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# Cardozo's Freudian Slips

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# CARDOZO'S FREUDIAN SLIPS

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Those of us who teach appellate opinions for a living are indebted to the great stylists—Marshall, Holmes, Cardozo, and Jackson—whose prose rises above the mostly turgid judicial plain.[1] Cardozo could write. But, his was "an alien grace."[2] Cardozo—to invoke his own typology of judicial styles[3]—was by turns magisterial, laconic, refined, precious, and persuasive. He could turn a phrase, but his prose was often overwrought. At his aphoristic best, he rivaled Holmes. At his worst, Cardozo could obscure thought "[b]ehind a cloud of words."[4]

Judge Posner notes that there are "two diametrically opposed" views of Cardozo's style—some praising it as terse and lucid and others criticizing it as fancy and overly precious.[5] Posner splits the difference, as it were: "The former style dominates in his judicial opinions; the latter is far more marked (though not dominant) in his nonjudicial writings."[6] There is some truth in this assessment. Several of Cardozo's best-known opinions—in particular, *MacPherson v. Buick Motor Co.*,[7] *Tauza v. Susquehanna Coal Co.*,[8] *Wood v. Lucy,*

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[1] Holmes complained in a letter to Pollack that "our reports were so dull because we had the notion that judicial dignity required solemn fluffy speech." HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874–1932, 132 (Mark de Wolfe Howe ed., 2d ed. 1961).

[2] Anon. Y. Mous, *The Speech of Judges: A Dissenting Opinion*, 29 VA. L. REV. 625, 630 (1943) (written by Jerome Frank). Frank complained that Cardozo often wrote as if "he had used a private time-machine to transport himself back into 18th Century England." *Id*. at 631.

[3] BENJAMIN N. CARDOZO, LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 10 (1931).

[4] Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 350 (1928) (Andrews, J., dissenting).

[5] RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 21-22 (1990).

[6] *Id*. at 22.

[7] 217 N.Y. 382 (1916).

[8] 220 N.Y. 259 (1917).

*Lady Duff-Gordon*,[9] and *Hynes v. N.Y. Central R.R.*[10]—are models of clear, edifying writing. In contrast, the famous "how trackless was the ocean" passage from *The Nature of the Judicial Process* is characterized by over-extended and mixed metaphors, literary allusion, and ornate prose.[11] Tellingly, Posner has to first edit the excess from the passage before he can pronounce it a "gem."[12]

Posner's generalization identifying different styles with different genres is not borne out by the evidence. Some of Cardozo's best epigrams appear in his extrajudicial writings. Consider three of my favorites.

- "They do things better with logarithms. . . , yet unwritten is my table of logarithms, the index of the power to which a precedent must be raised to produce the formula of justice."[13]

- "Life casts the moulds of conduct, which will some day become fixed law. Law preserves the moulds, which have taken form and shape from life."[14]

- "There is an accuracy that defeats itself by the over-emphasis of details."[15]

These lines exhibit a flow and grace that enhance rather than defeat their clarity. They are pithy, punchy, profound, and nearly as good as the classic criticism in *People v. Defore*:[16] "The criminal is to go free because the constable has blundered."[17]

Conversely, Cardozo's judicial prose was often overworked. Consider his opinion in *Welch v. Helvering*.[18] After the family grain business had declared bankruptcy, Welch became a purchaser for

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[9] 222 N.Y. 88 (1917).
[10] 231 N.Y. 229 (1921).
[11] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 166-67 (1921).
[12] POSNER, *supra* note 5, at 23.
[13] BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 1-2 (1928).
[14] NATURE OF THE JUDICIAL PROCESS, *supra* note 11, at 64.
[15] LAW AND LITERATURE, *supra* note 3, at 7.
[16] 242 N.Y. 13 (1926).
[17] *Id*. at 21.
[18] 290 U.S. 111 (1933).

another grain company. Over five successive years, Welch paid off the bankrupt company's debts and claimed the payments as business deductions. The Commissioner recognized that these payments served the bona fide business purpose of establishing good will with Welch's former customers. He nevertheless disallowed them, analogizing them to capital investments which are nondeductible. Cardozo also assumed that the payments to the bankrupt's former creditors were necessary to establish Welch in his new business. He concluded, however, that they were not "ordinary."[19] Cardozo admitted that the line between a capital investment and an ordinary business expense is unclear:

> Here, indeed, as so often in other branches of the law, the decisive distinctions are those of degree and not of kind. One struggles in vain for any verbal formula that will supply a ready touchstone. The standard set up by the statute is not a rule of law; it is rather a way of life. Life in all its fullness must supply the answer to the riddle.[20]

My tax professor practically snickered at this last line. We students made a running joke of it.

