Touro Law Review

Volume 38 | Number 4 Article 13

2023

# The Tort Whisperer: Nine Decades Later–My Perspective

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# THE TORT WHISPERER: NINE DECADES LATER–MY PERSPECTIVE

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Benjamin Nathan Cardozo (1870-1938).[1]
After all, he was only human.[2]

**ABSTRACT**

This Article provides a comparative analysis of Judge Benjamin Cardozo's tort decisions in *Palsgraf v. Long Island Railroad Co.*,[3] one of his most famous tort decisions, contrasted with a lesser-known tort opinion in *Hynes v. New York Central Railroad Co.*[4] The Author attempts to address Cardozo's humanistic and intellectual dichotomies which are exemplified by these two real-life tort precedents—one of which, *Palsgraf*, most practitioners may only have a distant recall. A historical overview of Cardozo's life is also discussed.

These two decisions portray Cardozo as an emotive human being exercising hit-or-miss judging. This theme provides a different

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[*] Larry M. Roth is a Florida attorney. A modified version of this Article was first published in the Florida Bar Journal. *See* Larry M. Roth, *Benjamin N. Cardozo: The Tort Whisperer Nine Decades Later,* 95 FLA. B.J. 9, 9-17 (2021).

[1] GEORGE S. HELLMAN, BENJAMIN N. CARDOZO AMERICAN JUDGE 312 (1940); *see also* RICHARD POLENBERG, THE WORLD OF BENJAMIN CARDOZO: PERSONAL VALUES AND THE JUDICIAL PROCESS 237 (1997) (noting that towards the end of his life in 1938, Cardozo was in "delirium . . . [H]e went over and over again on old decisions and court cases"); *see generally* RICHARD A. POSNER, CARDOZO, A STUDY IN REPUTATION (1990).

[2] "He died on the ninth of July." Indeed, Cardozo was human. "We saw the coffin lowered. From the hands of cousins earth was cast on the blanket of flowers. Finis to what was mortal in [Cardozo] the man who understood so well the words of Portia–who knew, moreover, not only that mercy should temper justice, but that mercy and justice are one. A gentle rain was falling." HELLMAN, *supra* note 1, at 312-13 (describing Cardozo's last illness and funeral).

[3] 248 N.Y. 339 (1928).

[4] 231 N.Y. 229 (1921).

viewpoint from Cardozo's historical image as a rigid, cold, and detached Jurist. It was this latter image that Cardozo sought to publicly display during his lifetime.

These internal enigmatic personality conflicts are what memorialize Benjamin Cardozo in the Law almost a century later. Cardozo remains perceived in legal historicism as some distant Moses-like, true to his Jewish faith "Lawgiver."[5] In the larger sense, however, at least Biblically, Cardozo did not view himself that way since despite an Orthodox family he was not religious.[6]

Any judgment the Reader reaches after analyzing this hypothesis will provide, at a minimum, an updated, more modern vision of Benjamin Cardozo. If this occurs, then my efforts have not been in vain.

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[5] HERMAN WOUK, THIS IS MY GOD: THE JEWISH WAY OF LIFE 164 (1988) [hereinafter "THIS IS MY GOD"]. [Moses] law comprises the first five Books of the Old Testament. *See also* PAUL JOHNSON, HISTORY OF THE JEWS 32 (1987) ("In collecting and codifying Israeli law, therefore, Moses had ample precedent. . . . To set down the law in writing, to have it carved in stone, was part of the liberating act of fleeing from Egypt, where there was no statutory law, to Asia, where it was by now the custom."). To Moses, the nomenclature has been given as the "Lawgiver." HERMAN WOUK, THE WILL TO LIVE ON 140-41 (2000) (referring to Moses as the "Lawgiver") [hereinafter "THE WILL TO LIVE ON"]; *see also* WOUK, THIS IS MY GOD, *supra*, at 17; HERMAN WOUK, THE LAWGIVER 3 (2013). Benjamin Cardozo was born Jewish, however, he did not live a Jewish ritualistic based life, but a secular one. POLENBERG, *supra* note 1, at 1, 13-15.

[6] Andrew L. Kaufman, *Sephardic Jew*, *in* THE JEWISH JUSTICES OF THE SUPREME COURT REVISITED: BRANDEIS TO FORTAS 35, 40-41 (Jennifer M. Love ed., The Supreme Court Historical Society, 1994); *id.* at 39 ("But it would be a mistake to think that Cardozo himself brought lessons from the study of the Torah to the study of secular law. As far as I can tell, he did not.").

## I. INTRODUCTION

It has been eighty-five years since Cardozo breathed his last breath.[7] Who remembers him? Do the far recesses of your cerebral memory, during the depths of a sleepy afternoon at law school, possibly conjure up some distant memory? Who was he? Maybe there were a few of you awake during tortuous Socratic epistemology, especially in torts[8] and contracts,[9] who might unearth a glimmer of Cardozo's legal and historical life.[10] Consistently, neither do any of our present personal injury or product liability litigators ever drop his name when waxing oratorically, or even within stellar written arguments. Judges also do not write Cardozo-like literary-based prose decisions during daily judicial efforts. Nonetheless, Benjamin Cardozo without a doubt had a profound foundational impact on nearly all topics of the Law, even if unknown by the current sea of Judiciary or the Bar.[11]

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[7] *See supra* notes 1 & 2 (discussing Cardozo's final earthly days, his death and funeral). The black shadow of death took Benjamin Nathan Cardozo on July 9, 1938. POLENBERG, *supra* note 1, at 238. It is now Summer 2023, eighty-five years later.

[8] *See, e.g.*, MacPherson v. The Buick Co., 217 N.Y. 382, 384-85 (1916) (holding that there did not have to be privity of contract to sue, on a warranty, the manufacturer for a defective tire); Altz v. Leiberson*,* 233 N.Y. 16, 18-19 (1922) (discussing a landlord's liability); Cullings v. Goetz*,* 256 N.Y. 287, 289 (1931) (discussing a negligence claim against a tenant for damage to car in the garage). *See generally* Warren A. Seavey, *Mr. Justice Cardozo and the Law of Torts,* 52 HARV. L. REV. 372 (1939).

[9] *See, e.g.,* Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 90 (1917) (discussing an inferential requirement in contracting to use reasonable efforts); Allegheny Coll. v. Nat'l Chautauqua Cty. Bank*,* 246 N.Y. 369 (1927) (concerning a promised gift to a college after death); *see also* Lawrence A. Cunningham et al., *A Study in Contracts*, 36 WILLIAM & MARY L. REV. l379, 1379 (1995); Arthur L. Corbin, *Mr. Justice Cardozo and the Law of Contracts*, 52 HARV. L. REV. 408 (1939).

[10] *See, e.g.,* GERALD GUNTHER, LEARNED HAND THE MAN AND THE JUDGE, at xv (1994) (stating wherein Learned Hand was quoted as saying Cardozo to be one of the great American judges of the Twentieth Century); 2 HOLMES & FRANKFURTER, THEIR CORRESPONDENCE, 1912-1934, at 235 n.3 (Robert M. Mennel & Christine L. Compston eds., 1996) (noting that Holmes said Cardozo was "the greatest judge that ever lived"); POSNER, *supra* note 1, at vii ("Although the legal establishment canonized Cardozo during his lifetime."); *see generally* BENJAMIN N. CARDOZO, CARDOZO ON THE LAW (1988). After his death, the Yale, Harvard, and Columbia Law Reviews, in an unprecedented action, published a joint issue dedicated to Cardozo's work in 1939. ANDREW L. KAUFMAN, CARDOZO 569 (1998).

[11] Holmes wrote to Cardozo that "[Cardozo was] the greatest judge that ever lived of course it may be that in the stone age or beyond there was a judicial genius or achievement beyond our ken today." Holmes & Frankfurter, *supra* note 10, at 235. In the field of criminal law, while on the United States Supreme Court, Cardozo

For those lawyers and judges still floundering in a legal abyss, you should know there is a law school named for him: Cardozo School of Law of the Yeshiva University in New York City.[12] This might be seen appropriate as Cardozo was by birthright Orthodox Jewish.[13] Despite this reference to "Yeshiva,"[14] Cardozo's name on the Law School

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authored a then landmark decision. *See* Palko v. Connecticut*,* 302 U.S. 319, 322-23 (1937). Within criminal law jurisprudence Cardozo is mostly associated with his *Palko* Supreme Court Opinion. *See* Richard Polenberg, *Cardozo and the Criminal Law: Palko v. Connecticut Reconsidered*, 2 J. SUP. CT. HIST. 92, 101-03 (1996). *Palko* was a double jeopardy case prohibited by the Fifth Amendment. *Palko,* 302 U.S. at 322-23. The larger question was whether that prohibition, as a denial of due process, was applied to the States through the incorporation of the Fourteenth Amendment. *Id.* at 319, 324. Cardozo and the majority of the Court determined that it did not. *Id.* at 328; POLENBERG, *supra* note 1, at 102, 104. The States were not bound by the Fifth Amendment in and of itself through the incorporation clause of the Fourteenth Amendment. *Id.* at 327-29. Ultimately in the case of *Benton v. Maryland*, the U.S. Supreme Court "expressly rejected the *Palko* doctrine of inapplicability of double jeopardy to the states." Benton v. Maryland, 395 U.S. 784, 793-96 (1969). The only other noteworthy criminal law decision which Cardozo authored while on the Supreme Court was *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97 (1934). *Snyder* was Cardozo's first criminal law Majority Opinion on the U.S. Supreme Court. KAUFMAN, *supra* note 10, at 548-51. Snyder had been convicted of first-degree murder resulting in a homicide during the course of a robbery." *Id.* at 548-49. The issue in *Snyder* was whether a defendant was deprived of his fundamental Fourteenth Amendment due process rights for not being present at a crime scene view during trial for the jury view although Snyder's counsel was. *Id.* at 549; *Snyder*, 291 U.S. at 103. In a five-to-four decision, Cardozo wrote for the majority that the individual rights of Snyder had not been violated. *Id.* at 112-13 ("When the scene by showers who are not the counsel for the parties, a defendant gains nothing by being present at a view any more than he gains when there is only bare inspection without an explanatory word.") *Snyder* was not an incorporation of the Bill of Rights to the States through the Fourteenth Amendment. *See* POLENBERG, *supra* note 1, at 92-93. For a good discussion of Cardozo's Criminal Law Opinions while on the Court of Appeals of New York, see KAUFMAN, *supra* note 10 at 391-415, where Kaufman's biography on Cardozo devotes Chapter 20 to his judicial opinions and extrajudicial writings, which were sparse in the field of criminal law; *see also* POLENBERG, *supra* note 1, at 44-81 (discussing Cardozo's opinions on specific Criminal Law topics such as the insanity defense, death penalty and Psychiatry and the Law in his Book).

[12] CARDOZO LAW, https://cardozo.yu.edu/, (last visited Apr. 13, 2023).

[13] KAUFMAN, *supra* note 10, at 10 ("His family, the Cardozos and the Nathans, were rooted in New York's old Sephardic Jewish Community, and he took pride in the fact that his ancestors had arrived in America before the Revolution.").

[14] Yeshiva is a Hebrew word meaning "a school for Talmudic study"; a "Jewish day school providing secular and religious instruction." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY, at 1367 (1984).

was used exclusively based on his contributions to the Law.[15] Cardozo Law School was not founded upon Jewish fundamental religious principles—as Cardozo, himself, did not practice Judaism.[16] Further, the Law School is not a "religious" based legal educational institution.[17]

Cardozo lived most his life during a period of overt hostile antisemitism in America.[18] As noted, he was born into an ultra-pious

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[15] In 1979, the Benjamin Nathan Cardozo Commemorative Issue, "forty years after Cardozo's death, inaugurated the law review of the newly founded Benjamin N. Cardozo School of Law . . . are signs of the magnitude of Cardozo's professional reputation." POSNER, *supra* note 1, at 11 n.23.

[16] KAUFMAN, *supra* note 10, at 69 (noting that he ceased to attend religious services; "[e]ven after he lost his belief in the tenets of Judaism [Laws]").

[17] *Mission Statement*, CARDOZO LAW, https://cardozo.yu.edu/about (last visited Feb. 20, 2023) ("The Benjamin N. Cardozo School of Law has three fundamental and mutually reinforcing goals: to provide a fully rounded and rigorous legal education that blends theoretical and practical approaches; to create and sustain an intellectual environment that values and supports imaginative and groundbreaking scholarship; and, drawing information from transcendent Jewish values, to strengthen the society as a whole by shaping solutions to pressing legal problems of the day.").

[18] See KAUFMAN, *supra* note 10, at 8-9, 15, 16 where Kaufman's biography gave several examples of the family being excluded from the Grand Union Hotel in Saratoga, New York. The all-Male Century Club to which Cardozo sought membership was antisemitic. *Id.* at 169. But through influence, Judge Cardozo was allowed membership. *Id.* Cardozo also privately feared activism by Jews in the 1930s would increase antisemitism. POLENBERG, *supra* note 1, at 184-85; *see also* POSNER, *supra* note 1, at 2. Most Eastern European Jews immigrated to the United States between 1881-1944, (overall approximately two million), and because of the Great Depression, some type of religious and cultural/societal backlash was bound to be generated. JOHNSON, *supra* note 5, at 370. Most of these East European Jews were terribly poor, Yiddish speaking, Hassidim ultra-religious, and did not have the tools, nor want to, assimilate into mainstream American life as the Jews who arrived even before the Revolution. *Id.* at 365-70. By the late 1800s to the first quarter of the Twentieth Century, "[t]hey [Jews] rightly judged that an anti-Semitic reaction was inevitable." *Id.* at 370. During this period a "new anti-Semitic sub-culture" arose. *Id.* These newer, but less acceptable Jews occupied "the ultra-dense Tenth Ward, where 740,401 people lived in 1,196 tenements spread over forty-six blocks" during 1893, in New York City. *Id.* at 372. Cardozo, also a Jew and a New Yorker, lived in a different world at the time on Madison Avenue and the upper Westside affluent neighborhoods. *See* KAUFMAN, *supra* note 10, at 19, 146. By January of 1895, the so-called well cultured French were yelling "[d]eath to the Jews!" *Id.* at 380. This was during the Captain Alfred Dreyfus affair, the only Jew on the French General Staff. Dreyfus was accused of treason, but hatred of the Jews undergirded the persecution of Dreyfus. *Id.* at 379-80. There were outbreaks of antisemitism during the Civil War. *Id.* at 368-69; *see also* STANLEY FELDSTEIN, THE LAND THAT I SHOW YOU—THREE CENTURIES OF JEWISH LIFE IN AMERICA 236 (1978) ("[Issac] Lesser ['most influential Jewish spokesman in mid-Nineteenth century America'] witnessed

Sephardic Jewish family.[19] However, Cardozo never lived as an adult bound by his religious and cultural strictures; instead, his public life thrived as a fully assimilated and accepted "Jew" into blue-blooded social and legal circles.[20]

Despite the time in which he lived, it is ironic that Cardozo experienced almost no antisemitism until he reached the United States Supreme Court.[21] Although Cardozo was born into a long lineage of ultra-pious Jews emigrating before the American Revolutionary War, he did not personally believe in religion and led a fully secular life.[22]

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the anti-Semitic outbursts brought on by the high-pitched emotionalism of the Civil War"). Zionism, the quest for a Jewish homeland in Palestine for Jews living in America created further animosity, labels of being unpatriotic, and discrimination of the Jews. *Id.* at 238-47.

[19] KAUFMAN, *supra* note 10, at 6 (noting that Cardozo was born into an Orthodox Sephardic Jewish family).

