.”).



Holmes's theory of torts further entailed a particular account of the obligations created by tort law. Given his premises, modern tort law could not be described as reflecting or enforcing moral or conventionally-recognized duties owed by one citizen to another. In modern societies, there were no such duties. Instead, the courts imposed liability for unreasonable conduct because they had concluded that it was the only rule that provided deterrence and compensation without unduly interfering with individual freedom. Accordingly, it was a mistake to say that a given defendant's tort liability derived from his breach of an obligation owed to the injured plaintiff. Rather, liability attached because the defendant had violated state directives commanding each citizen to refrain from unreasonable conduct threatening injury to others.<sup>85</sup>

Suppose, for example, a court held a shopkeeper liable for acting negligently and injuring a customer. In Holmes's view, liability did not attach because shopkeepers owe duties of care to their customers. Rather, liability was appropriate because an individual had failed to observe the requirement of reasonable care "imposed [by the State] on all the world, in favor of all."<sup>86</sup> If one had to use the language of obligation and duty, one could say that the tort law imposed "duties of all the world to all the world."<sup>87</sup> However, Holmes found even this formulation misleading insofar as it suggested that tort law presupposed a mysterious set of extra-legal duties. To say that tort law imposed a duty on all to act reasonably toward all was, in the end, an imprecise way of saying that courts had adopted a rule imposing liability on anyone who causes harm through an unreasonable act. Thus, for Holmes, negligence was necessarily *non-relational*. The tort was not properly described as causing harm by an unreasonable act toward a particular person or class of persons, but simply as causing harm by acting unreasonably.<sup>88</sup>

## 2. Prosser and the Critique of Duty

Prosser's understanding of tort law was largely Holmesian. He, too, viewed negligence law as designed to balance individual liberty and secu-

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<sup>85</sup> See Oliver Wendell Holmes, Jr., *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1, 6 (1870) [hereinafter *Codes*] ("[The law of torts] contains duties from all the world to all the world."); Oliver Wendell Holmes, Jr., *The Theory of Torts*, 7 AM. L. REV. 652, 660-61 (1873) [hereinafter *Torts*] (stating that torts generally consist of a breach of "a duty imposed on all the world, in favor of all").

<sup>86</sup> Holmes, *Torts*, *supra* note 85, at 661.

<sup>87</sup> *Id.* at 660.

<sup>88</sup> See Holmes, *supra* note 40, at 471-72 (criticizing the suggestion that negligence liability must rest on "special circumstances outside of the tendency of the act [to cause harm]").

riety<sup>89</sup> by means of a simple, non-relational directive<sup>90</sup> requiring citizens to conduct themselves in accordance with a state-generated standard of reasonable care,<sup>91</sup> coupled with an enforcement mechanism entailing indemnification for harms caused by violations of that directive.<sup>92</sup> But Prosser also introduced three important refinements to this view. The first of these concerned the core concept of reasonableness. As indicated, both men treated reasonableness as a state-generated and objective standard. But, whereas Holmes ultimately endorsed the standard because it promoted, or at least respected, the liberty of citizens, Prosser explicitly linked reasonableness to utility maximization, thereby helping to pave the path from Holmes to modern economic analysis of tort law.<sup>93</sup> According to Prosser, when tort law directs each citizen to avoid acting unreasonably, it seeks to enhance social utility by directing each person not to generate risks of harm to others that outweigh the benefits that accrue from so acting.<sup>94</sup>

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<sup>89</sup> See PROSSER, HANDBOOK, *supra* note 76, § 3, at 16 (“Men wish to be secure in their persons against harm and interference, not only as to their physical integrity, but as to their freedom to move about and their peace of mind.”); PROSSER & KEETON, *supra* note 27, § 3, at 16 (same).

<sup>90</sup> See PROSSER, HANDBOOK, *supra* note 76, § 36, at 224 (“[I]n negligence cases, the duty is always the same, to conform to the legal standard of reasonable conduct in light of the apparent risk.”); PROSSER & KEETON, *supra* note 27, § 32, at 173 (same).

<sup>91</sup> According to Prosser,

It is now more or less generally recognized that the “fault” upon which liability may rest is social fault . . . . The law finds “fault” in a failure to live up to an ideal standard of conduct which may be beyond the knowledge or capacity of the individual, and in acts which are normal and usual in the community, and without moral reproach in its eyes.

PROSSER, HANDBOOK, *supra* note 76, § 4, at 20-21; PROSSER & KEETON, *supra* note 27, § 4, at 22 (same).

<sup>92</sup> See PROSSER, HANDBOOK, *supra* note 76, § 2, at 10 (“The civil action for a tort . . . is commenced and maintained by the injured person himself, and its purpose is to compensate him for the damage he has suffered, at the expense of the wrongdoer.”); PROSSER & KEETON, *supra* note 27, § 2, at 7 (same).

<sup>93</sup> For Prosser’s utilitarianism, see PROSSER, HANDBOOK, *supra* note 76, § 3, at 17, arguing that tort law should be structured, in Jeremy Bentham’s words, to “promote that ‘greatest happiness of the greatest number,’ which by common consent is the object of society.” The current edition of the treatise, revised after Prosser’s death, departs rather markedly from the spirit of the Prosserian project by describing utility maximization as one among multiple possible goals.

A decisionmaker might deliberately seek to use the law as an instrument to promote the “greatest happiness of the greatest number,” or instead might give greater emphasis to protecting certain types of interests of individuals as fundamental entitlements central to an integrity of person that the law upholds above all else.

PROSSER & KEETON, *supra* note 27, § 3, at 16 (citation omitted).

<sup>94</sup> See PROSSER, HANDBOOK, *supra* note 76, § 1, at 9 (“[Tort law strives] to strike some reasonable balance between the plaintiff’s claim to protection against damage and the defendant’s claim to freedom of action for his own ends . . . .”); PROSSER & KEETON, *supra* note

The second refinement introduced by Prosser, and the refinement of greatest concern to us, concerns the duty element of negligence law. Although Holmes had a good deal to say on the subjects of duty and negligence, he had little to say about the implication of his theory of torts for the duty element recognized by the common law of negligence, in part because he was probably not bothered by decisions such as *Winterbottom*. Subsequent scholars with different political sympathies, including Prosser, were very troubled by these decisions, and they soon harnessed Holmesian analysis to mount a full-scale attack on the use of duty as a negligence concept. In particular, they developed two arguments that purported to demonstrate the necessity of abandoning the traditional treatment of duty as an independent element of negligence. First, they argued that the courts' justification for decisions like *Winterbottom*—that defendant owed no duty of care to the plaintiff—had to fail because it presupposed something which did not exist, namely an intelligible concept of duty. We call this “the conceptual argument for duty-skepticism.” Prosser and his contemporaries also argued that the concept of duty was unattractive because it was inherently conservative. We label this “the political argument for duty-skepticism.”

#### a. *The Conceptual Argument for Duty-Skepticism*

Nineteenth century courts and authorities, as we have seen, inquired under the aegis of duty whether the plaintiff could bring himself within the scope of a definite obligation owed by the defendant to him. They seemed to regard this as a legal inquiry that stood independently of any analysis of the reasonableness of defendant's conduct, or the utility of sanctioning such conduct.<sup>95</sup> According to the conceptual argument against duty articulated by Prosser, this sort of analysis was necessarily confused. Cast in its strongest form, Prosser's claim was that duty is meaningless—a piece of “artificial” gibberish.<sup>96</sup> A judicial opinion written so as to conclude that “liability does not attach because the defendant owed no duty to the plaintiff,” may as well have been written to conclude that “liability does not attach be-

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27, § 85, at 608 (same). By contrast, Holmes adhered to the traditional common law view of unreasonableness as a failure to use “ordinary” care. See, e.g., HOLMES, *supra* note 77, at 106 (noting that, under the leading case of *Brown v. Kendall*, 60 Mass. 292 (1850), the plaintiff is required to prove that the defendant “was wanting in the care which men of ordinary prudence would use under the circumstances”).

<sup>95</sup> See *supra* text accompanying notes 48-56 (discussing the criteria used by courts to inquire into the existence of a duty between the parties).

<sup>96</sup> See PROSSER, HANDBOOK, *supra* note 76, § 31, at 179-80 (“Th[e] concept of a relative duty is not regarded as essential by the continental law, and it has been assailed as serving no useful purpose, and producing only confusion in ours. Its artificial character is readily apparent . . . .”); PROSSER & KEETON, *supra* note 27, § 53, at 357 (same).

cause defendant is not a carrot." Alternatively, Prosser asserted that the notion of duty, even if intelligible, was hopelessly indeterminate. The notion of "relation" and its metaphoric counterpart—Lord Atkin's "neighbour" principle—were "so vague as to have little meaning, and as a guide to decision [they had] no value at all."<sup>97</sup> A court desirous of finding liability could always "find the necessary 'relation' in the position of the parties toward one another, and hence to extend the defendant's duty to the plaintiff."<sup>98</sup> Thus, in the blunt terms of Prosser's 1953 Michigan lectures: "There is a duty if the court says there is a duty; the law, like the Constitution is what [courts] make it."<sup>99</sup>

In addition, Prosser—following Leon Green and Percy Winfield—argued that, to the extent duty had any determinate content, its content was redundant with, and in fact determined by, the substantive liability standard of reasonableness.<sup>100</sup> The "breach" element already required the plaintiff to prove that the defendant acted without reasonable care. To say further, as Brett did in *Heaven v. Pender*, that no duty is owed unless an ordinary person would have recognized the potential for harm to the plaintiff, was merely to reiterate in different words that the defendant would not be held liable unless the plaintiff could show that he failed to "conform to the legal standard of reasonable conduct in light of the apparent risk."<sup>101</sup> Nor was it a surprise to Prosser that the only intelligible formulations of the duty element simply reproduced the reasonableness inquiry under the breach element. Because the duty of care was understood by Holmes and Prosser to be a duty owed to the world, the duty element by definition had to be satisfied in every case. Once a court presumes that the plaintiff's injury was the proximate result of the defendant's unreasonable conduct, all the requisite conditions for imposing negligence liability (on the Holmesian model) have been met. Duty thus could only be given substance at the cost of rendering it superfluous.

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<sup>97</sup> WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 36, at 168 (2d ed. 1955); PROSSER & KEETON, *supra* note 27, § 53, at 359. This critique of *Heaven* first appears in the 1955 second edition of the treatise.

<sup>98</sup> PROSSER, HANDBOOK, *supra* note 76, § 31, at 180; PROSSER & KEETON, *supra* note 27, § 53, at 357.

<sup>99</sup> Prosser, *supra* note 2, at 213.

<sup>100</sup> See Green, *supra* note 33, at 1028-29 (noting that as duty is defined by the courts, it is synonymous with breach); Percy H. Winfield, *Duty in Tortious Negligence*, 34 COLUM. L. REV. 41, 43 (1934) ("Duty means a restriction of the defendant's freedom of conduct; and the particular restriction here is that of behaving as a reasonably careful man would behave in similar circumstances.").

<sup>101</sup> PROSSER, HANDBOOK, *supra* note 76, § 36, at 224; PROSSER & KEETON, *supra* note 27, § 31, at 169.

This redundancy argument against the concept of duty reflected more than a preoccupation with the doctrinal elegance of negligence law. It went hand-in-hand with a final, instrumental argument against duty, implicit in the foregoing conceptual analysis. Where conduct was proved to be unreasonable, imposition of liability served a deterrent function; where the plaintiff was injured, imposition of liability also served a compensatory function. Causation (particularly when qualified by proximate cause principles) provided the nexus necessary to permit the simultaneous achievement of these policy goals. There was, it seemed, no practical function left for the concept of duty to perform.

In sum, according to the different versions of Prosser's conceptual argument, the concept of the duty of care was meaningless, indeterminate, doctrinally redundant, and pragmatically pointless. On any of these arguments, it followed that the legal concept of duty could not possibly have provided courts with a reason justifying their decisions denying liability. A judicial opinion reasoning that a defendant cannot be held liable because he owed no duty to the plaintiff only restated its premises; its articulated reason carried no justificatory weight.

Taking a step back, we can see that Prosser's variations on the conceptual argument against duty flowed quite naturally from his Holmesian approach to torts. Holmes, after all, had expressed the view that the concept of duty ought to be purged from legal analysis. At best, it conveyed in an imprecise way the expectation of official sanction. At worst, it was a misleading legal fiction. Likewise, Holmes was the original and most forceful advocate of the view that the standard of conduct set by the common law of negligence was simply a generic reasonableness standard: the requirement that each person act reasonably toward all the world. More generally, Holmes viewed the law as essentially regulatory: a means by which the State sought to channel conduct so as to achieve certain aggregate results. Given these commitments, Prosser's conceptual argument against duty makes perfect sense. The notion that individuals owe relational duties to one another runs counter to the basic conceptual commitments of the Holmesian project.

#### b. *The Political Argument for Duty-Skepticism*

Prosser's argument against duty also contained a political dimension. Duty, he argued, was not merely a legal fiction, it was a dangerous fiction, because it led lawyers and courts to import their biases into negligence doctrine without understanding or owning up to what they were doing. This much, Prosser claimed, had been demonstrated by Percy Winfield's analysis of the historical pedigree of the concept. According to Winfield, prior to the

early 1800s, there had been “virtually no consideration of duty,” and “little trace of any notion of a relation between the parties, or an obligation to any one individual, as essential in tort.”<sup>102</sup> It was only when the tort of negligence was being developed in the 1830s and early 1840s—a time when “the courts sought, perhaps more or less unconsciously, to limit the responsibilities of growing industry within some reasonable bounds”—that duty emerged as a tort element.<sup>103</sup> Duty, in other words, was a child of anti-regulatory, laissez-faire ideology. The courts had seized on the notion of duty because it seemed to justify, as a matter of principle (although it did not), their inclination to limit sharply the range of conduct that could generate negligence liability.<sup>104</sup>

In short, according to Prosser, the fact that courts began analyzing negligence claims in terms of duty in the mid-nineteenth century proved that duty was merely a projection of certain historical and class biases. That is, duty was a pseudo-concept masquerading as a freestanding justification for the conclusion that even devastating individual injuries often should be left uncompensated.<sup>105</sup> As such, duty belonged to the family of fictions that should be blacklisted as tools of laissez-faire ideology.<sup>106</sup> The concept of duty, at least as traditionally understood, had to be expunged from negligence lest it continue to mislead courts and lawyers into regarding their conservative biases as moral or legal truths.

<sup>102</sup> PROSSER, HANDBOOK, *supra* note 76, § 31, at 178-79 n.60 (citing Winfield, *supra* note 100); PROSSER & KEETON, *supra* note 27, § 53, at 357 & n.4 (same).

<sup>103</sup> PROSSER, HANDBOOK, *supra* note 76, § 31, at 179; PROSSER & KEETON, *supra* note 27, § 53, at 357.

<sup>104</sup> According to Winfield, *Winterbottom's* use of duty to limit liability marked a radical break with precedent and tradition because, in his view, the common law had for centuries operated on the Holmesian notion of universal or non-relational duty. His argument, however, is anachronistic and profoundly wrong-headed. As Professor Rabin has noted, for centuries before the heyday of laissez faire, the common law of civil obligations was filled with “no-duty” cases—cases in which a defendant whose fault caused harm was held not liable because he had no obligation to take care not to injure the plaintiff. See Rabin, *supra* note 28, at 946 (“In the supposed heyday of the fault principle, there was in fact no abstract notion of a general duty of due care irrespective of time, place and status . . .”); *id.* at 934, 937, 945-46 (providing examples of no-duty cases).

<sup>105</sup> See PROSSER, HANDBOOK, *supra* note 76, § 83, at 674 (noting that nineteenth-century judges believed “that it would place too heavy a burden upon manufacturers and sellers to hold them responsible to hundreds of persons at a distance whose identity they could not even know, and it was better to let the consumer suffer”); PROSSER & KEETON, *supra* note 27, § 96, at 682 (same).

<sup>106</sup> This roster also included the doctrines of contributory negligence, assumption of risk, and caveat emptor. See FOWLER VINCENT HARPER, A TREATISE ON THE LAW OF TORTS §§ 10-11, 102, at 25-30, 232 (1st ed. 1933).

### 3. Reconceiving Duty as Policy

As we will see, Prosser's renditions of the conceptual and political arguments against duty have been quite influential.<sup>107</sup> Yet they left him with a serious problem. As a Holmesian, Prosser had no place in his account of negligence for the notion of duty as an independent element of the tort. However, as a self-proclaimed scholarly reporter of the law—and one with an acute desire to influence the courts that he studied—Prosser could not simply announce in his treatise that duty, and its accompanying case law, ought to be eliminated.<sup>108</sup> Instead, he needed to find a way nominally to retain, yet rationalize and liberalize, that mischievous concept.<sup>109</sup> Taking his lead from Green,<sup>110</sup> Prosser solved his problem by offering an alternative explanation for the no-duty decisions, one that accounted for many or most of them without resorting to the incoherent, regressive concept of duty.

Courts such as the *Winterbottom* court had denied recovery ostensibly because the defendant owed the plaintiff no duty of care. According to a Holmesian such as Prosser, this description was necessarily erroneous: each had been decided on the assumption that defendant had violated the simple,

<sup>107</sup> See *infra* text accompanying notes 138-55 (describing the place of duty in modern tort theory and doctrine).

<sup>108</sup> See PROSSER, HANDBOOK, *supra* note 76, § 31, at 180 (stating that duty is “embedded far too firmly in our law to be discarded”); PROSSER & KEETON, *supra* note 27, § 53, at 358 (same).

<sup>109</sup> To this day, the treatise still begins its exposition of negligence by perfunctorily reciting the traditional four-part negligence formula of duty, breach, cause and damages found in nineteenth-century treatises. Moreover, it initially describes the duty element in traditional terms, explaining that, under the duty element, the plaintiff must prove that the defendant had “[a] duty, or obligation, recognized by the law, requiring [the defendant] to conform to a certain standard of conduct, for the protection of others against unreasonable risks.” PROSSER, HANDBOOK, *supra* note 76, § 30, at 177; PROSSER & KEETON, *supra* note 27, § 30, at 164. The breach element is in turn defined as a “failure [by the defendant] to conform to the standard required: a breach of the duty.” PROSSER, HANDBOOK, *supra* note 76, § 30, at 177; PROSSER & KEETON, *supra* note 27, § 30, at 164.

This apparent embrace of the traditional notion of duty should fool no one. By the third edition, Prosser was clear in his own mind that “duty” could not possibly refer to an element of negligence. Thus, he moved duty from its position as the first element of the tort (section 31), see PROSSER, HANDBOOK, *supra* note 76, §31, at 178, to its current position (section 53), see PROSSER & KEETON, *supra* note 27, §53, at 356-59, in which it is treated as an external, policy-driven check on negligence liability. Thus, under its current organization, the treatise—and, more confusingly for students, the Prosser casebook—lays out the traditional four-part test for negligence, then somewhat mysteriously ignores element one and proceeds to discuss in detail elements two, three and four. Moreover, when the reader is finally returned to the duty element under the miscellaneous heading of “limited duty,” she is greeted by the compendium of duty-skeptical arguments discussed above. See PROSSER, HANDBOOK, *supra* note 76, § 31, at 178; PROSSER & KEETON, *supra* note 27, § 53, at 356-59; JOHN W. WADE ET AL., CASES AND MATERIALS ON TORTS 385 (9th ed. 1994).

<sup>110</sup> See Green, *supra* note 33, at 1023-26.

non-relational directive to act reasonably, and thus each involved a breach of the duty of care in its only meaningful rendition. Prosser was compelled, therefore, to provide an alternative explanation as to why the courts had concluded that the defendant's presumed violation of the legal liability standard should not elicit the normal sanction requiring indemnification of the injured party. To conceive of the problem this way, however, was to identify its answer. The no-duty cases were not no-duty-of-care cases. Rather, they were no-duty-to-compensate cases. In each instance (by hypothesis), the defendant owed the world a "duty" of care and violated that "duty." The courts had nonetheless concluded that, because of an unusual alignment of policy factors, the prudent course was not to penalize conduct that was, by the terms of negligence law, sanctionable.<sup>111</sup>

Prosser memorably conveyed this crucial point in a passage that has formed one of the leading slogans of modern American negligence jurisprudence:

The statement that there is or is not a duty [of care] begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct. . . . It is a shorthand statement of a conclusion, rather than an aid to analysis in itself. . . . "[D]uty" is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.<sup>112</sup>

"Duty," in short, is "nothing more than a word" that judges rely upon to convey their belief that, notwithstanding a defendant's violation of the directive to act reasonably, the ordinary rule of liability for harms caused by such acts ought to be overridden in the interests of social utility.<sup>113</sup> Thus, whenever they had rendered "no-duty" decisions, the courts had actually determined that there was some policy reason not to apply the default rule of compensation for harm caused by unreasonable acts, perhaps because application of that sanction would generate a flood of costly litigation, or would

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<sup>111</sup> Thus, on Prosser's account, the tort of negligence contains two legal inquiries: (1) Did the defendant behave unreasonably, and (2) if so, is there any policy reason not to impose liability for damage caused by that behavior? In this, too, Prosser was essentially following Holmes, although Holmes did not explicitly hitch the second-stage policy inquiry to the duty element of the negligence tort. See *supra* note 82 (discussing Holmes's view that courts should sometimes immunize defendants for their unreasonable acts when necessary to promote public policy). But see Holmes, *Torts*, *supra* note 85, at 661 n.1 (analyzing the no-duty holding in *Collis v. Selden*, 3 L.R.-C.P. 495, 496-97 (1868), in Prosserian terms).

<sup>112</sup> PROSSER, HANDBOOK, *supra* note 76, § 31, at 180; PROSSER & KEETON, *supra* note 27, § 53, at 358.

<sup>113</sup> PROSSER, HANDBOOK, *supra* note 76, § 31, at 185 ("The real problem, and the one to which attention should be directed, would seem to be one of social policy: whether the defendants in such cases should bear the heavy negligence losses of a complex civilization, rather than the individual plaintiff."); PROSSER & KEETON, *supra* note 27, § 43, at 287 (same).



impose crushing liability on a nascent industry. Indeed, the very language used by the *Winterbottom* Barons revealed to Prosser that their decision was driven by such an assessment. It was Lord Abinger, after all, who had dismissed plaintiff's claim as entailing "the most absurd and outrageous consequences, to which I can see no limit."<sup>114</sup>

#### 4. Institutional Implications of the Critique of Duty

In order to appreciate why Prosserian duty-skepticism led to the scholarly embrace of *MacPherson*, and to set the stage for the analogy to constitutional scholarship discussed in Parts II and III, it is now necessary to note the third way in which Prosser's critique and reconstruction of the duty element extended Holmesian negligence analysis. Specifically, we must consider the implications of Prosser's recasting of doctrine for the acceptability of judge-made negligence law.

According to Prosser's account, nineteenth-century courts ascertained neither the concept of duty itself, nor their conclusions in specific cases, by interpreting the case law or the concept of duty. Judges instead used the duty concept to express their policy judgments that liability for unreasonable conduct sometimes had to be limited in the name of the public good.<sup>115</sup> The inquiry conducted under the guise of the duty element was thus an unconstrained inquiry into the social utility of imposing or denying liability. Hence, according to Prosser, "the problem of duty is as broad as the whole law of negligence" in that it concerns "whether the plaintiff's interests are entitled to legal protection against the defendant's conduct."<sup>116</sup>

Prosser's recasting of duty seemed to carry with it potentially vast implications for negligence law and tort law as a whole. Because the duty question ultimately turned on questions of policy, the justification for judge-made negligence law would have to lie in a claim that judges ought to be entrusted with the responsibility of setting the socially optimal level of tort liability. Prosser never backed away from this implication of his analysis. Indeed, he forthrightly argued that judge-made negligence law had to be conceived of and defended on the ground that judges are competent to un-

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<sup>114</sup> See PROSSER, HANDBOOK, *supra* note 76, § 31, at 179, § 83, at 674; PROSSER & KEETON, *supra* note 27, § 53, at 357, § 96, at 682. Prosser's reading of *Winterbottom* is likely mistaken. See *infra* note 357.

<sup>115</sup> See PROSSER, HANDBOOK, *supra* note 76, § 31, at 180 (arguing that duty is a mere "expression" of underlying policy considerations); PROSSER & KEETON, *supra* note 27, § 53, at 358 (same).

<sup>116</sup> PROSSER, HANDBOOK, *supra* note 76, § 31, at 180; PROSSER & KEETON, *supra* note 27, § 53, at 357-58.

undertake “social engineering.”<sup>117</sup> To be sure, he thought that courts sometimes were too quick to find a policy reason for denying claims brought by plaintiffs who had been injured by others’ unreasonable conduct. He nevertheless argued that courts could and should decide the duty-policy question.<sup>118</sup> The early California decisions embracing the Holmes-Prosser model clearly understood this message, concluding that their task under the heading of duty was to cut off liability at the point at which it generated more social costs than benefits.<sup>119</sup>

Occasionally, one sees judges and scholars who share Prosser’s Holmesian duty-skepticism and his optimism about the utility of social engineering, yet reject Prosser’s argument that judges are well-suited to undertake such analysis. According to them, Prosserian analysis in fact demonstrates the propriety of placing responsibility for tort law in the hands of legislators or administrators.<sup>120</sup> Other scholars share Prosser’s duty-skepticism but reject the idea that any political institution is well-positioned to engage in intelligent social engineering. Since, in their view, decisions of the sort called for under the duty element cannot be made rationally, they conclude that most or all of the issues in negligence should be left to the jury. One might see an early instance of this more radical critique of duty—and of the judi-

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<sup>117</sup> “Social Engineering” is the title of section 3 of the original *Handbook*. See PROSSER, *HANDBOOK*, *supra* note 76, § 3, at 15. Just as it backs away from Prosser’s forthright utilitarianism, *see supra* note 93, the current edition of the treatise also departs from the Prosserian project by qualifying his enthusiasm for judicial engineering. See PROSSER & KEETON, *supra* note 27, § 3, at 15 (retitling the section “Policy and Process”); *id.* § 3, at 17-20 (adding a discussion of “Lawmaking by Courts”).

<sup>118</sup> As we discuss below, at the same time scholars like Green and Prosser were arguing that their skeptical critiques of duty demonstrated the propriety of judicial engineering in tort law, constitutional scholars were developing a similarly skeptical critique of rights, yet concluding on the basis of their critique that courts were not competent to make policy. Thus, at the very time that constitutional law scholars were decrying judicial legislation, Prosser was advocating judicial social engineering. See *infra* text accompanying notes 208-23 (contrasting arguments for restrained judicial review with Prosser’s endorsement of judicial policymaking). This may not be the first time in American legal history when skeptical critiques of law have generated opposing assessments of institutional competence in public and private law. See HORWITZ, *supra* note 45, at 254-56 (arguing that early nineteenth-century scholars were instrumentalists about common law, but formalists about constitutional law).

<sup>119</sup> See *Rowland v. Christian*, 443 P.2d 561, 568 (Cal. 1968) (in bank) (finding that landowner liability should depend on the facts of the case, not on “rigid classifications” of plaintiffs); *Dillon v. Legg*, 441 P.2d 912, 916 (Cal. 1968) (in bank) (discussing a tortfeasor’s duty to third parties who suffer emotional harm).

<sup>120</sup> See Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555, 642-64 (1985) (arguing that modern tort law should be altered so that “[d]eterrence would be the domain of administrative agencies”); W. Kip Viscusi et al., *Deterring Inefficient Pharmaceutical Litigation: An Economic Rationale for the FDA Regulatory Compliance Defense*, 24 SETON HALL L. REV. 1437, 1467 (1994) (discussing the failure of tort law as a regulatory mechanism for pharmaceuticals).

cial role in formulating tort law—in Judge William Andrews’s dissent in *Palsgraf*.<sup>121</sup> A duty-skeptic, Andrews argued that the defendant railroad, which was presumed to have acted negligently, could be held accountable for any injury it caused. Setting limitations on that liability raised “a question of expediency,” that is, whether it would be good for society to impose liability for a remote consequence of a wrongful act.<sup>122</sup> But, according to Andrews, this judgment of expediency is not amenable to principled resolution. Indeed, about the most that could be said is that it requires consideration of various incommensurable policy factors. The question was one of “practical politics” that could only be answered by “common sense.”<sup>123</sup> Accordingly, it should be left to the jury except in extraordinary cases in which a judge can say, as a matter of law, that imposition of liability would clearly be inexpedient. On this version of duty-skepticism, negligence law is again reduced to policy-making, but policy-making is in turn reduced to process. Since no institution is in a better position to make intelligent policy, no institution can claim authority on the basis of competence or expertise. Instead, the institutional allocation of decision-making responsibility rests on legal principles of pedigree or accountability: in this case, the principle that juries are to decide common law actions.<sup>124</sup>

The judge-skeptics and the more radical policy-skeptics probably still remain a minority in the legal academy. Prosser, his contemporaries, and his heirs inside and outside of law and economics, by and large remain wedded to the idea that duty-skepticism is compatible with a belief in the continued propriety and legitimacy of judicial lawmaking in torts. Thus, Prosser’s skeptical reduction of duty to a public policy limit on liability has not generated an argument for judicial restraint or for the displacement of the judiciary by some other law-making institution. Quite the opposite, as indicated by the embrace by Prosser and other duty-skeptical scholars of Cardozo’s opinion in *MacPherson*, the reconceptualization of duty has for the most part been thought to provide an argument for aggressive judicial reform of tort law.<sup>125</sup>

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<sup>121</sup> *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 101 (N.Y. 1928) (Andrews, J., dissenting).

<sup>122</sup> *Id.* at 104.

<sup>123</sup> *Id.* at 103-04.

<sup>124</sup> Certain modern California decisions arguably tend toward this latter, un-Prosserian approach to duty-skepticism. See, e.g., *Weirum v. RKO Gen., Inc.*, 539 P.2d 36, 39 (Cal. 1975) (leaving a large role for the jury to play in determining “duty”).

<sup>125</sup> See *infra* text accompanying notes 126-37 (discussing the endorsement of *MacPherson* by Prosserian scholars).

C. *The Moral of MacPherson: The Standard Account*

At last we are in a position to appreciate the significance that modern scholars have attached to *MacPherson* and its rejection of *Winterbottom*. In their eyes, *MacPherson* marks the rejection by one of our greatest jurists of the most egregious instance of conceptually muddled and politically regressive duty-talk. Conversely, the decision constitutes Cardozo's clear-eyed embrace of the Holmes-Prosser model of negligence, combining a simple, non-relational state directive to act reasonably with judicially-crafted immunities from liability where necessary to further public policy.