It is, of course, unexceptional to say that a legal question is a matter of degree. But, by what gauge are we to take its measure? Cardozo does not say. He suggests that the law must draw on cultural "norms of conduct" in distinguishing between ordinary and extraordinary expenses.[21] Fair enough. But, what factors should one consider? Should it matter that Welch acted on advice of three different bankers?[22] *Welch* is an example of what Posner identifies as a failure by Cardozo "to follow through on the pragmatic program by candidly displaying and analyzing the practical considerations bearing

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[19] *Id*. at 113-14.

[20] *Id*. at 114-15.

[21] *Id*. at 114. *See also* text accompanying *supra* note 14. Presumedly, this is what he means when he says—in proto-Wittgensteinian fashion—that the standard is "a way of life." *Cf*. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 241, 88e (G. Anscombe trans., 1953) ("It is what human beings say that is true and false; and they agree in the language they use. That is not agreement in opinions but in form of life.").

[22] Joel S. Newman, *The Story of Welch: The Use (and Misuse) of the 'Ordinary and Necessary' Test for the Deductibility of Business Expenses*, *in* TAX STORIES: AN IN-DEPTH LOOK AT TEN LEADING FEDERAL INCOME TAX CASES 197, 203 (Paul L. Caron ed., 2d ed. 2009).

on decision."[23] But it is more than that; it is a mystification. "Life in all its fullness" obscures rather than clarifies the analysis.[24]

Cardozo's judicial pronouncements were often opaque in just this way—not arbitrarily, but strategically. He admitted as much in his 1925 ALI address: "Those of us whose lives have been spent on the bench or at the bar have learned caution and reticence, perhaps even in excess. We know the value of the veiled phrase, the blurred edge, the uncertain line."[25] Cardozo was acutely aware that metaphors in law could be used to "enslave" rather than "liberate" thought.[26] He knew, too, that the layperson often experienced such pronouncements as "a mystifying cloud of words."[27] Yet, he frequently exploited those insights in constructing his opinions. I examine several examples of his use of metaphor to obscure his shortcomings of reason. My claim is that when Cardozo waxes poetic it is not an accident, but a parapraxis or Freudian slip that signals a knowing weakness in his argument. Although it is hard to imagine Cardozo as a poker player, he certainly would have been a bad one. Metaphor is his "tell."

A classic instance is Cardozo's much cited opinion for the Court in *Gully v. First National Bank*,[28] a suit to collect a state tax from a federally chartered bank. The bank removed the case to federal court on the ground that the levy was possible only because of a federal statute waiving what would otherwise have been a constitutional immunity.[29] There was, thus, a necessary federal ingredient in the

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[23] POSNER, *supra* note 5, at 137.

[24] Newman, *supra* note 22 at 208, concludes that Cardozo "was wrong on the personal versus business issue, and he was wrong on the ordinary versus bizarre issue. As to ordinary versus capital, he was right, but his opinion gave us very little guidance."

[25] *Judge Cardozo's Address at Third Annual Meeting, American Law Institute*, 11 A.B.A.J. 294, 296 (1925).

[26] *See* Berkey v. Third Ave. Ry., 244 N.Y 84, 94 (1926) ("Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."). It is not, of course, true that metaphors usually deceive; that is a rationalist prejudice. For extended examination of a legal metaphor that is superior to more conventional legal formulations, *see* Steven L. Winter, *The Meaning of "Under Color of" Law*, 91 MICH. L. REV. 323 (1992). For further examples of the use of metaphors to clarify analysis, *see infra* notes 42-45 and accompanying text.

[27] *See* LAW AND LITERATURE, *supra* note 3, at 100 ("A metaphor, however, is, to say the least, a shifting test whereby to measure degrees of guilt that mean the difference between life and death. . . . I have no objection to giving [the jury] this dispensing power, but it should be given to them directly and not in a mystifying cloud of words.").

[28] 299 U.S. 109 (1936). Lexis shows that *Gully* has been cited in 2643 cases.

[29] *See* McCulloch v. Maryland, 17 U.S. 316 (1819); Osborn v. Bank of the United States, 22 U.S. 738 (1824).

plaintiff's case. Under *Osborn v. Bank of the United States*,[30] this would have been enough to satisfy federal question jurisdiction. Cardozo held against jurisdiction on the ground that the federal element was too remote. Here, again, Cardozo's attempt to explain his intuition shed more heat than light. The passage is worth quoting at length:

> What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation. One could carry the search for causes backward almost without end. . . . Instead, there has been a selective process which picks the substantial causes out of the web and lays the other ones aside. As in problems of causation, so here in the search for the underlying law. If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself, with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by.[31]

How are we to read that compass? The distinction between what is basic and what is collateral is left deliberately unformulated; yet, it too is a matter of degree and not of kind. Cardozo offers no principle, no metric, no test.[32] (Just as in *Welch*, he provided neither a workable concept nor, even, a verbal formula.) The distinction between what is

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[30] *Osborn*, 22 U.S. at 823 ("when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give . . . jurisdiction of that cause."). *But see* Shulthis v. McDougal, 225 U.S. 561 (1912); Shoshone Mining Co. v. Rutter, 177 U.S. 505 (1900).