[20] *Id.* at 6-9 (noting that Cardozo's ancestral family were Orthodox Sephardic Jews). Sephardic Jews were from the Mediterranean region, particularly Portugal and Spain (Portugal, in Cardozo's case). *Id.* at 6. The Sephardim were very insular, thinking themselves superior to the poorer, ragged Eastern European Jews, for example, the Polish and Russian, who were referred to as coming from the "shtetl" (a Yiddish term to describe a small town in Eastern Europe). *Id.* at 7-8; *see also* WOUK, THE WILL TO LIVE ON, *supra* note 5, at 59-60, 301-02. For descriptive divergences between Eastern European Jews (Ashkenazim) and Sephardim Jews (Mediterranean), see also FELDSTEIN, *supra* note 18, at 5-6, 35-36, 133-37, including Cardozo's Shearith Israel Synagogue. *Id.*; *see also* POLENBERG, *supra* note 1, at 13-17.

[21] Cardozo experienced a sheltered life, growing up with little or no antisemitism. POSNER, *supra* note 1, at 2. The Sephardim believed themselves elite amongst the Jews and were very insular. KAUFMAN, *supra* note 10, at 7. Cardozo's exposure to personal antisemitism occurred while on the U.S. Supreme Court, through the actions of Justice James McReynolds who hated Jews—including Louis Brandeis and Benjamin Cardozo, to whom McReynolds would intentionally effectuate personal and stated effronteries. *Id.* at 479-80. When Cardozo was sworn in as an Associate Justice, as "the oath was being administered to Cardozo, McReynolds ostensibly scanned a newspaper." ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., THE OLIVER WENDELL HOLMES DEVISE, IX HISTORY OF THE SUPREME COURT OF THE UNITED STATES, THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910-1921, at 354 (Paul A. Freund & Stanley N. Katz eds.,1984). McReynolds also believed Cardozo to be a more radical "Hebrew" than Brandeis. *Id.*; *see also* LEWIS J. PAPER, BRANDEIS: AN INTIMATE BIOGRAPHY OF ONE OF AMERICA'S TRULY GREAT SUPREME COURT JUSTICES 251 (1983); ALPHEUS THOMAS MASON, BRANDEIS: A FREE MAN'S LIFE 466 (1946).

[22] POSNER, *supra* note 1, at 7-8 (Cardozo had no religious beliefs); KAUFMAN, *supra* note 10, at 69 ("[H]e lost belief in the religious tenets of Judaism."); HELLMAN, *supra* note 1, at 166 (noting that Cardozo never attended religious services as an adult). *See also* KAUFMAN, *supra* note 10, at 24-25, 69-70 (showing further that Cardozo

Cardozo actively eschewed his origins from an Orthodox Jewish family tree dating back hundreds of years.[23] Paradoxically, Cardozo actively involved himself in public Jewish causes and controversies as a Lawyer, and when a Judge,[24] including one at his own Synagogue.[25] These activities occurred even though Cardozo shunned the formal tenets of Judaism such as attending Religious services.[26] He took on these Jewish missions even if it meant, as a by-product resultant public notoriety as a Jew.[27]

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was a Bar Mitzvah, and he remained a board member of Shearith Israel Synagogue). As to further irony of the man, Cardozo demanded a traditional Orthodox Hebrew funeral, with no English spoken or any eulogy given. *Id.* at 69-70; *see also* HELLMAN, *supra* note 1, at 13, 163, 166, 312. Cardozo remained throughout his life, contradictory perhaps in shunning his Jewish heritage, participating in several Jewish organizations. *Id.* at 163, 166. He supported the Zionist movement for a Jewish homeland, although only tacitly and never as fervently as Brandeis. KAUFMAN, *supra* note 10, at 175-77 (discussing the work he did, and support given to the Zionism movement). *See* PHILIPPA STRUM, LOUIS D. BRANDEIS, JUSTICE FOR THE PEOPLE, 234, 247, 266-90, 396 (1984); *see also* KAUFMAN, *supra* note 6, at 35 ("I have no doubt that the relation between Cardozo and Judaism had an effect in shaping the general attitude that Cardozo brought judging."). The poet who wrote the immortal words now on the Statute of Liberty was Emma Lazarus, Cardozo's first cousin and a Sephardic Jew. KAUFMAN, *supra* note 10, at 8; *see also* JOHNSON, *supra* note 5, at 371 (including Lazarus's initial three verses of her recognized words of that forever living poem: "Give me your tired, Your poor, Your huddled masses yearning to breathe free."). Johnson also remarked of Lazarus, that she "understood the meaning of America for World Jewry." *Id.* Lazarus also defended these Eastern European Jews against the slurs of anti-Semitism" in the magazine New Century (1882)." *Id.*

[23] POLENBERG, *supra* note 1, at 13-15, 18 ("Cardozo, however, did not become the observant Jew that Henry Pereira [Mendes, his Rabbi instructor] undoubtedly hoped he would.").

[24] *Id.* at 175-78 (including his involvement in the Zionist movement for the establishment of a Jewish homeland); KAUFMAN, *supra* note 10, at 175, 77.

[25] *Id.* at 69-70 (discussing that this particular dispute at the Shearith Israel Congregation involved the separate seating of the men from the women). Separating the sexes was in compliance with Orthodox Synagogue Jewry. *Id.* at 69 (noting that a Reform movement sought to change that policy). At the Synagogue's meeting on June 5, 1895, Cardozo had assembled support to maintain the Orthodox policy. *Id.* Cardozo persuasively spoke at that meeting to retain the Orthodox way. *Id.* at 70. Shearith Israel voted to retain their Orthodox procedures. *Id.*

[26] *Id.* at 18 ("Within a year or two after his bar mitzvah, a rabbi who knew [Cardozo] recalled he 'had swung away from all interest in ceremonial religion and during his later life did not attend religious exercises at the Synagogue.'"); KAUFMAN, *supra* note 10, at 69 ("Although he had ceased to attend religious services . . . .").

[27] *See supra* note 22 and accompanying text; *see also* KAUFMAN, *supra* note 10, at 69-70, 175-77 (stating that Cardozo also became involved in the Zionist movements for a Jewish homeland in Palestine, an issue controversial at the time); *id.* at 176

Although suffering throughout the daily trial lawyer's destiny of unrewarding litigated trench warfare, this Author managed to free up hours and hours to explore the past lives of both great, and not so great, Supreme Court Justices. These Justices' personal lives always fascinated me. This unfunded journey began during law school, mostly as a mental distraction. It was also motivated by a then-personal aspiration of mine, which ultimately became the bitter pill of an unfulfilled passion of becoming a judge.[28] During that pedagogical search for kindred legal spirits, three of these Justices seemed particularly larger than life, especially Benjamin Nathan Cardozo. It became easy to place him into my seminal category of great judges. That he was also Jewish was a fact not lost on me.[29]

This Writer has had his share of career lawyer engagements in what has proven to be vicious personal injury and product liability strategic and tactical litigation battles. My experiences in these situations have occurred even within sterile boundaries of certain Black Letter Tort Law principles. But lawyers use these principles in actual lawsuits as deceptions without meaning, perpetrated solely to achieve but one goal–win at all costs. Despite the Courts and the Bars often ephemerally professed Standards and Rules, I conclude from these experiences another maxim which exists here. Tort law is certainly about less than idyllic principled disagreements. Instead, they are bloody battles only over legal tender, personal egos, and obtaining attorneys' fees.

Through research, I learned that Benjamin Cardozo, who usually is perceived as aloof and above the dirty and nasty business of litigation, was also a trial lawyer before his aseptic judicial tenures.[30]

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(noting that Cardozo did not have the "public warrior" crusade fervor on this subject as did Brandeis); HELLMAN, *supra* note 1, at 163, 166. Cardozo, despite his birthright, shunned his Religion. POSNER, *supra* note 1, at 7 (noting that Cardozo never attended religious services as an adult).

[28] As a law student, I would scour the United States Reports to read all of the *In Memoriam* Sessions held for Supreme Court Justices who had passed away. I became quite familiar with the lives of all the men, at that time, who had served on the Court. No one takes rejection well. As for my own as to a Judge position, I file my dissent. That appointment was beyond my control, as was Death's journey to the end was for Cardozo. Towards the very end of Cardozo's human alertness, Chief Justice Charles Evans Hughes came to comfort, and to hold one last time that magical, but living soft hand. Cardozo said, "They tell me I am going to well, . . . but I file a dissenting opinion." HELLMAN, *supra* note 1, at 311.

[29] KAUFMAN, *supra* note 10, at 6. The other two were Holmes and Brandeis.

[30] POSNER, *supra* note 1, at 2-3; HELLMAN, *supra* note 1, at 24.

Thus, I believe he must also have personally participated in, without rose-colored spectacles, the utter rawness and ugly underside belly of litigation.[31]

To most, Cardozo is known for his politeness and passive personality as a Judge.[32] He is also widely recognized for his lectures and writings on why a Judge should not be bound to formalistically or ritualistically decided cases.[33] Making decisions regarding the blurred irrationality of human legal conflicts is not just a constrained esoteric exercise, rather it is more like a Petri dish experiment.

Cardozo wrote about a judge's latitude or experimentation to decide between fluid judicial entanglements:

> The [judge's] range of free activity is relatively small. We may easily seem to exaggerate it through excess of emphasis. None the less, those are the fields where the judicial function gains its largest opportunity and power. Those are the fields, too, where the process is of the largest interest. Given freedom of choice, how shall the choice be guided? Complete freedom—*unfettered and undirected*—there never is. A thousand limitations—the product some of statute, some of precedent, some of vague tradition or of an immemorial technique,—encompass and hedge us even when we think of ourselves as ranging freely and at large. The inscrutable force of professional opinion presses upon us like the atmosphere, though we are heedless of its weight.

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[31] *See, e.g.,* KAUFMAN, *supra* note 10, at 73-75. "[Cardozo's] counterattack against the assignee was also an assault on the assignee's counsel for serving as the instrument of harassment." *Id.* at 74. Cardozo "did not shrink from personal attack on the opposition or its counsel if the needs of the case called for it." *Id.* at 112. "Cardozo the advocate was not necessarily the saintly man that others have associated with the older [Judge] Cardozo." *Id.* (emphasis added).

[32] *Id.* at 568 ("[H]e impressed people with his kindness, his personal and intellectual integrity, and a serenity that projected extraordinary character."); POSNER, *supra* note 1, at 8-9 ("[H]e had a gentle, diffident manner, he was not in the least overbearing."). However, according to author and researcher, in LEWIS J. PAPER, BRANDEIS: AN INTIMATE BIOGRAPHY OF ONE OF AMERICA'S TRULY GREAT SUPREME COURT JUSTICES (1983), he reported and wrote that partially due to Cardozo's gentle nature, "Brandeis found Cardozo too timid, too sentimental in approaching decisions, especially difficult ones." *Id.* at 373.

[33] *See generally* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

> Narrow at best is any freedom that is allotted to us. How shall we make the most it in service to mankind?[34]

It is unknown, in our more recent times, if judges have any familiarity with Cardozo's lamentations on the science and art of judging.

My experience as a litigator has taught me that judges show little or none of that knowledge. Nevertheless, all Judges seem to know unabashedly and instinctively Cardozo's language of "power" and "unfettered and undirected" judicial action without having any underlying knowledge of their true etiology.[35]

This proffered cynicism is grounded in the waning sunset of my legal plow-pulling years, somewhat like Tevye's poor old horse.[36] Yet, I still wanted the opportunity to comment critically on Judges' obvious imperfections. My personal frustrations, ironically, can be partially explained using Cardozo's practical analysis of subjective judging.[37] Cardozo becomes personally exposed by his own contradictory musings on certain immutable judicial standards which then become blurred when his own emotional decisional elements are inserted.[38]

## II. CARDOZO: A LIFE OVERVIEW

Cardozo's legacy must be measured by the unrelenting movement of time with its evolving concepts of renown and failure. During Cardozo's life of legal and intellectual production he was canonized

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[34] BENJAMIN N. CARDOZO, THE GROWTH OF LAW 60-61 (1924) (emphasis added).
[35] *Id.*
[36] *See generally* SHOLEM ALEICHMAN, TEVYE THE DAIRYMAN AND THE RAILROAD STORIES (1996).
[37] Some of Cardozo's detractors accused him of judging too subjectively, and, therefore, arriving at personally desired results despite his obvious intellectual reasoning, where subjectivity gets lost in the legal prose of the written decision. *See* POSNER, *supra* note 1, at 15-28 (noting that one Cardozo critic challenged both the man and the judge "with emphasis on manipulation and concealment"). *See also* Allegheny College v. Nat'l Chautauqua Cty. Bank, 246 N.Y. 369 (1927) (living charitable gift to a college who later sued the grantor's estate for the balance of the gift payment), Cardozo was labeled a "tricky guy[,]" his "elusiveness[,]" and being "totally disingenuous." POSNER, *supra* note 1, at 15 (quoting Alfred S. Konefsky, *How to Read, Or At Least Not Misread*, *Cardozo in the Allegheny College Case*, 36 BUFFALO L. REV. 645, 687 (1987)). Another charge against Judge Cardozo has been for "suppressing critical facts" in certain cases. *See* POSNER, *supra* note 1, at 16-17.
[38] *See infra* pp. 1296-1345 (*Palsgraf*) and pp. 1345-53 (*Hynes*).

by his Profession.[39] As noted, throughout many sources cited in these footnotes, that movement of time has changed perspective on a Judge's reputation. As does evolving judgments of one person's life and work which can shift from bedrock to swirling particles of sand.[40]

For nineteen of his sixty-seven living years, Cardozo served as a Judge in New York State.[41] On November 4, 1913, Cardozo, at the age of forty-six, won the election for a judicial seat on the New York Supreme Court.[42] He took office on January 5, 1914.[43] Within five weeks, quite remarkably, he was designated to sit on New York's highest tribunal—the New York State Court of Appeals.[44] He was then elected in his own stead to the Court of Appeals in 1917,[45] where he remained until 1932.[46] Cardozo's last five years on the New York State Court of Appeals were spent as its Chief Judge.[47]

Cardozo's frail and delicate features did not separate him from other humans. But from the standpoint of mental acuity, Cardozo's

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[39] GUNTHER, *supra* note 10, at xv. Frankfurter said Cardozo was "the greatest judge that ever lived." HOLMES & FRANKFURTER, *supra* note 10, at 235; *see* POSNER, *supra* note 1, at vii (noting that "the legal establishment canonized Cardozo during his lifetime"); *see also* KAUFMAN, *supra* note 10, at 568-69.

[40] *See* POSNER, *supra* note 1, at vii-viii ("Today many legal thinkers believe that Cardozo has been greatly overrated."). *See supra* notes 10 & 35 and accompanying text (providing divergent views on Cardozo's judicial legacy, and highlighting both ends of the spectrum, from greatness to his judicial deficiencies).

[41] *Id.* at 2-4; HELLMAN, *supra* note 1, at 24.

[42] POSNER, *supra* note 1, at 2-3. Unlike most states, the New York Supreme Court is its trial court division. *New York State Courts: An Introductory Guide*, N.Y. STATE UNIFIED CT. SYS., https;//ww2.nycourts.gov/sites/default/files/document/files/2019-06/NYCourts-IntroGuide.pdf (last visited Apr. 13, 2023). In 1914, one did not have to subject themselves to overtly politicized so-called, otherwise, "Neutral" Judicial Qualifications Commissions. KAUFMAN, *supra* note 10, at 117 (noting that in 1913, Cardozo was a successful lawyer, "[b]ut extraordinary chance, in the form of New York politics, intervened"); *id.* at 117-25 (describing details of the politics and election procedures Cardozo went through, ultimately winning the election as Supreme Court Trial Judge). "Cardozo, a Democrat who had once turned [Charles] Burlingham down on a judgeship offer, accepted this time, although he said that he did not think that he would be elected." *Id.* at 119. There was nothing in that described process by Kaufman about impartial, so-called, judicial nominating commissions.