As the story is told by Prosser, *MacPherson* "struck through the fog" created by *Winterbottom*'s no-duty holding by identifying clearly that the question in the case was *not* whether the manufacturer owed a duty of reasonable care to the plaintiff, a question which in turn rested on the subsidiary doctrinal issue of whether a car constituted an inherently dangerous product.<sup>126</sup> Those questions needed no answer. Under the Holmes-Prosser model, Buick, like any other person or entity, was subject to the generic directive to act reasonably; thus, any product could serve as the basis for negligence liability if it posed a risk of harm.<sup>127</sup> For the same reasons, Buick's liability did not turn on evidence as to the existence of some relationship between Buick and MacPherson. Indeed, as Prosser read *MacPherson*, it held that a manufacturer like Buick was subject to liability "based upon nothing more than the sufficient fact that [it] ha[d] so dealt with the goods [in question] that they [we]re likely to come into the hands of another, and to do harm if they [we]re defective."<sup>128</sup>

Moreover, because *MacPherson* came to the Court of Appeals with the unreasonableness of Buick's actions assumed, Prosser maintained that Cardozo, being a good Holmesian, must have recognized that the only real question before the court was whether *Winterbottom* had properly granted manufacturers a policy-driven waiver of the compensation sanction that negligence law ordinarily imposes for harms caused by unreasonable acts. Even if the *Winterbottom* decision was justified in 1842, it could not be sustained in 1916. The intervening years had seen a "definite change" in

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<sup>126</sup> See PROSSER, HANDBOOK, *supra* note 76, § 83, at 677 (explaining that *MacPherson* did not "merely . . . extend the class of 'inherently dangerous' articles"); PROSSER & KEETON, *supra* note 27, § 96, at 683 (same).

<sup>127</sup> See PROSSER, HANDBOOK, *supra* note 76, § 83, at 677 (noting that liability for defective products is now part of the general responsibility to act reasonably); PROSSER & KEETON, *supra* note 27, § 96, at 683 (same); *see also* Prosser, *supra* note 7, at 1100 (explaining the scope of a manufacturer's negligence liability).

<sup>128</sup> PROSSER, HANDBOOK, *supra* note 76, § 83, at 674, 678 (noting that so long as conduct is likely to affect the interests of others, it is potentially unreasonable); PROSSER & KEETON, *supra* note 27, § 96, at 682 (same).

both "social philosophy" and economic reality.<sup>129</sup> Accordingly, Cardozo properly revoked the privilege to act unreasonably that *Winterbottom* had granted to Buick and other manufacturers.<sup>130</sup>

Prominent contemporary scholars, notably Professors Rabin and White, even more explicitly attribute to *MacPherson* the embrace of modern, Holmesian negligence. In his important analysis of the rise of the "fault principle," Rabin sought to trace the historical transition from pre-Holmesian notions of negligence liability, in which duties of care were thought to be relational, to the modern Holmesian fault principle—the notion of a comprehensive liability principle founded on a "general" duty of due care.<sup>131</sup> Pointing to the continued vitality of no-duty cases like *Winterbottom* into this century, Rabin argued that previous scholars had misdated this transition by claiming that it had already occurred when Holmes was writing in the late nineteenth century. As was clear from the privity cases and other "no-duty" decisions, negligence law continued to retain "doctrinal barriers that served to vitiate the fault principle" well into this century.<sup>132</sup> Thus, according to Rabin, it was only after Cardozo "artfully manipulated" the privity rule and its exceptions that the Holmesian fault principle was established in the critical area of products liability.<sup>133</sup>

Even though it is one of Rabin's targets, Professor White's intellectual history of American tort law provides a similar account of *MacPherson*. According to White, although Cardozo may not have been the first to embrace Holmes's notion of "universal duty"—the idea "that the negligence principle . . . was not tied to status or vocation or contract, but was a reflection of generalized civil obligations"<sup>134</sup>—his rejection of Buick's privity argument constituted a seminal instance of Holmesian thinking. Thus, "*MacPherson* appears as a classic modern negligence case, where a broad

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<sup>129</sup> See PROSSER, HANDBOOK, *supra* note 76, § 83, at 674, § 31, at 179; PROSSER & KEETON, *supra* note 27, § 96, at 682, § 53, at 357.

<sup>130</sup> One finds in Prosser's contemporaries a similar reading of *MacPherson*. See 2 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 28.1, at 1535 (1st ed. 1956) (noting that *MacPherson* reached the sound judgment that "liability would not unduly inhibit the enterprise of manufacturers"); Fleming James, Jr., *Scope of Duty in Negligence Cases*, 47 NW. U. L. REV. 778, 798 (1953) (stating that *MacPherson* "recognized probability of harm as the broad basis of duty in [sale of goods] cases (as it is in negligence law generally)"); see also Seavey, *supra* note 75, at 378 (explaining that *MacPherson* brought liability for negligently manufactured products into line with the general principles of negligence articulated by Holmes and others).

<sup>131</sup> See Rabin, *supra* note 28, at 936-38 (discussing the evolution of liability based on the fault principle).

<sup>132</sup> *Id.* at 936.

<sup>133</sup> See *id.* at 937.

<sup>134</sup> WHITE, *supra* note 45, at 125.

universal duty of care is substituted for particularized obligations owed only by certain persons."<sup>135</sup>

Finally, Judge Posner expresses much the same view of *MacPherson* in his recent study of Cardozo. According to Posner, the hallmark of Cardozo's decisions was his overriding concern to "mak[e] law more pragmatic," that is, to enact intelligent social policy through his decisions.<sup>136</sup> While noting that Cardozo's *MacPherson* opinion is devoted to an analysis of cases, Posner nevertheless argues that the decision was driven by Cardozo's assessment that *Winterbottom's* waiver of liability amounted to bad policy, and that liability was in fact most efficiently placed upon manufacturers like Buick. That Cardozo chose not to justify his decision in these terms is seen by Posner as a testament to Cardozo's tactical wisdom. Rather than writing a policy tract, he wrote what appeared to be a traditional judicial opinion in order to increase the likelihood that his judicial brethren would embrace it.<sup>137</sup>

Thus, from Prosser to Posner, mainstream tort scholars have maintained a near-consensus on the moral of *MacPherson*. They believe that it represents a seminal decision marking the judicial embrace of the Holmes-Prosser model of negligence. That model rejects the notion that a question exists as to whether a given defendant owes a given plaintiff a duty of care. There is always such a duty because the tort of negligence imposes a generic standard of reasonable care owed by all to all. The only questions that require consideration under the model are: the jury question of whether that generic standard of care was breached in a manner that proximately caused the plaintiff harm, and the judicial question of whether there is any public policy reason to override the default sanction that ordinarily requires a defendant to compensate the plaintiff for that harm. By refusing to rely on the distinction between inherently dangerous and not-inherently-dangerous products, Cardozo embraced the generic, or universal, duty of care. All products, he argued, might pose unreasonable risks of danger, and hence all manufacturers were potentially subject to liability for injuries caused by those products. Likewise, by rejecting the privity limitation, Cardozo signaled his progressive assessment that, as a class, manufacturers no longer were entitled to the immunity from negligence liability that *Winterbottom* had afforded them.

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<sup>135</sup> *Id.*

<sup>136</sup> RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 92 (1990).

<sup>137</sup> *See id.* at 109 ("[I]t is the very caution, modesty, and reticence of the opinion that explain its rapid adoption by other states.").

#### D. *The Present Status of Duty in Negligence Scholarship and Law*

More than a century after *The Common Law* was first published, eighty years after *MacPherson* was decided, and a half century after the first issuance of Prosser's treatise, the Holmes-Prosser critique of duty, as well as their positive reconstruction of duty as a catch-all policy inquiry, have achieved the status of dogma in mainstream tort scholarship. Thus, the treatment afforded duty by a leading torts scholar in his 1997 primer could have been written by Prosser, or for that matter, Holmes.

"Duty" is a largely question-begging concept that can be safely used if one is not misled by it . . . . Asking whether the defendant had a duty to the plaintiff and whether that duty was breached is . . . just another way of asking whether the defendant was negligent, and whether that negligence was a proximate cause of the plaintiff's harm. Analyzing the problem in terms of duty adds nothing, and could lead to the mistaken conclusion that even after the negligence and proximate cause questions have been answered, there is still no liability unless the defendant owed the plaintiff a duty independent of the obligation to exercise reasonable care. In the ordinary case this conclusion is mistaken, because the defendant's negligence is precisely the breach of duty that is alleged.

There is a class of cases, however, in which the defendant is not liable for negligence. This class of cases can accurately be described as involving "limited duty," in the sense that because the defendant is not liable for harm caused by his negligence, he owes no duty to exercise reasonable care to avoid injuring the plaintiff.<sup>138</sup>

Casebooks, treatises, and primers that attempt to articulate more or less mainstream accounts of negligence are rife with similar Prosserian statements.<sup>139</sup>

Academic treatments of negligence informed by economics have likewise proceeded largely on Holmesian premises. For example, in his economic analysis, Judge Posner has mainly sought to add rigor to the two central features of the Holmes-Prosser model of negligence: the liability standard of reasonable (efficient) care, and the notion of duty as a policy (efficiency) limitation on liability for harms caused by unreasonable conduct. His debt to Holmes and Prosser is thus evident in his opinion for the Sev-

<sup>138</sup> KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 225 (1997).

<sup>139</sup> See, e.g., GEORGE C. CHRISTIE ET AL., *CASES AND MATERIALS ON THE LAW OF TORTS* 104-05 (3d ed. 1997) (discussing duty and negligence liability); MARC A. FRANKLIN & ROBERT L. RABIN, *TORT LAW AND ALTERNATIVES* 115-16 (6th ed. 1996) (discussing negligence and the duty requirement); JOSEPH W. GLANNON, *THE LAW OF TORTS: EXAMPLES AND EXPLANATIONS* 171-74 (1995) (discussing situations where negligent defendants are not liable because they owe no duty of care to the plaintiff); PROSSER & KEETON, *supra* note 27, § 53, at 356-59 (explaining the concept of duty in negligence).

enth Circuit in *Edwards v. Honeywell, Inc.*<sup>140</sup> There, Posner concluded that a cause of action against a defendant who was presumed to have acted unreasonably so as to cause the death of plaintiff's decedent ought to be dismissed for lack of "duty," because potential defendants not sued by the plaintiff arguably could have more cheaply guarded against the harm in question.<sup>141</sup>

To be sure, corrective justice theorists such as Jules Coleman,<sup>142</sup> George Fletcher,<sup>143</sup> and Ernest Weinrib<sup>144</sup> have provided effective critiques of central aspects of economic analyses of tort law and Holmesian instrumentalism generally. Moreover, they have made important strides toward providing a non-instrumentalist interpretation of the idea that tortfeasors are obliged to make reparations to their victims and have emphasized the "relational" nature of this remedial duty.<sup>145</sup> However, their discussions have mainly focused on this secondary duty of repair rather than on the content or existence of primary duties of conduct. Coleman, for example, has self-consciously constructed a moral argument for the duty to repair that refrains from linking that duty to a particular conception of what constitutes wrongful or tortious conduct.<sup>146</sup> Other anti-instrumentalist theorists who have offered philosophical analyses of "fault" and "wrongful risk-taking" as the basis for negligence liability have tended not to address the duty of care as a distinct issue.<sup>147</sup> Although some scholars have attempted to develop a non-

<sup>140</sup> 50 F.3d 484, 491 (7th Cir. 1995).

<sup>141</sup> See *id.*

<sup>142</sup> See COLEMAN, *supra* note 23, at 303-60 (articulating the mixed theory of corrective justice).

<sup>143</sup> See Fletcher, *supra* note 23, at 537-43 (contrasting the corrective justice paradigm of "reciprocity" with the instrumentalist paradigm of "reasonableness").

<sup>144</sup> See WEINRIB, *supra* note 23, at 6-8, 46-55, 145-70 (criticizing instrumentalist renderings and economic analyses of tort law and offering an alternative, "formalist" account of tort law as corrective justice).

<sup>145</sup> See COLEMAN, *supra* note 23, at 374-75, 381 (stating that corrective justice creates a duty for the injurer to make whole the injured party because of their normative relationship); WEINRIB, *supra* note 23, at 135 (explaining the duty to repair as growing out of the defendant's breach of the duty of care owed to the plaintiff).

<sup>146</sup> See COLEMAN, *supra* note 23, at 348-49. There are some indications in Coleman's work that he links his account of corrective justice to a relational account of the primary duty to conduct oneself with due care towards certain others. See *id.* at 356-57 (suggesting that corrective justice is only compatible with accounts of wrongdoing in which wrongdoing is conceived in terms of breach of a duty owed by the defendant to the plaintiff). Likewise, Professor Weinrib has argued for a relational conception of the primary duty of due care, although his usage of the term "relational" is rather different from ours. See WEINRIB, *supra* note 23, at 158-64 (analyzing *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928)). For a discussion and critique of Weinrib's account, see Zipursky, *supra* note 27, at 73-75 and *infra* text accompanying notes 371-76.

<sup>147</sup> See, e.g., Jules Coleman & Arthur Ripstein, *Mischief and Misfortune*, 41 MCGILL L.J.



instrumental conception of negligence in which the concept of foreseeability sets a moral limit on the scope of the duty to repair,<sup>148</sup> the reality of our complex and variegated case law casts doubt on the prospect of reducing negligence to a duty of due care derived from a single, uniform concept of foreseeability.<sup>149</sup> Similar problems face those scholars, such as Weinrib, who have broached the subject of duties of conduct by superimposing onto tort law a transcendental Kantian notion of duty.<sup>150</sup> Such a notion is distant from the context-sensitive concept of duty that pervades ordinary tort law.<sup>151</sup>

In contrast to its dominance in the academy, the Holmes-Prosser model has received a mixed reaction in the courts. Certainly, the model received an enormous boost when the California Supreme Court explicitly adopted it in decisions such as *Rowland v. Christian*.<sup>152</sup> Indeed, the California Court went Prosser one better by adding a pseudo-scientific gloss to the public policy determination, famously phrasing it in terms of a multi-factor inquiry designed to balance various policy factors, including foreseeability, proximity, blameworthiness, and deterrence.<sup>153</sup> Moreover, courts in a majority of

91, 110-11 (1995) (identifying a general theory of fault in terms of an accommodation of liberty and security interests); Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 312-13 (1996) (arguing that negligence relies on a general standard of due care derived from a Rawlsian idea of reasonableness). There are, however, a number of important articles addressing specific duty doctrines within negligence law. See, e.g., Peter Benson, *The Basis for Excluding Liability for Economic Loss in Tort Law*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 427 (David G. Owen ed., 1995) (discussing the rationale for a limited duty to refrain from negligently causing pure economic harm); Stephen R. Perry, *Protected Interests and Undertakings in the Law of Negligence*, 42 U. TORONTO L.J. 247, 264-67 (1992) (arguing that a general duty to avoid negligently causing economic loss would violate moral norms underpinning liberal-capitalist societies); John A. Siliciano, *Negligent Accounting and the Limits of Instrumental Tort Reform*, 86 MICH. L. REV. 1929, 1973-80 (1988) (criticizing instrumentalist arguments for expansion of accountants' liability and noting the importance of fairness constraints on such liability); Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980) (arguing for duty to undertake easy rescues).

<sup>148</sup> See, e.g., Perry, *supra* note 23, at 509-10 (analyzing liability for injuries in terms of fault and foreseeability).

<sup>149</sup> See *infra* text accompanying notes 360-76 (explaining the concept of relational duty); see also text accompanying notes 339-48 (describing and criticizing readings of *MacPherson* that claim Cardozo conceived of foreseeability as setting a cap on liability for negligence).

<sup>150</sup> See, e.g., Kenneth W. Simons, *Justification in Private Law*, 81 CORNELL L. REV. 698, 737-40 (1996) (reviewing WEINRIB, *supra* note 23, and criticizing Weinrib's theory of corrective justice for its indeterminacy and inability to take into account the plurality of considerations that drive different areas of tort law).

<sup>151</sup> See *infra* text accompanying notes 350-76 (noting the context-dependent nature of duty analysis).

<sup>152</sup> 443 P.2d 561, 564 (Cal. 1968) (finding that the duty issue in negligence is whether there is a policy reason supporting an exception to the general rule of liability for negligence).

<sup>153</sup> See *id.* The Court found that duty turns on:

the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff

the states have at one time or another cited or quoted the Prosserian mantra that duty is a shorthand statement of a conclusion, rather than an aid to analysis in itself, and an expression of the sum total of considerations of policy.<sup>154</sup> And many regard the California court as having effected a salutary liberalization of negligence by removing duty-based limits on negligence liability.<sup>155</sup>

Still, it would be wrong to suggest that the model has come to dominate the courts as it has the academy. Most courts, for example, continue to adhere to some categorical rules in nonfeasance,<sup>156</sup> duty-to-rescue,<sup>157</sup> emo-

suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

*Id.* (citations omitted).

<sup>154</sup> See *Hawks v. State, Dep't of Pub. Safety*, 908 P.2d 1013, 1016 (Alaska 1995); *Ontiveros v. Borak*, 667 P.2d 200, 208 (Ariz. 1983) (en banc); *Parsons v. Crown Disposal Co.*, 936 P.2d 70, 80 (Cal. 1997); *Dillon v. Legg*, 441 P.2d 912, 916 (Cal. 1968) (in banc); *Bath Excavating & Constr. Co. v. Wills*, 847 P.2d 1141, 1152 (Colo. 1993); *Jaworski v. Kiernan*, 696 A.2d 332, 336 (Conn. 1997); *Furek v. University of Del.*, 594 A.2d 506, 522 (Del. 1991); *District of Columbia v. Cooper*, 483 A.2d 317, 321 (D.C. 1984); *Rupp v. Bryant*, 417 So. 2d 658, 667 (Fla. 1982); *Tabieros v. Clark Equip. Co.*, 944 P.2d 1279, 1296 (Haw. 1997); *Webb v. Jarvis*, 575 N.E.2d 992, 997 (Ind. 1991); *Teunissen v. Orkin Exterminating Co.*, 484 N.W.2d 589, 591 (Iowa 1992); *Wicina ex rel. Wicina v. Strecker*, 747 P.2d 167, 173 (Kan. 1987); *Grayson Fraternal Order of Eagles v. Claywell*, 736 S.W.2d 328, 330 (Ky. 1987); *Hartford Ins. Co. v. Manor Inn, Inc.*, 642 A.2d 219, 225 (Md. 1994); *Buczowski v. McKay*, 490 N.W.2d 330, 333 (Mich. 1992); *James v. Lieb*, 375 N.W.2d 109, 113 (Neb. 1985); *Turpel v. Sayles*, 692 P.2d 1290, 1292 (Nev. 1985); *Turcotte v. Fell*, 502 N.E.2d 964, 967 (N.Y. 1986); *Estates of Morgan v. Fairfield Family Counseling Ctr.*, 673 N.E.2d 1311, 1322 (Ohio 1997); *Wofford v. Eastern State Hosp.*, 795 P.2d 516, 519 (Okla. 1990); *Fazzolari ex rel. Fazzolari v. Portland Sch. Dist. No. 1J*, 734 P.2d 1326, 1331 (Or. 1987) (in banc); *Sinn v. Burd*, 404 A.2d 672, 682 (Pa. 1979); *Marchetti v. Parsons*, 638 A.2d 1047, 1050 (R.I. 1994); *McClung v. Delta Square Ltd. Partnership*, 937 S.W.2d 891, 894-95 (Tenn. 1996); *Langle v. Kurkul*, 510 A.2d 1301, 1305 (Vt. 1986); *Mostert ex rel. Mostert v. CBL & Assocs.*, 741 P.2d 1090, 1093 (Wyo. 1987). For examples of courts stating Prosserian conceptions of duty without expressly crediting Prosser, see *Lee v. Chicago Transit Auth.*, 605 N.E.2d 493, 501 (Ill. 1992); *L & H Aircro, Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 378 (Minn. 1989); *Sacco v. High Country Indep. Press, Inc.*, 896 P.2d 411, 418 (Mont. 1995); and *Rollins v. Petersen*, 813 P.2d 1156, 1160 (Utah 1991).

<sup>155</sup> See Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 608-09 (1992) (describing how courts perceived the elimination of doctrinal restrictions on a landowner's duties of care as modernizing obsolete rules).

<sup>156</sup> For nonfeasance cases, see PROSSER & KEETON, *supra* note 27, § 56, at 373-74, discussing the extent to which courts are willing to find liability in nonfeasance cases.

<sup>157</sup> See, e.g., *Handiboe v. McCarthy*, 151 S.E.2d 905, 907 (Ga. Ct. App. 1966) (finding no general duty to rescue when injury is not the fault of the person charged); *Yania v. Bigan*, 155 A.2d 343, 346 (Pa. 1959) (finding no duty to rescue unless one is legally responsible for

tional harm,<sup>158</sup> and/or economic harm<sup>159</sup> cases, citing “no-duty” rationales without providing exhaustive consideration of Prosserian policy factors.

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placing the other party in danger). See generally RESTATEMENT (SECOND) OF TORTS § 314 (1965) (“The fact that the actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.”).

<sup>158</sup> Two states recognize no duty to avoid negligent infliction of emotional distress. See *Gideon v. Norfolk S. Corp.*, 633 So. 2d 453, 454 (Ala. 1994); *Mechanics Lumber Co. v. Smith*, 752 S.W.2d 763, 765 (Ark. 1988). Six states extend a duty of care for emotional injuries only to those individuals who experience some physical harm. See *OB-GYN Assocs. v. Littleton*, 386 S.E.2d 146, 148 (Ga. 1989); *Shuamber v. Henderson*, 579 N.E.2d 452, 454 (Ind. 1991); *Anderson v. Scheffler*, 752 P.2d 667, 669 (Kan. 1988); *Deutsch v. Shein*, 597 S.W.2d 141, 145-46 (Ky. 1980); *Slaton v. Vansickle*, 872 P.2d 929, 931 (Okla. 1994); *Hammond v. Central Lane Communications Ctr.*, 816 P.2d 593, 596 (Or. 1991) (in banc). Ten states, the District of Columbia, and federal courts in FELA cases recognize the “zone of danger” rule, where a defendant only owes a duty not to inflict emotional injury to individuals within the zone of physical danger created by the defendant’s conduct. See *Consolidated R.R. v. Gottshall*, 512 U.S. 532, 554-56 (1994) (establishing a zone of danger duty limitation for FELA claims); *Keck v. Jackson*, 593 P.2d 668, 670 (Ariz. 1979) (en banc) (limiting a defendant’s liability to the zone of danger created by her negligence); *Towns v. Anderson*, 579 P.2d 1163, 1165 (Colo. 1978) (en banc) (same); *Robb v. Pennsylvania R.R.*, 210 A.2d 709, 714-15 (Del. 1965) (same); *Williams v. Baker*, 572 A.2d 1062, 1066-67 (D.C. 1990) (en banc) (same); *Rickey v. Chicago Transit Auth.*, 457 N.E.2d 1, 5 (Ill. 1983) (same); *Resavage v. Davies*, 86 A.2d 879, 880 (Md. 1952) (same); *Stadler v. Cross*, 295 N.W.2d 552, 553-54 (Minn. 1980) (same); *Asaro v. Cardinal Glennon Mem’l Hosp.*, 799 S.W.2d 595, 599 (Mo. 1990) (en banc) (same); *Bovsun v. Sanperi*, 461 N.E.2d 843, 844 (N.Y. 1984) (same); *Whetham v. Bismarck Hosp.*, 197 N.W.2d 678, 684 (N.D. 1972) (same); *Boucher ex rel. Boucher v. Dixie Med. Ctr., Inc.*, 850 P.2d 1179, 1182 (Utah 1992) (same).

<sup>159</sup> Courts in numerous contexts have refused to recognize a duty of care to avoid causing pure economic injury. See, e.g., *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 309 (1927) (“[A] tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong.”); *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1029 (5th Cir. 1985) (en banc) (denying recovery for pure economic loss in maritime context); *Bright v. Goodyear Tire & Rubber Co.*, 463 F.2d 240, 242 (9th Cir. 1972) (holding that a manufacturer has no duty to avoid pure economic loss in products liability context); *RK Constructors, Inc. v. Fusco Corp.*, 650 A.2d 153, 157 (Conn. 1994) (deciding that a third party tortfeasor owes no duty to an employer for economic loss through higher workers’ compensation premiums caused by the negligent injury of an employee); *Steele v. J & S Metals, Inc.*, 335 A.2d 629, 630 (Conn. Super. Ct. 1974) (holding that a third party tortfeasor owes no duty to an employer for lost profits resulting from the negligent injury of an employee); *Just’s, Inc. v. Arrington Constr. Co.*, 583 P.2d 997, 1005 (Idaho 1978) (concluding that a contractor owes no duty to store lessee for lost profits resulting from delayed construction on a contract between the contractor and lessor); *Koplin v. Rosel Well Perforators, Inc.*, 734 P.2d 1177, 1179 (Kan. 1987) (ruling that there is no duty to preserve possible evidence for another party to assist that party in future litigation against a third party); *Mandal v. Hoffman Constr. Co.*, 527 P.2d 387, 389 (Or. 1974) (holding that there is no “duty [to the plaintiff] where the only negligence charged is the failure to perform a contract with a third party,” even if the plaintiff is economically harmed by the failure). But see *People Express Airlines, Inc. v. Consolidated R.R.*, 495 A.2d 107, 118 (N.J. 1985) (“[A] defendant who has breached his duty of care to avoid the risk of economic injury to particularly foreseeable plaintiffs may be held liable for actual economic losses that are proximately caused by its breach of duty.”).

They also continue to focus on the relation between defendant and plaintiff in a wide range of professional malpractice<sup>160</sup> and landowner liability cases,<sup>161</sup> again apparently assuming that this issue has some intrinsic im-

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<sup>160</sup> One group of professional malpractice cases involves accountant liability to third parties. See, e.g., *Selden v. Burnett*, 754 P.2d 256, 259 (Alaska 1988) (holding that, when giving tax advice to a client, an "accountant owes a duty of care to third parties only if [he] specifically intends the third parties to invest relying on his advice, and only if he makes his intent known"); *Bily v. Arthur Young & Co.*, 834 P.2d 745 (Cal. 1992) (en banc) (refusing to impose upon an auditor a general duty of care to anyone but a client); *Waters v. Autuori*, 676 A.2d 357, 361-62 (Conn. 1996) (concluding that the promulgation of professional accounting standards by a professional accounting society does not create a duty of care to unknown third parties). Another group of professional malpractice cases involves attorney liability to third parties. See, e.g., *Stephens v. State, Dep't of Revenue*, 746 P.2d 908, 912 n.5 (Alaska 1987) ("[I]n general, the state does not owe its citizens a duty of care to proceed without error when it brings legal action against them."); *Friedman v. Dozorc*, 312 N.W.2d 585, 589 (Mich. 1981) (holding that an attorney owes no duty of care to an opposing litigant). See generally Benjamin C. Zipursky, *Legal Malpractice and the Structure of Negligence Law*, 67 *FORDHAM L. REV.* 649 (1998) (arguing that relational account of duty provides better account of legal malpractice law than Prosserian model). A third group of cases involves physician/psychiatrist liability to third parties. See, e.g., *Zamstein v. Marvasti*, 692 A.2d 781, 786-87 (Conn. 1997) (holding that a psychiatrist who evaluated whether a child had been sexually abused owed no duty of care to the father, the alleged abuser); *Webb v. Jarvis*, 575 N.E.2d 992, 998 (Ind. 1991) (concluding that "generally physicians do not owe a duty to unknown nonpatients who may be injured by the physician's treatment of a patient").

<sup>161</sup> Six states and the District of Columbia have followed the lead of California in *Rowland v. Christian*, 443 P.2d 561, 568 (Cal. 1968), by abolishing all common law landowner liability distinctions. See *Smith v. Arbaugh's Restaurant, Inc.*, 469 F.2d 97, 100 (D.C. Cir. 1972); *Webb v. Sitka*, 561 P.2d 731, 733 (Alaska 1977); *Pickard v. City of Honolulu*, 452 P.2d 445, 446 (Haw. 1969); *Cates v. Beauregard Elec. Coop.*, 328 So. 2d 367, 371 (La. 1976); *Limberhand v. Big Ditch Co.*, 706 P.2d 491, 496 (Mont. 1985); *Ouellette v. Blanchard*, 364 A.2d 631, 634 (N.H. 1976); *Basso v. Miller*, 352 N.E.2d 868, 872 (N.Y. 1976). Twelve states have abolished the licensee/invitee distinction, but have either endorsed or left intact the common law rules for trespassers. See *Wood v. Camp*, 284 So. 2d 691, 695 (Fla. 1973); *Jones v. Hansen*, 867 P.2d 303, 310 (Kan. 1994); *Poulin v. Colby College*, 402 A.2d 846, 851 & n.5 (Me. 1979); *Mounsey v. Ellard*, 297 N.E.2d 43, 51-52 & n.7 (Mass. 1973); *Peterson v. Balach*, 199 N.W.2d 639, 642 (Minn. 1972); *Heins v. Webster County*, 552 N.W.2d 51, 57 (Neb. 1996); *Ford v. Board of County Comm'rs*, 879 P.2d 766, 771 (N.M. 1994); *O'Leary v. Coenen*, 251 N.W.2d 746, 751 (N.D. 1977); *Tantimonico v. Allendale Mut. Ins. Co.*, 637 A.2d 1056, 1062 (R.I. 1994); *Hudson v. Gaitan*, 675 S.W.2d 699, 703 (Tenn. 1984); *Antoniewicz v. Reszcynski*, 236 N.W.2d 1, 11-12 (Wis. 1975). Fourteen states have expressly refused to abolish the common law landowner liability distinctions. See *McMullan v. Butler*, 346 So. 2d 950, 951 (Ala. 1977); *Baldwin v. Mosley*, 748 S.W.2d 146, 148 (Ark. 1988); *Lawson v. Safeway, Inc.*, 878 P.2d 127, 129 (Colo. Ct. App. 1994); *Morin v. Bell Court Condominium Ass'n*, 612 A.2d 1197, 1201 (Conn. 1992); *Bailey v. Pennington*, 406 A.2d 44, 47-48 (Del. 1979); *Mooney v. Robinson*, 471 P.2d 63, 65 (Idaho 1970); *Kirschner v. Louisville Gas & Elec. Co.*, 743 S.W.2d 840, 844 (Ky. 1988); *Astleford v. Milner Enter.*, 233 So. 2d 524, 525 (Miss. 1970); *Carter v. Kinney*, 896 S.W.2d 926, 930 (Mo. 1995) (en banc); *Di Gildo v. Caponi*, 247 N.E.2d 732, 736 (Ohio 1969); *Sutherland v. Saint Francis Hosp., Inc.*, 595 P.2d 780, 782 (Okla. 1979); *Tjas v. Proctor*, 591 P.2d 438, 441 (Utah 1979); *Younce v. Ferguson*, 724 P.2d 991, 995 (Wash. 1986) (en banc); *Yalowizer v. Husky Oil Co.*, 629 P.2d 465, 469 (Wyo. 1981). Illinois has abolished the distinctions by statute. See *Premises Liability Act*, 740 *ILL.*

portance. Even the California courts now show some concern over doctrinal problems generated by the Prosserian account of duty.<sup>162</sup>

The courts' uncertainty about what to do with duty is displayed in their uneven use of the concept of foreseeability. Sometimes foreseeability is deemed part of the issue of breach and thus left to the jury. Other times it is deemed the essence of duty and kept for the courts. Still other times it is left for the jury under the heading of proximate cause.<sup>163</sup> What one court finds unforeseeable as a matter of law, another court will find foreseeable as a matter of law.<sup>164</sup> Foreseeability is sometimes a necessary condition of liability, sometimes a sufficient condition, and sometimes merely a factor.<sup>165</sup> Far from cleaning up duty-analysis, the concept of foreseeability illustrates the confusion courts currently experience dealing with the duty element.