[31] *Gully*, 299 U.S. at 117-18.

[32] He did suggest a second, more practical distinction between "disputes that are necessary and those that are merely possible," *id*. at 118, but this was the very distinction rejected by Chief Justice Marshall in *Osborn*, 22 U.S. at 823-25, and its companion case, Bank of the United States v. Planters' Bank of Georgia, 22 U.S. 904 (1824) (suit on a promissory note assigned to the Bank).

basic and what is collateral is no more helpful than the discredited distinction between direct and indirect effects in Commerce Clause jurisprudence.[33] We are meant to get lost in the maze of Cardozo's metaphors and accept his resolution of the question. (Trackless seas, indeed.) It should come as no surprise that, when in *Franchise Tax Board* [34] Justice Brennan quotes this passage from *Gully*, it is to render a judgment "for reasons involving perhaps more history than logic."[35]

*Gully* is paradigmatic. Cardozo often turned to metaphors of causation to divert attention from the absence of argument or analysis. In *Schechter Poultry v. United States*,[36] Cardozo concurred with the majority in striking down wages-and-hours regulations pursuant to the National Industry Recovery Act as outside Congress's power to regulate interstate commerce. He explained his conclusion as follows:

> There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours "is an elastic medium which transmits all tremors throughout its territory; the only question is of their size." Per Learned Hand, J., in the court below. The law is not indifferent to considerations of degree. Activities local in their immediacy do not become interstate and national because of distant repercussions. What is near and what is distant may at times be uncertain. . . . There is no penumbra of uncertainty obscuring judgment here. To find immediacy or directness here is to find it almost everywhere. If centripetal forces are to be isolated to the exclusion of the forces that oppose and

[33] *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 124-25 (1942); NLRB v. Jones & Laughlin, 301 U.S. 1, 41 (1938); Swift & Co. v. United States, 196 U.S. 375, 398 (1905). *See also* United States v. Lopez, 514 U.S. 549, 572-73 (1995) (Kennedy, J., concurring) (describing the inconsistencies that arose when the New Deal Court applied "the abandoned abstract distinction between direct and indirect effects on interstate commerce").

[34] 463 U.S. 1 (1983).

[35] *Id*. at 4. The "kaleidoscopic situations" line—which, according to Lexis, is quoted in 134 cases in total—appears in a later passage of *Franchise Tax Board*. *Id*. at 20-21.

[36] 295 U.S. 495, 551 (1935) (Cardozo, J., concurring).

> counteract them, there will be an end to our federal system.[37]

The passage is elaborate in its imagery, if opaque in meaning. Although Professor Currie praised the "accustomed elegance" of the final line, he saw Cardozo's opinion as little more than a conclusion "without elaboration."[38] Rather, he read the "candid imprecision of Cardozo's approach" as an admission of the subjective nature of the inquiry.[39] "As always," he observed, "it was easier to declare there were limits than to explain why the particular case lay beyond them."[40]

If the passage seems cogent, it is because Cardozo artfully structures it around a series of *center-periphery* metaphors: motion at the outer rim being communicated to recording instruments at the center; tremors spreading though the land with distant repercussions; penumbras of uncertainty; a wheel whose balance must not be disturbed. But close examination reveals that the metaphors do not cohere. For one thing, Cardozo reverses vector without warning or discernable logic. He starts with the distinction between what is national and what is local. But, when he refers to motion at the outer rim being communicated to recording instruments at the center, he is saying that local activities at the periphery are registering their effect on the national economy as monitored in Washington. In the next sentences, he reverses direction yet again. Now he speaks of tremors radiating outward—that is, of local activities having distant repercussions on the over-all economy. When we reach the concluding sentence—"If centripetal forces are to be isolated to the exclusion of the forces that oppose and counteract them, there will be an end to our federal system"[41]—we are left to wonder at the mappings. Which are the centripetal forces and which the counteracting forces? Is the federal government (or interstate commerce) the rim of the wheel or its hub?[42]

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[37] *Id*. at 554.

[38] DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986, 223 (1990).

[39] *Id*.

[40] *Id*.

[41] *Schechter Poultry*, 295 U.S. at 554.