[43] KAUFMAN, *supra* note 10, at 127.

[44] *Id.* at 126; *see also Court of Appeals*, N.Y. CTS., https://nycourts.gov/ctapps/index2.htm (last visited Feb. 24, 2023).

[45] *Id.*

[46] POSNER, *supra* note 1, at 2-3.

[47] *Id.* at 3; KAUFMAN, *supra* note 10, at 4. Cardozo was appointed to the U.S. Supreme Court in 1932. *Id.* at 472.

telencephalon was the source of his demonstrated exceptional intelligence and logic. This made him appear to others cold, distant and "Spockian."[48] As a young man, Cardozo learned Latin and Greek, the classical education of his times.[49] Horatio Alger was one of Cardozo's early tutors.[50] Cardozo graduated from Columbia University in 1889, four years after enrolling at fifteen years of age.[51] He attended Columbia Law School for less than two years,[52] dropping out after finding the process non-stimulating.[53] Cardozo interned at a law firm, where he quickly proceeded to pass the Bar.[54]

For the next twenty-two years, Cardozo practiced as a hard-knuckled, relentless litigator, something quite contrary to his unquestionably quiet, gentlemanly to a fault, later judicial public character.[55] He ended his years of litigation focusing on appellate practice, and became renowned in that field of law.[56] During his litigation practice, he was not above personal attacks on other lawyers or their clients; he would do anything needed in the interests of his "client's goal."[57] Would the Professional Bar establishment today label Cardozo a "Rambo" litigator?

Cardozo found litigation stimulating, challenging, and a confidence builder.[58] The accomplishments he achieved were intertwined

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[48] Cardozo did not want people to know of his personal life [per Judge Learned Hand].'" HELLMAN, *supra* note 1, at 180 ("He [Cardozo] never quite wanted anybody to penetrate into his inner life. Cardozo had few close friends, and mostly stayed home socially."); KAUFMAN, *supra* note 10, at 472-74, 484-85, 567. One of those few close friends, Judge Irving Lehman of the Court of Appeals, stated after Cardozo's death that he was "[a] man of fastidious, reticence, he guarded jealously his personal privacy . . . Always he selected the field to which he would admit even his closest friends, when he would disclose to them his thoughts and feelings[.]" POLENBERG, *supra* note 1, at 3.

[49] *Id.* at 26.

[50] HELLMAN, *supra* note 1, at 14, 23, 122, 138 (noting that he learned French and was not unfamiliar with Italian); POLENBERG, *supra* note 1, at 18-24.

[51] HELLMAN, *supra* note 1, at 24-25.

[52] *Id.* at 37.

[53] KAUFMAN, *supra* note 10, at 45, 49-50.

[54] *Id.* at 54; HELLMAN, *supra* note 1, at 42-43; *see generally* C.D. BOWEN, YANKEE FROM OLYMPUS 408-12 (1944).

[55] KAUFMAN, *supra* note 10, at 73, 80-81. Cardozo was not a "saint" as far as litigation went. *Id.* at 112; *see also* POSNER, *supra* note 1, at 9. He had a toughness of an ambitious lawyer. *Id.* at 3, 73.

[56] KAUFMAN, *supra* note 10, at 93, 100-01; HELLMAN, *supra* note 1, at 43-44.

[57] KAUFMAN, *supra* note 10, at 112-13; *see also* POLENBERG, *supra* note 1, at 48.

[58] KAUFMAN, *supra* note 10, at 112-15.

with his forever present workaholic excesses.[59] Most remuneration from his professional efforts in law practice went to support his invalid sister Lizzie, Nell, and the household staff at the New York home where Cardozo lived with his female siblings.[60]

Cardozo's family life was complex.[61] He was generationally odd for the times, was not very social, and mostly stayed home.[62] His inner emotional turmoil perhaps explains his perceived aloofness, and relentless work habits.[63] There is no clear historical evidence of his sexual desires or practices.[64] For example, he never married.[65] Both his parents died before his adulthood.[66] He suffered through early deaths of all his siblings, except Nell.[67] Cardozo continuously lived with Nell until her demise in 1929.[68] Nell was a mother than perhaps a sister to him and their complicated intertwined emotional relationship never ceased during her lifetime.[69]

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[59] POSNER, *supra* note 1, at 12.
[60] KAUFMAN, *supra* note 10, at 64, 101, 128.
[61] POSNER, *supra* note 1, at 5-6. "Scholars of psychiatric bent might, however, want to explore the possible significance of the fact that Cardozo's mother died when he was a child and his father when Cardozo was an adolescent, and that Cardozo's twin was a girl." *Id.* at 6. *See generally* POLENBERG, *supra* note 1, at 2-13; KAUFMAN, *supra* note 10, at 3-5.
[62] POSNER, *supra* note 1, at 4-6; POLENBERG, *supra* note 1, at 3-5, 44-47; KAUFMAN, *supra* note 10, at 168 ("He spent most of his evenings at home, with Nellie or working [during law practice]. After he went on the bench, his evenings were spent the same way.").
[63] POSNER, *supra* note 1*,* at 6-7.
[64] The general view is Cardozo lived a celibate life. KAUFMAN, *supra* note 10, at 69. Judge Learned Hand put it more crudely, classifying Cardozo as sexless regardless of the way the gate swung. *Id.* at 68-69.
[65] *See, e.g.,* HELLMAN, *supra* note 1, at 49; KAUFMAN, *supra* note 10, at 85-86; POLENBERG, *supra* note 1, at 134 (speculating "that [Cardozo] was sexually dysfunctional, or had an unusually low sex drive, or was homosexual"); POSNER, *supra* note 1, at 5-7 (suggesting why Cardozo may never have married).
[66] He was nine years old when his mother died, and fifteen years old when his father, Albert, Sr. died. POSNER, *supra* note 1, at 2.
[67] Cardozo saw all his siblings die before him. KAUFMAN*, supra* note 10, at 64-66. Except for his eldest sister, Nell (Ellen), who passed away last in 1929; Grace, an artistic child died young; his brother died at a relatively young age, as did an invalid sister, Elizabeth (Lizzie), and Cardozo's twin sister, Emily. *Id.*
[68] *Id.* at 21.
[69] *Id.* at 67-68, 84-87, 146-48, 161, 192-94. Historically, there is no unearthed evidence that this close relation was sexually tinged. POSNER, *supra* note 1, at 5 ("[A]n unusually close relationship, although there is no reason to think that the relationship was sexual."). To some relatives Ben and Nell lived in "crystal purity" and "devotion

Overall, Cardozo's core judicial personality was rarely abrasive, generally passive, and always polite being an Edwardian gentlemanly manner to a fault.[70] Interestingly, his physical presence further earmarked him to others in his field as special.[71] Some observers said he was not only angelic-looking, but also possessed the persona of a saint.[72]

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and tenderness." POLENBERG, *supra* note 1, at 8. To others, Benjamin was unduly "indulgent and submissive" to Nell. *Id.*

[70] POSNER, *supra* note 1, at 7-9. Cardozo did have the talent to play the piano. KAUFMAN, *supra* note 10, at 23, 68 ("[T]hey [Nell] played chess and piano together"). It was one of his outlets for social activity, even though it was only at home. HELLMAN, *supra* note 1, at 43 ("[S]ometimes this was followed by a brief respite at the piano, playing four-handed with Nell[.]"). He played to help entertain Nell, particularly in the decade or so that her health declined. KAUFMAN, *supra* note 10, at 160-61. Before that in their mutual social isolation Ben and Nell enjoyed playing duets on the piano. *Id.* at 149 ("[D]uets on the piano with her."). This was during 1920s. *Id.* After Nell's death occurred on November 23, 1929, once a part of their daily routine of social interaction amongst the two of them was buried forever, Cardozo's long soft nimble fingers no longer glided across the ebony and ivory keys. KAUFMAN, *supra* note 10, at 193. "The piano was silent. Cardozo never played [the piano] again after his sister [Nell's] death." HELLMAN, *supra* note 1, at 192.

[71] KAUFMAN, *supra* note 10, at 22 ("[T]he sweetest thing that ever breathed"); *id.* at 112, 182-84; 482 ('Looked like a saint, acted like a saint, and really was a saint."); *see also id.* (He was also described as "physically beautiful."). *See* POSNER, *supra* note 1, at 7-8 ("impression of 'saintliness'"). Hellman, the biographer closest to the date of Cardozo's death, wrote in 1940: "You will see few other hands like his–the delicate hands of a poet and the aristocrat. And then go back to the chin. One must never forget Cardozo's chin. The hands and the chin–they tell the story. The eyes and the brow will serve as guides to the intellect of the man; but for the temperament and the character, the hands and the chin. In observing them, one begins to understand how this shy, this terribly shy person could emerge from his reticence and take immovable stand on the grounds of principle. . . It is exceedingly interesting to study these looks from infancy to the close of life." HELLMAN, *supra* note 1, at 41-42.

[72] There are several references in the literature to Cardozo's saint-like or angelic appearance in terms of how those in the Legal Profession knew him and worked with him. Polenberg and Kaufman provide but two such references. *See* POLENBERG, *supra* note 1, at 134 ("[C]ontemporaries . . . describing Cardozo they used words such as 'beautiful', 'exquisite', 'sensitive', or 'delicate' that suggested a lack of masculinity."); KAUFMAN, *supra* note 10, at 482. Cardozo had a poetic and mystical quality. HELLMAN, *supra* note 1, at 138. Holmes referred to Cardozo as having a "beautiful face." 2 OLIVER WENDELL HOLMES, JR. & SIR FREDERICK POLLACK, HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874-1932, at 181 (Mark DeWolfe Howe ed., 1944). Cardozo was characterized as angelic-like and "saintly." POSNER, *supra* note 1, at 7-8. "I have a request, now that you [Holmes] spoke so warmly of Cardozo's work.

Cardozo was an enigmatic and exceptionally private individual.[73] To prevent subsequent historians and the general public from infiltrating the multiple layers of his life, Cardozo insisted that "letters"[74] and correspondence, to and from his beloved sister (and mother-figure) Nell be destroyed.[75] Of course, certain professional and personal exchanges have survived, mostly his usual cryptic but still personally insightful missives to other family members.[76] However, they do not necessarily drill to the core of what might have been exposed in less guarded letters to Nell, the one he most trusted.

An overview of Cardozo's life reveals a convergence of unceasing work, duty, mostly obligations to his sister, Nell, to other family members as well, and to a world of books and ideas.[77] Aside from constantly taking care of Nell throughout her poor health, work was Cardozo's only other outlet.[78] The latter drive was something which incessantly burned internally. Ironically, between his family responsibilities and the love of Books, this resulted in him destined to a life of proverbially never having left home.[79] The other riddle masked beneath Cardozo's robe was his lonesome soul.[80]

Nevertheless, amidst his outward passiveness, an intellectual power within was forged into a fierce ambition to prove himself worthy

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He is a very shy and self-distrustful man, a rarely beautiful character." HOLMES & FRANKFURTER, *supra* note 10, at 111; G. EDWARD WHITE, THE AMERICAN TRADITION: PROFILES OF LEADING AMERICAN JUDGES 497 n.14 (1988); *see also* KAUFMAN, *supra* note 10, at 161, 183-85.

[73] Learned Hand said, "[Cardozo] never quite wanted anybody to penetrate into his inner life[.]" HELLMAN, *supra* note 1, at 180.

[74] POLENBERG, *supra* note 1, at 4-5.

[75] KAUFMAN, *supra* note 10, at 151-57, 180-81, 523-24; HELLMAN, *supra* note 1, at 86, 150, 182-86 (highlighting some of Cardozo's letters and correspondence). "She [Nell] had mothered him when he was a little lad." *Id.* at 187. *But see* POLENBERG, *supra* note 1, at 5 ("A substantial portion of Cardozo's correspondence has survived.").

[76] KAUFMAN, *supra* note 10, at 151-57; HELLMAN, *supra* note 1, at 86, 150, 183-86.

[77] HELLMAN, *supra* note 1, at 279-87. "My library was dukedom large enough, *quoting* Shakespeare." *Id.* at 279.

[78] *See generally* KAUFMAN, *supra* note 10, at 146-61; POLENBERG, *supra* note 1, at 5.

[79] *Id.* at 146-47.

[80] He was "preeminently a lonely man." HELLMAN, *supra* note 1, at 179; KAUFMAN, *supra* note 10, at 490 ("But Cardozo was a lonely man[.]"); POLENBERG, *supra* note 1, at 132-33 ("Cardozo confessed to feelings of loneliness which at times grew overwhelming").

and ethical as a Lawyer.[81] Most followers of Cardozo's life and works recognized his striving motivation as a lawyer and Judge to rectify the tarnished Cardozo family name caused by his father's ethical transgressions.[82]

It follows to ask what did Albert Cardozo do? Cardozo's father had been elected to the Supreme Court[83] in New York City with the assistance of the nefarious Tammany Hall political machine.[84] Unfortunately, Cardozo Sr. was not above political graft.[85] Albert Cardozo, Sr. was expected to buy into the *quid pro* favoritism demanded by Boss Tweed, Tammany's then leader.[86] Despite these paybacks required by this shady political machine, Cardozo's father was otherwise a very good trial judge; a brilliant one it was said.[87] But, Cardozo's father also doled out judicial favors to friends of Boss Tweed, such as the Wall Street financier Jay Gould.[88] Some of these Cardozo, Sr. judicial favors involved appointments of Tammany henchmen to corporate receivership positions for the fees they generated.[89]

When the scam became public, and was up, Judge Albert Cardozo, Sr. was targeted.[90] There were five misconduct charges ultimately brought against Albert Cardozo by The Association of the Bar

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[81] *Id.* at 33, 45-46 (noting "that his years as an attorney constituted 'a period of toil devoid of almost all the usual pastimes of youth'").

[82] *See* KAUFMAN, *supra* note 10, at 11-20; POLENBERG, *supra* note 1, at 32-33 (father's tarnished image may have had an affect); POSNER, *supra* note 1, at 17 (quoting G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 255 (1988)) ("Albert Cardozo's resignation 'dishonored the Cardozos and created in his son Benjamin a lifetime mission of restoring the family name!'").

[83] In New York State, the Supreme Court is the Trial Level Court. *Structure of the Courts*, NYCOURTS, www.https://nycourts.gov/courts/structure.shtml, (last visited Feb. 20, 2023). The Supreme Court terminology used in nearly all other States designate its highest Appellate Tribunal.

[84] KAUFMAN, *supra* note 10, at 11-13, 43.

[85] *Id.* at 13-18.

[86] *Id.* at 14, 20 ("The career of Albert Cardozo permits us a glimpse of the seamier side of the reaction between the new legal profession and the new economic and political forces that were emerging in America.").

[87] HELLMAN, *supra* note 1, at 10 ("His father, Albert Cardozo, was, by common consent, one of the most brilliant judges in the Supreme Court of New York State.").

[88] KAUFMAN, *supra* note 10, at 11-20.

[89] *Id.* at 15, 18; POLENBERG, *supra* note 1, at 26.