In sum, the Holmes-Prosser model of negligence, although dominant in the academy and highly influential with judges, has never completely taken hold of the judiciary. Many courts, in fact, seem to experience an uncomfortable tension here. On the one hand, they perceive that duty adds some intuitive and well-motivated contours to negligence law, and they recognize that duty has an appealing ring to it. On the other hand, they have been told

COMP. STAT. ANN. 130/2 (West 1994). The remaining seventeen states have not addressed the issue and, therefore, presumably have maintained the common law distinctions.

<sup>162</sup> See *Thing v. La Chusa*, 771 P.2d 814, 825-26 (Cal. 1989) (noting that factor-balancing has produced inconsistent rulings and provoked criticism by scholars). Even prior to *Thing*, the California court had not been entirely faithful to the Holmes-Prosser model. Indeed, as we discuss below, see *infra* text accompanying notes 392-93, 410-12, a number of prominent California cases seem to have been decided on the basis of the relational conception of duty that Prosser deemed nonsensical.

<sup>163</sup> See *supra* note 36.

<sup>164</sup> Compare *Buczowski v. McKay*, 490 N.W.2d 330 (Mich. 1992), with *Kitchen v. K-Mart Corp.*, 697 So. 2d 1200 (Fla. 1997). In both cases, the plaintiff sued K-Mart for selling ammunition (and in the Florida case, a .22 caliber rifle) to an intoxicated customer who subsequently shot the plaintiff. In *Buczowski*, the Michigan Supreme Court denied liability, holding that the shooting "was no more foreseeable than the potential harm from any product sold to an apparently inebriated customer that might be used to injure third parties." 490 N.W.2d at 335. In contrast, the Florida Supreme Court in *Kitchen* held that the sale created a "foreseeable 'zone of risk' of harming others," 697 So. 2d at 1202, and that the negligent entrustment claim should go to a jury. See *id.* at 1208. The Florida court expressly sought to distinguish *Buczowski*, noting that in *Buczowski* the defendant sold only shotgun shells, but in the immediate case the defendant sold both ammunition and a firearm, thus requiring greater contact between the store clerk and the intoxicated customer. See *id.* at 1206. This distinction appears weak given the fact that both courts acknowledged (or presumed for the sake of analysis) that the customer was visibly intoxicated. See *Kitchen*, 697 So. 2d at 1201; *Buczowski*, 490 N.W.2d at 334-35.

<sup>165</sup> Compare *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g Co. (Wagon Mound No. 1)*, [1961] 1 App. Cas. 388, 426 (P.C.) (appeal taken from Austl.) (foreseeability necessary and sufficient), with *Weirum v. RKO Gen., Inc.*, 539 P.2d 36, 39-40 (Cal. 1975) (foreseeability a factor).

repeatedly by all manner of academics that hard-headed, no-nonsense thinking reveals that duty is a mushy fiction, and that a rational law of negligence would do well without it. In short, they seem to be caught in an awkward position of feeling that the law's concept and categories of duty have a pull and texture of their own, but nevertheless believing that the intellectually honest alternative is the policy-driven conception of duty that leading scholars and some of our most aggressive courts have confidently championed. The underlying question in the remainder of this Article is whether there is something to be said for their intuition—whether it is possible to construct a conception of duty distinct from Prosser's public policy analysis that is capable of functioning within contemporary negligence law.

## II. RIGHTS-SKEPTICISM IN CONSTITUTIONAL SCHOLARSHIP

In Part I, we outlined the contours of the model that has come to dominate scholarly thinking about negligence. At the heart of that model is a philosophical claim that duty, cast as a non-instrumental concept, is incoherent, empty, or redundant, and hence that duty cannot possibly be understood as an independent element of the tort. Rather, if duty means anything, it can only constitute an oblique reference to considerations of public policy that counsel for or against the imposition of liability on unreasonable actors. Both the content of modern duty-skepticism and its scholarly acceptance, we argued, are reflected in the fact that Cardozo's landmark opinion in *MacPherson* has been widely celebrated by tort scholars as marking the judicial embrace of a progressive, instrumentalist reconceptualization of duty analysis as policy-making. Finally, we briefly pointed out at the end of Part I how this approach has influenced modern academic and judicial understandings of negligence.

In this Part, we seek by means of an intellectual-historical analysis of another department of law to identify conceptual grounds for attacking the largely unchallenged acceptance of the Holmes-Prosser model of negligence law. Until recently, constitutional scholarship was dominated by the assumption that a similarly reductive model provided the only intelligible account of constitutional law. Yet, in roughly the last twenty-five years, many important constitutional scholars, building in part on a broader philosophical rejection of reductive instrumentalist modes of thought, have argued with considerable force that non-instrumental notions of rights have played and should continue to play a vital role in constitutional law. On the same basis, we suggest in Parts III and IV that non-instrumental tort concepts—in par-

ticular, the concept of duty—have had and ought to continue to have a vital role in negligence law.<sup>166</sup>

### A. *From Allgeyer to West Coast Hotel*

In its 1897 decision in *Allgeyer v. Louisiana*, the Supreme Court held that the constitutional prohibition against deprivation of an individual's liberty "without due process of law" conferred a right on each American citizen "to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion [the lawful enjoyment and use of his faculties]." <sup>167</sup> According to the Court, this right barred legislatures from enacting and enforcing any law regulating the terms of contractual agreements, unless the regulation could be shown to serve certain essential public goods, such as the maintenance or improvement of public safety, health, or morals.<sup>168</sup>

For roughly the next forty years, the Due Process Clauses of the Fifth and Fourteenth Amendments were regularly invoked by federal and state courts as a basis for reviewing, and intermittently invoked as a basis for voiding, legislation regulating industrial working conditions.<sup>169</sup> The use of the doctrine to defeat such legislation is now associated most famously with the Court's 1905 decision in *Lochner v. New York*, striking down the state's maximum hour law for bakers.<sup>170</sup> But *Lochner* was, of course, only one important decision within this line of cases. Other notable substantive due process decisions included *Adkins v. Children's Hospital*,<sup>171</sup> *Adair v. United States*,<sup>172</sup> and the New York Court of Appeals decision in *Ives v. South*

<sup>166</sup> This summary may understate our claim. As we note in Part IV.B.4, *infra*, the case to be made for the reinvigoration of duty in negligence is arguably immune from objections that have often been thought to pose serious obstacles to, or limitations on, arguments for the reinvigoration of rights.

<sup>167</sup> 165 U.S. 578, 589 (1897).

<sup>168</sup> *See id.* at 591 (acknowledging the "right of the State to enact such legislation in the legitimate exercise of its police or other powers as to it may seem proper").

<sup>169</sup> In this period, the Court also invoked the Commerce Clause and other provisions to limit the scope of legislation. *See, e.g.*, CORWIN, CONSTITUTIONAL REVOLUTION, *supra* note 1, at 13-26 (discussing prominent Commerce Clause cases of the period). Recent historians have emphasized that the courts were hardly single-minded or relentless in their application of these doctrines. *See, e.g.*, JAMES W. ELY, JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888-1910, at 74-75 (1995) (noting that the Fuller Court made no persistent attempt to shield businesses against legislative attempts to impose public controls).

<sup>170</sup> *See* 198 U.S. 45, 57 (1905).

<sup>171</sup> 261 U.S. 525, 561-62 (1923) (holding that the Fifth Amendment's Due Process Clause prohibits Congress from enacting minimum wage laws).

<sup>172</sup> 208 U.S. 161, 179 (1908) (holding that the Fifth Amendment's Due Process Clause prohibits Congress from imposing criminal penalties on an employer who discharges an at-will employee on the basis of the employee's membership in a union).

*Buffalo Railway Co.*, striking down the New York workmen's compensation statute under the due process clauses of both the State and Federal constitutions.<sup>173</sup>

The *Lochner* era came to an abrupt close in the mid-1930s, when the Supreme Court issued a series of decisions through which it abandoned the project of policing economic regulation. Among the most significant of these was *West Coast Hotel Co. v. Parrish*, which signaled the Court's repudiation of *Lochner* by conceding that "the Constitution does not speak of freedom of contract" and that "the legislature has necessarily a wide field of discretion" in determining what measures will in fact serve the public good.<sup>174</sup>

### B. Holmes, Corwin, and the Academic Assault on Rights

Substantive due process analysis was attacked by James Bradley Thayer even before its formal christening in *Allgeyer*.<sup>175</sup> From that time until well after its demise forty years later, the doctrine was subject to criticism by a number of prominent legal scholars, historians, political scientists, jurists, and lawyers, including Leonard Boudin,<sup>176</sup> Felix Cohen,<sup>177</sup> Morris Cohen,<sup>178</sup>

<sup>173</sup> 94 N.E. 431, 441 (N.Y. 1911) ("[I]n its basic and vital features the right given to the employé by this statute, does not preserve to the employer the 'due process' of law guaranteed by the Constitution[. . .].")

<sup>174</sup> *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391, 393 (1937).

<sup>175</sup> See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 148-50 (1893) (positing a limited role for judicial review of legislative acts). Although Thayer developed his arguments for judicial restraint before the Supreme Court formally invoked the "liberty" provision of the Due Process Clause to invalidate legislation, he was reacting in part to precursors to *Allgeyer*, including *Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota*, 134 U.S. 418, 456-57 (1890), which struck down railroad rate regulations as unreasonable under the "property" language of the Due Process Clause. See Thayer, *supra*, at 148 n.1 (summarizing the issue in the railroad rate regulation case); see also Thomas C. Grey, *Thayer's Doctrine: Notes on Its Origin, Scope, and Present Implications*, 88 NW. U. L. REV. 28, 32-36 (1993) (describing Thayer's criticisms of judicial activism).

<sup>176</sup> See Louis B. Boudin, *Government By Judiciary*, 26 POL. SCI. Q. 238, 265 (1911) (criticizing "the annulment of legislation in recent years [through] the modern doctrines of 'due process of law' and 'liberty of contract'").

<sup>177</sup> See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 818-20 (1935) (asserting that the concept of due process employed by the Court is nonsensical).

<sup>178</sup> See Morris R. Cohen, *The Bill of Rights Theory*, 2 NEW REPUBLIC 222, 222 (1915), reprinted in MORRIS R. COHEN, *LAW AND THE SOCIAL ORDER* 148, 149-51 (1933) (asserting that "due process" is too vague to provide an adjudicative standard, and that the defenders of aggressive judicial review have failed to establish that the polity benefits from having the judiciary second-guess the wisdom of legislation).



Henry Steele Commager,<sup>179</sup> Edward Corwin,<sup>180</sup> Herbert Croly,<sup>181</sup> Felix Frankfurter,<sup>182</sup> Learned Hand,<sup>183</sup> Oliver Wendell Holmes,<sup>184</sup> Vernon Parrington,<sup>185</sup> Roscoe Pound,<sup>186</sup> and Thomas Reed Powell.<sup>187</sup> Most, but not all of these critics—Holmes being the most notable exception—were political “progressives” who viewed the development and application of substantive due process as thwarting socially beneficial legislation. All, however, endorsed broadly instrumentalist accounts of law, all were predisposed to be skeptical of judicial attempts to adumbrate within their constitutional analysis substantive notions of individual rights, and hence, all argued that a proper understanding of the nature of law undermined the foundations of decisions like *Lochner* and *Ives*.

In this sub-Part we will use Corwin as the constitutional analogue to Prosser, that is as an articulate representative of a generally Holmesian approach to constitutional theory. As we will demonstrate, there are remarkable similarities between Prosser’s critique of *Winterbottom* and duty, and Corwin’s critique of *Lochner* and rights. Indeed, they stem from the same

<sup>179</sup> See HENRY STEELE COMMAGER, MAJORITY RULE AND MINORITY RIGHTS 43-56 (1943) (arguing that the historical record shows that the judiciary has been no more protective of minority rights than the legislature, and thus that substantive due process analysis is misguided).

<sup>180</sup> See CORWIN, CONSTITUTIONAL REVOLUTION, *supra* note 1, at 112-17 (celebrating the Supreme Court’s abandonment of the approach that dominated the *Lochner* era); EDWARD S. CORWIN, THE TWILIGHT OF THE SUPREME COURT 181-84 (1934) [hereinafter TWILIGHT] (advocating that the Court cease its attempt to use the Due Process and other clauses to “super-vice” national legislation).

<sup>181</sup> See HERBERT CROLY, PROGRESSIVE DEMOCRACY 137-40 (1914) (describing how courts seized on the Due Process and other clauses to assert policy making preeminence).

<sup>182</sup> See Felix Frankfurter, *The Red Terror of Judicial Reform*, 40 NEW REPUBLIC 110, 112 (1924), reprinted in FELIX FRANKFURTER, LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER, 1913-1938, at 10, 13 (Archibald MacLeish & E.F. Prichard, Jr. eds., 1939) (advocating the elimination of due process jurisprudence).

<sup>183</sup> See Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495, 507-09 (1908) (stating that courts should only strike legislation if the legislature has no “sane” justification, and concluding that eight-hour day legislation should not be struck).

<sup>184</sup> See *Lochner v. New York*, 198 U.S. 45, 74-76 (1905) (Holmes, J., dissenting) (arguing that the Supreme Court should not read the Due Process Clause to incorporate controversial laissez-faire economic theory).

<sup>185</sup> See VERNON LOUIS PARRINGTON, 3 MAIN CURRENTS IN AMERICAN THOUGHT 118-20 (1930) (finding that a “plutocracy” promoted judicial review and substantive due process to bar redistributive legislation).

<sup>186</sup> See Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 615-16 (1908) (arguing that the Supreme Court’s substantive due process decisions rely on an illegitimate “jurisprudence of conceptions,” whereby the Court purports to deduce specific conclusions from an abstract concept of liberty).

<sup>187</sup> See Thomas R. Powell, *The Judiciality of Minimum-Wage Legislation*, 37 HARV. L. REV. 545, 545-46, 555-56 (1924) (asserting that due process is determined entirely by the policy preferences of individual judges).

basic assumptions about what constitutes an adequate justification for judicial decisions.<sup>188</sup>

### 1. Holmes on Rights

Holmes devoted relatively little scholarly attention to constitutional law, in part because he treated that branch of law on the same terms as he did common law, namely through the lens of a certain kind of legal positivism.<sup>189</sup> For Holmes, constitutional law, as much as tort law, was the creation of judicial decisions, construed as authoritative interpretations of the dictates of the sovereign.<sup>190</sup> The notion that the Constitution drew its content from rights existing independent of the state's acts struck him, like his predecessor and kindred spirit Jeremy Bentham, as a piece of unscientific, metaphysical nonsense.<sup>191</sup> The only meaningful notion of substantive rights (as opposed to remedial rights, or rights of action) was the notion of positive or legal rights, rights that existed by virtue of their recognition and enforcement through judicial decisions.

Yet, just as he concluded that even the narrow concept of legal duty ought to be eradicated from law, Holmes also concluded that even the narrow concept of legal rights should be jettisoned.<sup>192</sup> On Holmes's view, duties, or more accurately, the state directives and sanctions which regulate conduct, "precede rights logically and chronologically."<sup>193</sup> An attribution of

<sup>188</sup> Since Corwin was, in fact, an admirer and defender of the institution of judicial review, as well as a critic of theories of legislative supremacy, it may strike some readers as odd for us to identify him as a Holmesian, in part because Holmes is often associated with the idea of maximal judicial "restraint." However, as we mentioned in connection with Prosser, *see supra* text accompanying notes 117-24, and as we explain below in connection with Corwin, *see infra* text accompanying notes 219, 231, one can be a Holmesian skeptic about moral concepts of "duty" and "right," as well as their legal counterparts, yet still endorse a role for the judiciary in private and/or public law. We attribute such a view to Corwin.

<sup>189</sup> This is not meant to suggest that Holmes thought that judges ought to operate with the same degree of freedom in the constitutional realm.

<sup>190</sup> According to Holmes,

It must be remembered, as is clear from numerous instances of judicial interpretation of statutes in England and of constitutions in this country, that in a civilized state it is not the will of the sovereign that makes lawyers' law, even when that is its source, but what a body of subjects, namely the judges, by whom it is enforced, say is his will.

Oliver Wendell Holmes, Jr., *Book Notices*, 6 AM. L. REV. 723, 724 (1872).

<sup>191</sup> *See* JEREMY BENTHAM, ANARCHICAL FALLACIES 269 (Parekh ed. 1973) (1795) ("Natural and imprescriptable rights [are] rhetorical nonsense, nonsense upon stilts."); Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 41 (1918) (stating that notions of natural law unjustifiably attribute transcendental status to what is simply familiar or accepted).

<sup>192</sup> *See* Holmes, *supra* note 40, at 464 (advocating the banishment of all words of moral significance from legal analysis).

<sup>193</sup> Holmes, *Codes*, *supra* note 85, at 3.

legal rights, to his mind, was simply an imprecise way of stating that a given individual happened to be the beneficiary of judicially articulated directives curtailing the freedom of others. Once rights were properly understood as rooted in judicial limitations on the liberty of others, their claim to having a special character or status within legal or normative discourse was easily debunked. The judicial directives which indirectly generated rights derived from the same "legislative" considerations of social policy that formed the basis for all judicial directives. An individual's rights, in short, turned out to be nothing more than indirect consequences of sovereign directives towards others; directives that were generated by the same considerations of aggregate social welfare that the political branches employed when enacting and interpreting any laws.<sup>194</sup>

## 2. Corwin and the Critique of Rights

According to Holmesians such as Corwin, the questionable premise of substantive due process was that economic legislation raised a set of justiciable legal questions, questions that could be resolved by application of legal concepts such as "due process," "liberty of contract," and "reasonableness." Judges deciding these cases purported to put aside their own judgments as to whether such legislation would be good or bad for society, and claimed instead that they were merely interpreting the Constitution.<sup>195</sup> Holmes, however, had exposed the fallacies underlying these pretensions. Thus, just as Prosser harnessed Holmes to attack the concept of duty, Corwin found in Holmes the basis for a conceptual and a political attack on the concept of rights.

First, Holmes had shown that rights-talk, like duty-talk, was often, if not always, gibberish. The judges who engaged in substantive due process

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<sup>194</sup> See *id.* ("Even those laws which in form create a right directly, in fact either tacitly impose a duty on the rest of the world, as, in the case of patents, to abstain from selling the patented article, or confer an immunity from a duty previously or generally imposed, like taxation.").

<sup>195</sup> Justice Roberts's statement in *United States v. Butler* was taken to be the epitome of such claims.

When an act of Congress is appropriately challenged in the courts . . . the judicial branch of the Government has only one duty—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. . . . This court neither approves nor condemns any legislative policy.

297 U.S. 1, 62-63 (1936). For criticism of Roberts's views, see CORWIN, CONSTITUTIONAL REVOLUTION, *supra* note 1, at 12-13, criticizing Justice Roberts's oversimplified treatment of judicial review in the *Butler* decision, and CORWIN, TWILIGHT, *supra* note 180, at xxvi-xxvii, 185 n.8, citing Justice Roberts's opinion in *Nebbia v. New York*, 291 U.S. 502 (1933), to support Holmes's criticisms of anti-regulatory judicial decisions.

analysis could not point to any clear textual support for the right to liberty of contract. Indeed, they seemed to believe that this right derived from a shadowy normative order that existed independently of the order imposed by official decision; an ethereal body of natural law principles “not made but declared.”<sup>196</sup> Rights-talk presupposed that courts could act as “the automatic mouthpiece of ‘a brooding omnipresence in the sky,’ whether it be called constitution, statute, common law, law of economics, or law of Evolution.”<sup>197</sup> If this was so, then rights-discourse was a species of nonsense. The social and political world is distinct from the natural world precisely because it does not reflect any such order.<sup>198</sup>

Corwin also argued that rights-based concepts were radically indeterminate. After the enactment of the Fourteenth Amendment, the Supreme Court insisted that the Due Process Clauses, like the Privileges or Immunities Clause, said nothing about the ability of government to regulate private economic transactions.<sup>199</sup> Yet, within thirty years, it had found within the same clauses a substantive right to freedom of contract.<sup>200</sup> Worse, as articulated, that right was subject to an important qualification: it could be overridden if the legislation bore a “reasonable” relation to the achievement of certain public purposes. The Court had thus rendered the substance of the “right” of substantive due process completely malleable, depending on whether it was inclined to emphasize the importance of liberty or the reasonableness of the legislation.

In short, the “due process” clause came to arm the Court with a supervisory power over governmental function virtually without storable limits—to render it, in the words of Justice Brandeis, a “super-legislature.” Obviously, a power so vague, so indefinite, was available in 1935 to support practically any evaluation the Court chose to put upon the New Deal legislation from the point of view of its own conception of the public good.<sup>201</sup>

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<sup>196</sup> CORWIN, TWILIGHT, *supra* note 180, at 107; *see also* CORWIN, CONSTITUTIONAL REVOLUTION, *supra* note 1, at 94 (noting that judicial decisions unavoidably invoke the “sovereign prerogative of choice” (quoting Holmes (unattributed))); CROLY, *supra* note 181, at 164 (“[T]hose who would subordinate democracy to the Law must believe in the existence of certain permanent constructive principles of political conduct, to which society must conform . . .”).

<sup>197</sup> CORWIN, CONSTITUTIONAL REVOLUTION, *supra* note 1, at 94 (quoting Holmes (unattributed)).

<sup>198</sup> *See id.* at 33 (noting that the varieties of life cannot be captured in a formula).

<sup>199</sup> *See* CORWIN, TWILIGHT, *supra* note 180, at 72-73 (interpreting *Munn v. Illinois*, 94 U.S. 113 (1876), as instructing the railroads “to go to the polls and not the courts”).

<sup>200</sup> *See id.* at 74-78 (detailing the accelerated use of the Due Process Clause by the Court to implement principles of laissez-faire capitalism).

<sup>201</sup> CORWIN, CONSTITUTIONAL REVOLUTION, *supra* note 1, at 30 (footnote omitted). In the interest of interpretive accuracy, we should note that Corwin’s claim about the indetermi-

Likewise, according to Corwin, the other key rights-bearing provisions of the Constitution could be invoked to support any conclusion the Justices thought expedient.<sup>202</sup> Hence, his skepticism extended beyond substantive due process to all important constitutional rights. Indeed, Corwin took considerable delight in quoting Governor (later Chief Justice) Hughes on this point: “[W]e are under a Constitution, [but] the Constitution is what the judges say it is.”<sup>203</sup>

That rights proved upon examination to be nonsensical or indeterminate, in turn, fueled in Corwin’s work a version of Prosser’s political argument against duty. Just as Prosser claimed to find political significance in the timing of the invention of the duty element of negligence, Corwin concluded from the fact that late nineteenth-century judges were the ones to have read the right of economic liberty into the Due Process Clauses, that rights functioned as a label behind which courts could further the political cause of limiting state regulation of private activity. Substantive due process, as Holmes pointed out in his *Lochner* dissent, owed its existence not to a theory of rights, but to a generation of judges enchanted with *laissez faire*.<sup>204</sup>

### 3. Reconceiving Rights as Policy

Like Prosser, Corwin and his fellow rights-skeptics articulated a positive account of what court decisions that purported to invoke rights were really about. In some sense that account was inevitable; it was contained in the skeptical critique of substantive due process and related doctrines. Thus, as we have seen, Corwin thought that the due process decisions ultimately masked courts’ views as to the substantive merits of particular pieces of legislation. Indeed, it was evident to him that, in decisions such as *Lochner*, the courts were making fact-dependent legislative judgments as to the beneficial or harmful effects of particular legislation.<sup>205</sup> For Corwin, as for

nacy of constitutional analysis was tied to a historical claim that the Court had, during the course of the nineteenth century, rendered constitutional law indeterminate by building conceptual antimonies into its cases interpreting critical clauses. These antimonies then provided the Justices with a stock of thrusts and parries that permitted them to reach any outcome they thought best for the country. *See id.* at 31-33.

<sup>202</sup> *See id.* at 11-38 (explaining how several critical constitutional provisions had been interpreted by the Supreme Court so as to give it complete discretion in determining the substance of those provisions).

<sup>203</sup> *Id.* at 64.

<sup>204</sup> *See id.* at 85-87 (describing judicial application of *laissez-faire* concepts); CORWIN, TWILIGHT, *supra* note 180, at 49 (“Beginning about 1885 the Court’s construction of the clause underwent a curious development, largely in response to the *laissez faire* impulse.”).

<sup>205</sup> *See, e.g.*, CORWIN, CONSTITUTIONAL REVOLUTION, *supra* note 1, at 86-88 (discussing

Holmes, the rights afforded by the Constitution were emanations of judicial directives, which directives in turn rested on "legislative" judgments about how best to attain a certain state of affairs. Holmes's claim about the nature and sources of common law therefore applied with equal force to constitutional law: "The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned."<sup>206</sup> For Corwin, the Due Process Clauses, and the other broad provisions of the Constitution, provided a vehicle by which the Court passed judgment on legislation "from the point of view of its own conception of public good."<sup>207</sup>

#### 4. Institutional Implications of the Critique of Rights

As should be clear by now, Corwin's Holmesian rights-skepticism tracked very closely Prosser's Holmesian duty-skepticism. Corwin and Prosser both believed that Holmes had shown that judicial decisions that purported to rely on non-instrumental legal and moral concepts had to be confused or disingenuous because such concepts were nonsensical or indeterminate. Thus, it is no accident that Prosser's most pithy rhetorical attack on the concept of duty—"There is a duty if the court says there is a duty; the law [of negligence], like the Constitution, is what we make it"<sup>208</sup>—literally tracks Corwin's favorite anti-due process slogan—" [W]e are under a Constitution, [but] the Constitution is what the judges say it is."<sup>209</sup> Moreover, both men, along with many of their contemporaries, believed that the concepts of "rights" and "duty" were merely reifications of a set of attitudes and beliefs "typical of the social viewpoint of the nineteenth century" concerning the undesirability of government regulation.<sup>210</sup> Finally, according to both Prosser and Corwin, it followed from these arguments that judicial invocations of these concepts had to be understood as dressed-up instrumental arguments. Hence, one finds the precise analogue to Prosser's claim that "duty" is "shorthand" for "the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protec-

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the Court's willingness to rely on its own factual investigations).

<sup>206</sup> *Id.* at 93 (quoting HOLMES, *supra* note 77, at 35).

<sup>207</sup> *Id.* at 30.

<sup>208</sup> Prosser, *supra* note 2, at 15.

<sup>209</sup> CORWIN, CONSTITUTIONAL REVOLUTION, *supra* note 1, at 64 (quoting CHARLES EVAN HUGHES, ADDRESSES 139 (1908)).

<sup>210</sup> PROSSER, HANDBOOK, *supra* note 76, § 83, at 674 (citing privity requirements in tort law as an example of "the social viewpoint of the nineteenth century"); PROSSER & KEETON, *supra* note 27, § 96, at 682; *see also* CORWIN, TWILIGHT, *supra* note 180, at 48-49 (lamenting the influence that laissez-faire concepts had on the Court).

tion”<sup>211</sup> in Corwin’s claim that the Due Process Clause empowered the Court to give any evaluation it chose to put upon legislation “from the point of view of its own conception of public good.”<sup>212</sup>

a. *Rights-Skepticism and Judicial Review*

Their close kinship notwithstanding, Prosser’s duty-skepticism and Corwin’s rights-skepticism diverged with respect to their institutional implications, a divergence that was foreshadowed in Holmes’s own work and that has, until now, partially obscured the otherwise close resemblance of their arguments. Prosser, as we have seen, believed his deconstruction of duty would help the courts make better decisions because it would lead them to understand that duty questions entailed policy decisions about which liability rules were most desirable from a social point of view.<sup>213</sup> His Holmesian analysis thus generally supported the idea that judges ought to make negligence law by engaging in frank cost-benefit analysis.<sup>214</sup>

Corwin’s rights-skepticism had a rather different implication for the judicial role. Indeed, once rights arguments were revealed to be pure policy arguments, the question arose as to whether courts should have *any* significant constitutional law-making authority. This is because the courts’ claim of authority to invalidate legislation was much more closely tied to the validity of the concept of rights than was their claim of authority to make common law tied to the soundness of the concept of duty. Once the claim about rights was debunked, a serious question emerged as to whether there was any basis for the judicial claim of institutional competence; indeed, Corwin and like-minded scholars thought it fairly obvious that courts were *incompetent* to tackle many of the policy issues they confronted.

This conclusion was most obvious in the case of economic substantive due process. With the exposure of the incoherence of rights, the courts were left to justify their authority to strike legislation on the unlikely claim that their economic policy judgments were superior to those of the legislative and executive branches. Holmesian reductionism thus demonstrated the impropriety of aggressive review of economic legislation.<sup>215</sup> To varying degrees, rights-skeptics such as Corwin reached the same conclusion about many, if not most, of the key rights-bearing provisions of the Constitu-

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<sup>211</sup> PROSSER, HANDBOOK, *supra* note 76, § 31, at 180; PROSSER & KEETON, *supra* note 27, § 53, at 358.

<sup>212</sup> CORWIN, CONSTITUTIONAL REVOLUTION, *supra* note 1, at 30.

<sup>213</sup> See *supra* text accompanying notes 115-16.

<sup>214</sup> See *supra* text accompanying notes 117-19.

<sup>215</sup> See generally CORWIN, CONSTITUTIONAL REVOLUTION, *supra* note 1, at 16-30 (describing the manner by which judges expanded their role in economic regulation).

tion.<sup>216</sup> As a result, although the central question of modern negligence scholarship after Prosser has been the question of how judges ought to evaluate and accommodate competing policy considerations, the central question of constitutional scholarship after Corwin has been the question of judicial review—how a court’s interpretation of constitutional rights could justify the court in striking down popularly-enacted legislation.