[42] Here is a sentence-by-sentence breakdown of the vectors and semantics:

S1 - national to local

S2 - periphery to center - local to national

S3 - center to periphery - local to national (vector reversed)

S4 - none

S5 - center to periphery - local to national

The overall import of the final sentence remains clear: The federal system is like a finely tuned wheel that will break if its balance of forces is unsettled. It is a striking image that arrests our attention. But, one wonders, how is interstate commerce like a wheel? What, precisely, is the balance that would be disturbed? Is Cardozo saying that if we uphold the wages-and-hours regulations, the wheel will break because we will be reinforcing—isolating—the centripetal, national forces to the exclusion of local forces (the actions of local authorities or the market) necessary to counteract them? That would be consistent with the vector of the first sentence of the passage, which runs from national to local. The verb "isolate" is awkward on this reading, though perhaps not for Cardozo's archaic style; a better rendering might be "if we detach the centripetal forces from those counterbalancing them, the wheel will fly apart." Maybe the centripetal forces are the local economic activities whose effects are being monitored at the center. If so, the verb makes a bit more sense: It would be the causal effects of the local activities that are being isolated by the legal analysis. On this reading, Cardozo would be saying that if we pick out (isolate) the effects of the peripheral (that is, local) actions on the national economy to find causation and uphold the statute, then the federal system will break down. But what, then, are the countervailing national forces he is referring to? The wheel metaphor is memorable, but it is cryptic. It obscures the basis of Cardozo's judgment, rather than clarifying it.

A year later, in *Carter v. Carter Coal Co.*,[43] Cardozo dissented from the Court's decision striking down the provisions of the Bituminous Coal Act setting minimum and maximum prices.[44] Invoking his *Schechter Poultry* concurrence, he observed:

> Sometimes it is said that the relation must be "direct" to bring that power into play. In many circumstances such a description will be sufficiently precise to meet the needs of the occasion. But a great principle of constitutional law is not susceptible of comprehensive statement in an adjective. The underlying thought is

S6 - center to periphery - local to national

S7 - center to periphery - light = clarity to shadow

S8 - center to periphery - local actions to national effect

S9 - periphery to center - presumedly, national to local but referents unclear

[43] 298 U.S. 238 (1936).

[44] *Id*. at 324 (Cardozo, J., dissenting).

> merely this, that "the law is not indifferent to considerations of degree. . . ." It cannot be indifferent to them without an expansion of the commerce clause that would absorb or imperil the reserved powers of the states. At times, as in the case cited, the waves of causation will have radiated so far that their undulatory motion, if discernible at all, will be too faint or obscure, too broken by cross-currents, to be heeded by the law. . . . The relation may be tenuous or the opposite according to the facts. Always the setting of the facts is to be viewed if one would know the closeness of the tie. Perhaps, if one group of adjectives is to be chosen in preference to another, "intimate" and "remote" will be found to be as good as any.[45]

Here, the *center-periphery* metaphor is clear: The centrifugal forces are waves of causation undulating outward whose effects on interstate commerce must be decoded. (In this instantiation of the *center-periphery* metaphor, the counteracting forces *are* identified; they are the crosscurrents of other, national economic factors affecting the regulated industry.) Cardozo finds the national effects sufficiently significant in this case; but, once again, he fails to tell us why. Instead, he suggests that the discredited distinction between direct and indirect effects on commerce might be improved by substituting the terms "intimate" and "remote." But he self-consciously places these words in scare quotes, sending a clear signal that he knows these terms are no more helpful.

Notice three things about Cardozo's use of metaphors of causation: *First*, there is a subtle shift in the metaphors he employs. Causation is variously a kaleidoscope, a web, a wheel, or a series of radiating tremors or waves. *Second*, there is a cognitive and linguistic consistency to these metaphors; all of them are imagistically related by the figure of a circle or the *center-periphery* schema. *Third*, each of these different metaphors for causation has different entailments. A kaleidoscope mesmerizes; a web ensnares; a tremor disturbs or

[45] *Id*. at 327-28 (quoting *Schechter Poultry*, 295 U.S. at 554). The point of this passage, common to Holmes and Cardozo, is a rejection of the formalist faith in distinctions and a realist plea of necessity—that is, we know these distinctions do not work but we have to keep the system functioning. *See* STEVEN L. WINTER. A CLEARING IN THE FOREST: LAW, LIFE & MIND 295-97 (2001). But, this strategy comes with costs to law's legitimacy, *id*. at 296-97, and is in fact needlessly imprecise. *See id*. at 186-222.

destroys; a wave buoys, pushes, or engulfs; a wheel gets one where one wants to go.

The different metaphors also denote different models or concepts of causation. A kaleidoscope is a tube containing colored glass and mirrors that, when rotated, creates endlessly varying symmetrical patterns. The implication is that the ever-changing situations of life cannot be reduced to neat causal stories. Similarly, a web is an intricate structure of filaments in complex tension with one another; one cannot extract a single strand without destroying the entire structure. Thus, to pick the substantial causes from the web and lay the other ones aside is to falsify the causation issue. Analogously, a wheel is a powerful machine that works because of the balance among its components. It is a *system of forces*, and not a unidirectional, linear force like a tremor or a wave. As such, it is not at all like the legal concept of causation. But it is an apt metaphor for a system like federalism that is composed of complementary interacting forces.[46]

The choice of metaphor, in other words, should matter for how one thinks about an issue such as federalism or causation. It does not for Cardozo because, in these passages, he is not concerned with the substantive issue. He is interested, rather, in turning a phrase that will veil the blurred edge of his reasoning. The confusion of revolving colors of the kaleidoscope telegraphs exactly what Cardozo is up to in *Gully*. In effect, he is saying: "We cannot really know when the federal ingredient is enough of a federal ingredient, and I cannot tell you how we draw that line. Just trust me, and I will pick it out of the web."