[90] KAUFMAN, *supra* note 10, at 15-28.

of the City of New York.[91] Cardozo, Sr. was allegedly "guilty of mal and corrupt conduct[.]"[92] This charge was his father's ultimate judicial downfall, although these ethical violations were never fully substantiated or proven.[93]

Ultimately, the senior Cardozo resigned what was considered a then prestigious position under public pressure, and in disgrace.[94] However, he was never prosecuted, impeached or disbarred.[95] He went back to legal work, and developed a relatively successful law firm practice.[96] Just a few years later, however, after all this he died when Benjamin was only fifteen.[97] All this scandal involving Albert Cardozo, Sr., occurred when Benjamin was only two years old.[98] Thus, the *contra* argument has been set out that due to his tender age any emotional impact upon him was actually less than some have argued, in terms of shaping the final personality of Benjamin Cardozo.[99]

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[91] The Bar Association sought five charges against Albert Cardozo. KAUFMAN, *supra* note 10, at 17. First, "Cardozo's role in the aftermath of the Gold Conspiracy of 1869 when James Gould and James Fiske, having failed in their efforts to corner the gold market, sought to employ the legal system to reduce their losses." *Id.* Second, "The second charge involved unlawful release on habeas corpus of convicted clients of the law firm of Howe & Hummel." *Id*. The third charge alleged that Cardozo failed to specify charges against two women whom he had imprisoned in an effort to force them to reveal the whereabouts of a child whose custody was at issue. *Id.* ("The charge also alleged he [Cardozo] had prevented a lawyer from acting, on the women's behalf."). "The fourth charge concerned his refusal to vacate an order that Judge Barnard had issued in a case that Barnard had not himself heard." *Id.* "The fifth charge concerned both Cardozo's alleged nepotism respecting Gratz Nathan and his general political favoritism in the appointment of receivers and referees." *Id.* This fifth charge was referred to as corruption "in the appointment of referees[.]" *Id*. at 18.

[92] KAUFMAN, *supra* note 10, at 15, 18; POLENBERG, *supra* note 1, at 30.

[93] KAUFMAN, *supra* note 10, at 18.

[94] *Id.* at 17-19.

[95] *Id.*

[96] *Id.* at 19.

[97] Albert Cardozo left what was then a somewhat modest Estate of $100,000. POLENBERG, *supra* note 1, at 32; *see also* KAUFMAN, *supra* note 10, at 27.

[98] POLENBERG, *supra* note 1, at 35.

[99] *Id.* at 32-33 ("In the end, however, Albert Cardozo's influence on his son may have had less to do with the circumstances of his resignation, which occurred when Benjamin was two years old, than with the kind of person he [Albert Sr.] was . . . A stay-at-home person, sober, responsible, devoted to his work, and family–the description could have applied, as well as to Benjamin, in later years, as to his father.").

This public scandal, most believe, nevertheless, forever scarred the life existence of Benjamin Cardozo.[100] Benjamin Cardozo archivists agree his soul and mind after this scandal became focused on a quest to undo this Cardozo familial blight.[101] Cardozo ultimately succeeded at this during his lifetime.[102]

For Cardozo, judging became more than just following in paternal footpaths for a long-term financial safety net. He did not seek any type of perceived secure financial or aristocratic position as a Judge, along with potential pension benefits, and was very reticent from the outset to even seek judicial office.[103] In fact Cardozo, before being first elected to the New York Supreme Court, had turned down several appointments as a federal district court judge.[104] Instead, as a litigator Cardozo proved to be ambitious, successful, and ultimately financially secure.[105]

Cardozo seemed to know better than most that a judicial appointment to one who was, but a politically connected lawyer did not necessarily demonstrate that lawyer's professional achievements or abilities.[106] To his credit Cardozo, despite the previous Judgeship

[100] KAUFMAN, *supra* note 10, at 19. For a less dramatic view, see POLENBERG, *supra* note 1, at 32-33 (stating this did not have the impact on young Cardozo since he really did not know what happened or its details).
[101] POSNER, *supra* note 1, at 5.
[102] KAUFMAN, *supra* note 10, at 20.
[103] Benjamin Cardozo was highly successful private litigator and appellate counsel. *Id.* at 93, 98-99. He did not become a judge to escape the pressures or failures of litigation, or to seek a higher paying job. *Id.* at 11, 119, 125-26.
[104] *Id.* at 100-01 (noting that a $6,000 salary was very low).
[105] *Id.* at 76, 81, 82-84, 92 (indicating that he was considered "one of the best case lawyers who ever lived"); POSNER, *supra* note 1, at 13 (quoting GRANT GILMORE, THE AGES OF AMERICAN LAW 266-68 (1977)).
[106] KAUFMAN, *supra* note 10, at 101.

offers, waited until his ascendency was based on merit and not on politics.[107] In fact, he took no part in political activities during his times.[108]

Opinions authored by Cardozo while on the New York Court of Appeals stand out to this day as erudite and stylistically unique.[109] Cardozo's work clearly defied the sarcastic observations of the literary and poetic father of Oliver Wendell Holmes, Jr. that a lawyer "cannot be a great man," and that "[i]f you eat sawdust without butter, young man, you will be a success in the law."[110]

Cardozo's written opinions, to the lesser-talented such as myself, would seem absolutely excruciating to write. As it were this was also true for Cardozo personally; he labored over every crafted word and phrase.[111] Cardozo's writing style was unique, with "inversions of standard word order and his use of metaphor and aphorism make for brevity and vividness."[112] Critics of his literary talents, however, and there were some, referred to his cursive style as "alien" in its grace.[113]

I distinctly recall a law school Constitutional Law professor critical of the Cardozo-stylized parlance of English, often pontificating

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[107] "[Cardozo] was a successful lawyer [in 1913], but he had not been involved in political life, and his extra-curricular life had been limited. Barring extraordinary chance, little change in career was in order. But extraordinary chance, in the form of New York politics, intervened." KAUFMAN, *supra* note 10, at 117 (emphasis added). Before the election, as a successful practicing lawyer the adjectives used for him were superlatives: "Colleagues soon discovered not only his ability but also the strength of his character and personality." *Id.* at 112. "[T]he finest nomination made by any party. Every lawyer recognizes his splendid qualifications, his sterling character, and his entire independence from any unlawful influence.'" *Id.* at 122; ("extraordinary capacity", "preeminent ability"); *id.* at 98 ("Cardozo's successes enhanced his reputation, which spread beyond the city. . . . Cardozo occupied a special niche in the hierarchy of legal practice.").

[108] *Id.*

[109] POSNER, *supra* note 1, at 10-13; KAUFMAN, *supra* note 10, at 447-48.

[110] Bowen, *supra* note 54, at 202, 207. Holmes's father also said, "[i]f you would wax thin and savage, like a half-fed spider,—be a lawyer." *Id.* at 253.

[111] HELLMAN, *supra* note 1, at 139 ("[Cardozo] sweat blood over every page.").

[112] *Id.*

[113] POSNER, *supra* note 1, at 44. This view is attributable to Jerome Frank, another prominent judge, and also a Jew. *Id.* at 10-11. According to Posner, that criticism was set forth in an anonymously written article. *Id.* Frank's critical comments are almost antisemitic. *See* Anon Y. Mous, *The Speech of Judges: A Dissenting Opinion,* 29 VA. L. REV. 625, 630 (1943). Judge Jerome Frank wrote this anonymous article. POSNER, *supra* note 1, at 10 ("[Frank] who ridiculed Cardozo's style in an article published anonymously shortly after Cardozo's death") (internal citation omitted).

in class that Cardozo "would add a 'no' or a 'does not' to a legal opinion if those negative words made the written case read better, even though it changed the result."[114] Of course, my Professor's underlying premise about Cardozo, I have personally deduced, was "be damned the actual holding of the case so long as it sounds good in the end."[115]

On January 12, 1932, Oliver Wendell Holmes, Jr., the ninety-one year old icon of the Supreme Court, the most noteworthy and esteemed Judge in the United States,[116] retired.[117] Holmes had been on the Court since 1902.[118] However, it took Chief Justice Charles Evans Hughes paying a visit to Holmes's house at 1720 I Street[119] to convince

[114] Torts I Professor, James Quarles, former Dean of Mercer Law School. Class notes of Author, Spring Quarter 1973, University of Florida School of Law, Holland Law Center.

[115] *Id.*

[116] ROBERT W. GORDON, THE LEGACY OF OLIVER WENDELL HOLMES, JR. 4 (Stanford University Press, 1993); SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES 349-50, 365-66 (1989) ("[H]e was conscious of constant attention."). Holmes was celebrated "as few judges have ever been, beloved and revered "as a National Treasure." JOHN S. MONAGAN, THE GRAND PANJANDRUM–MELLOW YEARS OF JUSTICE HOLMES 139-42 (1988) ("Wendell's ninetieth birthday brought recognition of an international scale"); Larry Martin Roth, *Touched With Fire, Forged In Flame: Holmes and A Different Perspective*, 28 FLA. L. REV. 365, 372-73, 375 (1976).

[117] HELLMAN, *supra* note 1, at 199; Novick, *supra* note 116, at 374.

[118] HELLMAN, *supra* note 1, at 198.

[119] Holmes' 1720 I Street address was aside from the U.S. Supreme Court Building itself, perhaps was then the most notable judicial edifice existing in then Washington, D.C. "On Sunday, Chief Justice Hughes came to call [re: Holmes' resignation]: Novick, *supra* note 116, at 37. The newly inaugurated President Roosevelt "came to call." *Id.* at 376; *see also id.* at 259 ("Fanny [Holmes' wife] found a house for sale at 1720 I Street"). Then Franklin D. Roosevelt, on his third day in office on March 5, 1933, went specifically to visit Justice Holmes at 1720 I Street— an unprecedented event for the time. CONRAD BLACK, FRANKLIN DELANO ROOSEVELT—CHAMPION OF FREEDOM 275-76 (2003). Additionally, "[t]here were frequent calls [at I Street address]: Holmes former secretaries, Felix Frankfurter on visits to Washington, the Justices, he hostesses for whom he had become a lion once more. Novick, *supra* note 116, at 375, 482 n.47. The widowed Mrs. Beveridge came once a week to lunch–'sweet, sad, lonely creature'[.]" In January, the First Lady, Mrs. Hoover came alone to lunch. *Id.* at 372. "On his ninety-first birthday the newly inaugurated President . . . and Mrs. [Eleanor Roosevelt] came to call." *Id.* at 376.

Holmes, the larger-than-life judicial legend, to step down due to his age.[120] Oliver Wendell Holmes, Jr. was Benjamin Cardozo's idol.[121]

With the vacancy created by Holmes' retirement in 1932, despite being an election year, President Herbert Hoover chose Holmes' successor.[122] Hoover was hoping to gain political capital with a non-controversial, extremely qualified candidate.[123] Prior to 1932, Benjamin Cardozo had been multiple times considered for the Supreme Court.[124] But then there were geographic and political considerations,

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[120] *Id.* at 375 ("[A] majority of the Court had asked him [C. J. Hughes] to suggest that Holmes resign . . . Hughes [came] downstairs with tears on his cheeks, leaving [Holmes] wearing his customary expression of tranquil sadness.").

[121] HELLMAN, *supra* note 1, at 237-38; Novick, *supra* note 114, at 365 (stating Cardozo adored adulation on Holmes).

[122] KAUFMAN, *supra* note 10, at 455-71 (including a good concise political back scenes maneuvering to select Cardozo). Someone of Holmes' stature was needed as a replacement in terms of the politics behind whom President Hoover might appoint. *Id.* at 461 ("Many people expressed the view that a giant [Holmes] should be replaced by a giant."). Cardozo was then the "preeminent judge in the country." *Id.* at 455. Hoover wanted to keep balance on the Court, so after Holmes would need a perceived Progressive, although still in the Supreme Court's minority, to get through the [Democratic] Senate. *Id.* at 462. And, as to Hoover, "for powerful political reasons[,]" Hoover picked a Democrat in Cardozo, one of stature, disregarded geography considerations, and made "history" appointing Cardozo to the Supreme Court. *Id.* at 466-67.

[123] KAUFMAN, *supra* note 10, at 463-67, 469-70.

[124] *Id.* at 455, 680 n.1; Andrew L. Kaufman, *Cardozo's Appointment to the Supreme Court*, 1 CARDOZO L. REV. 23, 23 (1979). Cardozo was first considered in 1914, after he was first elected to the New York State Court of Appeals. *Id.* at 23 (although then still sitting only temporarily by designation on the Court of Appeals). *Id.* (then twice considered by Warren G. Harding in 1922). *Id.* at 24, 26 (concerns by then C.J. Taft about Cardozo). *Id.* at 23-24. "It has been further written that "[i]t was sixteen years since Cardozo's name had been first presented to the President for consideration as a Supreme Court Justice. . . . Cardozo's name however, was again mentioned in 1922 when Justice [William R.] Day retired and Pierce Butler was nominated." *Id.* at 23 n.3, 24. Cardozo was also pushed as a candidate to President Harding in 1922 again. *Id.* at 24. Cardozo's name was also put forth to President Calvin Coolidge in 1924, upon the retirement of Justice Joseph McKenna. *Id.* at 28. Harlan Fiske Stone was selected. *Id.* at 29. Stone turned out to become Cardozo's closest friend while on the Supreme Court. KAUFMAN, *supra* note 10, at 478 ("Cardozo's closest relationship on the Court was with Harlan Stone."). One can only conjecture the results and his judicial impact if Cardozo had been appointed in 1914, 1916, or 1922. If so, there would have been no *Palsgraf* decision as we know it today.

one Republican President[125] with Cardozo being a Democrat,[126] and ultimately he was Jewish.[127] Cardozo was also perceived as a Progressive during those years of a Conservative era.[128]

By 1932, however, Cardozo's reputation and Olympian stature in the Law overcame these earlier misgivings and prejudices, and calls for his appointment came from many circles.[129] This was also true in his ultimate nomination of bypassing the long held tradition of trying to keep a balanced geographical representation on the Supreme Court.[130] Cardozo was a New Yorker, as was current Chief Justice Charles Hughes.[131] Nevertheless, nomination to the Supreme Court of the United States, the highest judicial forum in the Republic, came to Judge Benjamin Nathan Cardozo on February 15, 1932.[132] He had to feel all blights on the Cardozo name had now been wiped clean.[133]

There was no hue and cry over the selection, only sparse opposition.[134] A Democratic controlled Senate confirmed Benjamin Nathan Cardozo to become an Associate Justice of the Supreme Court on March 14, 1932.[135] Cardozo officially succeeded Oliver Wendell Holmes, Jr.[136] Holmes, his idol, was pleased.[137]

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[125] KAUFMAN, *supra* note 10, at 172-73 (noting that his being overlooked in the 1920s, despite his unquestioned qualifications, was due to his religion–being a Jew); POSNER, *supra* note 1, at 2 n.3.

[126] KAUFMAN, *supra* note 10, at 461, 466-67; POSNER, *supra* note 1, at 2 n.3.

[127] There was disappointment from some quarters, limited, of Hoover appointing a second Jew to the Court. *Id.* at 467. "This last [a Jew] was a touchy issue." *Id.*

[128] HELLMAN, *supra* note 1, at 203-06; Novick, *supra* note 116, at 375.

[129] KAUFMAN, *supra* note 10, at 461-67.

[130] *Id*.

[131] *Id. See* HELLMAN, *supra* note 1, at 202.

[132] *Id.* at 208.

[133] *Id.* at 210; POLENBERG, *supra* note 1, at 235; KAUFMAN, *supra* note 10, at 470-71.

[134] Cardozo was a Democrat. KAUFMAN, *supra* note 10, at 119; *see also id.* at 469 ("Cardozo's appointment was greeted with an outpouring of approval, and Hoover received volumes of letters applauding his selection.") (internal citation omitted); *id.* ("The [Democratic controlled] Senate hearing on appointment was quite brief") (internal citation omitted); *id.* ("One disgruntled person said Tammany Hall was in a plot to get Cardozo."); *id.* at 469-70 ("The [judiciary] and the full Judiciary Committee approved the nomination unanimously.").

[135] *Id.* at 471.

[136] *Id.*; *see also* HELLMAN, *supra* note 1, at 202.

[137] BOWEN, *supra* note 54, at 412; HOLMES & FRANKFURTER, *supra* note 10, at 269 ("Like you I [Holmes] rejoice in Cardozo."). Philosophically most people thought Cardozo replacing Holmes would not alter or change the balance of viewpoints on the Court. MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 676-77 (2009).