#### b. *Two Kinds of Rights-Skepticism*

The link between Holmesian rights-skepticism and Holmesian duty-skepticism thus has been partially obscured because the former, unlike the latter, seemed to entail general hostility to robust judicial decision-making. It has been further obscured because the Holmesian rights-skeptical argument against judicial review, unlike the duty-skeptical argument for judicial revision of tort law, has, in the last half-century, increasingly taken the form of a strongly skeptical “legitimacy” argument, rather than the “functional” argument favored by Prosser and Corwin.<sup>217</sup>

As we saw above, Prosser’s Holmesian skepticism about duty translated into a functional argument that courts should—in the context of tort law—engage in “social engineering.”<sup>218</sup> Likewise, Corwin joined to the Holmesian premise that rights questions are policy questions the functionalist idea that policy questions are in principle amenable to rational resolution. This combination of rights-skepticism and functionalism often, although not always, provided a strong argument against judicial review. Judges, it was argued, confronted social problems through the distorting lens of individual litigation, analyzed those problems by lawyerly analysis of precedent and abstract principle rather than assessments of facts and probable effects, and typically possessed the conservative biases and

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<sup>216</sup> See *id.* at 13-16 (discussing various ways in which the Court aggressively interpreted constitutional provisions including the Supremacy Clause and the Necessary and Proper Clause).

<sup>217</sup> See *supra* text accompanying notes 117-19 (noting Prosser’s defense of the propriety of policy reasoning to decide negligence cases). Our distinction between “functional” rights-skepticism and “legitimacy” rights-skepticism resembles Ronald Dworkin’s distinction between the “skeptical” and “deference” theories of judicial restraint. See RONALD DWORGIN, *TAKING RIGHTS SERIOUSLY* 138 (1978) (arguing that critics of judicial review fall into two camps: those who are skeptical that rights exist, and those who are skeptical that courts do a better job of protecting rights than legislatures). However, there is an important difference. Dworkin distinguishes two skeptical theories of judicial competence, one that denies the existence of rights and one that acknowledges them. Ours is between two different bases for being skeptical about rights. This difference is important, in part, because it allows us to acknowledge constitutional theorists who reject across-the-board moral skepticism, yet argue that rights-talk reduces to consequentialist considerations of utility and/or expediency.

<sup>218</sup> See *supra* text accompanying note 117 (describing Prosser’s justification for supporting judge-made negligence law).



prejudices of the elite class from which they were drawn. In Robert McCloskey's later description, courts that engaged in aggressive judicial review thus gave themselves "the assignment of playing baseball with a billiard cue."<sup>219</sup>

By contrast, other critics of judicial review have tended to link their Holmesian rights-skepticism to a broader, more thoroughgoing skepticism foreign to Corwin and Prosser; one which more closely resembles the disposition we earlier attributed to Judge Andrews' *Palsgraf* dissent.<sup>220</sup> Courts, these "legitimacy" critics argue, ought to play a lesser role not because they are particularly inept at answering policy questions, but because such questions are evaluative and have no correct answer. Because policy questions ultimately must be decided by fiat, the fairest way to resolve them is by counting preferences or opinions through democratic elections. The legitimacy critic—of whom a good example may have been Learned Hand—thus puts aside any substantive notion of what good decisions would consist of, and adopts instead a framework where normative priority rests entirely upon process and pedigree.<sup>221</sup> Although, in torts, this kind of skepticism entailed giving all important questions to the jury, in constitutional law, it entailed ensuring that all questions, or at least all questions not unequivocally and unambiguously answered in the literal text of the Constitution, be resolved by elected officials.

These two variations on rights-skepticism ultimately reflect two very different analyses of the language of rights. A functionalist skeptic like Corwin believed that statements about rights are capable of rational assessment, once it is recognized that the metric for assessing them is the impact on human welfare of the legal scheme they created and not some airy conception of justice. By contrast, to a legitimacy skeptic such as Hand, statements about rights can only be seen as mere assertions of power and expressions of attitude, not genuinely capable of rational assessment. In current constitutional theory, one often sees the language of the legitimacy critic.<sup>222</sup>

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<sup>219</sup> ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 22 (1960). By contrast, to the extent one could identify areas of policymaking for which the courts were relatively well-suited, the functional critique of rights supported judicial review. See *infra* note 231.

<sup>220</sup> See *supra* notes 121-23.

<sup>221</sup> See RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 341-42 (1996) (discussing Hand's value-skepticism); DWORKIN, *supra* note 217, at 140 (same).

<sup>222</sup> Chief Justice Rehnquist, Judge Bork, and Lino Graglia have all employed the skeptical language of the legitimacy critic, although they maintain that this skepticism is compatible with an originalist theory of judicial review. See ROBERT H. BORK, *THE TEMPTING OF AMERICA* 257 (1990) ("There is going to be no moral philosophy that can begin to justify courts in overriding democratic choices where the Constitution does not speak."); Lino A. Graglia, "Interpreting" the Constitution: *Posner on Bork*, 44 *STAN. L. REV.* 1019, 1030

Although this may be accurate as a gloss on the work of some of the most vociferous modern critics of judicial review, it neglects a large and important version of rights-skepticism which has held significant sway in academia and in the courts—the functionalist version.<sup>223</sup> More pertinently, the ascendancy of the legitimacy branch of rights-skepticism has obscured the otherwise obvious parallel between the development of tort theory and constitutional theory in the first half of this century. In both areas, scholars became vigorous critics of a certain kind of judicial reasoning, namely reasoning in terms of non-instrumentalist normative concepts contained within the law. In tort law and scholarship, duty-skepticism has remained largely tied to a functionalist reduction of duty language to policy analysis. In constitutional law, however, the attack on rights has often played out in the form of a legitimacy argument against judicial review. This difference, although important, should not cause us to lose sight of the fact that, in the end, the skeptical arguments against *Lochner* and rights were the same skeptical arguments used against *Winterbottom* and duty.

### C. *The Moral of West Coast Hotel: The First Generation Account*

Whether in its functionalist or legitimacy cast, the immediate prescription that flowed from the Holmesian analysis of judicial (in)competence was the same. Courts had to stop second-guessing legislative assessments of the probable effects of economic regulatory legislation.<sup>224</sup> Thus, when the Supreme Court finally heeded forty years of academic criticism, as well as the Depression and President Roosevelt's shot across the bow, Corwin was delighted. As he read it, the decision in *West Coast Hotel* clearly reflected the

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(1992) ("There is no escaping that 'natural law' is a matter of prescription masquerading as description, dependant on who is doing the prescribing."); William H. Rehnquist, *Observation: The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 704-06 (1976) (arguing that in order to effectuate individual moral judgments in a democratic society, individuals should use the mechanisms of the democratic process rather than allow federal judges to impose their own ideals). Although we have sharply distinguished them here, it is probably the case that advocates of functionalist and legitimacy skepticism often adopt arguments that belong to each other's conceptual framework.

<sup>223</sup> The classic modern statement of functionalism is found in ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (2d ed. 1986). Bickel suggests that the justification for judicial review rests on identifying

a function [for the courts] which might (indeed, must) involve the making of policy, yet which differs from the legislative and executive functions; which is peculiarly suited to the capabilities of the courts; which will not likely be performed elsewhere if the courts do not assume it; which can be so exercised as to be acceptable in a [democratic] society.

*Id.* at 24.

<sup>224</sup> See CORWIN, *CONSTITUTIONAL REVOLUTION*, *supra* note 1, at 115.

judicial embrace and validation of Holmesian instrumentalism.<sup>225</sup> Indeed, the Court had conceded that the Constitution “does not speak of freedom of contract,” and does not “recognize an absolute and uncontrollable liberty,” but instead requires only that governmental regulations serve “the interests of the community,” where it is understood that “the legislature has necessarily a wide field of discretion” in determining what measures will in fact serve those interests.<sup>226</sup> Similar conclusions seemed to follow for other provisions of the Constitution that purported to identify and to protect abstractly conceived rights against the state. And so, by 1941, Corwin could optimistically write of a future in which the Court would limit its function to a handful of less obtrusive tasks.<sup>227</sup>

#### D. *The Moral of West Coast Hotel Reconsidered: The Rights Revival*

As just demonstrated, the efforts of Holmesian tort and constitutional scholars to rid their respective fields of what they regarded as incoherent and regressive concepts of duty and rights proceeded on parallel tracks throughout the first half of this century. Since then, however, their respective paths have diverged. Whereas tort scholarship has continued steadily down the Holmesian path, constitutional law has made a sharp turn “rights-ward.” In this section, we will briefly describe the revival of rights-based analysis in constitutional law in order to build our case for a revival of duty-based analysis in tort law.

##### 1. The Persistence of Rights

Even in their heyday, the instrumentalist rights-skeptics faced serious difficulties in accounting for constitutional law and practice. Their most fundamental problem was explaining how they could embrace strong rights-skepticism without thereby advocating the elimination of judicial review: a radical conclusion that few explicitly endorsed<sup>228</sup> and that the newly pro-

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<sup>225</sup> See *id.* at 78 (“In the Parrish case the long-standing judicial taboo on minimum wage legislation was revoked.”).

<sup>226</sup> *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391-93 (1937).

<sup>227</sup> See CORWIN, *CONSTITUTIONAL REVOLUTION*, *supra* note 1, at 115 (discussing the modest role that courts might play in the future). This is not to assert that Corwin would necessarily have maintained the same prescription for the courts had he confronted contemporary problems in civil rights. As a “functional” account of judicial review, Corwin’s theory was, in fact, relatively adaptable to changing social, economic, and political conditions.

<sup>228</sup> Consider, for example, Justice Frankfurter’s hesitancy to approve of a court’s interference with legislative action. At least early in his career, Frankfurter was sufficiently committed to rights-skepticism that he was willing to condemn on principle instances of judicial review that reached results he found congenial, including *Meyer v. Nebraska*, 262 U.S. 390 (1923). Yet, Frankfurter also maintained that courts should invoke Fourteenth Amendment

gressive Supreme Court never pursued.<sup>229</sup> Even the most vociferous academic critics of the Court rejected plans to dismantle the mechanism of judicial review, seemingly in the belief that the courts ought to be doing *something* under the heading of constitutional law.<sup>230</sup> Yet, given the stringent nature and broad scope of the rights-skeptical critique, such a belief was hard to justify.<sup>231</sup>

The problems faced by rights-skeptics only escalated in the 1940s, '50s, and '60s as academics struggled to come to terms with the Supreme Court's burgeoning free speech, privacy, criminal procedure, and equal protection

due process to prevent certain forms of discrimination. See Sanford V. Levinson, *The Democratic Faith of Felix Frankfurter*, 25 STAN. L. REV. 430, 439 (1973) (noting that "[i]n April 1924, Frankfurter declared himself to be 'strongly for restricting 14th Amendment [jurisprudence] to 'unreasonable' racial and religious discriminations'" (citations omitted)).

<sup>229</sup> Even as the Court swore off economic substantive due process, it adhered to, and expanded upon, the rights-driven notion of "incorporation," while also laying the groundwork for the modern law of equal protection. See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (stating that discrimination on the basis of religion, national origin, and race "may be a special condition . . . which may call for a correspondingly more searching judicial inquiry"); *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1937) (noting that Fourteenth Amendment due process protection against the states encompasses those guaranties of the Bill of Rights necessary to maintain ordered liberty); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (finding that an act requiring all children to attend public school "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (finding that liberty under the Fourteenth Amendment includes the right "to contract, to engage in . . . the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness").

<sup>230</sup> See WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND THE LABOR UNIONS CONFRONT THE COURTS, 1890-1937*, at 59-60 (1994) (explaining that progressives were reluctant to condemn judicial review outright); see also DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS 211-47* (1997) (discussing progressive academics' ambivalent attitude toward judicial protection of free speech).

<sup>231</sup> Functionalist rights-skeptics, like Corwin, tended to argue that, although courts could only claim constitutional supremacy by asserting that they possessed superior policymaking abilities to the political branches, there were certain functions for which they could plausibly make such a claim. Thus, for example, Corwin occasionally alluded to the idea, later developed by the "Legal Process" school, that courts were uniquely equipped to force legislatures to reason clearly about the purposes of specific enactments and whether the terms of the enactments were likely to achieve those purposes.

I am far from saying that . . . Judicial Review . . . should be scrapped. Judicial review still has its uses, and important ones. Especially does it present an admirable forum in which to rationalize and clarify, to authenticate in terms of broad principle, the determinations of political authority, and to articulate them with the more durable elements of tradition.

CORWIN, *CONSTITUTIONAL REVOLUTION*, *supra* note 1, at 115. Corwin also endorsed, with qualifications, courts' "increased concern to protect against hasty and prejudiced legislation the citizen's freedom to express his views—a right of vital importance for the maintenance of free institutions." *Id.*

jurisprudence. If a single case can be said to illustrate these problems, it was *Brown v. Board of Education*.<sup>232</sup> It was clear at the time of *Brown* that “nine old men” were imposing their normative judgments on legislatures whose members and constituents had embraced, by a clear majority, opposing normative judgments.<sup>233</sup> And, few believed that historical or textual data, original intent, or precedent justified the Court’s decision; in fact, most of those materials seemed to cut against it.<sup>234</sup> Yet, *Brown*’s statements that the Constitution commands a right to equal protection for all races, that segregation violates the rights of African-Americans, and its ultimate conclusion that segregation is unconstitutional, all seemed correct.<sup>235</sup>

The rights-skeptic was not left speechless by *Brown*—a number of non-rights-based explanations might have been and were offered. But, in the world of constitutional law and scholarship, *Brown* became a paradigm of the courts doing something right, just as *Lochner* was a paradigm of the courts doing something wrong. And, as the writings of Hand, Hart and Sacks, and Wechsler attest, *Brown* was neither a natural application of, nor easily explained by, rights-skepticism.<sup>236</sup> The conflict between what made

<sup>232</sup> 347 U.S. 483 (1954) (holding that racial segregation in public schools violates the equal protection of the laws guaranteed by the Fourteenth Amendment).

<sup>233</sup> See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 32-33 (1959) (proposing that *Brown* “must have rested on the view that racial segregation is, in principle, a denial of equality to the minority against whom it is directed”).

<sup>234</sup> See RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 117-33 (2d ed. 1977) (noting that the history of the Fourteenth Amendment demonstrates that it was not intended to outlaw segregated schools); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 30-41 (1980) (same); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58-59 (1955) (same).

<sup>235</sup> See BICKEL, *supra* note 223, at 237-38; Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960) (endorsing *Brown* on the ground that segregation was part of a system “set up and continued for the very purpose of keeping [a whole race of people] in an inferior station”); Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 24 (1959) (supporting the judgment of *Brown*, although expressing dissatisfaction with its opinion).

<sup>236</sup> See LEARNED HAND, *THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES*, 1958, at 54-55 (1958) (criticizing the *Brown* Court for substituting its legislative judgment for that of elected officials); Wechsler, *supra* note 233, at 32-34 (questioning whether a principled justification for *Brown* could be found); Anthony J. Sebok, *Reading The Legal Process*, 94 MICH. L. REV. 1571, 1587 n.67 (1996) (reviewing HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (1994)). Sebok notes in his review that:

It is hard not to imagine that Hart and Sacks are addressing the specter of *Brown v. Board of Education* when they state that “[t]he present question is whether the enthusiasts for adjudication as a method of settling every kind of social problem may not be open to the charge of trying to make a similarly parasitic use of the prestige of the method.”

*Id.* (citation omitted).

*Brown* right jurisprudentially and what made *Lochner* wrong may not have been sharp, but it clearly was deep.

## 2. Reviving Rights

*Brown* and other decisions of the Warren Court helped spawn a number of new approaches to constitutional law, distinguishable from the approaches taken by the first-generation critics of *Lochner* by their embrace of some notion of rights. Indeed, academic rights discourse has flourished since the 1960s, manifesting itself in many different forms. In briefly surveying the array of such views, our goal is not to align ourselves with any one of them; rather, it is to point out that academics and judges with a wide range of political commitments and widely divergent conceptions of judicial review have endorsed the intelligibility and value of rights-based reasoning about constitutional law.<sup>237</sup> By pointing this out, we hope to highlight the oddity of the continued rejection of duty analysis in negligence scholarship. We also hope to fend off the unwarranted inference that our argument for the revival of duty-based analysis is linked to the acceptance of unenumerated rights generally, or the particular doctrine of substantive due process.

The first theory of rights we will identify is one that has been widely adopted by modern heirs to legitimacy skeptics such as Hand. These scholars have attempted to temper Hand's position by distinguishing between rights clearly embodied and defined in the constitutional text and all other rights. Courts, according to this view, are not permitted to engage in unstructured normative inquiries about rights, but can nonetheless enforce the 'explicit' limitations on governmental activity contained, for example, in the first eight Amendments of the Bill of Rights. The Constitution is thus conceived as a piece of positive law, containing certain provisions that have a core of meaning which can be determined without recourse to moral or instrumentalist reasoning. This core, at a minimum, establishes a framework in which judges can claim a legitimate function—namely, that of applying clearly enacted law. The critique of rights and judicial review is therefore triggered only when the judiciary is faced with the discretionary task of construing the vague provisions of the Constitution.<sup>238</sup>

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<sup>237</sup> We recognize, of course, that some modern constitutional scholars continue to advocate various forms of rights-skepticism. See, e.g., Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1363-64 (1984) (outlining four related critiques of rights).

<sup>238</sup> The idea that there is a strong distinction between enumerated and unenumerated rights is most famously associated with Justice Black's approach to incorporation doctrine. See generally Paul A. Freund, *Mr. Justice Black and the Judicial Function*, 14 UCLA L. REV. 467, 468 (1967) (discussing Black's initial reluctance "to agree that the exclusionary rule of evidence, established as a corollary of the search-and-seizure clause, was binding on the

A second approach, which might be dubbed the “pragmatic account of rights,” maintains that one can assert the existence of rights—and justify courts’ exercise of judicial review—without recourse to a full-blown theory of rights. According to this view, judicial enforcement of rights is justified because there are times when governmental bodies, whose work the courts review, simply fail to make the decisions that, morally or prudentially, they ought to make. Insofar as there is any theoretical explanation as to why the courts ought to be making these decisions, it is a practical response: there is a job to do and the courts are sometimes available and prepared to do it. This approach to constitutional rights and judicial review is in some sense anti-theoretical. It accepts the idea that citizens possess rights that render certain governmental actions off limits; yet, it rejects the need for articulating those reasons in the form of a theory of rights. Many constitutional scholars who operate in the spirit of legal realism probably subscribe to a version of this approach.<sup>239</sup>

A third important post-Warren Court approach to constitutional law is the process-based theory of rights, foreshadowed in Justice Stone’s famous footnote four of the *Carolene Products* decision.<sup>240</sup> The most eloquent modern elaboration of this view is, of course, John Hart Ely’s *Democracy and Distrust*.<sup>241</sup> According to the process-theorists, the rights-skeptics are basically correct to conclude that democratically responsive governmental bodies are better, or more legitimate, decision-makers. Nevertheless, the skeptics failed to realize that democratic rule presupposes certain rights, including rights to equal representation, equal protection, privacy, and freedom of speech and association.<sup>242</sup> Thus, the Warren Court could coherently

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states, since it could not be derived from the text of the fourth amendment”). This distinction has been defended by, among others, Justice Scalia and Judge Bork. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 37-47 (Amy Gutman ed., 1997) (arguing for textualism on the ground that it is necessary “to embed certain rights in such a manner that future generations cannot readily take them away”); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971) (criticizing *Griswold v. Connecticut*, 381 U.S. 479 (1965), on the ground “that new basic rights could [not] be derived logically by finding and extrapolating a more general principle of individual autonomy underlying the particular guarantees of the Bill of Rights”).

<sup>239</sup> See, e.g., RICHARD A. POSNER, *OVERCOMING LAW* 192 (1995) (endorsing an anti-theoretical, “felt need” account of rights and judicial review); J. Skelly Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 803-05 (1971) (defending the Warren Court and its supporters for acting to protect fundamental rights).

<sup>240</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>241</sup> See ELY, *supra* note 234.

<sup>242</sup> See *id.* at 74 (discussing the Warren Court’s interventionist decisions, which were fueled “by a desire to ensure that the political process . . . was open to those of all viewpoints on something approaching an equal basis”).

claim that it was engaged in the distinctive enterprise of rights-based reasoning, so long as it sought to articulate and protect the rights necessary to maintain the fair workings of the democratic process. Later writers working within this tradition have sought to redefine the rights protections implicit in the principle of democratic rule by introducing broader conceptions of democracy.<sup>243</sup>

Another modern theory of rights, which might be described as broadly originalist or historicist, seeks to identify and define rights by reference to epochal social and political transformations, such as those that occurred as a result of the New Deal and during the civil rights era. According to this school, led by Professor Ackerman, constitutional rights are defined and determined in periods of heightened political activity and awareness, and these rights are to be enforced by the courts until such time as a new political order is established.<sup>244</sup>

Still another account of rights, articulated by Justices Harlan and Cardozo,<sup>245</sup> and endorsed by modern scholars including David Strauss, Laurence Tribe, and Harry Wellington, adopts what might be described as a common law approach to constitutional rights.<sup>246</sup> Under this approach, the

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<sup>243</sup> See, e.g., CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 133-53 (1993) (explaining the theory of deliberative democracy and its implications for judicial review); Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657, 1683 (1997) (arguing that feminist constitutional theory should identify the necessary preconditions of women's effective political participation); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1532-36 (1988) (arguing that democratic citizenship ought to entail privacy as a political right); see also Fleming, *supra* note 6, at 214-17 (comparing the theories of Ely and Sunstein); Lawrence G. Sager, *The Incurable Constitution*, 65 N.Y.U. L. REV. 893, 915-24 (1990) (comparing the theories of Ely and Michelman).

<sup>244</sup> See Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1022-31 (1984) (discussing the "dualistic conception of political life" presented in THE FEDERALIST).

<sup>245</sup> See *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) ("[T]he full scope of liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints. . . ." (citations omitted)); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J.) (discussing the doctrine of selective incorporation and "ordered liberty").

<sup>246</sup> See LAURENCE H. TRIBE & MICHAEL C. DORF, *ON READING THE CONSTITUTION* 76-79, 116-17 (1991) (discussing Harlan's "process of interpolation and extrapolation" with respect to the specific liberties protected by the Bill of Rights and advocating his approach to constitutional decision-making); HARRY H. WELLINGTON, *INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION* 77-123 (1990) (discussing the development of constitutional law through adjudication); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996) (claiming that the common law tradition, which "rejects the notion that law must be derived from some authoritative source and finds it instead in understandings that evolve over time, . . . best explains, and best



courts claim a special competence and obligation to identify various norms, including rights, within evolving practices and traditions. Thus, to the extent that our liberal traditions and modern social practices reflect commitments or aspirations to rights against majoritarian legislation, courts may claim the authority to constrain legislative and executive discretion and action. Justice Souter recently provided an eloquent articulation of this position in his concurrence in *Washington v. Glucksberg*.<sup>247</sup>

The last, and in some respects the most ambitious, approach to constitutional rights derives from the work of a group of scholars that includes, most prominently, Ronald Dworkin.<sup>248</sup> According to Dworkin, by explicitly incorporating a Bill of Rights, and by creating an independent judiciary to enforce those rights, the Constitution established a political order that regards certain interests as so fundamentally important to the individual that it prevents a majority from invading those interests, even when doing so would further laudable public goals.<sup>249</sup> These interests are not merely to be weighed against the value of the public goals; they “trump” those goals and

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justifies, American constitutional law today”).

<sup>247</sup> See 117 S. Ct. 2258, 2283 (1997) (Souter, J., concurring) (suggesting that in constitutional review it is the job of a court to determine whether the statute in question “falls inside or outside the zone of what is reasonable in the way it resolves the conflict between the interests of state and individual”).

<sup>248</sup> See DWORKIN, *supra* note 221, at 1-38 (advocating a “moral reading” of the Constitution); RONALD DWORKIN, *LAW’S EMPIRE* 397-99 (1986) (defending the theory of “constitutional integrity,” which supports strong judicial protection of counter majoritarian rights); DWORKIN, *supra* note 217, at 133 (defending a rights-based account of constitutional law); see also SOTIRIOS A. BARBER, *THE CONSTITUTION OF JUDICIAL POWER* 235 (1993) (criticizing the modern belief that “a more or less willful assertion of personal preference is all that can lie behind judicial choice in hard cases” of constitutional interpretation); DAVID A.J. RICHARDS, *TOLERATION AND THE CONSTITUTION* 11-19 (1986) (discussing Dworkin’s rights-based philosophy and criticizing Ely’s refusal to incorporate substantive rights into constitutional theory); Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 535 (1998) (arguing that accountability is “a structural feature of the constitutional architecture, the goal of which is to protect liberty”); James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 2-3 (1995) (proposing that “our basic liberties” are manifestations of “deliberative democracy” and “deliberative autonomy,” themes which “help orient our deliberations, reflections, and judgments about our Constitution and our constitutional democracy”); Walter F. Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 749 (1980) (discussing how the rights and restrictions of the Constitution “enhance the freedom of the individual by curtailing government, leaving it . . . only enough power in domestic affairs to prevent one segment of society from oppressing another”); Sager, *supra* note 243, at 936 (discussing constitutional decision-making as a judgment-driven process that “does not depend upon the direct support of political majorities”).

<sup>249</sup> See DWORKIN, *supra* note 217, at 133 (“The Constitution, and particularly the Bill of Rights, is designed to protect individual citizens and groups against certain decisions that a majority of citizens might want to make, even when that majority acts in what it takes to be the general or common interest.”).

cannot be invaded in the pursuit of them.<sup>250</sup> The trumping character of rights, in turn, explains why the judiciary is the appropriate institution to enforce the Bill of Rights. Because the interpretation and application of the Constitution is an articulation of the concept of rights that the framers placed in the Constitution, it is essential that judges engage in reasoning about the nature and content of those rights. If the judiciary fails to enforce them, there will be no check to determine whether the government has complied with its obligation to leave undisturbed the rights that the Constitution was designed to protect.<sup>251</sup> Likewise, by arguing that the Constitution incorporates a set of normative political principles built around a theory of individual rights that deems the political branches *illegitimate* to the extent that they trample upon certain kinds of individual interests, Dworkin's theory directly confronts the "legitimacy" objection to judicial review. Because their roles as rights-enforcers are precisely what gives courts the power to review the acts of the other branches, legitimacy demands that rights-based reasoning be the medium of their analysis.<sup>252</sup>

### 3. *Lochner* and *West Coast Hotel* Revisited

With the resurgence of rights theory in constitutional law, new understandings have emerged as to what was wrong with decisions such as *Lochner*. Indeed, according to many contemporary scholars, the problem with *Lochner* is not its invocation of rights-based reasoning, which these scholars regard as legitimate. Instead, they offer a number of different explanations about what was really wrong with *Lochner*.

The most straightforward view is that the Court was not doing anything wrong theoretically or methodologically, it simply got the wrong answer when it concluded that there is a fundamental constitutional right to economic liberty. This is the view expressed by the joint opinion in *Planned Parenthood v. Casey*, which disowned economic substantive due process, while endorsing due process in certain non-economic spheres.<sup>253</sup> Others, such as Ely, criticize *Lochner* and substantive due process more generally, not for deploying the concept of rights, but rather, for doing so in a "substantive" context where the judiciary's involvement is not necessary to

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<sup>250</sup> See *id.* at xi ("Individual rights are political trumps held by individuals. Individuals have rights when . . . a collective goal is not a sufficient justification for denying them what they wish . . .").

<sup>251</sup> See *id.* at 142-43 (stating that "decisions about rights against the majority are not issues that in fairness ought to be left to the majority").

<sup>252</sup> See *id.* at 147.

<sup>253</sup> See 505 U.S. 833, 847-50, 861-62 (1992) (distinguishing among personal liberties that are or are not secured by substantive due process rights).

maintain the integrity of the democratic process.<sup>254</sup> Still, others suggest that *Lochner* was right at the time it was decided, but rendered “wrong” by subsequent social, economic, political, and theoretical changes which collectively amounted to the rejection of the laissez-faire conception of the state.<sup>255</sup> Perhaps the most extended post-instrumentalist critique of *Lochner* is provided by Sunstein in the piece whose title provides the eponym of our own.<sup>256</sup> According to Sunstein, *Lochner*’s mistake lay not in its deployment of the concept of rights, but in its equation of constitutional rights with the distribution of entitlements mandated by the common law status quo.<sup>257</sup> This equation, he argues, was accomplished by two questionable means. The first consisted of the judicial claim that constitutional rights reflect a pre-political, neutral order. The second was a presumption that the legal status quo at the time of *Lochner* accurately reflected that order and that legislative departures from this baseline were therefore illegitimate.<sup>258</sup> The lesson of *Lochner*, according to Sunstein, is not that rights are nonsense or have no place in constitutional law, but that we should not presume that our current scheme of positive law rights correctly identifies the rights that are, or ought to be, protected by the Constitution. Instead, Sunstein argues that constitutional law calls on lawyers, scholars, and politicians to use various forms of normative reasoning, including rights reasoning, to assess the validity of existing social and political arrangements.<sup>259</sup>

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<sup>254</sup> See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 938-41 (1973) (suggesting that the *Lochner* philosophy grants “unusual protection to those ‘rights’ that somehow seem most pressing, regardless of whether the Constitution suggests any special solicitude for them”).

<sup>255</sup> See Ackerman, *supra* note 244, at 1056-57 (arguing that “twentieth century Americans rejected the higher law handed down by the Supreme Court in the name of their predecessors”); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 421-23 (1995) (noting that advances in economic theory undermined the view that economic regulation was fundamentally irrational).

<sup>256</sup> See Sunstein, *supra* note 3.

<sup>257</sup> See *id.* at 903 (asserting that *Lochner* was wrongly decided because it “depended on baselines and consequent understandings of actions and neutrality that were inappropriate for constitutional analysis”).

<sup>258</sup> See *id.* at 904 (“Efforts to change the common law framework are not by virtue of the fact constitutionally suspect, and measures that respect the framework are not ‘inaction’ necessarily to be immunized from legal scrutiny.”).

<sup>259</sup> See *id.* at 918 (“[T]he task for the future is to develop theories of distributive justice, derived from constitutional text and purposes, that might serve as the basis for evaluating any particular practice.”).

## III. RECONSIDERING DUTY-SKEPTICISM

Modern academic rights-skepticism and duty-skepticism were born at roughly the same time out of roughly the same arguments.<sup>260</sup> Largely through the influence of Holmes, a view emerged that concepts of rights and duty are incoherent, and thus cannot have any genuine content apart from utilitarian considerations of policy or the personal attitudes of those who invoke them. As we have seen, however, the force and popularity of rights-skepticism has greatly diminished among constitutional scholars.<sup>261</sup> Many, if not most, no longer believe that rights reasoning is inevitably incoherent or regressive. Indeed, many have embraced rights thinking as an important conceptual tool for encouraging and directing positive social change. Yet, tort scholars cling to duty-skepticism out of a belief that it is the only philosophically and politically respectable way of thinking about negligence.