On the other hand, the "web of causation" metaphor does not appear in *Schechter* where it would actually be appropriate. After all, what is a market if not a web of causation? A market is a large polycentric system; if you pull on a strand in one part of the system it will affect what goes on elsewhere. As Lon Fuller observes: "A rise

[46] The proper tension of a wheel depends on the materials, the design (wheels with gears attached are asymmetrical), and the balance among all of the components. The contemporary constitutional standards for federalism as in *Lopez* and National Federation of Independent Business v. Sibelius, 567 U.S. 519 (2012) (Opinion of Roberts, C.J.) are categorical and rigid. The better approach is found in the system-focused logic of cases such as Garcia v. San Antonio Transit Authority, 469 U.S. 528 (1984), and Gibbons v. Ogden, 22 U.S. 1, 197 (1824). *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). *See also* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000).

in the price of aluminum may affect in varying degrees the demand for, and therefore the proper price of, thirty kinds of steel, twenty kinds of plastics, an infinitude of woods, other metals, etc."[47] When Cardozo says that to "find immediacy or directness here is to find it almost everywhere,"[48] he has the right insight but the wrong conclusion. Because markets are a like a web, to find interstate commerce here *is* to find it everywhere—which is precisely what the Court ultimately recognized in *Wickard*.[49]

Cardozo is not interested in causation, but in persuasion. His uses of metaphor are not substantive, but strategic. He is sophisticated in his facility, but manipulative in his intent. Though his rhetorical skill is estimable, his metaphors supplant what should be the work of argument and analysis. A rhetorician of Cardozo's power could use metaphor to explain what he is doing and why. That, however, is not Cardozo's game.

No symposium on Cardozo is complete without discussion of his opinion in *Palsgraf v. Long Island Railroad Company*.[50] While

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[47] Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 395 (1978).

[48] *Schechter Poultry*, 295 U.S. at 554.

[49] "Once an economic measure of the reach of the power granted to Congress in the Commerce Clause is accepted, questions of federal power cannot be decided simply by finding the activity in question to be 'production' nor can consideration of its economic effects be foreclosed by calling them 'indirect.'" *Wickard*, 317 U.S. at 124-25.

At the conference, the question arose whether the decisions in *Lopez* and *Sibelius* are consistent with the Court's rationale in *Wickard*. Despite the later Courts' characterizations, they are not. *Compare Lopez*, 514 U.S. at 638 (the Gun Free School Zone Act "is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise"), and *Sibelius*, 567 U.S. at 550 ("power to regulate commerce presupposes the existence of commercial activity to be regulated"), *with Wickard*, 317 U.S. at 125 ("even if appellee's activity be local *and though it may not be regarded as commerce*, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce") (emphasis added). The key point is that from an economic perspective none of these legalistic distinctions—between local and national, direct and indirect, commerce and not-commerce, action and inaction—make any sense.

> Was Filburn's cultivation of wheat in excess of the quota "action" or "inaction"? In one sense, it was action—i.e., the forbidden planting and harvesting of wheat. From another perspective, it was inaction—i.e., a failure to go into the market to buy wheat. Did Filburn's cultivation of wheat for home use represent a decrease in the demand (thus, depressing prices) or an increase in the supply of wheat available for consumption (thus, depressing prices)? The answer to each of these questions is "both" and "it doesn't matter because the effect is precisely the same."

Steven L. Winter, *When Things Went Terribly, Terribly Wrong Part II*, 24-27 (2014) (Jotwell 5th Anniversary Conference: Legal Scholarship We Like and Why It Matters), available online at http://jotwell.com/wp-content/uploads/2014/07/ Winter-Terribly-Wrong-II-final.pdf.

[50] 248 N.Y. 339 (1928).

*Palsgraf* is not an example of his florid use of metaphor as in the cases we have considered, we can see these same kinds of Freudian slips, parapraxes, and tells that signal when he is up to something.

In *Palsgraf*, Cardozo sought to obviate the question of proximate cause by focusing instead on the antecedent legal question whether there was a duty owed to the plaintiff.[51] Liability turns on duty, and duty is determined by foreseeability. But *that* is a word he never uses. The closest he comes is in the final sentences when he allows that liability for "an unforeseeable invasion of an interest of another order" of the same person might present a different question.[52] Otherwise, Cardozo uses no form of the word "foreseeable."[53] Instead, he talks about "the eye of vigilance." He goes metaphoric on us. It is the "eye of ordinary vigilance;" it is the "eye of reasonable vigilance;" but, it is always "the eye of vigilance."[54] (I envision the eye atop a pyramid that is on the back of the dollar bill—the "eye of vigilance.") That is the first tell: Cardozo's unaccountably overwrought phrase telegraphs that something is about happen.