The United States Supreme Court, however, was a position Cardozo did not want in 1932.[138] He was already in poor health.[139] Moreover he personally and socially enjoyed his D.C. tenure even less, though short it was.[140] While on the Court, Cardozo kept up his unparalleled and well-known prodigious work habits, despite several bouts with serious health matters.[141] His lifetime term on the Court lasted only six years.[142] During most of 1938, Cardozo recovered after suffering another stroke and further coronary ailments at the Port Chester, New York county home of Irving Lehman.[143] The latter was a good friend and earlier co-jurist on the Court of Appeals.[144] Despite all efforts, Cardozo's heart stopped beating on July 9, 1938, at 6:40 p.m.[145]

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[138] POSNER, *supra* note 1, at 4; *see* HELLMAN, *supra* note 1, at 237-38.

[139] POSNER, *supra* note 1, at 4 ("Cardozo was already suffering from coronary artery disease when he joined the Supreme Court.").

[140] "He was 'wretchedly homesick and despondent.'" KAUFMAN, *supra* note 10, at 472, 686 n.1. Cardozo much preferred the collegiality and the homeliness on the N.Y. Court of Appeals. *Id.* at 472. In that Court, when in Session, they all stayed at the same Boarding house. HELLMAN, *supra* note 1, at 203-04, 247-48; KAUFMAN, *supra* note 10, at 137. The Court of Appeals had a collegiality to it, quite different from the Supreme Court. POLENBERG, *supra* note 1, at 120-21.

[141] Cardozo was a prodigious worker, usually working twelve to fourteen hours a day. HELLMAN, *supra* note 1, at 122. Even on the Supreme Court and with a sick heart, he would work incessantly. *Id.* at 122. It is believed he might have lived longer had he slowed down. KAUFMAN, *supra* note 10, 194-95, 480-81, 486. Oftentimes Chief Justice Charles Hughes would withhold an assignment of an opinion to Cardozo until the Sunday morning after the Saturday conference so he could rest, as Hughes knew otherwise Cardozo would immediately start work on his assignments. *Id.* at 481.

[142] POSNER, *supra* note 1, at 5.

[143] KAUFMAN, *supra* note 10, at 567 ("In May [1938], Sissie Lehman [Irving's spouse] suggested that Cardozo be brought to the Lehman home in Port Chester, New York. She hoped that living in the country would help his recovery."); HELLMAN, *supra* note 1, at 312 (Cardozo "left Washington forever. He is at the lovely country home, on Ridge Street, Port Chester, of Judge and Mrs. Lehman.").

[144] HELLMAN, *supra* note 1, at 119 ("In the same year-1924-Irving, another Columbia Jurist, joined the Court of Appeals. Cardozo and he [Lehman] had long been friends.").

[145] KAUFMAN, *supra* note 10, at 567; POLENBERG, *supra* note 1, at 236-38 (noting the belief that "he died without hurt"). Cardozo's official cause of death was a "coronary thrombosis, that is a clot in the blood vessels of the heart." *Id*. at 238.

## III. CARDOZO AND THE IMPERFECT SCIENCE OF JUDGING

In 1921, Cardozo was asked by Yale Law School to give the Storrs' series of lectures on the Law.[146] The written compilations of his four different lectures were later published in a Book entitled, *The Nature of the Judicial Process* (hereafter "Judicial Process").[147] These lectures were likely his most famous of a number of extra-judicial writings.[148] There were also other Cardozo essays and lectures which quite often commented on how and why Judges judge: *The Growth of the Law*,[149] *The Paradoxes of Legal Science*,[150] and *Law and Literature*.[151]

There has been a debate as to whether these judicial decision-making pronouncements, particularly in *Judicial Process*, have stood the test of time as seminal works on the fine art of judging.[152] Nevertheless, Cardozo's *Judicial Process* sought to analyze judging from more of a humanistic standpoint, yet still within certain structures, challenging staid principles of strict ritualistic adherence to outdated perceived objective concepts.[153] It was controversial for that time, and actually led for calls for his impeachment as Cardozo was a sitting judge.[154]

This Article's intellectual task in dealing with Cardozo as a Judge demonstrates that his philosophies on judging were not empirically or ritualistically tractates. I attempt to set out, even though Cardozo never intended to denude judicial precedent, his unbounded personal feelings and emotions as witnessed in the two cases analyzed

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[146] HELLMAN, *supra* note 1, at 123.

[147] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921). The Nature of the Judicial Process and Cardozo's other extra-judicial writings, including essays, have been compiled in LESLIE B. ABRAMS, JR. BENJAMIN N. CARDOZO, CARDOZO ON THE LAW (The Legal Classics Library 1982).

[148] POSNER, *supra* note 1, at 12-13; KAUFMAN, *supra* note 10, at 199-200. *See also* POLENBERG, *supra* note 1, at 86-87.

[149] BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 56-67 (1924).

[150] BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 58-61 (1928).

[151] BENJAMIN N. CARDOZO, LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES, 15-38 (1931) [hereinafter "LAW & LITERATURE"].

[152] KAUFMAN, *supra* note 10, at 204, 217-19; POSNER, *supra* note 1, at 13.

[153] *Id.* at 18-19, 21. *See* Paul A. Freund, *Forward: Homage to Mr. Justice Cardozo*, 1 CARDOZO L. REV. 1, 2-3 (1979).

[154] One reference was to its being "hard-core pornography," and Cardozo was "courting impeachment." POSNER, *supra* note 1, at 12; *see also* GRANT GILMORE, *supra* note 105, at 75-77. For Gilmore's critical retorts to *Judicial Process*, see *id.* at 74-77.

herein. Through this supposition Cardozo's own personal judging often displayed realism about juristic levels of base emotions, biases, prejudices, likes and dislikes of cases, even of certain attorneys or parties, although not his recognized legacy, be brought to life. Even the deistic cerebral "saint like"[155] Cardozo had judgmental human flaws as do all Judges, despite their contrary exhortations.[156]

Cardozo's *Judicial Process* included four lectures: (1) "The Method of Philosophy";[157] (2) "The Methods of History, Tradition and Sociology";[158] (3) "The Method of Sociology[:] The Judge as a Legislator";[159] and, (4) "Adherence to Precedent[:] The Subconscious Element in the Judicial Process. Conclusion:"[160]

> Our first inquiry should therefore be: Where does the judge find the law which he [or she] embodies in . . . [their] judgment? There are times when the source is obvious. The rule that fits the case may be supplied by the constitution or by statute. If that is so, the judge looks no farther. The correspondence ascertained, his [or her] duty is to obey[.] The constitution overrides a statute, but a statute, if consistent with the constitution, overrides the law of judges.[161]

In "The Growth of The Law" lecture in 1924,[162] Cardozo unveiled and articulated a more personalized version of judging he often exercised:

> We shall know that the process of judging is a phase of a never-ending movement, and that something more is

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[155] All accounts agree on Cardozo's salient traits as a person." POSNER, *supra* note 1, at 6; GILMORE, *supra* note 105, at 75 ("By the unanimous testimony of his contemporaries, Cardozo was a Saint."). Cardozo always left a powerful image upon friends and colleagues. KAUFMAN, *supra* note 10, at 183 ("Christ must have looked like that"; was one expression. Many others, including some of his colleagues, referred to him 'as a saint', or talked of his 'quiet priest-like' qualities.") (internal citations omitted). One New York Court of Appeals contemporary, Judge John O'Brien, characterized Cardozo as "a genius and a Saint." *Id.* at 183, 632 n.21.

[156] *See generally* POSNER, *supra* note 1, at 10 ("Cardozo was not a Saint . . . and there was probably an element of calculation in his demeanor. But he was fundamentally a good and gentle soul.").

[157] CARDOZO, *supra* note 33, at 25-26.

[158] *Id.* at 51.

[159] *Id.* at 98.

[160] *Id.* at 142.

[161] *Id.* at 14.

[162] CARDOZO, *supra* note 149, at 1.

> exacted of those who are to play their part in it than imitative reproduction, the lifeless repetition of a mechanical routine.
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> * * *
>
> I come back in the end to the text with which I started: "Law must be stable, and yet it cannot stand still." The mystery of change and motion still vexes the minds of men as it baffled the Eleatics of old in the beginnings of recorded thought. I make no pretense of having given you the key that will solve the riddle, the larger and deeper principle that will harmonize two precepts which on their face may seem to conflict, and thus to result in an antinomy. I can only warn you that those who heed the one without honoring the other, will be worshiping false gods and leading their followers astray. The victory is not for the partisans of an inflexible logic nor yet for the levelers of all rule and all precedent, but the victory is for those who shall know how to fuse these two tendencies together in adaptation to an end as yet imperfectly discerned. I shall not take it amiss if you complain that I have done little more than state the existence of a problem. It is the best that I can do.[163]

Cardozo certainly articulated his inner personal judging views. But he also took ownership of an internal, but not always consistent, judgmental process of judging.

*Judicial Process* was where Cardozo's first articulated his juristic percepts, theorems that restrictive boundaries of judicial precedent were not shackles to personal freedom of decision-making.[164] These factors may propose that even a distinguished Judge like Cardozo, who was capable of deciding a case, instead founded on an unquestionable concrete legal principle or a subjective ephemeral personal predilection.[165] My conclusion from this, *a priori,* is that the

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[163] *Id.* at 142-43.

[164] POSNER, *supra* note 1, at 27-31 ("Since Cardozo is describing the judicial method, it is the judge . . . who is to steer by the light of social welfare" as so perceived, bias, or ingrained predisposition emanating from that person.").

[165] CARDOZO, *supra* note 33, at 34-38. "The accidental and the transitory will yield the essential and the permanent. The Judge who molds the law by the method of

same questions of law are decided inconsistently during variant times by different generational judges, even under essentially the same facts.[166]

The living theorem within *Judicial Process* was not the stable, societal, judicial, legalistic bulwark many believed Cardozo to have espoused.[167] Instead, Cardozo suggested that law is not an anchored buoy hooked to the Deep Sea bottom's immovable tectonic crust and stated as much in *Judicial Process*:

> The work of a judge is in one sense enduring and in another sense ephemeral. What is good in it endures. What is erroneous is pretty sure to perish. The good remains the foundation on which new structures will be built. The bad will be rejected and cast off in the laboratory of the years.
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> * * *
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> I sometimes think that we worry ourselves overmuch about the enduring consequences of our errors. They may work a little confusion for a time. In the end, they will be modified or corrected or their teachings ignored. The future takes care of such things. In the endless process of testing and retesting, there is a constant rejection of the dross, and a constant retention of whatever is pure and sound and fine.[168]

My belief is that through these statements the Law means one thing to one Judge, but the same issue is different in another Judge's Courtroom next door, or on a higher or lower floor.

Some of Cardozo's further lamentations in *Judicial Process* may give surprise pause, then and now, although arguably they only

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philosophy may be satisfying an intellectual craving for symmetry of form and substance." *Id.* at 35. It has been posited by others that Cardozo in fact overlaid his personal values onto his judicial decision making. *See, e.g.,* POLENBERG, *supra* note 1, at 247.

[166] *See* POSNER, *supra* note 1, at 7-9; GILMORE, *supra* note 105, at 75.

[167] POSNER, *supra* note 1, at 25-26; CARDOZO, *supra* note 33, at 66-67 ("The rule that misses its aim cannot permanently justify its existence.").

[168] CARDOZO, *supra* note 33, at 178-79.

exemplified the personal nature of judging he articulated.[169] This one invariable aspect is the irony that it is the human judge who can make the Law perplexing, gray and formless. Cardozo struggled with this:

> I was much troubled in spirit, in my first years upon the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile. I was trying to reach land, the solid land of fixed and settled rules, the paradise of a justice that would declare itself by tokens plainer and more commanding than its pale and glimmering reflections in my own vacillating mind and conscience.[170]

In that same essay Cardozo provided a clear realization about the malleability of a Judge's ruling, relying even on English common law for this supposition:

> A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.[171]

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[169] POSNER, *supra* note 1, at 13 (noting that Cardozo "concealed innovation as fidelity to settled law").

[170] CARDOZO, *supra* note 33, at 166.

[171] *Id.* at 32. *See Quinn v Leathem*, [1901] AC 495 UKHLS 2; http://bailii.org/uk/cases/UKHL/1901/2.html) (last visited Apr. 23, 2023) (*quoting* Lord Halisbury in *Quinn v. Leathem*, [1901] UKHL 2 AC 495, 506 (appeal taken from N. Ire.). In "Judicial Process" Cardozo used the aforementioned cite from the *Quinn* case when discussing the logical precedent of the Law to arrive at a result. On retrospect, it seems to me, a strange reference since *Quinn* was a 1901 "conspiracy" to injure case decided by the House of Lords. The *Quinn* case issue revolved around whether there was a conspiracy to injure some of Leathem's employees, and customers by the Belfast Butcher's Association and Quinn. (It/files/1453025170_Quinn20v%20Leathem%201901%20UKHL%202%20%2805%20August%201901%29.pdf) (last visited Apr. 23, 2023), at 1-2/ 23; 7-9/ 23. Quinn prevailed at Queens Court, and at the Irish High Court. *Id.* at 5/23. It seems the major issue was whether the case factually established Leathem's allegation of conspiracy intent to injure and damage, which cause prevailed at trial. *Id.* at 10-11/23. An earlier House of Lords case on conspiracy found on similar facts no intent to injure or harm. *Id.* at 2-3. That latter case was *Allen v. Ford,* [1898] AC 1 (HL), a leading U.K. case on conspiracy tort law and economic loss. *Id.* Thus, the majority

Cardozo also recognized the altering currents of riptide affecting legal certainty.[172] Due to a real, or artificially created legal uncertainty, Cardozo condoned room for a Judge to "spin" the facts to support a particular end: "I often say that one [a judge writing a judicial opinion] must permit oneself, and that quite advisedly and deliberately, a certain margin of misstatement."[173]

As written, Cardozo said a Judge can "misstate" the facts if he or she believes they plug into a self-determined illuminated rationale

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of Lords thought *Allen* did not control the *Quinn* outcome. *Id.* at 12/23, 16/23, 22-23/23. *Quinn* was dismissed. *Id.* Lord Halisbury made but a cryptic reference to precedent, or plainly speaking, "a case is only an authority for what it actually decides." *Quinn v Leathem: HL 5 Aug 1901. Id.* at 2-3/23. *See Unlawful Means Conspiracy has Two Form*s, SWARB, www.https://swarb.co.uk/quinn_v_ leathem-HL-5-Aug-1901/. (last visited Feb. 8, 2023). *See also* Aditya Singh & Saumya Singh Thakur, *Case Analysis of* Quinn v. Leathem*,* 4 INT'L J. L. MANAGEMENT & HUMANITIES 5520, 5522-24, 5526 (2021). It would seem, at least to subject Author, logically inconsistent for Cardozo to use that quote from *Quinn*. This is because the precedent of Allen did not control the outcome of *Quinn. Id.* at 12/23, 23/23, 16/23. But that's Cardozo's implicit point, I believe, was a judge can manipulate so called precedent using or not using some facts to make it distinguishable. The motive is not suggested nefarious. It's just that judges are human, and have the philosophy and beliefs they do to obtain a particular result. A Black Robe does not necessarily make a pure and pristine human soul or intellect. *See also* David Cheifetz, *Forgetting the Audience: The SCC and Private Law*, THE COURTICA (2018). In a Canadian legal article, Cheifetz quotes this same *Quinn* quotation from Lord Halisbury which Cardozo also did. *See* CARDOZO, *supra* note 33, at 32:

> A case is only an authority for what is actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.