In this Part, we review some of the reasons that undergirded the widespread rejection of rights-skepticism. We then argue that, for these same reasons, duty-skepticism cannot be understood as the only intellectually respectable position to take in tort law. In support of this conclusion, we revisit and rebut Prosser's conceptual and political arguments for eliminating duty from negligence law. Our method here is partly that of intellectual history—we briefly describe and explain a set of changes in the intellectual landscape that has left constitutional theorists and lawyers more receptive to certain kinds of reasoning than their predecessors in the eras of Holmes and Corwin. But, in delving into this history, we are also asserting that the reasons for this increased receptiveness are sound. We think the conceptual and philosophical reasons offered in support of the Holmesian skepticism about rights and duties do not stand up to close scrutiny, but instead display a set of dogmatic attitudes about values, meaning, and knowledge. It does not follow that reasoning in terms of rights and duties is philosophically mandatory. Rather, by noting the inadequacy of certain global objections to rights-based and duty-based reasoning, we merely show why they should be considered as available options. For present purposes, that is more than enough, because until now, the vast majority of modern tort scholars seem to have believed otherwise.

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<sup>260</sup> See *supra* text accompanying notes 208-12 (comparing Corwin's Holmesian rights-skepticism to Prosser's Holmesian duty-skepticism).

<sup>261</sup> See *supra* text accompanying notes 238-52.

### A. *The Grounds of Rights-Skepticism*

At the heart of the instrumentalist analysis of constitutional law was a skeptical view of the discourse of rights. According to either the functionalist or the legitimacy argument, the evil of *Lochner* was the courts' claim that there exist rights that are normatively grounded, yet distinct from instrumental concerns about social goals, and that are empirically ungrounded, yet relied upon as a basis for the judicial exercise of power.<sup>262</sup> Once the artificial and inscrutable nature of rights discourse had been uncovered, the case had been made for a clearminded, efficacious, and progressive deference by the judiciary to the political branches.

A functional critic, such as Corwin, would claim that rights discourse was merely a guise for reasoning about the desirability of various social goals and the most efficacious means of realizing them. The functionalist thus operated within the influential Anglo-American traditions of utilitarian, pragmatist, and empiricist thinking about political theory and moral epistemology. At the level of political theory, both British utilitarians and American pragmatists argued that laws and legal systems had to be evaluated in terms of their ability to promote desirable consequences, usually increased human happiness or welfare.<sup>263</sup> Very broadly speaking, this prescription reflected the core empiricist idea that statements have meaning only insofar as they are connected to observable consequences in the world.<sup>264</sup> Looking at the impact of acts (or laws) on human welfare is necessary, according to this view, to render normative statements meaningful.

Given these commitments, it is not surprising that utilitarians such as Corwin felt compelled to recast rights in terms of policy and consequences. The courts talked about rights "existing," yet their existence could not be described or verified in terms of observable states of affairs.<sup>265</sup> Moreover, rights were conceived as constraints on state action whose validity was not tied in any tight way to the consequences they generate. Cast as such, rights could only strike the empirically oriented pragmatist or utilitarian as a confusion and a hindrance to the proper evaluation of acts, rules, and poli-

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<sup>262</sup> See *supra* text accompanying notes 195-207 (discussing Holmesian criticisms of rights-based constitutional analysis).

<sup>263</sup> See generally JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart eds., Athlone Press 1970) (1789) (defining and defending the utilitarian evaluation of laws and policies); JOHN STUART MILL, UTILITARIANISM (Oskar Piest ed., Bobbs-Merrill 1957) (1861) (same).

<sup>264</sup> See MILL, *supra* note 263, at 44-45 (stating that good is known through what is desired); Holmes, *supra* note 40, at 457-58 (arguing that the object of the study of law is "the prediction of the incidence of the public force through the instrumentality of the courts").

<sup>265</sup> See *supra* text accompanying notes 196-98 (discussing Holmesians' suspicion that substantive due process presupposes the idea of natural rights).

cies.<sup>266</sup> Rights-talk therefore had to be reduced to statements about the desirability of different social end states.<sup>267</sup> The statement by the *Lochner* Court that the right to economic liberty prevented the New York legislature from enacting a maximum hour law could then be understood for what it really was: a statement of the judges' belief that the welfare or happiness of the citizens of New York would be diminished by that law.<sup>268</sup>

Although equally suspicious of rights-talk, legitimacy critics such as Hand disagreed with functionalists as to the problems inherent in it.<sup>269</sup> Indeed, in the eyes of the legitimacy critic, the functionalist critics were provincial, because the same reasons that warranted the elimination of rights discourse also undermined reliance on any notion of utility or public good.<sup>270</sup> According to someone like Hand, democratic rule was the most desirable political order, precisely because it proceeded on the assumption that evaluative statements of any kind are irrational, unjustifiable, and hence, the subject of interminable disagreement.

Hand's strongly skeptical defense of democracy should be understood against the backdrop of the broader intellectual movements of his time. These movements included a radical version of empiricism developed in the first half of this century by logical positivists and logical empiricists such as A.J. Ayer,<sup>271</sup> Rudolf Carnap,<sup>272</sup> and Carl Hempel,<sup>273</sup> and their followers in other disciplines, including B.F. Skinner in psychology<sup>274</sup> and C.L. Stevenson in ethics.<sup>275</sup> Although all empiricists, including both pragmatists and

<sup>266</sup> See *supra* text accompanying notes 192-94 (noting Holmes's antipathy to rights).

<sup>267</sup> See, e.g., ROSS HARRISON, BENTHAM 100-03 (1983) ("[W]hat look like descriptions of how the law is are really expressed wishes, desires, ideas, about how the law ought to be."); see also *supra* text accompanying notes 205-07 (discussing the Holmesian view that rights derive from policy considerations).

<sup>268</sup> See *supra* text accompanying note 205 (noting the claim of Corwin and others that "in decisions such as *Lochner*, the courts were making fact-dependent legislative judgments as to the beneficial or harmful effects of particular legislation").

<sup>269</sup> See *supra* text accompanying notes 220-23 (discussing the legitimacy branch of rights-skepticism).

<sup>270</sup> See *supra* text accompanying notes 220-23 (noting several arguments offered by legitimacy critics).

<sup>271</sup> See generally ALFRED JULES AYER, LANGUAGE, TRUTH AND LOGIC (1952) (setting forth the logical positivist program).

<sup>272</sup> See generally RUDOLF CARNAP, *The Rejection of Metaphysics*, in PHILOSOPHY AND LOGICAL SYNTAX 9 (1935) (rejecting metaphysics and ethics as meaningless).

<sup>273</sup> See generally CARL G. HEMPEL, *Empiricist Criteria of Cognitive Significance: Problems and Changes*, in ASPECTS OF SCIENTIFIC EXPLANATION AND OTHER ESSAYS IN THE PHILOSOPHY OF SCIENCE 101 (1965) (linking meaning to conditions of verification).

<sup>274</sup> See generally B.F. SKINNER, BEYOND FREEDOM AND DIGNITY (1971) (discussing behaviorism).

<sup>275</sup> See generally CHARLES L. STEVENSON, ETHICS AND LANGUAGE (1944) (setting forth an emotivist theory of ethical statements).

verificationists, held up inductive science as the model for genuine knowledge, the verificationists were considerably more ruthless in their application of certain epistemological standards. Indeed, at various times, they condemned as unverifiable nonsense not only moral discourse, but aesthetics, psychology, sociology, history, mathematics, and even philosophy itself.<sup>276</sup> In his more hyperbolic moments, Holmes sometimes expressed the radical sentiments of the verificationist, as when, for example, he suggested that statements about legal rights and duties could be rendered verifiable—and hence would have content and meaning—only when understood as predictions of judicial decisions.<sup>277</sup>

To varying degrees, then, scholars such as Holmes, Corwin, and Hand operated in an intellectual culture that accepted as gospel that the only route to knowledge was verification through perception, or inference from observation, and that the possibility of meaning depended on the possibility of empirical verification. According to this understanding of knowledge—whether in its milder, “common sense” empiricist form, or its stronger verificationist form—discourse about rights, like discourse about beauty, was a prime candidate for debunking. Notions of rights and duties were not easily explained in terms of observation or experience, and the variety of normative categories and assessments they yielded were not amenable to reduction to simple observational propositions. Indeed, the typical response from an empiricist to a claim about rights was: what does it mean? and how can it be verified? According to the utilitarians and the pragmatists, norms of conduct could be verified only if expressed in terms of propositions about observable human states of welfare. According to the verificationist, all evaluative propositions—even those concerning individual welfare—were to be understood as subjective expressions of attitude or imperatives.<sup>278</sup>

## B. *The Grounds of the Rights Revival*

### 1. Conceptual Grounds: Challenging Verificationism and Utilitarianism

While empiricism in some forms may remain strong, the unyielding programmatic empiricism of the logical positivists and the other verifica-

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<sup>276</sup> See Benjamin C. Zipursky, *Legal Coherentism*, 50 SMU L. REV. 1679, 1682-89 (1997) (describing the aims of logical positivists and logical empiricists to undermine areas of discourse that were not sufficiently tied to verifiable statements).

<sup>277</sup> See Holmes, *supra* note 40, at 461 (stating that “rights” and “duties” are nothing more than predictions of what courts will do).

<sup>278</sup> See, e.g., AYER, *supra* note 271, at 108 (arguing that ethical terms are intended both to express feeling and stimulate action).

tionists fell prey to powerful philosophical critique starting in the 1950s.<sup>279</sup> The use of verification conditions as criteria for meaning was demolished by Quine<sup>280</sup> and Wittgenstein,<sup>281</sup> and the view of natural science as the unique bastion of culturally unmediated knowledge was shaken by Kuhn.<sup>282</sup> While some hair-shirted skeptics took these critiques as reason to demote the status of all areas of human inquiry and discourse, many philosophers took the opposite approach. They were motivated, in part, by the thought that, if scientific knowledge and language about natural phenomena could not even meet the standards that philosophy had set for them, then there was probably something inadequate about the theorizing that led to the development of those unrealistic standards. Consequently, more flexible views of meaning and knowledge have developed that emphasize the importance of establishing coherence within a web of beliefs or theoretical statements. The work of Hilary Putnam, Donald Davidson, and Richard Rorty exemplifies the turn to "coherence" theories of truth, meaning, and knowledge.<sup>283</sup>

Within normative scholarship, such as ethics, political theory, and law, theorists have likewise expressed renewed confidence in the possibility of intelligible theories that do not reduce to states of pleasure or to statements of preference. Some, like Rawls, have set forth coherence theories within ethics and political philosophy.<sup>284</sup> But an equally common, and somewhat

<sup>279</sup> A highly influential account of, and contribution to, this series of criticisms is provided by RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 257-311 (1979).

<sup>280</sup> See generally WILLARD VAN ORMAN QUINE, *Two Dogmas of Empiricism*, in *FROM A LOGICAL POINT OF VIEW* 20 (1953) (criticizing the verificationist theory of meaning and the analytic/synthetic distinction).

<sup>281</sup> See generally LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (3d ed. 1958) (criticizing efforts to reduce the phenomenon of meaning to associations with perceptions).

<sup>282</sup> See generally THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970) (arguing that scientific revolutions are not explained simply by reference to newly acquired, uncontroversially superior evidence, but rather by a paradigm shift in the outlook of the scientific community).

<sup>283</sup> See generally DONALD DAVIDSON, *On the Very Idea of a Conceptual Scheme*, in *INQUIRIES INTO TRUTH AND INTERPRETATION* (1984) [hereinafter *Conceptual Scheme*] (asserting that a proper understanding of the impossibility of transcending language leads to rejection of the idea of incommensurable conceptual schemes); Donald Davidson, *A Coherence Theory of Truth and Knowledge*, in *TRUTH AND INTERPRETATION: PERSPECTIVES ON THE PHILOSOPHY OF DONALD DAVIDSON* 307 (Ernest LePore ed., 1986) [hereinafter *Coherence Theory*] (setting forth a coherence theory of truth and knowledge); HILARY PUTNAM, *REASON, TRUTH AND HISTORY* (1981) (adopting a pragmatist theory of truth and a coherence theory of knowledge); RORTY, *supra* note 279 (asserting that the failure of verificationist, representationalist, and foundationalist projects are not grounds for skepticism, but instead, grounds for abandonment of philosophy and tolerance of alternate discourses).

<sup>284</sup> See JOHN RAWLS, *A THEORY OF JUSTICE* 48-51 (1971) (setting forth the "reflective equilibrium" model of moral theorizing and essentially adopting a coherence theory of justifiable moral belief).



anti-philosophical, approach offered by philosophers such as Donald Davidson,<sup>285</sup> Ronald Dworkin,<sup>286</sup> Sabina Lovibond,<sup>287</sup> John McDowell,<sup>288</sup> and Hilary Putnam,<sup>289</sup> has been to undermine the alleged philosophical reasons for trying to squeeze normative theorizing into the conceptual and methodological boxes that prior generations of philosophers have prescribed for it.<sup>290</sup>

The opening up of moral epistemology, in turn, has helped to fuel a revival of interest in moral theories beyond simple utilitarianism. Although it continues to enjoy considerable popularity, utilitarianism was the subject of severe philosophical critique in the 1950s, '60s, and '70s. Rawls forcefully argued that utilitarianism could not really accommodate the notion of fairness, which depended on a notion of reciprocity alien to the utilitarian framework.<sup>291</sup> Rawls, Dworkin, and several others argued that the idea of equality is not captured by utilitarianism's willingness to count each person's preferences equally to those of others.<sup>292</sup> More generally, Rawls emphasized that utilitarianism, at some deep level, cannot respect the "sepa-

<sup>285</sup> See generally Davidson, *Coherence Theory*, *supra* note 283 (displaying openness to the wide range of discourses that could come within the range of truth and knowledge from a coherentist point of view).

<sup>286</sup> See generally Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87 (1996) (defending objectivity and truth in ethics by arguing, in part, that hard realism based on a naive correspondence theory is a straw-man).

<sup>287</sup> See generally SABINA LOVIBOND, *REALISM AND IMAGINATION IN ETHICS* (1983) (rejecting anti-realism and hard realism in ethics and adopting a Wittgensteinian/Davidsonian view).

<sup>288</sup> See generally John McDowell, *Non-Cognitivism and Rule-Following*, in WITTGENSTEIN: TO FOLLOW A RULE 141 (Steven H. Holtzman & Christopher M. Leich eds., 1981) (building from late Wittgenstein to a critique of anti-realism in ethics).

<sup>289</sup> See generally PUTNAM, *supra* note 283 (rejecting the fact/value distinction from within a pragmatist, coherentist viewpoint).

<sup>290</sup> This is not to say that the metaphysical and epistemological status of moral discourse is now a dead issue in the philosophical world. There remains a vital debate in that area. See, e.g., WALTER SINNOTT-ARMSTRONG & MARK TIMMONS, *MORAL KNOWLEDGE?: NEW READINGS IN MORAL EPISTEMOLOGY* (1996) (collecting contemporary articles that display diverse points of view in metaethics). Important scholars continue to maintain the position that moral discourse is not entitled to full status as a domain of potentially truth-bearing assertions. See, e.g., ALLAN GIBBARD, *WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT* (1990) (discussing moral discourse as the domain in which persons bring one another into normative practices through communicative interchange, but not the domain in which speakers represent facts to one another). Notably, however, even those who remain skeptical of the possibility of genuine truth and knowledge in ethics do not generally purport to undermine the possibility of legitimate synthesis in moral discourse. See *id.* at 272 (suggesting that judgments about rights may involve a particular sort of moral sentiment subject to particular sorts of discourse).

<sup>291</sup> See RAWLS, *supra* note 284, at 14.

<sup>292</sup> DWORKIN, *supra* note 217, at 232-38 (noting that utilitarianism asks officials to satisfy people's personal and external preferences, which may conflict).

rateness of persons" because it treats a diminution in the well-being of one person as offset by an increase in the well-being of another.<sup>293</sup> Bernard Williams also argued forcefully that utilitarianism's strong conception of negative responsibility renders it profoundly counterintuitive and presents insoluble problems in explaining how morality is integrated into what individuals find important and worthwhile in their lives.<sup>294</sup> Finally, utilitarianism was the subject of more serious criticism by those who questioned what was sometimes deemed the most plausible version of the view: namely, rule-utilitarianism.<sup>295</sup>

The rethinking of epistemology and the critique of utilitarianism has helped spur a proliferation of moral theories. Some, of course, remain wedded to skepticism, utilitarianism, or other forms of naturalism.<sup>296</sup> Others, however, are openly deontological and Kantian.<sup>297</sup> As a result of Rawls's work, a broad social contract tradition has re-emerged,<sup>298</sup> and from quite a different direction, feminist theorists such as Carol Gilligan and Annette Baier have constructed compassion-based accounts of ethics.<sup>299</sup> Through the work of Philippa Foot, Alasdair MacIntyre, Martha Nussbaum, and "republican" historians and philosophers, even the virtues have come to enjoy a place in contemporary moral philosophy.<sup>300</sup> Perhaps most interesting for

<sup>293</sup> *Id.* at 26-27, 286-89 (arguing that utilitarianism does not take seriously the distinction between persons).

<sup>294</sup> See Bernard Williams, *A Critique of Utilitarianism*, in J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 75, 93-118 (1973) (arguing that utilitarianism makes integrity as a value unintelligible).

<sup>295</sup> See, e.g., DAVID LYONS, *FORMS AND LIMITS OF UTILITARIANISM* 119-60 (1965) (criticizing rule-utilitarianism). See generally *UTILITARIANISM AND BEYOND* (Amartya Sen & Bernard Williams eds., 1982) (providing criticisms of a variety of forms of utilitarianism).

<sup>296</sup> See, e.g., GIBBARD, *supra* note 290 (constructing a naturalistic account of moral norms); ROBERT E. GOODIN, *UTILITARIANISM AS A PUBLIC PHILOSOPHY* (1995) (defending utilitarianism and showing how it can be applied effectively over a wide range of public policies); GILBERT HARMAN, *THE NATURE OF MORALITY* (1977) (presenting arguments for relativistic and naturalistic approaches to morality).

<sup>297</sup> See, e.g., ALAN GEWIRTH, *REASON AND MORALITY* (1978) (offering a contemporary Kantian view that bases morality in reason).

<sup>298</sup> See DAVID GAUTHIER, *MORALS BY AGREEMENT* (1986) (discussing the social contract theory of morality, drawing upon contemporary game theory and decision theory); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974) (developing Lockean social contract theory in a libertarian direction); RAWLS, *supra* note 284.

<sup>299</sup> See ANNETTE C. BAIER, *MORAL PREJUDICES: ESSAYS ON ETHICS* (1994) (emphasizing trust, compassion, and relationships in ethics); CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982) (describing the role of caring and empathic bonds in female moral psychological development).

<sup>300</sup> See PHILIPPA FOOT, *VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY* (1978) (finding a place for virtue concepts within contemporary analytic moral philosophy); ALASDAIR MACINTYRE, *AFTER VIRTUE* (1981) (advancing a neo-Aristotelean theory of morality, emphasizing the role of virtues); MARTHA C. NUSSBAUM, *THE FRAGILITY*

our purposes, numerous philosophers, including Thomas Nagel, Samuel Scheffler, and Judith Jarvis Thomson, have used common sense morality as an important repository of moral convictions, which reason and language can shape into consistent and justifiable sets of moral beliefs.<sup>301</sup>

## 2. Political Grounds: Progressive Rights

The intellectual climate since the 1960s and '70s has thus been one in which rights discourse is no longer regarded as intellectually irresponsible, as a mask for statements of preference or policy, or as a deviant departure from the true path of utilitarian thinking. Of course, this change in rarified academic circles was hardly the sole, or even the main, cause of the renewed interest in non-instrumental moral concepts. Rather, it was a condition that permitted academics to conceive of a set of important political and social developments in certain ways. The civil rights movement, set against the background of the war against fascism, created an environment in which moral convictions about equality and fairness had depth and power that utilitarianism and skepticism seemed unable to accommodate.<sup>302</sup> Equally important, these broader changes provided evidence to rebut the argument that rights necessarily function only to reify the status quo. Indeed, if the *Lochner* Court had shown that rights-reasoning could be used to support a rigid libertarian regime, then the Warren Court had shown that rights also could function as a basis for progressive social change. Likewise, the rights-theorists who sought to make sense of the Warren Court provided accounts of rights that distinguished them from policy considerations and advocated their use to constrain policy decisions, yet did so in part to protect the interests of historically disenfranchised and subjugated members of society.<sup>303</sup> Both the Court and a wide range of theorists concluded that there

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OF GOODNESS (1986) (explaining the role of virtues in the good life).

<sup>301</sup> See THOMAS NAGEL, *THE VIEW FROM NOWHERE* (1986) (integrating subjective and objective aspects of ordinary moral thought); SAMUEL SCHEFFLER, *THE REJECTION OF CONSEQUENTIALISM* 133-51 (rev. ed. 1994) (reconstructing morality by recognizing the sphere in which agent-centered concerns play a significant role); JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* (1990) (constructing rights theory in part by using powerful moral intuitions). These thinkers are not necessarily committed to reconstructing ordinary morality; however, ordinary moral convictions are important to their methodology.

<sup>302</sup> See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 4-7 (1991) (linking the ascendance of rights discourse with both the rejection of fascism and the rise of the civil rights movement).

<sup>303</sup> See, e.g., DWORKIN, *supra* note 217, at 206-39 (discussing civil disobedience and reverse discrimination); Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) (advocating the position that the Fourteenth Amendment should be interpreted to confer rights to financial assistance from the state).

were certain aspects of a progressive conception of democracy that were *best* (if not exclusively) captured and protected by a notion of rights as a special kind of constraint on political action.<sup>304</sup> The fact that the *Lochner* Court advanced an inegalitarian political theory through the notion of rights as constraints did not demonstrate the inherent regressiveness of rights, but rather, the need for care and caution in articulating any theory as to the rights we have.<sup>305</sup>

### C. *Reassessing the Grounds for Duty-Skepticism*

Rights-reasoning in constitutional law withered in the middle of this century in part because of the regressive use to which rights had been put, in part because of the barren intellectual soil for normative thinking, and in part because social and political exigencies tended to place questions of macroeconomic policy at the forefront of constitutional law. As the social and political landscape changed, the Warren Court demonstrated new uses for rights-reasoning, and as the intellectual soil became increasingly fertile, rights-reasoning once again began to flourish in constitutional law and scholarship. Yet, despite these changes, and notwithstanding the valuable contributions of corrective justice theory, mainstream tort theory remains implacably opposed to the acceptance of substantive, non-instrumental, normative theorizing in thinking about the standards of conduct that tort law articulates.

We believe that a change in tort theory is overdue. We say this not merely as a matter of keeping up with the Dworkins. The claim that global duty-skepticism is the only intellectually respectable position in tort law is as unpersuasive as the claim that rights-skepticism is the only respectable position in constitutional law. The contentions with regard to duty, as with those in regard to rights, are that certain kinds of concepts are incoherent or indeterminate pseudo-concepts that merely provide cover for conclusions reached on the basis of other considerations and that those concepts are inherently tools of regressive regimes. Such contentions are no less dogmatic, and no more defensible, coming from Prosser than from Corwin.

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<sup>304</sup> See, e.g., DWORKIN, *supra* note 217, at 133 (discussing how the moral rights of individuals are protected against the majority); ELY, *supra* note 234, at 73-104 (discussing the Court's role in policing the process of representation).

<sup>305</sup> See Sunstein, *supra* note 3, at 917-19 (describing and criticizing accounts of constitutional law that accept common law distributions of rights and liberties as neutral baselines).

## 1. Prosser's Conceptual Argument

Prosser, as we have seen, obtained a lot of mileage from his quip that judicial talk of duty is merely conceptual shorthand for statements regarding whether it would be advantageous to impose liability for a class of negligent conduct.<sup>306</sup> Taken as obvious since that time, we can now see that this sentiment is little more than an expression of a set of reductive utilitarian and empiricist assumptions. Indeed, all of Prosser's arguments against a substantive notion of duty can be understood as incantations of a philosophical bias against the use of certain kinds of moral concepts in the law. This intellectual hostility to the concept of duty is most explicit in Prosser's rejection of duty as a "meaningless" concept,<sup>307</sup> but the same philosophical assumptions are apparent in the "indeterminacy," "redundancy," and "pointlessness" arguments described above.<sup>308</sup>

Prosser argued that the notion of duty had to be incoherent because judicial formulations of duty were prohibitively vague or indeterminate. At first blush, this argument is impressive, for it is true that different judges asking the duty question may (and do) reach different answers using a non-reductive conception of duty. But, this is true of virtually every substantial concept embedded in the law, and as we have seen, it is certainly true of the instrumentalist inquiry that Prosser substituted for duty analysis.<sup>309</sup> For Prosser's argument to stick, the indeterminacy associated with the concept of duty must be particularly objectionable for some reason. Prosser, however, never offered such a reason. Indeed, his analysis does not so much support the rejection of duty as it reflects a predisposition for thinking that moral concepts are not really fit for reasoned discourse. In short, Prosser's claim is not really an argument, but rather a bias, stemming from a set of philosophical presuppositions that are no longer entitled to the status of presumptive conceptual truths.

Prosser's more subtle conceptual argument against a substantive moral conception of duty was his invocation of the argument from redundancy.<sup>310</sup> The claim of this argument is that duty contains no genuine content of its own, because prominent general formulations of the concept, such as Brett's

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<sup>306</sup> See *supra* text accompanying notes 112, 138-51 (describing the judicial reception of Prosserian statements regarding duty).

<sup>307</sup> See *supra* text accompanying note 96 (describing Prosser's claim that duty is meaningless).

<sup>308</sup> See *supra* text accompanying notes 97-100.

<sup>309</sup> See *supra* text accompanying notes 32-38 (criticizing the Holmes-Prosser model of negligence as inept at providing a framework for analyzing negligence problems).

<sup>310</sup> See *supra* text accompanying notes 100-01 (stating Prosser's argument that any determinate concept of duty is redundant with the substantive standard of reasonableness).

in *Heaven v. Pender*,<sup>311</sup> cast it in terms that reiterate the “reasonable person” formula for determining breach.<sup>312</sup> In fact, the conclusion that duty collapses into the notion of reasonableness is not, as Prosser seemed to suggest, a matter of conceptual necessity, but instead, is driven by the substantive assumption that the duty enforced through negligence law consists of the generic Holmesian duty to act reasonably. Once one assumes, with Holmes, Prosser, Andrews, and the California Supreme Court, that negligence law imposes on each person a duty of reasonable care owed “to the world,” then, of course, there is nothing for a plaintiff to prove under the heading of duty.<sup>313</sup> The core of the redundancy argument is thus not a rejection of duty, but a substantive assumption about the conceptual structure of duty in negligence. Pursuant to this view, the duty of due care is a general, non-relational duty to the world to act in ways that do not unreasonably risk harm.<sup>314</sup>

With hindsight, one can see why Prosser was attracted to the non-relational conception of duty and hence to the redundancy argument. The moral assessment of action, for the utilitarian, is a matter of discerning how one’s actions will affect everyone in the world who may be affected by them. Favorable actions are ones that tend to increase human welfare; unfavorable actions are ones that tend to increase human pain, suffering, or injury above and beyond their contribution to welfare.<sup>315</sup> Perhaps a theorist with Prosser’s normative commitments could ask the question: did this sort of conduct risk injury *to this plaintiff*? But, the answer to that question would not have a special saliency with regard to the normative assessment of the conduct. That assessment requires looking at whether one unreasonably risked injury, *all things considered*.

All this makes sense as far as it goes, but it does not actually go very far. The problem for Prosser is that, on a wide variety of theories, including

<sup>311</sup> 11 Q.B.D. 503 (Eng. C.A. 1883).

<sup>312</sup> Preliminarily, we note that this objection unjustifiably presumes that formulations such as Brett’s provide the best available account of duty, and more generally, that the measure of a concept is its amenability to generic formulation. In fact, there is no obvious reason to privilege either Brett’s formulation or concepts that happen to be readily available in abstract terms. Notice that Cardozo in *MacPherson* took great care in invoking Brett’s formula, noting that “Like most attempts at comprehensive definition, it may involve errors of inclusion and exclusion.” *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916).

<sup>313</sup> This point is made most clearly by Judge Andrews in his *Palsgraf* dissent. See *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 102 (N.Y. 1928) (Andrews, J., dissenting) (“Due care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B, or C alone.”).

<sup>314</sup> See *supra* text accompanying notes 85-88.

<sup>315</sup> See, e.g., MILL, *supra* note 263, at 10 (noting that actions are right as they tend to produce happiness and wrong as they tend to produce unhappiness).

Kantian, virtue-based, religious, libertarian, social contract and feminist theories, it makes sense to talk about duties of care running to particular persons.<sup>316</sup> Duty language abounds in ordinary moral discourse and practice: parents have duties to care for their children; friends have duties to watch out for one another; professionals have circumscribed and well-defined duties to their patients or clients; strangers have at least a base set of negative duties toward one another. Although it is perhaps embarrassingly obvious to say these things, it is necessary to do so, because in the spirit of empiricist rigor, Holmes, Prosser, and their followers have maintained that lawyers cannot employ the concept of duty, notwithstanding the fact that philosophical theory and common sense had previously found it quite tenable. Prosser's redundancy argument fails precisely because it assumes, without justification, that it is incoherent to speak of duties running to particular persons or categories of persons.

The final and most overtly normative version of the conceptual argument suggests that duty is pointless (unless it is code for a floodgates argument), because the functions of deterrence and compensation are already adequately secured by a system that imposes liability on the basis of unreasonable conduct proximately causing injury.<sup>317</sup> This argument also rests on a dogma about tort law, one which insists that conceptual categories must be incoherent unless they are tied to specific utilitarian goals, such as deterrence, compensation or administrative ease. Prosser was not able to recognize the possibility of a principle that links the justification for imposing a duty to compensate a plaintiff with the question of whether the defendant had actually breached a duty to the plaintiff. This principle treats liability-imposition as having a normative structure and significance apart from its instrumental value. While courts (and more recently, non-instrumental scholars of torts) give central prominence to this normative aspect of the law,<sup>318</sup> Prosser clearly had no room for it.

For all of these reasons, Prosser's argument that duty is conceptually incoherent boils down to the uncritical acceptance of the reductionist brands of empiricism and utilitarianism current in the legal academy of his day.

<sup>316</sup> See *supra* notes 296-301 (describing utilitarianism and discussing contemporary Kantian views).

<sup>317</sup> See *supra* text accompanying notes 156-62 (stating that most courts adhere to rules in nonfeasance, duty-to-rescue, emotional harm, and/or economic harm cases without fully considering Prosserian policy factors).