And, something is about to happen. For a judge known for his eloquence, Cardozo is surprisingly tongue-tied in *Palsgraf*. In holding that there was no negligence to the plaintiff, he explains:

> If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming, with reference to her, did not take to itself the quality of a tort because it happened to be a wrong, though apparently not one involving the risk of bodily insecurity, with reference to some one else.[55]

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[51] *Id*. at 346 ("The law of causation, remote or proximate, is thus foreign to the case before us. The question of liability is always anterior to the question of the measure of the consequences that go with liability."). Whether he succeeded is an open question. William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 1 (1953) ("Subsequent decisions, even when they cite *Palsgraf*, have remained in a state of disagreement and confusion, and the problem presented cannot be said by any means to be settled and disposed of."). For a more recent survey of *Palsgraf's* legacy that reaches a similar conclusion, *see* W. Jonathan Cardi, *The Hidden Legacy of Palsgraf: Modern Duty Law in Microcosm*, 91 B.U. L. REV. 1873 (2011).

[52] *Palsgraf*, 248 N.Y. at 347.

[53] In *MacPherson*, in contrast, he uses the word "foreseen" six times. *MacPherson*, 217 N.Y. at 385 ("Because the danger is to be foreseen, there is a duty to avoid the injury."); *id*. at 390 (twice); *id*. at 392; and *id*. at 394 (twice).

[54] All together, he uses the phrase four times. *Palsgraf*, 248 N.Y. at 342, 343, 344. "Vigilance" appears three times in *MacPherson*, always in conjunction with "duty" and never "eye." *MacPherson*, 217 N.Y. at 385, 389, 394.

[55] *Palsgraf*, 248 N.Y. at 342.

That does not sound like the Cardozo we know. Why is he suddenly so tongue-tied?

Cardozo is signaling—perhaps deliberately, but I assume unconsciously—that he is playing fast-and-loose with us. First, he is playing fast-and-loose with his mischaracterization of the facts. Cardozo presents the facts in the most bloodless, most abstract way possible. As Judge Noonan has noted, we learn nothing from the opinions[56] about Mrs. Palsgraf's age, her marital status, her employment, how many children she had, whether they were present, what her injuries were or how much the jury awarded.[57] Most notably, Cardozo says that the plaintiff was "standing far away" next to scales "at the other end of the platform many feet away,"[58] though the record was in fact silent on the question.[59] This makes her injuries from the falling scale seem like a freak accident, possibly a fabrication. In Prosser's words, we feel the case was rightly decided because the claim was "too preposterous, . . . too improbable, too fantastic."[60] In fact, however, Mrs. Palsgraf and the scale stood scarcely ten feet from the explosion.[61] Posner brands Cardozo's mistreatment of the facts "outright fictionalizing."[62] Equally important are the things Cardozo does not tell us. The New York Times reported the incident in a front-page story. The explosion was so powerful that it was heard several blocks away:

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[56] I say "opinions," in the plural, because the same is true of Andrews's dissent.

[57] JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS 113 (1976). Posner describes Cardozo's statement of the facts as "elliptical," "slanted," "economical," and "skeletal." It "strips away all extraneous details, . . . and perhaps some essential facts as well" and "enables the reader to grasp . . . so much of the situation as Cardozo wants the reader to grasp." POSNER, *supra* note 5, at 38, 42.

[58] *Palsgraf*, 248 N.Y. at 341.

[59] *Id*. at 356 (Andrews, J., dissenting); Prosser, *supra* note 51, at 3 n.10; POSNER, *supra* note 5, at 34. Cardozo also uses a series of hypotheticals to create the impression that Mrs. Palsgraf was at the far end of the platform. *See Palsgraf*, 248 N.Y. at 342 (a hypothetical about "a passenger at the other end of the platform"); *id*. at 343 (another about a person who is injured while "standing at the outer fringe" of a crowd).

[60] Prosser, *supra* note 51, at 27; *see* POSNER, *supra* note 5, at 36 (Cardozo makes "the collapse of the scale seem freakish").

[61] "Bomb Blast Injures 13 In Station Crowd: Package of Fireworks Explodes in Beach Bound Throng in East New York," *The New York Times* 1 (August 25, 1924) (hereinafter "*Bomb Blast*"), available online at: https://timesmachine.nytimes.com/timesmachine/1924/08/25/issue.html. Since the tenor of the Times article is to render the events as dramatically as possible, the report on the position of the scale as "more than ten feet away" (not a dozen or fifteen feet away) can be assumed reliable.

[62] POSNER, *supra* note 5, at 47.