*Quinn v. Leathem*, [1901] UKHL 2 AC 495, 506 (appeal taken from N. Ire.). In *Quinn v. Leathem*, the "A.C.", or Appeal Cases, reference refers to the legal abbreviation for the report series. libguides.bodleian.ox.ac.uk/c.php?g=422832&p=2887383/law-uklaw (last visited Apr. 25, 2023) (unlocking UK case citations). One would have to go to that series to locate the case, *i.e., Quinn*. The reference to UKHL is to the UK House of Lords, which is now called the Supreme Court (S.C.). *Id.* The number, like in *Quinn*, was 2. *Id.* That would refer to the Second Case decision in the H.L. for 1901. *See* DONALD RAISTRICK, INDEX TO LEGAL CITATIONS AND ABBREVIATIONS, (2013 ed.).

[172] POSNER, *supra* note 1, at 27 ("Few rules of our time are so well established that they may not be called upon any day to justify their existence as means adopted to an end"); CARDOZO, *supra* note 33, at 98-99.

[173] CARDOZO, LAW & LITERATURE, *supra* note 151, at 7.

for that decision.[174] This unstated decisional bias in my opinion is apparent to all. As I would say: "It is so because I say it is so." Cardozo similarly wrote as much in his essay *The Nature of Judicial Process*, as well as other writings.[175] Cardozo, in these extra-judicial essays articulated theorems, I believe, which demonstrated and elevated this type of personal subjectivity. This contrasts, panoramically, with the general view of Cardozo being thought of as a judicial pillar of the Law's paralogism commandments of predictability and uniformity.[176] If so, using his postulate it can be argued that Cardozo diagnosed in barebones terms that any judgmental endpoints can properly be justified by changing, or at least how a Judge factually word paints, a juridical decisional picture.

In this limited overview, I attempt to examine whether my interpretive analysis of Cardozo's judicial record accurately reflects his methodology. That is to say generally, does a Judge make decisions based on bias and pre-ingrained predilections? Cardozo would occasionally literarily shroud that inert subjectiveness with a generalized stated doctrine where the true decisional motivation is rhetorically hidden.

## IV. NEXT STOP—*PALSGRAF:* INTRODUCTION TO THE STUDY OF PALSGRAF

Throughout my forty-five years as a trial attorney, I have dealt with what I have been told were so-called esoterical principles of invariant Tort law. Yet nothing, particularly the Law, was or is static.

The many different cases which were subject to the same law, applied to facts, never had the same results because of decisions made by different Judges. Even trying the same factual case twice rendered different outcomes even with the same Judge. Cardozo somewhat addressed this phenomenon of static-versus-dynamic law in *Judicial Process*.[177]

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[174] POSNER, *supra* note 1, at 43.
[175] *See, e.g.,* CARDOZO, *supra* note 33.
[176] *See* POSNER, *supra* note 1, at 18-19, 22 ("Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of 'the legislature; or in other words, the will of the law.'") (quoting Osburn v. Bank of the United States, 212 U.S. 738, 866 (1824)).
[177] *See, e.g.,* CARDOZO, *supra* note 33, at 14, 18, 33, 36-37, 47-49.

From these experiences, I discerned that Cardozo's historic contributions to the development of the Black letter Law of Torts were a seemingly ever-changing, contradictory, and mostly frustratingly inconsistent track.[178] In my life's endeavors, reading Cardozo in Law School sounded great. Practicing it on the street cast Cardozo to me in a different light. Consistent with this, there already had, before this Article, been much research into Cardozo's sometimes confounding writing and decision-making analytics, which some accepted, and other criticized.[179]

Due to the fact of Cardozo sitting on the Court of Appeals for eighteen years, he wrote a many great Tort Opinions.[180] It is not my intent to find a common thread, or even one overriding legal principle from these divergent rulings. Even if that were my intent here, such an endeavor would have any Cardozo researcher run for cover like it was a wildfire. As such, any modern Cardozo Tort researcher surfing the web will find themselves chasing in circles his decisional roundabouts.

Despite a Mount Everest challenge related to Cardozo and development of overall Tort Law, I herein offer only a limited exploration into two New York negligence cases he decided.[181] They are cases intended to illustrate two specific instances of subjective, emotive results, contrary to cerebral decision-making by Judge Cardozo.

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[178] *See, e.g.,* MacPherson v. The Buick Co., 111 N.E. 1050 (N.Y. 1916); H.R. Moch Co. v. Rensselaer Water Co., 159 N.E. 896 (N.Y. 1928); Ultramares Corp. v. Touche, 174 N.E. 441 (N.Y. 1931); *see also* KAUFMAN, *supra* note 10, at 310-12.

[179] *See generally* Paul A. Freund, *Foreword: Homage to Mr. Justice Cardozo*, 1 CARDOZO L. REV. 1 (1979) (providing a favorable analysis of Cardozo); Anon Y. Mous, *The Speech of Judges: A Dissenting Opinion,* 29 VA. L. REV. 625, 630 (1943) (providing a negative evaluation of Cardozo). *See also* Alfred S. Konefsky, *How to Read, or at Least Not Misread, Cardozo in the Allegheny College Case*, 36 BUFF. L. REV. 647 (1987) (arguing that Cardozo's decision in the *Allegheny College* case was elliptical, convoluted, and incomprehensible); POSNER, *supra* note 1, at 15.

[180] *See, e.g.,* Perry v. Rochester Lime Co., 219 N.Y. 60, 62 (1916) (discussing a dynamite box in the Erie Canal); Bird v. St. Paul Ins. Fire & Marine Ins. Co., 224 N.Y. 47, 49 (1918) (regarding a boat damaged by an explosion); Greene v. Sibley, Lindsey & Curr., Co., 257 N.Y. 190, 191-92 (1931) (where a shopper fell over mechanic). KAUFMAN, *supra* note 10, at 245-46 ("In the course of his eighteen years on the Court of Appeals, Cardozo addresses all these [Tort] issues."). *See also* Seavey, *supra* note 8 (referencing Cardozo's Tort Decisions, their influence, and his personal stature within this area of the Law).

[181] *See generally* Palsgraf v. Long Island R.R. Co., 248 N.Y. 339 (1928); *see also* Hynes v. New York Central R.R. Co., 231 N.Y. 229 (1921).

I believe Benjamin Cardozo can be portrayed as a jurist who was no less human or imperfectly forthcoming than any lawyer or another Judge. So said, it is not meant to challenge his Judicial standing. This is also despite the stoic, calculating, cold steel trap legal mind with that unmatched renowned style of unique stylistic legal prose. However, there is no doubt that Benjamin Cardozo possessed an intellect that remained solid in legal theory and practice, but one which, in reality, often personally manifested itself at odds with the latter.

My final analytical conclusion on Cardozo can be seen to slip through from behind his otherwise self-imposed internal existence he protected by an "Oz" like barrier curtain. He has emerged to me as both a deeply complex, and a conflicted legal thinker. But in the overall sense one only existent of flesh and bone. His perceived logical decisions here in the area of Torts, for which he strove to make juridically airtight, seem to me, in the end, surprisingly influenced by emotional serotonin often elevating his heart over his brain.

## V. *PALSGRAF*-VIEWED ANEW

Surely even the most hunkered down practicing attorneys ensconced within isolated cubicles of concentration must remember Torts class and *Palsgraf v. Long Island R.R. Co.*[182] *Palsgraf* was perhaps the most controversial opinion Cardozo ever penned.[183]

During Judge Cardozo's tenure the New York State Court of Appeals opinions were assigned by simple rotation.[184] *Palsgraf* randomly fell upon the desk of Chief Judge Benjamin Cardozo in Albany, New York, the *situs* of that Court.[185]

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[182] 248 N.Y. 339 (1928).

[183] KAUFMAN, *supra* note 10, at 287.

[184] POSNER, *supra* note 1, at 47.

[185] KAUFMAN, *supra* note 10, at 137 ("When Cardozo was not sitting in a session, he worked in his New York Office. When he was scheduled for a court session, Cardozo took a Monday morning train ride to Albany [NY]."); *id.* at 143-44. *See New York Court of Appeals*, WIKIPEDIA, https://en.wikipedia.org/wiki/New_York_Court_of_Appeals (last visited Feb. 25, 2023). The Court of Appeals of the State of New York is located in Albany, New York. KAUFMAN, *supra* note 10, at 168. Cardozo had an office in New York City, and "went [by train] to Albany for Court sessions, he would return to New York [City] to be with Nellie over the weekends." *Id.* at 147. That Court was established in 1847 in Albany, New York. *Id.* The New York State Court of Appeals is located at 20 Eagle Street, Albany, New York 12207. *Id.*

As an overview, there had already been a jury trial finding in favor of Mrs. Palsgraf,[186] and a two-to-one intermediate Appellate Court, Second Department decision affirming that verdict.[187] But now let us dig a little deeper historically, and factually, before extracting Conclusions.

### A. The *Palsgraf* Testimonial Story

Before there were judgments and appellate divisions, *Palsgraf* had pleadings filed, a jury trial with witness testimony, jury instructions, dispositive motions and Final Judgment.[188] These are, at least in theory, the factors for the decisional outcome controlling the model of how case issues were to be decided. As constituting a record, it is support or not for that result? As you will see, I venture to submit to you, this is not what happened in *Palsgraf.*

### B. The Pleadings

The *Palsgraf* incident occurred August 24, 1924.[189] On October 2, 1924, Mrs. Palsgraf filed the lawsuit.[190] Her Complaint alleged various acts of negligence, when boiled to their essence, against The Long Island Railroad Company.[191] The claim for negligence against the Railroad was their duty of operating and controlling their East New York Station.[192] This included the rail platform that was available for the plaintiff and others to use both while waiting for and boarding their arriving trains without "being injured."[193]

The Complaint alleged the Railroad knew there was always a large number of people on the platform congregating near and awaiting the trains.[194] And as a result these crowded people would be pushed

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[186] POSNER, *supra* note 1, at 36 (noting that the jury awarded $6,000 damages).
[187] Palsgraf v. Long Island R.R. Co., 225 N.Y.S. 412 (App. Div. 2d Dep't 1927).
[188] AUSTIN WAKEMAN SCOTT & ROBERT BYRON KENT, CASES AND OTHER MATERIALS ON CIVIL PROCEDURE 1067-68 (1967).
[189] KAUFMAN, *supra* note 10, at 286.
[190] Scott & Kent, *supra* note 188, at 1061.
[191] *Id.* at 1063, 1066.
[192] *Id.* at 1064.
[193] *Id.* at 1065.
[194] *Id.*

and jostled about in boarding defendant's trains.[195] Palsgraf also contended the Railroad had:

> [t]he duty to prevent the bringing upon its passenger stations or platforms and the transportation upon its passenger trains or cars of fireworks or other flammable and combustible substances, and to exercise such care, caution and prudence in the premises that passengers or other persons would not be allowed to bring upon and into its said stations or cars or trains any fireworks or other combustible or explosive substances.[196]

Palsgraf claimed due to this, and the large number of people the defendant knew were at the station and on its platform, insufficient employees were supplied.[197] And by reason of the Railroad's neglect, all the people were in "close proximity to a dangerous and unexploded blast of gunpowder or other explosive[.][198] As a result of a negligent explosive blast at the Platform, Plaintiff was "violently jostled," shoved, or pushed by the force of said explosion"[.][199] Further,

> plaintiff was knocked down or against certain of the platform stairs, inflicting on plaintiff grievous, serious and painful injuries in and about her person and causing plaintiff to be and become sick, sore and painful[.][200]

Palsgraf further claimed shock to her nervous system,[201] and loss of control of organs and speech.[202] "Plaintiff is still unable to pursue her usual occupation[.]"[203] Palsgraf sought $50,000 in relief.[204]

The clear thrust of the Complaint was that this station and platform were abundant with passengers.[205] The Complaint did not say

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[195] *Id.*
[196] *Id.*
[197] *Id.* at 1064-65.
[198] *Id.* at 1065.
[199] *Id.*
[200] *Id.*
[201] *Id.*
[202] *Id.*
[203] *Id.*
[204] *Id.* at 1066.
[205] *Id.* at 1064.

exactly where in relation to the explosive blast was Mrs. Palsgraf, only that she was in "close proximity" and lawfully on the platform.[206]

The Long Island Railroad Company acknowledged its corporate existence and that it controlled the Railroad and all "appurtenances" in the Borough of Brooklyn where the train station was located.[207] However, the Company denied all other assertions.[208]

### C. The Trial and Evidence

For all the time spent on *Palsgraf*, the paper and typescript used, as well as the intellectual and vocal expenditures of energy to hundreds and hundreds of thousands of law students over the years, this case was barely a two-day trial.[209]

Mrs. Palsgraf testified, and apparently was believable to the jury since they found for her and awarded damages of $6,000 for her injuries.[210]

I will not spend time on the precise injuries Mrs. Palsgraf claim since neither Judge Cardozo nor Judge Andrews in dissent did.[211] As to the so-called "critical factors" by the research intelligential, Palsgraf's lawyer, Matthew Wood, did a sufficient job, except for determining where was the plaintiff standing when the unexpected explosion occurred.[212] The attorney for the Railroad Company failed on the discovery of this critical point as well.[213]

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[206] *Id.*
[207] *Id.*
[208] *Id.* at 1061.
[209] *Id.* at 1067-68. The irony of this Author spending one and half years doing the same as all the others digging for "the Holy Grail" has not been lost on me.
[210] *Id.* at 1096 (noting that the jury was out from 11:55 a.m. to 2:30 p.m.). The verdict returned was $6,000 plus costs taxed. *Id.* at 1068. A verdict in today's 2023 dollars would be approximately $100,609.16. SAVING, https://www.saving.org/inflation/inflation,php?amount=60003year=1 (last visited Feb. 28, 2023).
[211] 248 N.Y. at 340-47; 248 N.Y. at 347-56 (Andrews, J., dissenting).
[212] KAUFMAN, *supra* note 10, at 297 ("Mrs. Palsgraf's distance from the incident was critical."); Scott & Kent, *supra* note 188, at 1069-73.
[213] Scott & Kent, *supra* note 188, at 1073-75. William McNamara, the Long Island Railroad attorney seemed more fixated on the fact, despite the crowded station, whether most people were carrying bags and valises. *Id.* at 1074, 1078, 1085. One can only surmise his jury defense was so many valises and bags being carried how could the Railroad know any of them had an explosive? The Judge, as noted later, gave in his Instructions—The Railroad had no "duty" to check passenger bags. *Id.* at 1095.

Mrs. Palsgraf testified that she was forced into a little corner by the scale due to the crowds.[214] She said the platform was fifteen feet wide.[215] Then the explosion of flying glass, "ball of fire," being choked with smoke, "and the scale blew and hit me on the side."[216] Others, including her on cross, testified there was "black smoke," making it difficult to breathe and no one could see a thing.[217] What the Railroad lawyer's questioning seemed most interested in was that everyone was carrying a valise or a package,[218] obviously with the intent that carrying a package was the everyday norm of people at that Station.

Nevertheless, from the transcript testimony evidenced facts of standing "six or seven feet" from the explosion (as to the eyewitnesses Gerhardts);[219] daughter Lillian Palsgraf had turned left away from the trains to go to the newsstand at the other end of the platform,[220] Mrs. Palsgraf turned right and apparently went towards the trains.[221] The newsstand where Lillian went was twenty-nine feet from her mother.[222]

Interestingly, as witnesses a husband and wife testified, Mr. and Mrs. Gerhardt.[223] They stated one "Italian" person made the train, but it was the second one who was carrying a "bundle" running also towards it.[224] However, as the "Italian" passed her, he hit Mrs. Gerhard hard in the stomach.[225] There is no immediately obvious explanation for this strange event.