<sup>318</sup> See Coleman, *supra* note 21, at 66-67 (discussing the notion of correlativity essential to corrective justice theory); Zipursky, *supra* note 27, at 59-70, 88-93 (describing the requirement that a defendant's conduct be wrong in relation to plaintiff as central to tort law); see also WENRIB, *supra* note 23, at 114-44 (stating that correlativity is essential to the normative structure of private law).

With widespread recognition within the philosophical world and other parts of the legal academy that Prosser's purportedly "hard-headed" assumptions about moral concepts can no longer be accepted as axioms, tort law ought to be released from the grip of Prosser's meaninglessness, indeterminacy, redundancy, and pointlessness arguments. Whatever else can be said on its behalf, the Holmes-Prosser model of negligence, and its non-relational conception of duty, can no longer claim the status of conceptual truth.

## 2. Prosser's Political Argument

Prosser's political argument against the concept of duty rests on the claim that the concept was necessarily the servant of a politically and socially regressive regime of undercompensation.<sup>319</sup> This is a particularly important point in connection with privity and *Winterbottom*, and we shall have more to say about it in connection with *MacPherson*, below. For present purposes, it is important to see how weak the political argument is as an argument against use of the concept of duty. It hardly follows from the fact that *Winterbottom* and other nineteenth-century decisions relied on a concept of duty to deny liability, that the concept of duty is inherently preservative of the economic or political status quo. Rather, it is the conjunction of a requirement of duty with further premises, such as the premise that there is no duty from manufacturers to product users, that preserved the status quo. The Prosserian duty-skeptic has trouble recognizing this point, because he has trouble grasping the possibility of retaining the concept of duty while simultaneously rejecting its extant applications. This is because he does not credit the concept of duty with having any genuine content apart from its particular applications. And this, again, is another instance of his narrow-minded assumption that certain moral concepts lack content, and cannot really serve as loci of rational argumentation.

To be sure, one of the strengths of the Prosserian approach to torts, evidenced in the decisions of the California Supreme Court in the 1960s and '70s, is the willingness of judges who use this approach to engage in pragmatic adjustment of the law to new historical conditions and new questions.<sup>320</sup> But, as decades of constitutional decisions demonstrate, and as we will see in *MacPherson* itself, instrumentalists do not have a monopoly on pragmatic or critical reflection on the law.

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<sup>319</sup> See *supra* text accompanying notes 102-06 (describing the political argument for duty-skepticism).

<sup>320</sup> See *supra* text accompanying notes 152-55 (describing the California Supreme Court's adoption of the Holmes-Prosser model in *Rowland v. Christian*).



## IV. THE PLACE OF DUTY IN NEGLIGENCE LAW

Prosser's arguments against duty fail to establish the incoherence of moral and relational conceptions of duty. Indeed, they provide, at most, reasons why a certain kind of utilitarian should not be attracted to those conceptions. The hostility towards duty in modern torts scholarship can now be seen for what it is: an undefended commitment to empiricist and utilitarian philosophies, masquerading as a conceptually necessary axiom. By demonstrating this much, we hope to have created a willingness on the part of the reader to entertain the possibility of a non-reductive conception of duty. Our remaining task is to start to make the positive case for retention of such a concept as part of the tort of negligence. This we propose to accomplish by two means. First, we will show that, to the extent *MacPherson* stands as a progressive landmark, it is a testament not to the value of the Holmes-Prosser conception of negligence and its non-relational duty of care, but to a relational conception of duty. Second, we will suggest ways in which relational duty can and ought to play a constructive role in negligence analysis.

A. *The Moral of MacPherson Revisited*1. *MacPherson* and the Relational Conception of Duty

Let us return to Cardozo's opinion in *MacPherson*. Recall that Prosser and his intellectual heirs invoked that opinion as a standard bearer for the duty-skeptical, policy-driven Holmes-Prosser model of negligence. Their interpretation of *MacPherson* starts at a major disadvantage; for, as Posner admits, nowhere in Cardozo's opinion does one find the language of universal duty, reasonableness, and policymaking.<sup>321</sup> Instead, the opinion speaks in terms of a substantive conception of duty quite similar to the notion of relational duty that Holmes and Prosser found to be empty and misleading. Thus, the opinion treats the duty question as *the* issue of the case: "the question to be determined is whether the defendant owed a duty of due care and vigilance to anyone but the immediate purchaser."<sup>322</sup>

Further textual evidence against the Prosserian reconstruction is found in the opinion's repeated return to the issue of whether the defendant was obligated to *conduct itself* in a certain way. According to Prosser's account, the issue in the case was the policy question as to whether negligent product manufacturers should be required to compensate non-purchasers injured by

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<sup>321</sup> See POSNER, *supra* note 136, at 109 (noting that although it was Cardozo's "most important opinion," it was "modest . . . in pretending to be restating rather than changing the law" and "reticent . . . about the policy considerations relevant to the change it made").

<sup>322</sup> *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1051 (N.Y. 1916).

their products. For Cardozo, however, the resolution of that question turned on the duty issue; the issue itself had meaning for him apart from the question of liability. Moreover, its meaning did not concern whether a manufacturer does, or should, have a duty to *compensate* such a plaintiff. The questions, according to the court, were whether Buick had a "duty of vigilance,"<sup>323</sup> whether it bore an "obligation to inspect,"<sup>324</sup> how great was the "need of caution,"<sup>325</sup> and how "strict[ ]"<sup>326</sup> was the duty to which Buick had to conform its conduct. In its grandest passage, quoted earlier, Cardozo's opinion announces that he and his brethren have "put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law."<sup>327</sup> It would be hard to find a more emphatic announcement stating that manufacturers owe a duty to *conduct themselves* so as to attend to the safety of product users.

If we step back from the text of the opinion, we find another reason to conclude that *MacPherson* is not rightly understood as embracing the Holmes-Prosser model of negligence. *MacPherson* is, of course, one of Cardozo's landmark tort opinions, and in an even more famous opinion—*Palsgraf*—Cardozo explicitly rejected a universal conception of duty in negligence law.<sup>328</sup> The duty-skeptical interpretation of *MacPherson* thus suffers from a second interpretive problem; it is altogether inconsistent with Cardozo's other leading negligence decisions. Adhering to an anti-Holmesian view, *Palsgraf* insists that negligence is a "relation[al]" concept.<sup>329</sup> This was Cardozo's stated reason for denying liability,

<sup>323</sup> *Id.* at 1055.

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> *Id.* ("Both by its relation to the work and by the nature of its business, [Buick] is charged with a *stricter* duty." (emphasis added)).

<sup>327</sup> *Id.* at 1053.

<sup>328</sup> *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 100 (N.Y. 1928) ("What the plaintiff must show is 'a wrong' to herself; i.e., a violation of her own right."); see also WEINRIB, *supra* note 23, at 159-64 (discussing how *Palsgraf* rejects the universalist conception of duty in negligence law); Zipursky, *supra* note 27, at 7-15 (analyzing Cardozo's *Palsgraf* opinion as revealing a relational conception of duty).

<sup>329</sup> See *Palsgraf*, 162 N.E. at 101 ("Negligence, like risk, is thus a term of relation."). Proponents of the standard view of *MacPherson* thus tend to find Cardozo's *Palsgraf* opinion perplexing. See, e.g., WHITE, *supra* note 45, at 126-27. Some seem content to surmise that, in the years between *MacPherson* and *Palsgraf*, Cardozo came to recognize that *MacPherson* had opened the door to potentially massive new levels of negligence liability, and that he employed the language of relational duty in *Palsgraf* as a belated attempt to limit that liability. See *id.* Because these scholars have misread *MacPherson*, they are forced to posit a deep tension between Cardozo's two most famous tort opinions, and to resolve that tension by treating *Palsgraf* as a piece of ad hoc policymaking which uses the language of relational duty as a

notwithstanding the court's assumption that the railroad had caused Mrs. Palsgraf harm by its unreasonable conduct toward the package-carrying passenger. Most famously in *Palsgraf*, but consistently throughout his negligence jurisprudence, Cardozo insisted that the duty to act reasonably is not a duty owed to the world at large, but a duty owed to the plaintiff in particular.<sup>330</sup> This view is evident in Cardozo's language throughout *MacPherson* itself. It is also the reason that he thought the key question in that case was whether Buick owed a duty to MacPherson.

Third, and most importantly, our reading of *MacPherson* makes sense of Cardozo's legal argument in a way that Prosserian readings cannot. Cardozo derived the manufacturer's duty to the consumer almost entirely from case law, particularly the line of cases dealing with "inherently dangerous" products.<sup>331</sup> To the Prosserian, who regards the duty issue as raising a policy question, this focus on precedent poses something of a mystery. Prosser himself, as we have seen, assumed that Cardozo's doctrinal analysis was devoted entirely to proving the negative proposition that there is no meaningful distinction to be drawn between inherently-dangerous and not-inherently-dangerous products. Cardozo's rejection of this distinction, Prosser further reasoned, indicated that Cardozo believed that manufacturers owe duties of care to anyone who might be injured by their products, and hence evidenced his embrace of Holmes's duty to the world.<sup>332</sup> In fact, Cardozo's treatment of doctrine turns out to be far more subtle than Prosser took it to be. This discovery should hardly come as a surprise. If Prosser's reading were correct, it would be difficult to understand why *MacPherson* is regarded as an exemplar of judicial craft, rather than as a run-of-the-mill exercise in Realist law-skepticism.<sup>333</sup>

When Cardozo examined the precedents concerning inherently dangerous products, he saw that he could not limit the duty of care to manufactur-

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rhetorical smokescreen. See Zipursky, *supra* note 27, at 12 (stressing that Cardozo should not be viewed "as having a proximate cause view of the case"). Our analysis of *MacPherson*, by contrast, permits a unified understanding of the two opinions.

<sup>330</sup> See, e.g., *Ultramares Corp. v. Touche*, 174 N.E. 441, 444 (N.Y. 1931) (holding that an accountant's liability to third-party investors for a negligent audit of a client cannot rest on the duty of care owed to the client; rather it requires an independent duty owed to the investors); *Wagner v. International Ry.*, 133 N.E. 437, 437 (N.Y. 1921) (holding that a defendant who negligently imperils a third party owes a duty of care to a rescuer only because "[t]he wrong that imperils life is a wrong [not only] to the imperilled victim; it is a wrong also to his rescuer").

<sup>331</sup> See *supra* note 64 and accompanying text.

<sup>332</sup> See *supra* text accompanying notes 126-28 (discussing Prosser's reading of *MacPherson*).

<sup>333</sup> See DWORKIN, *supra* note 217, at 111-15 (holding out *MacPherson* as an exemplar of legal analysis); LEVI, *supra* note 64, at 14-18 (same).

ers of a special class of products whose purpose or normal function was to injure and destroy. Even if one could articulate an adequate description of that category, the courts clearly had not relied on any such notion. Indeed, they had already extended the "inherently dangerous" label to coffee urns and scaffolding.<sup>334</sup> Cardozo was thus compelled to reject any doctrinal distinction based solely on the purpose or function of the product in question. But, in rejecting the idea that the law of duty tracks the nature of the product, he did not thereby simply abandon or ignore these precedents (as Prosser's reading suggests). Rather, Cardozo offered an alternative interpretation of the cases, one that fit better and provided a more suitable justification for them.

In Cardozo's view, the "thing of danger" cases were not a haphazard collection. Instead, they embodied the principle that a duty of care running from a manufacturer to a non-privity will attach whenever (1) the nature of the product alerts the manufacturer that, if it is negligently made and not checked, it is likely to endanger physical safety; (2) the product, if it is negligently made and not checked, is likely to endanger the physical safety of users not in privity with the manufacturer; and (3) the product will not be checked for safety by anyone prior to its use by persons not in privity with the manufacturer. Thus, according to Cardozo's reading of precedent, the intrinsic dangerousness of a product was *relevant* to the duty inquiry insofar as it tended to establish that the manufacturer would, or should, know that the product posed a danger of physical harm to persons with whom the manufacturer was not in privity. But, the dangerousness of a product was not a *necessary* condition for the existence of such a duty between the manufacturer and users not in privity with the manufacturer.

Within the inherently dangerous product cases, Cardozo found the principle that, where the nature of the product provides notice that due care in manufacture is necessary to avoid probable physical harm to a class of persons who cannot be expected to inspect the product, a duty of care runs to that class of persons, regardless of privity. As such, his reading of the cases does not adopt Holmes's notion of the duty to the world. The obligation to take care described by Cardozo is not grounded in a general or generic duty to the public. Rather, it derives from a set of obligations, owed by certain classes of defendants to certain classes of plaintiffs, that Cardozo found implicit in the common law of torts, including the "thing of danger" precedents.

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<sup>334</sup> See *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1052 (N.Y. 1916) (referring to *Staitler v. Ray Mfg. Co.*, 195 N.Y. 478, 482 (1909), where the court held a manufacturer liable for injuries resulting from an "explosion of a battery of steam-driven coffee urns" because the appliance was one which was "liable to become dangerous in the course of ordinary usage").

For Cardozo, then, the issue in *MacPherson* was exactly the issue he posited: whether manufacturer attentiveness to possible dangers to product users not in privity with it is conduct that it is obligated to undertake for those users. From a modern perspective, the question may seem too trivial to merit asking, but in Cardozo's day, it was not quite so easy. It is now part of our ordinary social and moral understanding that businesses which manufacture and market products to consumers have certain responsibilities to those consumers, and that those consumers have certain legitimate expectations of manufacturers. These sorts of expectations are built by the law itself in some measure. But, these expectations are not wholly products of the law; the law reflects a developing understanding of that normative relationship.<sup>335</sup> As Cardozo himself recognized in his jurisprudential writings, judicial announcements of rights and duties often serve the role of crystallizing norms that already have currency on certain shared social understandings.<sup>336</sup> In so doing, courts express, justify, and make enforceable these norms.

*MacPherson* was a groundbreaking case because it crystallized the modern understanding of the responsibility of manufacturers to those who use their products. The moral idea, embedded in negligence law, that actors owe due care to others, applied in light of the evolving social understandings of the role of the manufacturer, enabled Cardozo to identify a legal duty of due care running from manufacturers to certain product users. Yet, this extension of the concept of duty was inchoate in the public culture of the day, and it conflicted with both the privity rule of *Winterbottom* and the more general notion, also extant at this time, that manufacturers owed duties only to their privies.

Cardozo brought this tension to a head, and resolved it by making explicit and public a norm requiring manufacturers to be vigilant of the physical safety of product users, regardless of privity. He thus wrote: "We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of the contract and nothing else."<sup>337</sup> The expression of this norm was the recognition of a duty. Moreover, in deciding to permit liability to turn on the breach of such a duty, Cardozo transformed a social and moral norm into an enforceable le-

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<sup>335</sup> See Goldberg, *supra* note 43, at 1334-35 (discussing how the law often incorporates social norms and societal expectations); Zipursky, *supra* note 27, at 92 (discussing how the law is based upon "moral, political, and social considerations" and actively reinforces and encourages treatment of others in line with these moral and social norms).

<sup>336</sup> See, e.g., Goldberg, *supra* note 43, at 1334-42 (discussing how laws often reinforce social norms); see also CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 104 (1987) ("The legal claim for sexual harassment made the events of sexual harassment illegitimate socially as well as legally for the first time.").

<sup>337</sup> *MacPherson*, 111 N.E. at 1053.

gal norm. This, it appears, is what Cardozo had in mind when he wrote: "We have put the source of the obligation where it ought to be. We have put its source in the law."<sup>338</sup>

## 2. *MacPherson*, Foreseeability, and the Universality of Duty

In previous Sections, we provided a historical account demonstrating how modern tort scholars have come to treat duty-skepticism as obvious or inevitable.<sup>339</sup> This account should itself help to explain the reason that *MacPherson* is persistently misread as a Holmesian opinion: it is all but unthinkable to modern tort scholars that a universally applauded, "progressive" decision by a great judge such as Cardozo could have derived from any other approach. By employing the constitutional law analogy to explain why the duty-skepticism position is neither obvious nor irresistible,<sup>340</sup> we next sought to establish the viability, in principle, of a non-Holmesian, relational conception of duty and, by implication, a non-Holmesian reading of *MacPherson*. Finally, in the preceding sub-Section, we marshalled substantial evidence to show that *MacPherson* and other leading Cardozo opinions are, in fact, best read as endorsing a relational conception of duty, and cannot be understood as emblematic of Holmesian duty-skepticism. Now, to complete the case for our reading we must address two common confusions that *MacPherson* seems to have engendered, one concerning the place of *foreseeability* in duty analysis, and the other concerning what we will call the *universality* of duty.

### a. *Foreseeability and Duty*

*MacPherson* is sometimes thought to have held that the duty element of Mr. MacPherson's case was satisfied once the court found his injuries were foreseeable to the defendant. More generally, this interpretation proceeds, Cardozo thought that duty is based on reasonable foreseeability. Thus, as in *Palsgraf*, if Cardozo concluded that the plaintiff's injury was unforeseeable, then he found no duty. By contrast, if he concluded that the injury was foreseeable, as in *MacPherson*, then he found a duty.

It is important to see that this interpretation of *MacPherson*, and of Cardozo's negligence jurisprudence generally, is just another way of asserting that Cardozo endorsed the Holmes-Prosser approach. According to this "foreseeability account," the negligence cause of action still requires only

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<sup>338</sup> *Id.*

<sup>339</sup> See *supra* Part I.B and notes 75-124 (discussing academic analysis of the duty element of negligence).

<sup>340</sup> See *supra* Part III and notes 262-320 (reconsidering duty-skepticism).

that the defendant cause injury by acting unreasonably (toward anybody). Foreseeability is then employed in place of a multi-factor balancing test as the criterion for determining whether to grant the defendant a policy-based immunity from liability. The employment of foreseeability to set the limit on liability may be justified either by instrumental concerns about unmanageable levels of litigation or excessive damages, or by concerns about the fairness of imposing liability for remote harms. But, either way, duty is conceived of non-relationally, with foreseeability serving as an externally driven cap on liability for negligence.

As an account of *MacPherson*, the foreseeability variant on the Holmes-Prosser model fails on several grounds. First, Cardozo's opinion does not limit liability to foreseeable harms. Indeed, it explicitly rejects the notion that duty turns on mere foreseeability, emphasizing instead that the imposition of a duty requires a much higher degree of awareness of potential harm.<sup>341</sup> More broadly, as our previous discussion of the case makes clear, the defendant's awareness of potential harm to the plaintiff was but one aspect of the court's analysis and holding. Cardozo further required that the defendant have reason to *know* its product would be dangerous if negligently made (and that it would not be inspected prior to use). Whether a manufacturer has a duty to a consumer under *MacPherson* will therefore hinge in part on product-type, and will only apply to those products that are *known* to be dangerous if negligently made, even if the plaintiff's product-related injury was within the range of reasonable foresight. Perhaps most strikingly, the duty articulated by Cardozo applies only when the product, if negligently made, is "*reasonably certain to place life and limb in peril.*"<sup>342</sup> The foreseeability account, by contrast, suggests that all foreseeable harm to a plaintiff should be actionable, and that a plaintiff should not be limited to claims for injuries to life and limb, let alone "reasonably certain" instances of such injury.

The foreseeability account we have described also fails because it blurs the distinction between treating the foreseeability of a plaintiff's injury as a necessary condition for the existence of a duty and treating it as a sufficient condition. While *Palsgraf* does treat reasonable foreseeability as a necessary condition,<sup>343</sup> neither *Palsgraf* nor *MacPherson* treats reasonable fore-

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<sup>341</sup> See *MacPherson*, 111 N.E. at 1053.

If to the element of danger there is added *knowledge* that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. . . . *There must be knowledge of a danger, not merely possible, but probable.*

*Id.* (emphasis added).

<sup>342</sup> *Id.* (emphasis added).

<sup>343</sup> See *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 99 (N.Y. 1928) (noting that a plaintiff

seeability as a sufficient condition.<sup>344</sup> If the foreseeability account is intended to preserve the idea that duty is non-relational, then the foreseeability account must maintain that breach, causation, and injury are, in some sense, enough for a negligence action, and that the addition of a foreseeability test for duty is merely a policy-driven check on liability. This, however, would require treating foreseeability as a sufficient condition for duty, which it plainly is not in *MacPherson*.<sup>345</sup>

As indicated above, the foreseeability account also claims to wield the support of *Palsgraf*. In fact, however, it entirely misses the point of that case. To be sure, reasonable foreseeability does figure prominently in *Palsgraf*, but not as a part of a non-relational account of duty. On the contrary, as many scholars have grudgingly appreciated, and as one of us has recently demonstrated, Cardozo's *Palsgraf* opinion can only be understood as invoking a relational conception of duty.<sup>346</sup>

*Palsgraf*, in fact, contained two duty issues: one obvious and one subtle. The obvious issue was whether the railroad owed a duty of care to its

"might claim to be protected against unintentional invasion [of her bodily security] by conduct involving in the thought of reasonable men an unreasonable hazard that such invasion would ensue. These, from the point of view of the law, were the bounds of her immunity").

<sup>344</sup> *Palsgraf* denies a right of action to the plaintiff, of course, and contains no dicta stating that reasonable foreseeability suffices for liability. *See id.* The insufficiency of foreseeability in *MacPherson* is discussed *supra* at notes 341-42 and accompanying text.

<sup>345</sup> Those who believe that *MacPherson* treats foreseeability as a sufficient condition for duty may claim support in the following passage: "If he is negligent, where danger is to be foreseen, a liability will follow." *MacPherson*, 111 N.E. at 1053. This statement, however, appears only after Cardozo has taken great care to describe the various limitations on the manufacturer's duty of care that we have just discussed. In fact, it is part of an argument for setting further limits on the duty of care owed by component part manufacturers:

[I]t is possible that *even knowledge of the danger and of the use will not always be enough*. . . . We are dealing now with the liability of the manufacturer of the finished product, who puts it on the market to be used without inspection by his customers. If *he* is negligent, where danger is to be foreseen, a liability will follow. We are not required at this time to say that it is legitimate to go back of the manufacturer of the finished product and hold the manufacturers of the component parts. To make their negligence a cause of imminent danger, an independent cause must often intervene; the manufacturer of the finished product must also fail in his duty of inspection. It may be that, in those circumstances, the negligence of the earlier members of the series is too remote to constitute, as to the ultimate user, an actionable wrong.

*Id.* (emphasis added) (citations omitted). Given this context, it seems clear that the word "he" in the sentence in question is a shorthand reference to the type of manufacturer on which Cardozo has already placed a duty of care, that is, the manufacturer that knows, or should know, that its product poses a serious threat of physical harm to ultimate users and will not be inspected prior to use.

<sup>346</sup> *See Palsgraf*, 162 N.E. at 100 ("The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation."); Zipursky, *supra* note 27, at 7-15 (interpreting *Palsgraf* to assert that foreseeability of harm to the plaintiff is required in order to make a breach of a duty negligent relative to that plaintiff).



customer, Mrs. Palsgraf. Clearly, the railroad did owe a duty of care to its customer, and there was no need for any discussion of reasonable foreseeability in order to establish this conclusion. Instead, Cardozo invoked foreseeability to deal with the question of *breach* as a standard for setting the outer boundary on the level of precaution that the railroad was obligated to take.<sup>347</sup> If it were the case, he reasoned, that the only harm Mrs. Palsgraf suffered was unforeseeable to the conductors who pushed the package-carrying passenger, then the court would have to conclude, *as a matter of law*, that any duty owed by the railroad to Mrs. Palsgraf was not breached. And, that is precisely what Cardozo did conclude. But, this conclusion, in turn, gave rise to the subtle duty question in the case: namely, the question of why it should *matter* that the railroad did not breach its duty to Mrs. Palsgraf, given that the railroad was already presumed to have breached the duty of care it owed to the other passenger. As both Cardozo and Andrews fully recognized, this question posed quite starkly the issue of whether duty should be viewed relationally or non-rationally; that is, whether Mrs. Palsgraf should be permitted to borrow the railroad's negligence toward another, differently-situated passenger to satisfy the missing breach element of her own cause of action. As we have seen, Cardozo endorsed the relational account, while Andrews opted for the non-relational view. Again, reasonable foreseeability had no bearing on Cardozo's resolution of this duty issue.

At bottom, the foreseeability account fundamentally misconceives the role that foreseeability plays in *MacPherson*. In *MacPherson*, foreseeability is not intended as a policy-driven or fairness-based limitation on the harms for which a wrongdoer may be held liable. To read the opinion this way is to convert what Cardozo regarded as a duty question concerning conduct and obligation into a proximate cause question concerning the extent of liability. For Cardozo, the foreseeability of harm to a class of persons goes to the question of whether certain conduct is owed to those persons, not to whether certain liabilities are appropriately borne by defendants. Thus, when discussing why the privity rule did not apply to actions based on mislabeled poisons, Cardozo wrote: "A poison, falsely labeled, is likely to injure any one who gets it. Because the danger is to be foreseen, there is a duty to avoid the injury."<sup>348</sup> The manufacturer's awareness that a certain class of persons will be endangered if it sends out a mislabeled poison—the high likelihood of this danger to non-privies—is a ground for saying that the defendant is obligated to those persons to take due care to label the poison

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<sup>347</sup> See *Palsgraf*, 162 N.E. at 100 (reasoning that, to ask defendants to take measures against unforeseeable harms is to demand of them "extravagant" care, rather than ordinary, reasonable care).

<sup>348</sup> *MacPherson*, 111 N.E. at 1051 (emphasis added).

correctly. Foreseeability, in other words, is conceived in *MacPherson* as part of a relational conception of duty, rather than an external check on liability.

b. *Universality and Duty*

The other major objection to our reading, one closely related to the foreseeability argument just raised, concerns the scope of duty as it is conceived in *MacPherson*. This objection is rooted in an inference that many have been tempted to draw from *MacPherson's* rejection of the notion that duty depends on contract. If one extends beyond the literal terms of this negative holding, and reads *MacPherson* to say that the existence of a duty does not depend on contract *or status*, then we seem to have a basis for treating it as a case that declares that the duty of due care is *universal*—Holmes's duty to all the world.

This objection rests upon an understandable, but serious, confusion in the logic of duty. Suppose we assume, for purposes of argument, that nineteenth-century negligence law stated that each person's duties of due care ran only to a limited set of persons with respect to whom he or she stood in a pre-established, socially-recognized relationship: doctor to patient, innkeeper to guest, manufacturer to customer-in-privity, carrier to passenger, and so on.<sup>349</sup> This view has two components. One component is the idea that duties run *to* persons or classes of persons—that they are in this analytic sense relational, rather than non-relational or simple. The second component is that these relational duties of due care run only to persons with whom one has a pre-existing, socially-structured relationship that fits into one of a limited set of forms. The first idea might be called “the Relationality Thesis”; the second might be called “the Special-Relationship Thesis.”

Now consider the assertion that a person's duty of care is *universal*. This can be understood in two ways: as a denial of the Relationality Thesis, or as a denial of the Special-Relationship Thesis. The former—which was the view of Holmes, Prosser, and Andrews in *Palsgraf*<sup>350</sup>—entails that the duty of due care is a general duty of acting reasonably. But, this cannot be Cardozo's view; as we have seen, he explicitly rejected it in *Palsgraf*.<sup>351</sup> Understood as a denial of the Special-Relationship Thesis, however, the

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<sup>349</sup> This was not actually the state of the law in the nineteenth century or earlier. See *supra* text accompanying notes 52-56 (providing examples of duties of care owed to strangers).

<sup>350</sup> See *Palsgraf*, 162 N.E. at 102 (Andrews, J., dissenting) (“Due care is a duty imposed on each one of us to protect society, . . . not to protect A, B, or C alone.”); *supra* text accompanying notes 85-90 (discussing Holmes's and Prosser's accounts of duty).

<sup>351</sup> See *Palsgraf*, 162 N.E. at 100 (defining one's duty to another as arising from his relation to the other).

avocation of universal duty entails only that one may have duties to take care not to harm others, even if one's relationship to those persons does not fit into one of the traditional categories with respect to which courts have announced such duties. More generally, it suggests that one may have duties of care to *each* other person in society, even to strangers. But, duties of due care, even according to this view, are still relational; they still involve obligations to particular persons or classes of persons to take care not to injure them. Thus, for example, a person who does not fall within the class of persons to whom the defendant owes a duty of care cannot recover for her injuries, even if those injuries are caused by the defendant's breach of duty to others.<sup>352</sup>

Cardozo's rejection of the privity requirement, and his use of foreseeability in his *MacPherson* opinion, indicate that he rejected the Special-Relationship Thesis. This does not entail, however, that he rejected the Relationality Thesis. There is thus a limited sense in which scholars like Prosser, White, and Posner are correct in thinking of *MacPherson* as a universal duty case.<sup>353</sup> Because it denies that legal duties of care can only exist where there is a preexisting relationship between defendant and plaintiff, Cardozo's opinion can be described as endorsing a universal duty of care in the second sense mentioned above. Unfortunately, this description tends to promote confusion between the two different senses of "universal" duty. And this confusion explains why Prosserians are baffled when they come to *Palsgraf*, in which Cardozo explicitly rejects the idea of a duty to the world. Cardozo did believe that duties of due care sometimes ran between persons not in a pre-existing business or personal relationship with one another, and he was a universalist in this sense. But, he also believed that duties were relational—that they ran to persons or classes of persons—and he was an anti-universalist in that sense.

It might help to amplify this point by considering how Cardozo would have responded if confronted with a suit against an auto manufacturer brought by a pedestrian or some other bystander who suffered a foreseeable injury as a result of the manufacturer's negligence.<sup>354</sup> If one assumes that it

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<sup>352</sup> See *infra* text accompanying notes 379-86 (discussing a situation in which a plaintiff cannot recover for harm caused by a defendant's negligence towards others).

<sup>353</sup> See *supra* text accompanying notes 126-37 (discussing these scholars' interpretation of *MacPherson*).