> There was a terrific roar, followed by several milder explosions, and a short-lived pyrotechnic display. The car nearest the explosion rocked and the windows crashed. Pieces of the big salute bomb shot up to the platform and hit persons nearby. The force of the detonation also ripped away some of the platform and overthrew a penny weighing machine more than 10 feet away. Its glass was smashed and its mechanism wrecked.[63]

Nor does Cardozo tell us that thirteen people were injured. Most were treated on the scene: six for abrasions, contusions, and lacerations; four for minor burns; two—including Mrs. Palsgraf—for shock. Three of the injured were taken to the hospital for diagnosis, but later discharged.[64]

Both the Times report and the opinions in *Palsgraf* suggest that the force of the explosion caused the scale to fall. Prosser reports, however, that there was an interval of seconds between the explosion and the breaking of the scale.[65] After studying the record, Prosser ultimately concluded that the "event could not possibly have happened" as described in the opinions.[66] (Given the Times report, that is a serious understatement.) Most likely, the scale was knocked over by the stampede of panicked passengers.[67]

Do these facts change the case? If one agrees with Cardozo's atomized understanding of duty,[68] the case should come out the same way. Nevertheless, the severity of the actual incident changes how we understand the case in at least four ways. First, it tests the limit of *Palsgraf's* stark principle. Under Cardozo's atomized logic, the explosion could have killed one or more of the passengers and there would still be no liability. Second, on the actual facts, the injury was,

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[63] *Bomb Blast*, *supra* note 61, at 1. *See* POSNER, *supra* note 5, at 33-35.

[64] *Bomb Blast*, *supra* note 61, at 1.

[65] Prosser, *supra* note 51, at 3 n.9.

[66] NOONAN, supra note 57, at 119 (quoting from the 1962 edition of Prosser's *Torts* casebook).

[67] Prosser, *supra* note 51, at 3 n.9.

[68] *Palsgraf*, 248 N.Y. at 343-44 ("What the plaintiff must show is 'a wrong' to herself; i.e., a violation of her own right, and not merely a wrong to some one else, nor conduct 'wrongful' because unsocial, but not 'a wrong' to any one."). As I have argued elsewhere, *Palsgraf* can be viewed as a standing case (and many standing cases are equally proximate cause cases). Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1391, 1475-78 (1988).

if nothing else, *proximate*. "Always the setting of the facts is to be viewed if one would know the closeness of the tie."[69] Third, Cardozo loads the dice in his favor by making the case seem, in Prosser's word, "preposterous." But, with thirteen injured and extensive damage to the platform, the entire scenario—including Mrs. Palsgraf's shock and post-traumatic muteness—becomes eminently believable. Fourth, Cardozo presents the case in a "cavalier and unreliable" manner as if "no reasonable man could find for plaintiff."[70] But, there was a jury verdict in this case. Ordinarily, an appellate court accepts as true the account of the facts that is most consistent with the jury's verdict.

Cardozo, however, has already told us that he does this kind of thing. Earlier, I quoted the line in *Law and Literature* where he said: "There is an accuracy that defeats itself by the over-emphasis of details."[71] But, in the very next sentence he goes on to confide: "I often say that one must permit oneself, and that quite advisedly and deliberately, a certain margin of misstatement."[72] He has told us that he misstates facts from time-to-time when it suits his purposes. Here he makes the case easy for his desired rule by presenting a highly abstracted, partial, and partly fictionalized set of facts.

Second, there is a misuse of analogy in *Palsgraf*. Interestingly, it is telegraphed with a familiar image: "A different conclusion will involve us, and swiftly too, in a maze of contradictions."[73] This is another parapraxis, for Cardozo wants us to be lost in the maze. Thus, he gives us the following hypothetical:

> A guard stumbles over a package which has been left upon a platform. It seems to be a bundle of newspapers. It turns out to be a can of dynamite. To the eye of ordinary vigilance, the bundle is abandoned waste, which may be kicked or trod on with impunity. Is a passenger at the other end of the platform protected by the law against the unsuspected hazard concealed beneath the waste?[74]

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[69] *Carter Coal*, 298 U.S. at 328 (Cardozo, J., dissenting).

[70] Prosser, *supra* note 51, at 31; Michael D. Green & Ashley DiMuzio, *Cardozo and the Civil Jury*, 34 TOURO L. REV. 183 (2018).

[71] *Law and Literature*, *supra* note 3, at 7.

[72] *Law and Literature*, *supra* note 3, at 7.

[73] *Palsgraf*, 248 N.Y. at 342. Cardozo spins several such analogies in the remainder of the paragraph.

[74] *Id*.

This sounds a lot like *Palsgraf*, but it is not. It is the same newspaper bundle with explosives, just a slightly different set. The passenger is once again situated much further away from the explosion than Mrs. Palsgraf actually was. But what is missing from this hypothetical is negligence to anyone. In *Palsgraf*, the conductor is pushing a man onto a moving train—something they do not do anymore because it is much too dangerous (and for entirely foreseeable reasons). In this hypothetical, there is no negligence to anyone; there is just a piece of newspaper on the floor which "may be kicked or trod on with impunity."[75] Cardozo offers us a misanalogy that is as far from the issue in *Palsgraf* as his statement of the facts is from what actually transpired on that Long Island Railroad platform on that August morning.