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[214] *Id.* at 1071.
[215] *Id.*
[216] *Id.*
[217] *Id.*at 1074-75, 1077, 1084, 1086-87, 1089; *id.* at 1071 (stating that her arm, hip, side were hit and she was "black and blue" after the accident).
[218] *Id.*at 1074-75, 1078, 1085.
[219] *Id.* at 1085.
[220] *Id.* at 1089.
[221] *Id.* at 1071.
[222] *Id.* at 109 (according to the transcript, the clerk stated, based on Lillian's in-court demonstration, that "[i]t is 29 feet"). It should be noted that this was not the entire testimonial transcript, briefs or opening and closing statements which appear to be in the Scott & Kent Book. *Id.* at 1069-94.
[223] *Id.* at 1076 (providing Mr. Gerhardt's trial testimony); *id.* at 1083 (providing Mrs. Gerhardt's trial testimony).
[224] *Id.* at 1076.
[225] *Id.* at 1076 ("[T]wo Italians . . . one had bundle under his arms"; "and one fellow who had the bundle hit my wife in stomach."); *id.* at 1083 ("[A]s he ran past he hit me with his right arm, right in the stomach.").

There are a few more notable facts about the trial evidence. The door on the train was not closed as the car began to move, in fact held open by the Railroad employee.[226] The characterization of the package seemed differently described at trial than on appeal.[227] It was not disputed it was without markings, though the testimony gives an impression of the newspaper wrapping up dynamite or bomb—"fifteen to twenty inches; it was quite a large bundle."[228] "Well the way he had it rolled up I would say it was like oval; it wasn't a square package."[229] Mrs. Palsgraf did not wait days to go see a doctor. She was treated at the scene by a doctor and ambulance.[230] After that she had Dr. Parshall see her at home on August 25, 1924, the next day.[231] Additionally, the factual testimony seemed clear about the violence of the explosive blast, something in terms of a descriptive nomenclature given to the explosion which is absent from the Court of Appeals opinion.[232]

There is reference to Cardozo thinking *Palsgraf* was just a frivolous case due to the description of Palsgraf's injuries, *i.e.,* traumatic diabetes, stammer, and difficulty speaking.[233] Furthermore, there was evidence to support Cardozo's suspicions.[234] Plaintiff called a

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[226] *Id.* at 1085.

[227] In the Complaint it was variously described as "fireworks or other combustible or explosive substances." *Id.* at 1064; *id.* at 1065 ("[G]unpowder or some other explosive" is how the cause of the explosion is alleged in the Fifth paragraph of the Complaint.). Mr. Gerhardt testified to "fire and fireworks." *Id.* at 1076. Gerhardt said a "bundle" carried the items. *Id.* Mrs. Gerhardt referred to them as "cylindrical" in shape, "15 inches long[,]" and a "large bundle[.]" *Id.* at 1083. The Author notes that large cylinder-shaped bundle gives the impression of dynamite. The bundle blew up when it was dropped between the rail which the platform with the ensuing explosion. *Id.* at 1076, 1083. Exactly what those bundled explosive items were specifically is still unknown. The medical term "mute" is defined as "[u]nable or unwilling to speak to one who does not have the faculty of speech." WEBSTERS NEW WORLD/STEDMAN'S CONCISE MEDICAL DICTIONARY 483 (1987).

[228] Scott & Kent, *supra* note 188, at 1083 (according to Grace Gerhardt who was an eyewitness).

[229] *Id.*

[230] *Id.* at 1072 ("And the ambulance doctor took me to the waiting room.").

[231] *Id.* at 1079. Prior research has explained that, aside from being bitter by the appeal lost, Mrs. Palsgraf ultimately lived as a mute after she lost her case. POSNER, *supra* note 1, at 35 n.6.

[232] *Palsgraf*, 248 N.Y. at 341 (noting that "[t]he fireworks when they fell exploded"). At least Judge Andrews said it was a "violent explosion." *Id.* at 347.

[233] POSNER, *supra* note 1, at 42, 47.

[234] *Id.* at 35-36. At trial, Palsgraf's attorney called a Neurology expert. Scott & Kent, *supra* note 188, at 1091-94 (noting that Mrs. Palsgraf would be all right at some period after the trial was over).

neurologist as an independent expert whose testimony did not help Mrs. Palsgraf's case. The expert testified that after examining Mrs. Palsgraf he believed that her symptoms would go away once the lawsuit did.[235]

From this record, a number of relevant points raised at trial were not issues that were brought up on appeal.[236] The trial judge ruled the Railroad had "no duty" to search everybody's bags.[237] But he also refused to charge the jury, as proffered by the Defense, that the Railroad had to have any knowledge of the explosives before the jury could find any negligence.[238] This ruling was arguably crucial to plaintiff's case. Yet, it supported Cardozo's heavy reliance on the unmarked package to dismiss evidencing no danger or risk it had or was relevant to the issue of his finding no negligence.[239] Cardozo never mentioned the Instruction.

The Railroad Company's lawyer did not put on a defense.[240] The trial judge said there was no evidence that the door or its gate of the moving train car was closed at the time, presumably as it should have been.[241] The Judge did say, however, that the evidence showed the gate to the platform was closed.[242] According to the testimony of Mrs. Gerhardt, who was seven feet away, the railroad "guard" was the

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[235] *Id.* at 1093 ("[B]ut after litigation closed—I don't mean by that her getting a verdict, but as soon as the worry was over of the trial is over and she knows she doesn't have to go here on the witness stand and undergo cross-examination she should make a fairly good recovery in about three years.").

[236] Most of these constituted what the trial Judge believed the Law to be as set forth in Final Jury Instructions. *See* Scott & Kent, *supra* note 188, at 1094-97. Exceptions were taken for appeal. *Id.* at 1096. Neither the *Palsgraf* majority nor dissent mentioned jury charges, even if what the jury was given proved to be legal error in charging the Panel.

[237] *Id.* at 1075 ("[N]o duty on part of defendant . . . to examine each passenger.") The trial judge commented to the jury that if the Railroad had this duty then "none of us would be able to get anywhere." *Id.* Obviously, then the judge would have troubles with the TSA.

[238] *Id.* at 1096. The trial court refused to charge that for the jury to find negligence against the Railroad "it knew, or should have known, that the bundle carried by the passenger carried fireworks and explosives." *Id.* (emphasis added).

[239] *Palsgraf*, 248 N.Y. at 342 ("If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless at least outward seeing with reference to her, did not take to itself the quality of a tort because it happened to be wrong, apparently not one involving the risk of bodily insecurity, with reference to someone else.").

[240] *Id.* at 1094.

[241] *Id.* at 1096.

[242] *Id.*

one on the train, and in addition to assisting "he held the door open and the other man on the platform pushed him in."[243] The defendant's motions to set aside the verdict as well as for a new trial were denied.[244]

None of these issues, especially the jury charges, although preserved and if presumably taken up on appeal, were ever discussed in any of the Opinions.

As noted, in a three to two majority, the intermediate Appellate Court, Second Department, affirmed the verdict.[245] There were two interesting points from the Second Department decision.[246] First, the majority raised the fact that the Long Island Railroad owed Mrs. Palsgraf "the highest degree of care required by common carriers.[247] This was neither discussed by Cardozo nor Andrews.[248] Their second point was reference to a putative applicable New York City Ordinance.[249] However, the Appellate Division, Second Department simply said there was no evidence that the passenger with the bundle had any permit to carry the explosives, "and it does not appear that the provisions" of such Ordinance were violated.[250] This conclusionary only statement carried with it no explanation or factual foundation of support.[251]

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[243] *Id.* at 1085
[244] *Id.* at 1097.
[245] *Id.* at 1101-05; Palsgraf v. Long Island R.R. Co., 222 A.D. 166, 168 (N.Y. App. Div. 1928).
[246] *See Palsgraf v. Long Island R.R. Co.,* 222 A.D. 166 (N.Y. App. Div. 1928). The decision was 3-2 favoring the jury's verdict rendered for Mrs. Palsgraf. KAUFMAN, *supra* note 10, at 293 ("The majority explicitly referred to the high degree of duty that the Railroad owed Mrs. Palsgraf as a passenger.").
[247] *Palsgraf,* 222 A.D. at 168 ("It must be remembered that the plaintiff was a passenger of the defendant and entitled to have the defendant exercise the highest degree of care required of a common carrier.").
[248] *Palsgraf*, 248 N.Y. 339, 340-54.
[249] *Palsgraf,* 222 A.D. at 167 ("There was no evidence to show that the passenger carrying the bundle had any authority or permit under the Code of Ordinances of the City of New York to carry or transport fireworks, or the value of those fireworks, and it does not appear that the provisions of such Code of Ordinances were violated.").
[250] *Id.*
[251] New York City Ordinance dealing with "Explosives and Hazardous Trades" appears, at least portions thereof, quite pertinent to that Sunday, August 24, 1924, activity at the East Central Station of the Long Island Railroad Company. *New Code of Ordinances of the City of New York, June 20, 1916, ch. 10, Explosives and Hazardous Trades* (focusing on Article 6, Section 92(6), Fireworks). This theorem is, perhaps, a lone legal wolf in the wilderness concept by the Author of this article. At

trial the Railroad defense counsel, as will be noted, cross-examined witnesses on the fact most if not all passengers in the Station carried some type of package or valise. Scott & Kent, *supra* note 188, at 1074 (providing Mrs. Palsgraf's trial testimony); *id.* at 1078, 1085 (including the cross-examination by defense of Mr. Gerhardt and Mrs. Gerhardt, respectively). So to the Railroad, carrying a package, valise or even a bundle, I submit, arguably created no red flags of Notice of explosives. To that end, the trial judge ruled there was no duty imposed upon the Railroad to check every bag. *Id.* at 1095 ("No such duty devolves upon the railroad company in this case, and no negligence can be predicated upon the failure of the dependent to stop a passenger while moving across its platform and examining what he might have with him"). It was hypothesized at first that all these bundles and packages, for example, were generally carrying firecrackers and fireworks for an Italian holiday. POSNER, *supra* note 1, at 35 (Whether there was at the time such a custom among Italian Americans, I have not been able to discover[.]"). *Id.* at 39 n.14. The Italian man whose large "bundle" per Mrs. Gerhardt did not seem dressed for a "beach outing" nor his comrades. POSNER, *supra* note 1, at 33-34; KAUFMAN, *supra* note 10, at 298. One of the Italian men got scared and left his bundle at the railway station taking flight. One of the original men left the bundle at the station. Police later found dynamite with it. POSNER, *supra* note 1, at 33-36. To the present Author, *Palsgraf* has gaps and lapses to it. *See id.* at 37-38. The found "dynamite" was not Fourth of July fireworks. Common sense tells you they are for destruction, not celebrating activities. *See* WEBSTER NINTH NEW COLLEGIATE DICTIONARY 166 (1984) (explosive device designed to detonate); *id.* at 465 (firecrackers usually discharged to make "noise"). It is beyond this Article's scope, but here I submit this one quick hypothesis. These "Italian" looking men with "large bundles[,]" per the testimony, were not going to celebrate, but to cause destruction. The 1910s and 1920s were an active time of political anarchist and other ideologically based bombings, even by Labor Unions. *See* IRVING STONE, CLARENCE DARROW, FOR THE DEFENSE 359-64 (1941) (The Haymarket anarchists); *id.* at 368 ("dynamite the doors of the bunks" to get money for the revolution); *id.* at 258-59 (dynamiting to LA Times Building). Bombs are not firecrackers. Their uses are for different purposes. Destruction versus celebration. The packages being described by the Gerhardts in *Palsgraf* I submit were Bombs, meant to destroy or damage something or someone in a structure. Fortuitously, or not, one large bundle of these purported sticks of dynamite from testimonial cylindrical and long "bundles" fell onto the train tracks and sparks from the wheels and metal tracks ignited the explosives. The East Central Long Island Railroad Station was collateral damage. That was not the target. *But for* Railroad employees and Italian men's careless negligence perhaps some other story would have been written that day by the New York Times about an explosion heard blocks away and people injured, even killed. *See Bomb Blast Injures 13 in Station Crowd*, N.Y. TIMES (Aug. 25, 1924), at 1. How else can one describe the dark billowing smoke from the explosion witnesses testified to resulting in not being able to see. *See* Scott & Kent, *supra* note 188, at 1087, 1088, 1090. Then the wooden planks being ripped apart. *See* POSNER, *supra* note 1, at 34-35. As a plausible big picture view, and the nature of society revolving around the early 1920's, *Palsgraf* was collateral damage, unintended. It became a Tort cause celebre. But the Italian gentlemen with the large

## VI. THE COURT OF APPEALS PROTAGONISTS AND MRS. PALSGRAF

It is with this specific backbeat of the actual fact specifics of the *Palsgraf* case that the next area of discussion addressed. An evaluation could determine whether Judge Cardozo or Judge Andrews used what was recognized or discarded from the case and if the factual disputes decided by the jury were followed. Further, this evaluation could determine whether that result had in anyway helped Mrs. Palsgraf's appeal. The rest of the narrative is how the Cardozo majority decision for the New York State Court of Appeals took all away which had been given by a jury of Mrs. Palsgraf's peers.

### A. Cardozo First

*Palsgraf* was a railroad station incident. Cardozo was no stranger to trains.[252] The case did not arise, however, from a failure in the mechanics or technology of a train, but from events which occurred on the Railroad Station platform servicing passengers of those trains.[253] Without question from his own experiences, Cardozo knew about departure and arrival platforms,[254] and understood thoroughly New York train stations of the 1920s.[255]

Cardozo was a formative product of the Nineteenth Century, but lived his judicial life during the first third of the Twentieth Century.[256] I believe, therefore, Cardozo was influenced both intellectually and personally more greatly by the Victorian Era's genteel times

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bundles I speculate were mostly filled with dynamite and explosives and were not meant to devolve to the ever growing legacy of Benjamin Cardozo.

[252] POLENBERG, *supra* note 1, at 82 ("[O]n the morning of November 13, 1922, Benjamin Cardozo arrived by overnight train to Ithaca, New York, where he was to lecture at Cornell University."); KAUFMAN, *supra* note 10, at 195 (referring to a different event, Kaufman notes that "[h]is [Cardozo] colleague Frederick Crane took him off to the Metropolitan Museum of Art to see the Havemeyer Collection. Then he went by train to Boston, spent a night at a hotel, and was driven by Felix Frankfurter to spend a day with Justice Holmes on Beverly Farms").

[253] POLENBERG, *supra* note 1, at 246.

[254] *See id.* at 82-83 (including overnight train to Ithaca, New York and noon train to New York City on November 13-14, 1922).

[255] *Id.*

[256] Cardozo was born and grew-up in the last quarter of the Nineteenth Century. KAUFMAN, *supra* note 10, at 15-16, 23-24, 27-29. His judging began in 1914. *Id.* at 3, 21-29, 143, 162-68.

of the Nineteenth Century. His formulative and adolescent years were lived during those Victorian times. The more complex human actions, morals, and social mores resulting from the Twentieth Century's perplexing industrialization and modernization of Society proved somewhat problematic, in my opinion, for Cardozo.[257]

*Palsgraf* was not the first case where Cardozo tried to establish a "Long and Winding Road"[258] of immutable Tort Law principles."[259] Another factor to be considered when examining *Palsgraf* is the difference between Cardozo's life in financial comfort of upper West Side wealth and Mrs. Palsgraf's status as a "janitor" woman, who received little empathy or sympathy from Cardozo.[260] In my opinion this was

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[257] Some may challenge my last statement. One basis would be Cardozo's landmark decision in *MacPherson v. The Buick Motor Company*, 217 N.Y. 382 (1916). *MacPherson* was certainly a case arising from the New Industrial Age. KAUFMAN, *supra* note 10, at 270-72, 273 (Cardozo's analysis recognized the industrial and mercantile importance of the motor vehicle, but also balanced that not to go too far down that liability road). "Cardozo studiously avoided discussing the broad ramifications of the [industrial case]." *MacPherson*, 217 N.Y. at 392 (moving coach to carry the provisions). That case established the groundwork for modern product liability and warranty law. POLENBERG, *supra* note 1, at 2 (opinion insisted "that legal principles should be harmonized with the "needs of life in a developing civilization"). He held an automobile manufacturer accountable, even without privity with customer, to potential defects in their motor vehicles as they are dangerous instrumentalities unknown to the ultimate purchaser. *MacPherson*, 217 N.Y. at 389-90. A consumer had an expectation that there was a warranty of good workmanship and design in such a product; and, if there wasn't, the manufacturer could be held liable. *Id*. at 394-95. This was not, I believe, an emotional reactive decision; it was Cardozo the pure legal theoretician. This helps explain both his greatness and fascination about him. *See* KAUFMAN, *supra* note 10, at 265-85.