<sup>354</sup> Cardozo's court appears never to have directly confronted the issue of bystander recovery in negligence actions for product-related injuries, although the ability of such plaintiffs to recover is perhaps implicit in the holding of earlier cases. See, e.g., *Torgesen v. Schultz*, 84 N.E. 956, 957 (N.Y. 1908) (holding that a bottler/vendor of carbonated water owes a duty of care to a domestic servant employed by the purchaser, who was injured when the defendant's bottle exploded as the servant positioned it in the purchaser's home). With the adoption in

is in the spirit of *MacPherson* to permit a cause of action by this bystander,<sup>355</sup> does it not follow that Cardozo conceived of duty non-relationally? For the reasons just articulated, the answer is “no.” The logic of *MacPherson* might well imply the existence of a duty to that bystander, and therefore, a cause of action. But, this would be because certain bystanders fall within a class of persons to whom vigilance of life and limb is a duty, which duty was breached. The absence of a pre-existing relationship would not by itself negate the existence of a duty of care owed by the manufacturer to the bystander. Rather, it would indicate that if there was a duty, it would be a duty of the sort that strangers owe to other strangers, and might well be narrower in scope or less demanding than the duty the manufacturer owes to those with whom it has pre-existing relationships. Thus, even if we assume that *MacPherson* entails the imposition of liability on manufacturers to bystanders who suffer foreseeable injuries as a result of the manufacturer’s negligence, that assumption does not undercut our claim that Cardozo’s account of duty is relational.<sup>356</sup> To put the point more generally:

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1973 of strict products liability, the Court of Appeals explicitly extended liability for product-related injuries to bystanders. See, e.g., *Codling v. Paglia*, 298 N.E.2d 622, 628-29 (N.Y. 1973) (“We accordingly hold that, under a doctrine of strict products liability, the manufacturer of a defective product is liable to *any* person injured or damaged if the defect was a substantial factor in bringing about his injury and damages . . .” (emphasis added)).

<sup>355</sup> See *Wagner v. International Ry.*, 133 N.E 437, 438 (N.Y. 1921) (holding that a defendant owes a duty of care to a bystander who attempts to rescue a third-party injured by the defendant’s negligence).

<sup>356</sup> Cardozo’s notion of relational duty can also be brought into focus by contrasting *MacPherson* with *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960), another seminal product-injury case with which it is often paired, and sometimes confused. In *Henningsen*, the New Jersey Supreme Court, following *MacPherson*, rejected the auto manufacturer’s argument that Mrs. Henningsen’s cause of action for injuries—which sounded in warranty rather than negligence—was barred by the absence of privity. See *id.* at 83. Also following *MacPherson*, the Court reasoned that the privity limitation was harsh and illogical in an age when cars were marketed almost exclusively through dealers. See *id.* However, when *Henningsen* invoked modern conditions, it did so in part as a reason to look behind the formalities of the transaction in order to treat the manufacturer and ultimate purchaser as standing in a contractual relationship within which the dealer served as a mere intermediary. Thus, it rejected the manufacturer’s lack-of-privity argument, in part, because it found that, for all practical purposes, there *was* a contractual relationship between the manufacturer and the consumer. See *id.*

In *MacPherson*, Cardozo faced similar facts, and shared the sense that, given modern commercial realities, it was absurd to suppose that the car dealer was the only one who could pursue a negligence action against the manufacturer. Yet, his goal was not to expand the realm of duty by extending the law of contract. Quite the opposite, he denied that contract determined duty. His court, he insisted, had “put aside the notion that the duty to safeguard life and limb . . . grows out of contract and nothing else.” 111 N.E. 1050, 1053 (N.Y. 1916). Clearly, for Cardozo, putting the duty of care “in the law,” *id.*, meant recognizing duties of care between parties to a contract, between persons in a more informal relationship, such as manufacturer-user, and between strangers with no pre-existing relationship at all. See *id.*

one need not embrace Holmes's notion of a duty to the world in order to conclude that strangers owe one another duties of care. Conversely, the fact that strangers do owe each other duties of care is no reason to believe that negligence law is appropriately reduced to a generic, non-relational directive instructing actors to avoid acting unreasonably.

One might ask what point is served by describing Cardozo's approach as articulating a relational theory of duty, given that the theory treats even strangers as having "relationships." The short answer is that, from a relational view, the question of liability to the plaintiff does not turn on whether liability is morally permissible or socially desirable, but rather turns on whether defendant's conduct breached an obligation to the plaintiff. Hence, in both *MacPherson* and *Palsgraf*, Cardozo held that the critical question was not (as Holmes and Prosser would suppose) whether the imposition of liability made for good policy or was fair, but whether the defendant was obligated to use ordinary care to protect the physical well-being of the plaintiff, and whether the negligent conduct alleged by the plaintiff was a breach of that duty. This "short answer" in fact contains several distinct ideas which will be explained in the next section: that duty is to be understood deontologically, not consequentially; that standing is to be understood relationally, not instrumentally; and that the concept of duty in negligence is relationship-sensitive, rather than generic. For the moment, our point is simply that, as a conceptual matter, a relational, but universalistic, conception of duty is in important ways different from a non-relational conception.

### 3. The Moral of *MacPherson* and the Lesson of *Lochner*

We have argued in this Section that *MacPherson* must be read to embrace a relational conception of duty. If we are correct, then the reasons that *MacPherson* was rightly decided and *Winterbottom* wrongly decided are not the reasons offered by the Prosserian. The privity requirement was not, as Prosser argued, simply an ill-advised policy limitation on liability, although perhaps it was that.<sup>357</sup> The deeper problem was its assumption that the du-

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<sup>357</sup> Recall that Prosser took *Winterbottom* to be driven by the Barons' concern not to let excessive tort liability retard industrial growth. See *supra* text accompanying note 115 (discussing the Barons' concern that "a flood of costly litigation . . . [would have] crushing liability on nascent industry"). This reading is anachronistic, in part because it assumes that the Barons thought that the judiciary ought to decide individual tort cases by fashioning ad hoc, policy-based limitations on liability. In fact, as the Barons seem to have viewed the case, they had two choices: treat negligence as the now-familiar four element tort, with the understanding that the duty issue would be determined by narrowly construed precedent, or treat negligence as the Holmes-Prosser tort, but *without* the Prosserian policy backstop. Thus, when the Barons deployed their floodgates arguments, they did so as a basis for *rejecting* the Holmes-Prosser model on the ground that it generated the "outrageous" consequence that actors would

ties of due care owed by manufacturers were fixed by contract. Contract can support such duties, and often bears on their existence. But, the duty to safeguard life and limb does not end with contract.

If we once again invoke the parallel between the histories of tort and constitutional law and scholarship, it should now become apparent that, in its essentials, the mistake of *Winterbottom* was the error of *Lochner* itself. In both cases, the courts identified a normative concept—"duty" in the former, "right" in the latter—with a particular, narrow version of that concept that corresponded with some of the central tenets of classical liberalism. In fact, both of these particular conceptions expressed the same fundamental principle: namely, the idea that one ordinarily is entitled to set the terms of one's interactions with others as one wishes. The claim made by the plaintiff in *Winterbottom*—that there exist duties of care within the world of commerce that do not derive from contractual undertakings—posed a fundamental challenge to this libertarian ideal, just as the maximum hours legislation in *Lochner* posed the same challenge from a somewhat different direction.

Holmesian constitutional scholars thought that, in order to reject *Lochner*, they had to reject rights. As modern scholars have shown, they were wrong. To shake free from *Lochner*, it was not necessary to abandon the concept of rights altogether. Rather, rights had to be detached from laissez-faire ideology. In a similar fashion, Holmesian tort scholars have for decades maintained that, to overcome *Winterbottom*'s narrow conception of duty, it is necessary to eliminate duty as a substantive component of negligence. To his credit, Cardozo recognized and avoided this mistake. The moral of *MacPherson* thus resides in his astute insight that duty had to be liberated from its narrow, contractual incarnation, not rejected outright.

### B. *Toward a Relational Conception of Duty*

Our goals have been to depict the prevailing view of duty in negligence law, to point out ways in which this view is both interpretively and prescriptively inadequate, and to suggest, by drawing a parallel with changes in the notion of rights in constitutional theory, that we might do better to move beyond skepticism to a theoretical framework that permits deployment of

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be liable for any injuries traceable to their unreasonable conduct. In other words, it was in large part because the Barons did *not* think it possible or appropriate to limit liability through policy analysis that they rejected the Holmes-Prosser account of negligence and instead adopted the traditional understanding of negligence built around relational duties of care. Cardozo, we have argued, followed the Barons insofar as he saw no reason to reject the traditional understanding of the tort. Instead, he insisted on a broader, more flexible interpretation of the duty concept.

duty as a non-reductive normative notion. We have tried to highlight the desirability of such a possibility by showing that even to make sense of what Holmesians themselves hail as a great decision—*MacPherson*—one must employ a relational conception of duty. Additionally, in the Introduction, we alluded to several standing problems in negligence law that are connected to the Prosserian construction of duty, including: the existence of large bodies of common law for which the Holmes-Prosser model fails to account; the confusion over the meaning of “foreseeability” and its place in duty analysis; the unmanageability and instability of Prosserian policy analysis; the perplexing place of the common law in a Prosserian world; and the failure of Prosserian negligence to mesh with common sense in such a way as to guide conduct.<sup>358</sup> The cumulative force of these arguments leads us to conclude that the development of a non-instrumental notion of the duty of care within negligence law is a topic that merits scholarly attention. In what follows, we abstract from our account of *MacPherson* and outline what such a theory might look like and why it might meet some of the interpretive and prescriptive shortcomings we attributed to the instrumentalist view.<sup>359</sup>

### 1. Overview of the Relational Conception of Duty

As noted above, we are not the first to employ the term “relational duty” in articulating a non-instrumental account of negligence law, and it is therefore especially important to say just what we mean by it.<sup>360</sup> When we use the phrase “the relational conception of the duty of due care in negligence law,” or “the relational conception of duty,” we intend to denote a conception that is *relational* in its analytical structure, as opposed to non-relational; a conception that is *relationship-sensitive*, as opposed to abstract and context-independent, and that is *non-instrumental* in that it rejects a reductive-instrumentalist account of “duty” in terms of the pros and cons of liability rules, and takes seriously the idea that duty refers to a kind of obligation. Each of these features will be explored below. Furthermore, we will suggest that both the conceptual structure and, to a certain extent, the content of the judgments about duty that are embedded in negligence law, reflect ordinary moral judgments about duties owed to others. Finally, we emphasize that

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<sup>358</sup> See *supra* text accompanying notes 27-41 (outlining limitations of Prosserian analysis).

<sup>359</sup> For a more detailed exploration of how our relational concept of duty illuminates a particular area of negligence law, see Zipursky, *supra* note 160, analyzing legal malpractice doctrine.

<sup>360</sup> See *supra* note 146 (noting that Coleman and Weinrib have discussed relational conceptions of duty).

our conception of duty is embedded in the “duty” element within negligence law, as opposed to the duty of repair.

Let us also be clear on what *sort* of account we aim to be offering. In the first instance, we offer a *descriptive* or *interpretive* account of the conception of the duty of due care as it is found in the common law of negligence. We argue that what we call the “relational conception of duty” better explains the form, content, and pattern of normative reasons given within duty doctrine than Prosser’s conception, or instrumentalist views more generally, and that it better explains the rules and principles we actually have.

We believe our account also has normative implications. Our interpretive claims, conjoined with a norm to the effect that judges normally have a *prima facie* obligation to apply the common law in a manner that is faithful to the conceptions and principles embedded in it, provides support for the claim that judges should employ a relational conception of duty in negligence law. Additionally, there are many things to be said on behalf of the relational conception of duty in negligence law in its own right. Thus, we shall argue that the law stands a better chance of remaining stable, manageable and predictable under the relational conception than under a Prosserian conception; that a law incorporating a relational conception more effectively and more efficiently guides human conduct; that a relational conception better preserves respect for the law; that a relational conception better integrates law into a variety of personal, professional and institutional settings; and that a relational conception is more consistent with the traditional role of the judiciary in negligence law. None of this presupposes or purports to show that the relational conception of duty is itself true as a moral matter; rather, it suggests that various desiderata for selecting possible models of negligence law from a normative point of view are best satisfied by the relational conception.

Some readers will probably want to know the answer to a further question: whether these claims about duty are true, or, more modestly, whether they are the best justified answers to moral questions about what our duties really are. This Article is not principally devoted to such questions, because we believe results of substantial importance can be reached without answering them. But, we do not deny that we think a relational conception of duty has significant plausibility as a moral matter, even standing apart from the law. More importantly, we harbor no illusions that first-order moral questions about duty can, or should, be finessed entirely within any legal theory that attempts to rehabilitate a moral concept within the law and to revitalize the use of such a concept. At the very least, if the relational conception of duty is obviously morally wrong, no appeal to *stare decisis* and institutional functionality ought to save it. But, in defining, explaining, and



displaying the relational conception, we show that it exceeds in plausibility the low threshold that is necessary for our descriptive and functional superiority arguments to retain their force.

a. *Relationality and Relationships*

Our conception of duty is relational. The duties of care on which negligence actions are predicated are duties *to persons or classes of persons*. One is obligated to take a certain level of care to ensure that certain injuries do not befall those persons or classes of persons. The duty question in a negligence case is whether the defendant owed a duty to the plaintiff to use a particular level of care to avoid the sort of injury the plaintiff suffered. The breach question is the question of whether, assuming there was a duty to the plaintiff to use that level of care, the defendant did use the appropriate level of care. In typical personal injury cases, it is so clear that there *is* a duty of reasonable care from the defendant to the plaintiff that the duty question recedes and breach is simply the failure to take ordinary care to avoid injuring the plaintiff. But, in cases where the existence of such a duty from the defendant to the plaintiff is controversial—such as *MacPherson*—the duty question is both formally and, as a matter of practice, prior to the breach question.<sup>361</sup>

As our discussion of both *MacPherson* and *Palsgraf* illustrates, a plaintiff's right to recover damages for an injury caused by defendant's negligence exists only if the defendant breached a duty of due care owed to the plaintiff. Hence, the relational nature of duty is not merely relevant to the question of when negligent conduct is an actionable tort; it is also relevant to the question of *who is entitled to bring an action* based on the defendant's negligent conduct. In this respect, the conception of duty embedded in the law of negligence accompanies a particular sort of *standing* requirement, as has been analyzed in detail elsewhere.<sup>362</sup> Our negligence law does not give

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<sup>361</sup> Note that the relational conception of duty is not offered as a full theory of the primary duty of conduct in negligence law, but rather of the "duty" element within that primary duty. If "primary duty" in negligence law is taken to refer to the duty, a breach of which will trigger a right of action by a plaintiff against a defendant, then the primary duty must be one in which a breach includes the causing of injury. Hence, it is plausible to view the primary duty of negligence law as a complex duty of a particular form: a duty not to injure another person by failing to stay within the duty of care one owes her or him. See Ripstein & Zipursky, *supra* note 44. Although one of us (Zipursky) has in fact argued for just this analysis, and it is consistent with the views offered here, it is not essential to the view offered in this Article. We raise the issues in order to (1) call attention to the need to integrate a theory of the duty of due care into a general account that explains what triggers a right of action; (2) suggest that such an integration is possible; and (3) give an example of such an integration.

<sup>362</sup> See Zipursky, *supra* note 27, at 27-40 (arguing, as a doctrinal matter, that negligence law contains implicit but pervasive standing requirements).

a plaintiff a right of action against anyone who injured him, but only against a defendant who breached a duty not to injure him.<sup>363</sup> A right of action is not merely compensation for those hurt; it is an avenue of recourse for those to whom duties have been breached, against those who breached the duties.<sup>364</sup>

In addition to its relational nature, our conception of duty is characterized by what might be called *relationship-sensitivity*. The existence and content of the duties of care one person owes to another are dependent, in part, on the nature of the relationship between those persons.<sup>365</sup> Determining whether Buick owed MacPherson a duty to be vigilant to avoid physical injury required a determination of the duties within a manufacturer-consumer relationship. Likewise, for example, the scope of a physician's duties of care to another person depends, in part, on whether that person is that physician's patient.<sup>366</sup> Similarly, the scope of a landowner's duty to another depends, in part, on the relationship between the landowner and the plaintiff.<sup>367</sup> The nature of the relationship between defendant and plaintiff also is relevant when determining whether a defendant must take affirmative acts to prevent a plaintiff from being injured,<sup>368</sup> or whether a defendant owes a plaintiff a duty to avoid causing emotional or economic harm.<sup>369</sup>

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<sup>363</sup> See *id.* (explaining the circumstances under which third parties may recover for negligence on the part of the defendant).

<sup>364</sup> See *id.* at 70-93 (arguing that the corrective justice theory of tort law cannot account for tort law's standing requirement).

<sup>365</sup> See generally Samuel Scheffler, *Relationships and Responsibilities*, 26 PHIL. & PUB. AFF. 189 (1997) (arguing that the scope and content of moral duties and special responsibilities to others are relationship-sensitive).

<sup>366</sup> See, e.g., *Clarke v. Hoek*, 219 Cal. Rptr. 845, 851 (Cal. Ct. App. 1985) (holding that a defendant physician monitoring other physicians performing surgery on the plaintiff did not have a physician's duty of care to the plaintiff because the plaintiff was in no sense *his* patient); *Werner v. Varner, Stafford & Seaman, P.A.*, 659 So. 2d 1308, 1311 (Fla. Dist. Ct. App. 1995) (holding that a physician who negligently failed to inform a patient of the potential effects of a medication on the patient's driving did not breach a duty to the motorist rear-ended by the patient). Our claim is not that physicians have duties only to their patients, but rather that the scope and content of the duties they owe to others depends upon whether those others are their patients. See, e.g., *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 340 (Cal. 1976) (in bank) (holding that when a therapist recognizes or should recognize that a patient presents risks of serious danger to identifiable persons, then the therapist has a duty to warn those persons). *Tarasoff*, discussed *infra* at text accompanying note 412, is so striking because it purports to carve out a niche of duty owed by psychiatrists to non-patients.

<sup>367</sup> See *infra* text accompanying notes 394-97 (discussing the rules for invitees, licensees, and trespassers in landowner liability law).

<sup>368</sup> See RESTATEMENT (SECOND) OF TORTS §§ 315-20 (1965) (articulating special relationships that warrant exceptions to the general rule that there is no duty to protect persons against harm from third parties).

<sup>369</sup> See Zipursky, *supra* note 27, at 28-32 (outlining negligence law in the area of economic and emotional harm).

While our negligence law certainly recognizes some duties of care running from one stranger to another, stranger-stranger is a particular category of relationship. Indeed, it is the category in which our duties of care are generally least demanding.

The relationship-sensitivity of duty in negligence has been closely followed by courts applying and extending the law of duty in their daily work,<sup>370</sup> but it has not been adequately recognized by scholars or by courts in their more theoretical moments. For example, while Professor Weinrib, like the courts in *Heaven v. Pender*<sup>371</sup> and *Donoghue v. Stevenson*,<sup>372</sup> has recognized the relational nature of the duty of due care, he explicitly treats this as a matter to be understood in quite abstract and universal terms.<sup>373</sup> This leaves Weinrib hard-pressed to explain, among other things, the contours of our doctrine of nonfeasance and misfeasance, because he implicitly elevates the non-actionability of nonfeasance in stranger-stranger cases into an essential feature of negligence law.<sup>374</sup> Similar interpretive problems appear to beset Weinrib with regard to emotional and economic harm: for him, a certain type of harm either *is* sufficiently important to justify constricting another's liberty in a scheme of reciprocal and equal liberty and security, or it is not.<sup>375</sup> Yet, our actual negligence law does not offer a uniform answer on liability for emotional and economic harm; whether there is a duty to take care to avoid imposing such harms is dependent on the relationship between the parties.<sup>376</sup> In this way, we argue, a relationship-sensitive notion of duty better accounts for both the structure and content of our negligence law.

#### b. *Priorities, Relationships, and Duties*

Can a relational conception of duty be given a rational reconstruction within an intelligible framework of moral principle? We begin with the mundane observation that being a moral person involves, in part, constrain-

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<sup>370</sup> See *infra* Part IV.B.2 (discussing the importance of relationships in evaluating the existence of a duty).

<sup>371</sup> 11 Q.B. 503 (Eng. C.A. 1883).

<sup>372</sup> 1932 App. Cas. 562 (appeal taken from Scot.).

<sup>373</sup> See WEINRIB, *supra* note 23, at 125 (discussing the importance of the unity of the plaintiff-defendant relationship in negligence law).

<sup>374</sup> See *id.* at 153 (“[F]or the plaintiff’s injury to be actionable, it must be the consequence not of mere failure to act but of the defendant’s risk creation.”).

<sup>375</sup> See *id.* at 134 (“[T]o recover in tort, the plaintiff’s injury must be to something, such as personal integrity or a proprietary entitlement, that ranks as the embodiment of a right.”).

<sup>376</sup> See *infra* text accompanying notes 382-83 (discussing the standing rule in the context of pure economic harm).

ing one's conduct in light of certain aspects of the well-being of others.<sup>377</sup> Having a sense of duty is critical to being a moral person because it involves a recognition of the importance of acting in light of others' well-being. The existence of duties of care to others—a parent's duty to his child, or a physician's duty to her patients—causes individuals to focus on certain aspects of the well-being of others. This enables individuals to prioritize certain aspects of their conduct. It also enables them to sustain and develop an internalized normative pull towards a certain set of actions. This is the feeling of being obligated in certain ways to those others—a parent's internal orientation to fulfill his duties to his child, or a physician's recognition of the necessity of doing what her patients' well-being requires. Societies possess many practices and institutions that have the effect of inculcating certain social norms that simultaneously implant or sustain in members a recognition and feeling of certain duties to others. Some of these norms are relatively definite—the duty not to kill others—applicable to each against each. Other norms are only applicable in more narrow contexts and are more open-ended in content, for example, a lawyer's duty to represent her clients' interests zealously.

Duties of care are a subset of relational duties more generally. They are relatively open-ended duties that take a wide variety of shapes and forms depending on context and relationship. Because we recognize a wide range of duties of care in our society, each of us prioritizes certain needs of others and certain required courses of conduct in some manner, and each of us is motivated by this sort of pull to action. Duties of care enable us as actors to select courses of conduct for ourselves that are consistent with important aspects of others' well-being. They also enable us to sustain friendships, family relations, professional relationships, business contacts, employment relationships, and so on. That is not only because we could not remain in such settings if we failed to conform our conduct to the relevant norms—though that is largely true. It is, more deeply, because the creation of these relationships goes hand-in-hand with the cultivation of an internalized motivation and disposition to focus on another's interests.

The foregoing suggests that, were there unlimited duties of due care, a sense of duty would no longer be capable of playing a prioritizing role.<sup>378</sup>

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<sup>377</sup> See JOSEPH RAZ, *Duties of Well-Being*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 1, 1-28 (1994) (advancing a theory of duties that connects those duties to individual well-being).

<sup>378</sup> As this sentence indicates, the foregoing account of duty is certainly illuminated, in part, by considerations that are arguably characterizable as "consequentialist," notwithstanding the generally deontological and anti-instrumentalist bent of our position. However, to recognize that the value of the concept of duty and a sense of duty are explicable, in part, by consequentialist thinking is hardly to concede that net consequences are the sole moral measure of

The very notion of prioritizing certain interests of others carries with it the implication of a limitation on what is given high priority. Moreover, were duties not varied by reference to kinds of relationships, certain forms of relationships and social relations would not even be possible.<sup>379</sup> The twists and turns of the duties that are accepted within everyday morality reflect the twists and turns of an ordinary citizen's sense of duty. It is essential to the roles played by the sense of duty that they have these limitations and variations.

## 2. Relational Duty in the Common Law of Negligence

In a broad range of negligence cases, courts focus specifically on whether a defendant who was concededly negligent in some respect breached a duty of care to the plaintiff. *Palsgraf* is the most famous such case, but it is the tip of the iceberg.<sup>380</sup> For example, in *Ultramares Corp. v. Touche*<sup>381</sup> and in a spate of accountant malpractice cases where it is assumed that the defendant accountant was negligent, the question is whether nonclients who are injured may recover. The courts' analyses of these cases turn on whether the defendant had a duty of due care, not just to his client, but to the nonclient plaintiff as well. In *Robins Dry Dock & Repair Co. v. Flint*<sup>382</sup> and in pure economic harm cases more generally, the defendant has acted negligently but the plaintiff's ability to recover for losses occasioned by that negligence is unclear.<sup>383</sup> Courts resolve the issue by deciding whether the defendant breached any duty running to the plaintiff. A currently unsettled issue, exemplified by the Illinois Supreme Court's recent decision in *Doe v.*

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actions, duties, and policies. And, more pertinently, it is hardly to recognize that the concept of duty in the law should be understood instrumentally.

<sup>379</sup> According to Raz:

Some activities and relationships cannot be specified except by reference to duties (or rights) . . . . Some activities and relationships which cannot be specified except by reference to duties are intrinsically good. Friendship is such a case in which the two properties coincide. Friendships ought to be cultivated for their own sake. They are intrinsically valuable. At the same time the relations between friends, the relationship which constitutes friendship, cannot be specified except by reference to the duties of friendship. When this is the case the justifying good is internally related to the duty. The duty is (an element of) a good in itself.

RAZ, *supra* note 377, at 41.

<sup>380</sup> See Zipursky, *supra* note 27, at 16, 27-40 (discussing cases in which recovery is denied due to the lack of a breach of duty to the plaintiff by the defendant).

<sup>381</sup> 174 N.E. 441, 444 (N.Y. 1931) (Cardozo, C.J.) (holding that the plaintiff could not recover economic loss from the defendant accountant due to lack of privity).

<sup>382</sup> 275 U.S. 303, 308 (1927) (holding that recovery of pure economic injury may only be had where the defendant breaches a duty to the plaintiff to avoid economic injury).

<sup>383</sup> See Zipursky, *supra* note 27, at 30-32 (detailing the substantive standing rule in the context of cases of pure economic injury).

*McKay*,<sup>384</sup> concerns whether a psychotherapist whose patient accuses her parent of childhood sexual abuse is liable for the emotional harm the parent suffers. Again, courts in cases like *McKay* make the issue turn on whether the defendant therapist had a duty to the parent to take care not to cause him emotional harm; the *McKay* court decided such a duty did not exist.<sup>385</sup> Cases like *Ultramares*, *Robins Dry Dock*, and *McKay* make little sense within a Prosserian framework, which does not permit analysis in terms of duties of conduct running to particular persons. The pattern of rules and exceptions declared by courts is more intelligible within a relational conception of duty.

The idea of prioritization can first help explain the general rule that there is no duty to take care to avoid causing another emotional or economic harm.<sup>386</sup> Our duties to take reasonable care not to cause physical injury or property damage to others are quite burdensome. There is a great deal about which to be careful, and the burden increases with the number of activities in which one is involved. At this stage in the development of our shared conception of duty, and in the development of the law, these are duties of care each person owes to every other person. They are universal duties in the relational but unrestricted sense. To add to these duties other general duties to take care to avoid causing emotional and economic injuries would be enormously burdensome. Indeed, it would arguably be so burdensome that it would undercut the capacity of the sense of duty to prioritize and to focus.

Conversely, however, there are certain relationships in which there is a duty to avoid emotional harm. Thus, for example, in *Gammon v. Osteopathic Hospital of Maine*, the Supreme Court of Maine recognized the widely held rule that a funeral home or mortician has a duty to take care not to impose emotional harm on the decedent's loved ones by mishandling the corpse.<sup>387</sup> This duty is obviously consistent with the recognition that duty is

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<sup>384</sup> No. 83094, 1998 Ill. LEXIS 913 (June 18, 1998). For a discussion of a case factually similar to *McKay*, see Cynthia Grant Bowman & Elizabeth Mertz, *A Dangerous Direction: Legal Intervention in Sexual Abuse Survivor Therapy*, 109 HARV. L. REV. 549, 555-56 (1996), concluding that third-party recovery in a case involving an adult survivor of abuse is unsound because it "might well close off a promising avenue (therapy for sexual abuse survivors) for resolving a key social problem and at the same time strengthen an abusive (and patriarchal) aspect of our social structure."

<sup>385</sup> See *McKay*, 1998 Ill. LEXIS 913, at \*15 (holding that "the defendant therapist owed a duty of care to her patient only, and not to nonpatient third parties").

<sup>386</sup> See PROSSER & KEETON, *supra* note 27, § 54, at 359-66 (noting that the failure to take precautions against emotional harm is generally not actionable). Failure to take precautions against economic harm is generally not actionable either. See *id.* § 129, at 978.

<sup>387</sup> 534 A.2d 1282 (Me. 1987) (extending from the mortician cases an imposition of duty on the hospital to avoid emotionally harming a deceased's relative by mishandling a corpse).

a prioritizing notion; indeed, it is just this sort of harm upon which we expect and want a mortician to be focused. Likewise, an accountant obviously has a duty to take reasonable care to avoid economic harm to his client: that is exactly what we want the accountant to be prioritizing.<sup>388</sup> More generally, our context-sensitive, relational notion of duty explains why special relationships affect the contours of negligence. The relationship between defendant and plaintiff actually can be used to explain why we *expect* defendants to take precautions against certain kinds of harm to a plaintiff, not simply why defendants must pay if they do not take precautions.

Second, the contours of duty doctrine often reflect a feel for the place of duty in a relationship or an institutional structure. A clear example is the attorney's duty to a client.<sup>389</sup> The duty of due care to a client embraces far more care, for far more and greater kinds of harm, than many other sorts of duties.<sup>390</sup> This is, in part, because the relevant professional institutions and social structures cultivate and value a particular kind of lawyer-client relation. To combine this with the point about prioritizing, a lawyer's sense of duty to the client not only involves a very high level of care regarding a wide range of interests, but also a prioritizing of the client's interests above the interests of others. And hence, we should not be surprised that when the law gets to the question of what duties of care the lawyer owes to nonclients, the law offers a rather thin set of duties, particularly where recognition of such duties would threaten to conflict with the duties owed to clients.<sup>391</sup> In *Goodman v. Kennedy*,<sup>392</sup> for example, the court held that an attorney's negligent conduct leading up to a transaction does not normally give rise to liability to adverse parties in the transaction, because there is no duty of due care to those persons. Conversely, courts have had little trouble imposing a duty of care to plaintiffs in cases like *Lucas v. Hamm*,<sup>393</sup> where the defen-

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<sup>388</sup> See PROSSER & KEETON, *supra* note 27, § 129, at 1001 (explaining that cases for liability turn "on a special relationship or an assumption of responsibility by the negligent promissor, and equally on the presence of a narrow and particular class of potential plaintiffs").

<sup>389</sup> See Zipursky, *supra* note 160 (applying the relational conception of duty to explain legal malpractice doctrine).

<sup>390</sup> See generally 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 1:101, at 1 (2d ed. Supp. 1998) (identifying four categories of duties owed by lawyers to clients).

<sup>391</sup> See generally 2 HAZARD & HODES, *supra* note 390, §§ 4:100-4.4:105, at 707-764.4 (detailing the relationship of lawyers with third parties in contexts other than litigation).

<sup>392</sup> 556 P.2d 737, 743 (Cal. 1976) ("The present defendant had no relationship to plaintiffs that would give rise to his owing plaintiffs any duty of care in advising his clients that they could sell the stock without adverse consequences.").

<sup>393</sup> 364 P.2d 685, 689 (Cal. 1961) ("[T]he main purpose of the testator in making his agreement with the attorney is to benefit the persons named in his will and this intent can be effectuated, in the event of a breach by the attorney, only by giving the beneficiaries a right of

dant negligently drafted a will, and plaintiffs (the intended beneficiaries of the testator) were unable to inherit because of the negligence. Though privacy is missing, the imposition of a duty to intended beneficiaries is consistent with, and perhaps demanded by, an adequate contextual understanding of the relationships among the attorneys, clients, and intended beneficiaries.