Third, and finally, there is Cardozo's line: "[R]isk imports relation."[76] It is a great line. But what does it mean? Jerome Frank complained that Cardozo wrote as if he had used a private time machine to go back to 18th Century England to learn English.[77] In its archaic sense, "import" means "to have as its signification; to carry the meaning of; to signify."[78] In context, it is clear that this is how Cardozo is in fact using the term: "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension."[79]

But the phrase "risk imports relation" is ambiguous and can be understood in ways Cardozo did not intend. Risk *implies* relation and, as Prosser says, "our ideas of relations change."[80] Suppose I am a manufacturer who makes a plastic bottle using a carcinogenic ingredient that puts the end consumers at risk. In that case, the law will imply an obligation. Again, as Prosser says (in Legal Realist fashion): "There is a duty if the court says there is a duty."[81] On this

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[75] *Id*.

[76] *Id*. at 344.

[77] *See supra* note 2 and accompanying text.

[78] *Oxford English Dictionary Online*, I.1.b., http://www.oed.com.proxy.lib.wayne.edu/view/Entry/92550?rskey= EPZcnM&result=2&isAdvanced=false#eid

[79] *Palsgraf*, 248 N.Y. at 344.

[80] Prosser, *supra* note 51, at 13.

[81] Prosser, *supra* note 51, at 15. *Cf*. *MacPherson*, 217 N.Y. at 391 ("The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be."). In the paragraph that follows the "risk imports relation" discussion in *Palsgraf*, Cardozo provides a remarkably formalistic account of the development of the tort of negligence. *Palsgraf*, 217 N.Y. at 345-46 ("Negligence is not a tort unless it results in the commission of a wrong, and

view, the phrase "risk imports relation" has yet another unintended meaning: Risk introduces relation; it brings relation with it. The holding of *MacPherson*, after all, is that the manufacturer has a duty to the people it has endangered regardless of privity. One might respond that, in such cases, risk to the end consumer is foreseeable.[82] Except that it was not foreseeable until *MacPherson* said that it was. Thus, even Cardozo concedes in *Palsgraf* that: "Some acts, such as shooting, are so imminently dangerous to anyone who may come within reach of the missile however unexpectedly, as to impose a duty of prevision not far from that of an insurer."[83] Maybe pushing a person on a crowded platform onto a moving train is one of those cases. Maybe Mrs. Palsgraf's status as a paying passenger on the Long Island Railroad is one of those relations carrying with it a higher standard of duty.[84] Ultimately, it is a question of policy.[85] Yet, in *Palsgraf*, policy is the one thing that Cardozo never addresses.

Cardozo is justly famous for his insistence in *The Nature of the Judicial Process* that: "The final cause of law is the welfare of society."[86] We see that Cardozo in *MacPherson* and *Hynes*; he seems hidden in *Welch*, *Gully*, and *Schechter Poultry*; he is conspicuously absent from *Palsgraf*. It is precisely in these latter cases that Cardozo the master rhetorician emerges. And, make no mistake, Cardozo is a master. He is like the duo Penn & Teller, who first explain to the audience how the standard magic trick works only to perform it in a way that nevertheless surprises. Cardozo first tells us that he misstates the facts, that metaphor can be used to enslave thought, that he knows "the value of the veiled phrase, the blurred edge, the uncertain line"[87] and that we must, therefore, be careful not to get lost in a maze of

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the commission of a wrong imports the violation of a right."). Prosser offers a more realist account of the development of the concept of duty. Prosser, *supra* note 51, at 12-15 ("Does the railroad, then, owe a duty to Mrs. Palsgraf not to injure her in this way? Why, yes, if the court finds that it does. There is no other answer.").

[82] *MacPherson*, 217 N.Y. at 390-91.

[83] *Palsgraf*, 248 N.Y. at 344.

[84] Prosser, *supra* note 51, at 7 ("From the moment that she bought her ticket the defendant did in fact owe her a duty of the highest care, one of the most stringent known to the law."); *accord* POSNER, *supra* note 5, at 39.

[85] *See* NOONAN, *supra* note 57, at 136-38 ("Was a form of transportation which was known to kill several thousand persons a year and to injure many thousands more to be treated as responsible for the injuries it generated only when its employees could reasonably have foreseen the particular persons they might injure?").

[86] NATURE OF THE JUDICIAL PROCESS, *supra* note 11, at 66.

[87] *See supra* note 25 and accompanying text.

confusion. And then he does just that: He misstates the facts, uses metaphor to mislead the reader, concatenates divergent images that do not fit each other or the facts, and leads us through a maze of examples designed to befuddle. But, Cardozo *is* a master magician: First, he tells us what the trick is going to be; then, he does the trick; and then we are delighted by the sleight of hand and applaud.