The significance of relationships is also reflected in the three-fold distinction among invitees, licensees, and trespassers in the traditional law of landowner liability.<sup>394</sup> Although a contract or undertaking is not a necessary condition for duty, each does normally give rise to a range of duties of care. It follows that those who invite others to their land for business purposes have substantial duties of care to those persons, and in particular, have substantial duties to take care that their premises are safe. Conversely, as a general matter, the law recognizes almost no duties of care extending from landowners to trespassers.<sup>395</sup> This policy embodies the intuitive idea that one is not obligated to watch out for the interests of those who enter one's land against one's right. An extreme case is the widespread conviction that burglars shall not be permitted to recover in negligence from those whose homes they were burgling.<sup>396</sup> Between the trespasser and the invitee is perhaps the most frequent guest, the licensee. Because the licensee comes with permission, the owner cannot wash his hands of all duties. However, because the relationship among the parties is that of equals, neither of whom enjoys a material benefit from the other's presence, a middle level of duty controls.<sup>397</sup>

A relational conception of duty, when understood in connection with the idea of prioritization, may also help to explain the reason that negligence law draws a distinction between nonfeasance and misfeasance.<sup>398</sup> Duties to refrain from misfeasance do not threaten to subsume all of one's decisions.

action . . .").

<sup>394</sup> See, e.g., *Carter v. Kinney*, 896 S.W.2d 926, 928 (Mo. 1995) (defining and enumerating the duties owed to invitees, licensees, and trespassers).

<sup>395</sup> See, e.g., *Tantimonico v. Allendale Mut. Ins. Co.*, 637 A.2d 1056, 1062 (R.I. 1994) (holding that landowners do not have a duty to save trespassing motorcyclists). The famous "attractive nuisance" exception to this rule for certain child trespassers is set forth in *RESTATEMENT (SECOND) OF TORTS* § 339 (1965), stating the various conditions which will make a possessor of land liable for "physical harm to children trespassing thereon caused by an artificial condition upon the land."

<sup>396</sup> See *supra* note 39 (discussing California's enactment of legislation establishing that landowners do not owe a duty of care to burglars injured by negligently maintained premises).

<sup>397</sup> See, e.g., *Carter*, 896 S.W.2d at 928 (stating that "the possessor owes a licensee a duty to make safe dangers of which the possessor is aware").

<sup>398</sup> See, e.g., *Harper v. Herman*, 499 N.W.2d 472, 474-75 (Minn. 1993) (holding that boat owners have no affirmative duty to prevent harm to passengers with whom they have no special relationship).



By contrast, were there a duty of due care under the law to prevent harm, one would be pervasively burdened with a duty to prevent a variety of harms. Not only would such a requirement sit poorly with common sense—which treats most affirmative acts to strangers as supererogatory, not obligatory<sup>399</sup>—it would not mesh with a tenable conception of duty. Social, institutional, professional, and contractual relationships, however, often expand the duty of care by sweeping in affirmative acts, just as they often expand it to include the obligation to be vigilant to avoid causing emotional or economic harm. We suspect that such expansions are, again, for a combination of reasons. The capacity of duty to prioritize is consistent with a broader duty within these more selective settings. Moreover, the psychological role of a sense of duty as part of the maintenance of a relationship or an institutional structure explains why, in certain relationships, one is not merely responsible for non-harm, but is also responsible for a certain aspect of the betterment of another's condition.

Hence, we find courts deciding that there is a duty of affirmative aid in cases like *Farwell v. Keaton*,<sup>400</sup> where the plaintiff and the defendant were social companions carousing together, but that there is no affirmative duty, in cases like *Harper v. Herman*,<sup>401</sup> where a defendant who had no prior relationship to the plaintiff was held to have no duty to warn the adult plaintiff of the risk of diving into shallow water.

The lack of duty to rescue strangers in emergencies is a notoriously controversial area of the common law,<sup>402</sup> and our model explains why. The general rule of nonliability for nonfeasance matches our socially shared sense of duty; it makes sense from the point of view which prioritizes a certain subset of the acts one owes to others. However, when individuals are confronted with emergencies—such as the person who happens upon a drowning child<sup>403</sup>—our common sense moral intuitions tell us that there is a duty to rescue, even if in most jurisdictions, negligence law does not. The

<sup>399</sup> Cf. Epstein, *supra* note 23, at 201 (“[T]he distinction is taken between that conduct which is required and that which, so to speak, is beyond the call of duty.”).

<sup>400</sup> 240 N.W.2d 217, 222 (Mich. 1976) (holding that the defendant had a duty to aid his social companion, who was in distress).

<sup>401</sup> 499 N.W.2d at 474-75 (finding no special relationship between a plaintiff and a defendant when the plaintiff is a guest on the defendant's boat).

<sup>402</sup> See, e.g., *Yania v. Bigan*, 155 A.2d 343, 346 (Pa. 1959) (holding that because the defendant had not placed the plaintiff in a dangerous position, the defendant had no duty to rescue the plaintiff, who was drowning before him). Compare Epstein, *supra* note 23, at 189-204 (discussing the reasons that tort law should not impose liability for failure to rescue), with Weinrib, *supra* note 147, at 251 (arguing that tort law should impose liability for failure to perform easy rescue in emergencies).

<sup>403</sup> See *Handiboe v. McCarthy*, 151 S.E.2d 905, 907 (Ga. Ct. App. 1966) (finding no duty to save a drowning child).

identification of emergencies as a special category in which affirmative duties of aid apply, notwithstanding the stranger-stranger relationship, makes sense within the relational conception of duty we have sketched. A category of "emergency," in which another person's physical well-being is immediately and urgently dependent upon one's action, is itself a salient moral notion that can play a significant prioritizing role. However, a category of "emergency" does not threaten to swamp each of us with pressing responsibilities, thereby undermining the capacity of the sense of duty to prioritize. The puzzle is then to explain why the common law rejects a general duty of aid in emergencies. The most convincing answer is that, within the area of affirmative aid, the *law of duty* insists on brighter lines than we find in the *conventional morality of duty*. The rule of nonliability for failure to rescue in emergencies thus combines a potentially defensible general nonfeasance/misfeasance distinction with a strong preference against exceptions. This distinction prevents the law from recognizing a widespread moral conviction that emergencies warrant an exception to the ordinary rule that one has no affirmative duties to protect others, absent special relationships.<sup>404</sup>

Finally, a relational conception of duty may also help to clarify the role of the much abused term "foreseeability" in the tort of negligence, and the related issue of how to allocate the roles of judge and jury in negligence law.<sup>405</sup> Initially, the foreseeability of the harm that the plaintiff suffered at the hands of the defendant is relevant to the question of breach, because whether ordinary care entails taking precautions against particular injuries in specific circumstances turns, in part, on how foreseeable those injuries are to the defendant. And, foreseeability is also relevant to the determination of proximate cause, because unforeseeability of injury to a plaintiff is an important, albeit not exclusive, ground for arguing that injuries or damages are too remote to warrant imposition of liability on the defendant—even if the defendant breached a duty to the plaintiff. Both breach and proximate cause are jury issues;<sup>406</sup> yet, courts have held that foreseeability is also relevant to duty,<sup>407</sup> which is usually regarded as a question of law for the court.<sup>408</sup>

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<sup>404</sup> See James A. Henderson, Jr., *Process Constraints in Tort*, 67 CORNELL L. REV. 901, 930-40 (1982) (arguing that the common law's failure to impose liability on the basis of a Weinribian duty of easy rescue in emergencies is attributable to process and manageability considerations). In other words, while it may be that pragmatic considerations provide the best explanation as to why courts have not imposed liability for failure to rescue, a substantive, non-reductive account of duty is needed to explain the following: why the law draws a sharp misfeasance/nonfeasance distinction in the first place; why there is no general duty to rescue; and why the category of "emergencies" seems to be a plausible candidate for being treated as an exception to the general rule.

<sup>405</sup> See *supra* text accompanying notes 38, 163-65 (discussing differing views on how foreseeability is relevant to duty, breach, and proximate cause).

<sup>406</sup> See PROSSER & KEETON, *supra* note 27, § 45, at 321 (stating that if "reasonable per-

Under the relational conception of duty, foreseeability can be relevant in at least two ways that implicate a substantive role for the court, not just the jury. First, as indicated above, a plaintiff has standing to bring a cause of action only if the defendant breached a duty owed to her. Thus, while the question, "Was the harm suffered by the plaintiff of a sort reasonably foreseeable to the defendant?" may be an issue for the jury, the broader issue, "Does the plaintiff's cause of action require that the plaintiff's injuries were of a sort reasonably foreseeable to the defendant?" is an issue of law. That there is such a requirement built into the relational conception of duty is a matter of law, and is enforced by the court. This is the role that foreseeability plays in Cardozo's *Palsgraf* opinion.

Second, under the conception of duty we have been advocating, courts face a threshold question as to whether members of the class of persons to which the defendant belongs owe a duty to members of the class of persons to which the plaintiff belongs, to take care to avoid a certain kind of harm. If the answer is "yes," then the breach question arises. Accordingly, the foreseeability of the particular plaintiff's injury to the defendant is relevant to the factual issue of whether the duty so interpreted has been breached. But, foreseeability is also relevant to the threshold question itself. Recall that according to our conception of duty, there is both a prioritizing aspect of duty and a relationship-constructing aspect of duty. If one has a duty of care to another, that other person figures (or should figure) in one's deliberation in a certain way.<sup>409</sup> Because the possibility of duty serving a prioritizing role is compromised by casting the duty net too wide, the question arises as to which types of persons are obligated to be vigilant to avoid causing certain types of harm to certain others. The ease or difficulty for persons in the defendant's category to anticipate those harms is relevant to whether it makes sense for such persons to be said to have a duty to be vigilant against causing them. Hence, as in cases such as *MacPherson*, the decision that certain defendants are particularly well-situated to foresee the sort of harm that befell the plaintiff is not only relevant to whether there was

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sons might differ, the issue of 'proximate cause' is submitted to the jury").

<sup>407</sup> See *id.* § 54, at 359 n.24 (listing foreseeability among the factors balanced by courts when determining the existence of duty).

<sup>408</sup> See *supra* note 37 and accompanying text (citing cases which hold that duty is a question of law for the court, but that foreseeability, which is a question of fact for the jury, has a determinative effect on the issue of duty).

<sup>409</sup> See *Donoghue v. Stevenson*, 1932 App. Cas. 562, 580 (appeal taken from Scot.) (holding that there is a duty owed to persons "so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question" (emphasis added)).

a breach.<sup>410</sup> It is also relevant to whether a category of defendant may properly be declared to owe a duty of due care to a category of plaintiff. Foreseeability, as it bears on the latter question, is a question for the court, not the jury.<sup>411</sup>

The role of foreseeability in duty analysis can be seen in the context of *Tarasoff v. Regents of the University of California*,<sup>412</sup> in which the California Supreme Court held that psychotherapists have a duty to those whom they could, through reasonable diligence, identify as being at risk of serious injury from an attack by the psychotherapist's patient. The difficult decision in the case was whether the therapist's superior, but not-wholly-reliable, ability to foresee injury to certain third persons justifies a conclusion that therapists have a general duty to be vigilant of harm to those persons, notwithstanding the therapists' potentially conflicting duties to their own patients. Without taking sides for or against *Tarasoff*, a relational conception of duty permits us to understand why the issue of foreseeability—that is, how well a defendant is situated to foresee the type of harm that was realized—is sometimes a distinctive issue in duty analysis.

### 3. Duty and Institutional Competence

These are the beginnings of our suggestions about how a relational theory of duty in negligence law might be used to lend coherence to the common law of negligence, where an instrumental theory clearly failed to do so. But, the second cluster of criticisms we proffered were prescriptive ones: that the instrumentalist standard tends to be unmanageable; that there may be no obvious reason that courts rather than legislatures should be lawmaking if the instrumental account is right; that the instrumental account sits poorly with common sense; and that it lacks the capacity to guide conduct.<sup>413</sup> We believe that a non-instrumentalist notion of duty along the lines suggested above will help to solve these problems.

We are suggesting that courts take the question of duty in negligence law at face value, rather than reducing it to a blunderbuss policy question.

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<sup>410</sup> See, e.g., *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 340 (Cal. 1976) (en banc) ("When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger.")

<sup>411</sup> The reasons as to why genuine duty questions (as opposed to breach questions misleadingly cast as duty questions) ought to be decided by the court is addressed *infra* in the text accompanying notes 415-22.

<sup>412</sup> 551 P.2d at 340 (identifying a therapist's duty "to take one or more of various steps" when determining "that his patient presents a serious danger of violence to another").

<sup>413</sup> See *supra* notes 39-40 and accompanying text (setting forth both instrumentalist and non-instrumentalist criticisms of the Holmes-Prosser model of negligence law).

Consider, for example, the duty to rescue doctrine as typified by *Farwell v. Keaton*.<sup>414</sup> Taken at face value, the question “Does one friend owe another a duty to use reasonable care to provide medical attention when one is suffering from an acute injury in the presence of the other?” is perhaps difficult, but not unmanageable. Answering this question does not involve predicting a huge array of policy implications, or balancing a wide range of incommensurable considerations. It involves probing whether, given our common law’s general unwillingness to articulate a duty of affirmative aid among strangers, and given its willingness to find such a duty in a range of formal “special” relationships structured by educational or professional institutions, the relationship between teenage friends carousing together should be deemed to support a duty of care broad enough to require reasonable efforts to provide medical assistance.<sup>415</sup> The answer involves extending these categories and articulating a principle embedded in the law. But, there is no reason to expect an unusual level of instability, unpredictability, or concealment of values in answering such a question, and hence there is no reason to treat it as suffering from the vices of unmanageability.

Similarly, there is no reason to think that the relational understanding of the duty question is better designed for legislatures than for courts. For, while norms are always being constructed and revised, in some sense it is misleading to regard the resolution of the duty question as a simple act of policymaking. Rather, concepts already in the law are being stretched in one direction or another, as litigants ask the courts whether the conception of duty inherent in the law should be understood to reach their cases. The interpretation of concepts embedded in the law, and their application to future cases, is quintessentially a judicial, not a legislative, activity—even though this interpretation may itself involve evaluative thinking, and even though it will certainly have policy implications.

Furthermore, one would expect the relational understanding of duty to sit well with common sense regarding duty. The relational conception accomplishes this by taking as its base the socially shared understandings of duty that are already embedded in the law, and seeking to advance the law by interpreting the content of duty in a manner that is sensitive to the development of social norms. While the Prosserian account sometimes purports to leave room for sensitivity to social norms, this openness is fundamentally

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<sup>414</sup> 240 N.W.2d 217 (Mich. 1976) (holding that a defendant owed an affirmative duty to aid his social companion, who was in medical distress).

<sup>415</sup> The *Farwell* court, in fact, held that the defendant owed a duty to the plaintiff on the ground that the defendant and the plaintiff “were companions on a social venture. Implicit in such a common undertaking is the understanding that one will render assistance to the other when he is in peril if he can do so without endangering himself.” *Id.* at 222.

at odds with the instrumental orientation of that approach. By contrast, the relational conception of duty gives our common sense understanding of duty a central place in the law of negligence.

Finally, we expressed concern that, by shifting to a notion of reasonableness as opposed to duty, and by advocating a broad policymaking approach to the contours of liability, scholars, judges, and citizens have begun to dissociate the idea of tort law from the notion that the law carries intrinsic motivational force.<sup>416</sup> The consequence, we speculated, was that society must increasingly come to rely on tort law's application and sanctions in order for the law to have any action-guiding force. If "duty" no longer means something one ought to feel bound to do, and if society wants individual conduct to be affected, then society must ratchet up the enforcement level, the penalty level, or both.

The relational conception of duty attempts to retain a mesh between our ordinary sense of what we owe others, and our sense of what the tort law requires of us. The law itself can bolster social and moral norms, and conversely, social and moral norms can bolster compliance with the law. To the extent that people can understand their legal duties to one another by fitting them into their moral, social, and professional frameworks, the law can be more easily internalized. Moreover, the individual sense of duty we feel in morality, if applied to our legal norms, is capable of significant action-guiding potential, quite apart from probabilistic speculations about the likelihood of liability.

The instrumentalist conception of duty, in its attempt to reach analytic clarity and to control liability, divided the concept of duty into two components: a non-relational conduct component, which required simple reasonableness, and an all-encompassing liability component, which looked to the overall consequences of a scheme of liability-imposition. Ironically, instrumentalists failed to see that a relational conception of duty may be better able to do both jobs. At the level of conduct, it permits a more selective set of norms that have a greater psychological grip than non-relational reasonableness, and that are mutually reinforcing with social and professional norms. The law is thus more easily internalized, guides citizens more reliably and with less enforcement, and commands greater respect.<sup>417</sup> Moreover,

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<sup>416</sup> For a discussion of the sense in which the norms of tort law have action-guiding force, see Zipursky, *supra* note 27, at 57-58, discussing various views of how the law guides conduct. See generally H.L.A. HART, *THE CONCEPT OF LAW* (1961) (describing the role of law in guiding private action); Dale A. Nance, *Guidance Rules and Enforcement Rules: A Better View of the Cathedral*, 83 VA. L. REV. 837, 858-63 (1997) (observing that law-abiding citizens treat legal rules as guidance rules, not simply as enforcement rules).

<sup>417</sup> Cf. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 468-88 (1997) (arguing that a just-deserts-based system better retains moral credibility

because the standard of conduct does not open up potential liability as widely as does mere reasonableness, it reduces the need for the court to make a wide range of apparently ad hoc decisions at the level of liability, for which they may be poorly qualified. In this manner, a relational conception of duty preempts many unmanageable, ill-considered policy judgments.<sup>418</sup> The fundamental rule determining liability is that if the plaintiff's injury stems from the defendant's breach of a duty of due care owed to the plaintiff, then the defendant will be liable to the plaintiff. The reach of such a rule is not nearly so ominous when we understand our duties in the more controlled and systematic manner offered by a relational conception of duty.

#### 4. Constitutional and Common Law: A Final Comparison

We have argued that the development of constitutional law and theory provides us with reasons to re-examine tort law. In fact, until now, we have understated our case in certain respects. The argument for a nonreductive conception of duty in tort law is stronger than the comparable argument in constitutional law. In constitutional law—particularly in the area of substantive due process—courts that take a rights-based approach may feel anxiety at the dearth of text and accompanying “legislative” history to support the identification of allegedly fundamental rights.<sup>419</sup> Yet, if the Constitution is the law, then there are legitimate concerns over whether the judge is merely fabricating a right. Second, by permitting judges to make sensitive calls on the moral question of the rights individuals possess, judicial review causes a shift of power from legislative bodies to courts, and, in some cases, from the states to the federal government.<sup>420</sup> There are, then,

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and better meshes with community norms than a direct utility-based system, and therefore, is more effective at guiding conduct).

<sup>418</sup> We should be clear at this point that we believe that there are certain classes of negligence cases in which policy is appropriately invoked to limit liability: for example, suits traditionally governed by immunity principles or suits that threaten to interfere substantially with the performance by public or quasi-public actors of important governmental functions. *See, e.g., Riss v. City of New York*, 240 N.E.2d 860, 860-61 (N.Y. 1968) (refusing for policy reasons to hold police liable for failing to protect plaintiff from violent ex-suitor); *cf. Aaron D. Twerski, Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts*, 57 N.Y.U. L. REV. 521, 527-35 (1982) (arguing that judges do, and should, use policy analysis to limit liability in certain difficult design defect cases). Our point is that instrumentalists have erred in arguing that the concept of duty in negligence law involves only policy analysis, and thus, courts have been forced to rely far too heavily on policy reasoning, which cannot bear the weight that they have put on it.

<sup>419</sup> *See, e.g., ELY, supra* note 234, at 43-72.

<sup>420</sup> *See, e.g., BRUCE ACKERMAN, 1 WE THE PEOPLE: FOUNDATIONS* 13-16 (1991) (arguing against aggressive judicial review of rights because “it is the People who are the source of rights”); *BORK, supra* note 222, at 159 (arguing that overaggressive rights reasoning by the

interpretive, separation of powers, and federalism problems that stem from rights-based accounts of the Constitution. Each of the rights theories we mentioned consists, in part, of an effort to retain a robust conception of rights while accommodating these concerns. It is not our business here to comment on the relative successes or failures of such projects. It is sufficient to point out that, while some cede more than others, there is a shared recognition that the project of facilitating rights discourse is rendered more delicate because of the need to remain consistent with an unchanging and carefully worded text, on the one hand, and the historically measured role of the federal courts, as compared with federal and state political branches, on the other.

The relational conception of duty in tort law does not face either of these problems. First, the common law of torts has no single document that is, itself, the key legal authority for the entire area. Rather, it depends upon an accretion of decided cases within the law. The authority of the principles underlying the law comes from its status as the common law, not from a particular text or from a judge's own initial evaluation of those principles. Similarly, the constitutional issues of separation of powers and federalism do not surface here. Indeed, they cut in favor of the analysis we are adopting. The judiciary has traditionally handled duty questions, and has traditionally been recognized to have the prerogative to do so. Text and separation of powers—two fundamental problems facing rights-based accounts of the Constitution—pose no obstacles to judicial duty-analysis in tort law.

While the tort conception of duty is less problematic than the constitutional conception of rights in these respects, there are nevertheless important similarities between them. The deontological conception of rights in constitutional theory, as articulated most prominently by Ronald Dworkin,<sup>421</sup> envisions a separation between two sorts of reasons bearing on government action. On the one hand, a multitude of moral, social, and economic factors

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judiciary threatens federalist values).

<sup>421</sup> See DWORKIN, *supra* note 217, at 81-149, 184-205 (providing an analysis of propositions about legal rights). We rely here on Dworkin's theory of rights to provide an analogue to our account of duty. In this respect, our argument provides the mirror image of his famous invocation of *MacPherson* to explain and justify his theories of constitutional rights and judicial review. See *id.* at 111-15. Dworkin has thus employed *MacPherson* as part of a general jurisprudential argument against instrumentalist and utilitarian accounts of law. He has also devoted attention to torts. See, e.g., DWORKIN, *supra* note 248, at 276-313 (arguing that a theory of law-as-integrity better justifies the common law of torts than economic theories); Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L.J. 353 (1997) (analyzing market-share liability). Nevertheless, we do not discern in his work an engagement with Cardozo's understanding of the substantive law of negligence, nor a critique of the standard Holmes-Prosser account of torts. We make this observation not to criticize Dworkin, but merely to note the different foci of our respective analyses.



must be weighed (and sometimes traded) against one another. On the other hand, there is a series of principles that frame the permissible scope of these broader policy choices.<sup>422</sup> We understand these framing principles as vesting political rights in members of the political community. By this we mean, in part, that certain precious individual interests should not be interfered with by the government in its usual policy-making choices.<sup>423</sup> Legal theorists have been captivated by this model of rights.

The rights theorist must explain what warrants treating certain principles as framing principles and what interests are sufficiently precious to deserve such treatment. Some answers to these questions have achieved widespread recognition. Courts, it is often said, are fit to decide what is in this privileged class because their judgment is independent of the actors who are most prone to invade these interests. The courts' place in our overall institutional structure permits an impressive kind of enforcement of this boundary, because their decisions are typically enduring, rather than fleeting, and their change is incremental rather than rapid—advantages where the role of principles is, in part, the provision of stability. There is ample evidence that the Framers envisioned courts serving this role.<sup>424</sup>

The concept of duty serves an analogous role in everyday individual decisionmaking. An individual has many decisions to make about many aspects of his or her life, including moral, financial, political, employment, family, and community decisions. These decisions are pluralistic, heterogeneous, and often, to a significant degree, consequentialist. Yet there is a separate sort of reason that affects our decisions about how to act—reasons pertaining to our duties towards others. In some ways, these reasons frame our decisions about how to act in daily life. Phenomenologically, the sense of a duty to another is a sense of being bound to another, recognizing an intense, often unquestioned, normative pressure to act or to refrain from acting a certain way in light of the duties one owes to others. As discussed earlier, the sense of duty contains a sense of the prioritization of the action to which one has a duty.<sup>425</sup> It also contains a sense of a line that one does not cross.

Our political system has selected the courts and the common law of torts to reflect a substantial component of our ordinary convictions about

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<sup>422</sup> See DWORKIN, *supra* note 217, at 184-205, 190-97 (discussing constitutional rights in the context of broader principles, such as the idea that citizens have certain fundamental moral rights against their government).

<sup>423</sup> See *id.* at 190 (“United States citizens are supposed to have certain fundamental rights against their Government, certain moral rights made into legal rights by the Constitution.”). We do not mean to suggest that Dworkin believes that rights are merely strong interests.

<sup>424</sup> See *id.* at 142 (“Chief Justice Marshall recognized [that] . . . the Supreme Court in the end, must have the power to declare statutes void that offend the Constitution.”).

<sup>425</sup> See *supra* text accompanying notes 378-79.

duty. Having seen the constitutional story, this should not be surprising. The common law provides a point outside of the individual's own preferences that serves as a sort of check on one's ordinary decisions. More generally, it permits the sense of duty to serve as a line, or a framing point, that is not to be crossed. In fact, the courts' power simply underlines the sense of the enforceability of the boundaries and the sense of the bindingness of the duty. Further, the common law's inertia as to duties ensures a kind of stability in the framework, even if what is inside the framework should be changing. Even where there is change, it is ordinarily incremental in a manner that permits continuity.<sup>426</sup>

Thus, both in constitutional law and in torts, the judiciary serves to delineate and to enforce a certain normative boundary, a boundary within which other normative decisions are made. In the constitutional case, the decisions are made by governmental bodies, and in the case of torts, the decisions are made by individuals and corporate entities. If this system is to function smoothly, the boundaries must remain enforceable, relatively stable and possible to grasp. Given their power, given the doctrine of *stare decisis*, and given their ability to reason in a manner that builds upon accessible everyday convictions, our courts have the capacity to do this job in both cases, if they permit themselves to engage in such reasoning.

Yet, the very advantages of duty-based reasoning in the courts are also its greatest hazards. For with progress—economic, industrial, political, social, scientific, and moral—comes a sense that our usual normative reasoning has been improperly bounded. However, we have planted these concepts with the judiciary precisely because of its capacity to produce relatively stable and enduring decisions. We have also internalized these concepts in a manner that exerts a sort of normative pressure which does not easily enter the mix of everyday practical reasoning about means and ends. In short, our institutional structures and our psychological concepts give rights and duties a staying power that is valuable, because they insulate certain sorts of interests and needs from the reach of everyday practical reasoning. Yet, while this insulation and staying power are invaluable in a day-to-day sense, they may become shortcomings, over the long term, because it is sometimes necessary to change our boundaries.<sup>427</sup>

*Winterbottom*, like *Lochner*, is a case of ossified boundaries. When such cases present themselves, it is tempting to resist the idea of normative boundaries altogether, and to try to remake the law within a flat conceptual structure, like utilitarianism, that takes in all considerations at one time.

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<sup>426</sup> See Goldberg, *supra* note 43, at 1364-65 (discussing Cardozo's incrementalism).

<sup>427</sup> See *id.* at 1353 ("[J]udges tend to lose a sense of the law as the expression of an ongoing community life.").

What Cardozo showed us in *MacPherson* is that there is another option. Where social and moral progress reveal that our legal boundaries are drawn in the wrong places, courts may penetrate to the principles underlying our boundaries and construct new boundaries. Just as the rejection of *Lochner* should be understood as the rejection of an ossified conception of rights, but not a rejection of rights altogether, so the moral of *MacPherson* must be understood as a rejection of an archaic conception of duty, but not as a rejection of duty itself.

### CONCLUSION

It is dogma among torts scholars that, as Prosser put it, duty is merely shorthand for a laundry list of policy factors bearing on whether liability should be permitted or barred in some class of cases. *MacPherson* is used as an emblem for this dogma because it eliminated the privity rule, which was the most notorious duty limitation in negligence law. In place of thinking about duty, scholars have told modern courts they must think about all the different results that may flow from opening and closing the floodgates of litigation in various degrees. Many courts, like those of California, have listened to the scholars and altered their negligence law so that reasonableness is the general standard of conduct and duty is simply a liability-management tool. Those jurisdictions that have left their duty law intact have done so apologetically, as if the honest course of action would be to follow Prosser and California.

Our aim has been to challenge this dogma. Duty, as the word itself suggests, is a non-instrumental concept. Yet, modern American tort law has been the object of a constant assault by thinkers, such as Holmes, Prosser, Rabin, and Posner, who recoil from the use of such concepts. In other areas of the academy, and in the courts, reductive instrumental thinking is no longer treated as gospel. Rights-based reasoning and duty-based reasoning are now recognized as playing a legitimate, and often essential role, within the law, and their philosophical credentials are at least equal to those of the utilitarian thinking which has dominated tort law for so many decades. Such concepts, it is true, can be captive to regressive regimes, and were so captive in the heyday of *laissez-faire* thinking. But, as constitutional scholars have shown in their reinterpretation of the *Lochner* era, the error of the *laissez-faire* courts lay in their assumptions about the content of rights and duties and about their static nature—not in the concepts of rights and duties themselves.

Ironically, *MacPherson* itself turns out to be an embodiment of a non-instrumental, relational conception of duty. The court ordered the manufacturer to pay compensation precisely because it understood the manufac-

turer-user relationship to be one that imposed a duty on the manufacturer to be vigilant of harm it might cause the user. The *MacPherson* court then read that duty into the law itself. Far from rejecting the concept of duty, *MacPherson* embraces duty, yet insists on a flexible, moral interpretation of the content of the concept.

A relational conception of the duty of due care should now be recognized as an option in negligence theory. Its deployment does not require abstract moral philosophy, but simply careful interpretation of the concepts of duty already present in the tort law. Unlike constitutional law, we need not be defensive about text because the relevant authority is the entire common law of negligence, which abounds with moral notions of duty. Nor should separation of powers or federalist concerns precipitate hesitation: the contours of tort law are traditionally the domain of the judiciary. For all of these reasons, the authority of courts to engage in deontological reasoning in tort law leaves an open field.

What does such a conception promise? We have only begun to formulate a wishful answer to this question. We hope to make headway on long-standing problems in the organization and interpretation of the common law of duty by candidly recognizing a connection between the nature of plaintiff-defendant relationships and the content of duties owed. By explaining how the contours of our relationship-based duties provide intelligible guidance for the contours of liability, we hope to diminish reliance upon multi-factor analyses that are unmanageable, unprincipled, and unpredictable. By recognizing that legal duties are a kind of obligation to others, we hope to keep alive the idea that the law binds not simply by the threat of liability, but by the force of duty.

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