[258] The Beatles, "The Long and Winding Road" on "Let It Be" (Apple Records 1970).

[259] *See, e.g.*, Perry v. Rochester Lime Co., 219 N.Y. 60, 62 (1916) (discussing a dynamite box in the Erie Canal); Bird v. St. Paul Ins. Fire & Marine Ins. Co*.,* 224 N.Y. 47, 49 (1918) (regarding a boat damaged by an explosion); Greene v. Sibley, Lindsey & Curr, Co., 257 N.Y. 190, 191-92 (1931) (where a shopper fell over mechanic).

[260] Cardozo has been criticized for not relating to ordinary people. W. PAGE KEETON ET AL. PROSSER AND KEATON ON THE LAW OF TORTS 248 n.1 (5th ed., 1984); POSNER, *supra* note 1, at 33 (using the term "Janitor"). Mrs. Palsgraf described herself as a "janitor" in her testimony. Scott & Kent, *supra* note 188, at 1070 ("I was a janitor and went out to work"); *see* JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON & WYTHE AS MAKERS OF THE MASKS 114-22, 191-92 (1976) (criticizing Cardozo's ability to relate to the individual human beings involved in the case). *See also* KAUFMAN*, supra* note 10, at 11 (Cardozo came from a well to do hierarchy environment living in "fashionable new neighborhood at 12 West 47th Street just off Fifth Avenue[.]"). *id.* at 146-47 (Cardozo was "able to afford a good deal of help in running the house" at 16 West 75th Street).

partially related to, and manifested by, Cardozo's mostly self-imposed isolation from mainstream life, and the lingering inculcation as a youth of Sephardic Jewry, believing themselves aloof from others.[261] And one criticism which followed the Cardozian judgeship legend has been how he failed to relate to ordinary people.[262]

I believe it important to understand these aforementioned factors when analyzing *Palsgraf* because Cardozo showed no reference of humanity in his written disposition of Mrs. Palsgraf's claim. The Sephardim, which Cardozo was born into, thought of themselves as more educated, cultured, and kept themselves apart from most others.[263] They felt aloof to those Jews immigrating from Eastern Europe (*i.e.,* the Ashkenazim).[264] The Ashkenazi Eastern European Jews brought with them ideas of social revolution and radical political thoughts based upon their societal backgrounds and experiences with pogroms while the Sephardic Mediterranean Jews, like Cardozo, were much more conservative and non-radical in their political beliefs.[265]

Cardozo's Judaic ancestors were from the Mediterranean area, mostly the Spanish and Portuguese countries.[266] The Sephardim were culturally insular, even elitist as to other Jews and much more different

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[261] KAUFMAN, *supra* note 10, at 10. *See also id.*, at 4 ("Cardozo's family life and loyalty to his Sephardic heritage also reflected a moral and social conservatism that balanced his progressive, modernizing instincts."); *id.* at 5 ("Even though he led a sheltered personal life, he was adventurous in the world of ideas.").

[262] *See* Noonan, *supra* note 260, at 191-92 (criticizing Cardozo for an inability to relate to the parties in the *Palsgraf* case).

[263] *See* KAUFMAN, *supra* note 10, at 7-8 ("In the Nineteenth Century many Sephardic Jews considered themselves the elite of American Jewry."); *id.* at 587 n.7; POLENBERG, *supra* note 1, at 14 ("As one scholar explained, the Sephardim 'considered themselves a superior class, the nobility of Jewry, and for a long time their co-religionists on whom they looked down, regarded them as such.'"); *see also id.* at 227 (quoting R. Meyer Keyserling, *Sephardim*, JEWISH ENCYCLOPEDIA) (1901)).

[264] KAUFMAN, *supra* note 10, at 7-8.

[265] *See* JOHNSON, *supra* note 5, at 355 ("The Sephardi[m] indeed had a strong regard for ancient historical institutions, and thus conformed to his image of the Jew. But the Ashkenazi[m], whom he chose to ignore in his argument, were far more restless, innovatory, critical and even subversive [in England]."); *id.* at 363-66 (Russian pogroms antisemitic official policy of Tsarist Russia and no other place in Europe); *id.* at 370 ("The mass arrival of poor Ashkenazi Jews in New York naturally force-fed the growth of this new anti-semitic subculture"); *id.* at 373-75; KAUFMAN, *supra* note 10, at 6-9 (noting Cardozo was more of moderate in his political and cultural views than East European Jews).

[266] JOHNSON, *supra* note 5, at 355.

from the Eastern European diaspora.[267] It was not unusual for Sephardic Jews in America to look down their noses at their own religious Eastern European race due to the latter's dirty Shtetl-clad appearances and lifestyles.[268]

Eastern European Jews coming to America in the mid-1800s and afterwards lived mostly in hellish conditions on the lower East Side of New York City.[269] Cardozo, I believe, shared no commonality of experiences with these Eastern European Jews, or those from other ethnicities living in the same neighborhoods.[270] It seems unclear that Cardozo was empathetic in his feelings towards America being a cultural melting pot.[271] This is consistent, as you have already read, with how he was often criticized for not relating to the common person.[272]

This backdrop review of Cardozo is not intended to mean or imply he was a Nativist. I do not believe such, and nothing points that he was. But one cannot ignore, I believe either, that Sephardic heritage which was indoctrinated into him as a child, or that he neither grew up nor lived his life in the New York slums and tenement houses.[273] The air Cardozo breathed on the Upper West Side was rich and rarefied. Lives of those he associated with professionally and business wise, I believe, were at best paternalistic to the invisible street life.

The way Cardozo laid out the case facts led me to immediately conclude how the dispute would likely be decided.[274] It must be

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[267] *Id.* at 6-9 (describing Cardozo's family historic migration ultimately to America prior to the Revolutionary War). Diaspora is defined as "the settling of scattered colonies of Jews outside Palestine after the Babylonian exile." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 35 (1984). *See also Dispora*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/diaspora (last viewed Feb. 25, 2023) ("The Jews living outside Palestine or modern Israel"). The modern view of Jewish people's Diaspora is most associated with the Jews spreading across Europe, Asia and Africa after the destruction of the Second Temple about one-hundred years after the death of Christ. WOUK, *supra* note 5, at 52-55, 60-61.

[268] *Id.* at 8-9. For a description of "shtetl," see FELDSTEIN, *supra* note 18, at 185 and JOHNSON, *supra* note 5, at 172.

[269] FELDSTEIN, *supra* note 18, at 133-38.

[270] POSNER, *supra* note 1, at 47 (feminist critics of Cardozo said he had no sympathy or empathy for the "poor" woman, Mrs. Palsgraf).

[271] *See* KAUFMAN, *supra* note 10, at 7-8, 210.

[272] Keeton, *supra* note 260, at 218 n.1.

[273] KAUFMAN, *supra* note 6, at 39-42 ("Cardozo's Sephardic Jewish Heritage, however, was undoubtedly an important part of his life"). KAUFMAN, *supra* note 10, at 11, 22 ("[Cardozo's father] moved his growing family to a large brownstone house in a fashionable new neighborhood at 12 West 47th Street, just off of Fifth Avenue.").

[274] *See* Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 349-41 (1928).

acknowledged that Cardozo achieved his result by tinkering with the record facts as he had been accused of doing in certain cases.[275] To that end Cardozo culled out only these Spartan impersonal facts about Palsgraf's case:

> Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform, many feet away. The scales struck the plaintiff, causing injuries for which she sues.[276]

It seems clear to me that Cardozo "fudged" by omitting or ignoring material facts,[277] such as the crowded rail platform, distances, locations of people, and where Mrs. Palsgraf was at the time of the explosion.[278]

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[275] Cardozo allegedly tinkered with the facts in other cases. Robert Birmingham, *A Study After Cardozo: DeCicco v. Schweitzer, Noncooperative Games, and Neutral Computing*, 47 U. MIA. L. REV. 121, 130 (1992). *See also* POSNER, *supra* note 1, at 43 ("Cardozo defended the right of a judge to deliberately misstate the facts."); CARDOZO, LAW & LITERATURE, *supra* note 151, at 7 ("I often say that one must permit oneself, and that quite advisedly and deliberately, a certain margin of misstatement."). This issue of selective use of facts, or even alternatively selecting or isolating supporting facts for a Judge's decision was discussed in the Section of this Article dealing with Cardozo's Science of Judging.

[276] *Palsgraf*, 248 N.Y. at 340-41.

[277] *See* POSNER, *supra* note 1, at 43. *See* WILLIAM M. LANDES & RICHARD POSNER, THE ECONOMIC STRUCTURE OF TORTS 246 n.39 (1987) (stating "Professor Landes and I [Posner] were similarly mislead").

[278] *See* POSNER, *supra* note 1, at 37-38, 40 ("If Cardozo's statement of the facts can be criticized for inaccuracy . . ."); KAUFMAN, *supra* note 10, at 298 ("In any case,

Cardozo recognized conceptually in *Palsgraf* that for liability there must first be a duty.[279] Only then could one gauge causatively any "proximity" analysis between the explosion and the person upon whom the destruction wreaked havoc.[280] Foreseeability must be present for duty and causation, but the threshold of applicability of these two legal concepts has different elements.[281] Duty is primary.[282] Thus, in *Palsgraf* Cardozo focused only on the imposition of a scope of duty and failed to impose that requirement by drawing an arbitrary line of factual locality on which to base his decision.[283]

The general legal prose in his Opinion suggests that foreseeability or lack of causation may have led to Mrs. Palsgraf's imploded appellate defeat of her legal claim. For sure, the parameters of some arbitrarily drawn Cardozo distal limit on scope of duty, I believe, resulted in everyone's liability exposure being much more restricted.[284]

Cardozo never identified Mrs. Palsgraf by name in his Opinion; she was only a "plaintiff."[285] But in her anonymity, I believe, Cardozo used her as a metaphor for those others on the Rail Station platform as she was not the only person there that day.[286] It is my viewpoint like the explosive fragments from that unknown newspaper wrapped package or "bundle," a legal duty to Cardozo also had distance limitations. In *Palsgraf*, Cardozo found a proximal limitation of legal responsibility, or duty, for a civil Tort wrong which he limited to an "orbit of danger."[287]

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Cardozo believed that the exact distance did not matter because the result differ only if Mrs. Palsgraf had been within the zone of risk, that is standing right next to where the negligent conduct occurred . . ."); *id.* at 299 (Mrs. Palsgraf "seems to have been no more than ten yards away from the negligent conduct."); *id.* at 655 nn.30-31.

[279] *Palsgraf,* 248 N.Y. at 342 ("back of the [negligent] act must be sought and found a duty to the individual complaining[.]").

[280] *Id.* at 342-43.

[281] *Id.* at 344-45, 347; KAUFMAN, *supra* note 10, at 299-300.

[282] *Id*. at 351-52 (Andrews, J., dissenting). Cardozo did not use the word foresee, but it seems he substituted the phrase "proximate causes" or "proximity." *Id.* at 346-47.

[283] *Id.* at 342-44. The phraseology Cardozo used for scope of duty or negligence was being aware of "risk," "eye of vigilance perceives the risk of damage." *Id.* at 344.

[284] *Palsgraf,* 248 N.Y. at 334-36.

[285] *Id.* at 340-41, 343, 345; POSNER, *supra* note 1, at 51.

[286] *See* KAUFMAN, *supra* note 10, at 286 (mentioning how thirteen people were injured and sent to the hospital, except Palsgraf). The testimony was that the East New York Station was very crowded with people. Scott & Kent, *supra* note 188, at 1060.

[287] *Palsgraf,* 248 N.Y. at 343.

Cardozo's scope of duty formula, "orbit of danger"[288] is not an objective prescription.[289] This lyrical sounding principle of non-specific verbiage is set forth in the Opinion,[290] but without any prescribed parameters or dimensions.[291] Absent any structures, boundaries, or limitations, either quantitively or qualitatively of "orbit" as a Black Letter Law Standard, it became purely a subjective concept by Cardozo, I believe. Accordingly, I ask whether Cardozo was really acting here as a super juror deciding the factual case *contra* to the real jury? Cardozo's "orbit of danger" characterization is not necessarily comparable to Holmes's scribed conclusion of what is or is not considered sedition under the Espionage Act of 1917,[292] and the Sedition Act of 1918,[293] where "a clear and present danger being presented was used as the benchmark standard."[294] "Orbit of danger," in my analysis, is about as helpful as Justice Potter Stewart's Supreme Court perspective on pornography. "I know it when I see it."[295] Like Cardozo's anti-Palsgraf holding, it is purely subjective as within the eye of the beholder.

In *Palsgraf*, Cardozo attempts to state a liability criterion establishing duty limits for the common law trespass of Tort.[296] Yet his non-specified spatial boundaries of an "orbit of danger," measured without benefit of a transom, arbitrarily resulted in Palsgraf without really any cogent explanation, being outside the scope of duty resulting

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[288] *Id.* ("Even then the orbit of danger as disclosed to the eye of reasonable diligence would be the orbit of duty"). *See* POSNER, *supra* note 1, at 43-44.

[289] *Id.* Cardozo does not specifically define, quantitively, what is the "orbit." *Id.* at 343 ("Even then, the orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty."). *See* KAUFMAN, *supra* note 10, at 311. His language rationale discusses "proximity," Palsgraf being "far away," "according to the circumstances," and other broad-brush quantitative analogs. *Id.* at 341, 343, 346.

[290] *Palsgraf*, 248 N.Y. at 343 ("Even then, the orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty.").

[291] In *Palsgraf*, Cardozo refers to no distances or dimensions developed in the testimony at trial. *See, e.g.,* Scott & Kent, *supra* note 188, at 1087, 1090. In his written Opinion, Cardozo merely states Palsgraf was "many feet away" "or standing far away." *Palsgraf,* 248 N.Y. at 341.

[292] 18 U.S.C. ch. 37; 18 U.S.C. § 792 *et seq.*; Pub. L. 65-24.

[293] Pub. L. 65-150, 40 Stat. 553 (May 16, 1918).

[294] Oliver Wendell Holmes, Jr., THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, & OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. 315 (Richard A. Posner ed., 1992); *see also* Schenck v. United States, 249 U.S. 47, 52 (1919).

[295] Jacobellis v. Ohio*,* 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[296] *Palsgraf*, 248 N.Y. at 346.

in a dismissal of her damages.[297] Cardozo's overturning of the *Palsgraf* verdict award was presumed irrespective of the presumptive "deep pocket" coffers of the Long Island Railroad.[298]

The "orbit of danger" was based on Cardozo's devised principle that relativity to risk at hand determined if the negligent event or action was within a scope of duty.[299] However, Cardozo established no lines of numbers to mark out quantum parameters as to where that boundary of a duty was exactly to be drawn within his "orbit."[300] This was clearly highlighted from the following *Palsgraf* analysis:

> The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff [Palsgraf], standing far away. Relatively to her it was not negligence at all.
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> * * *
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> The argument for the plaintiff is built upon the shifting meanings of such words as "wrong" and "wrongful," and shares their instability. What the plaintiff must show is "a wrong" to herself, *i.e.,* a violation of her own right, and not merely a wrong to someone else, nor conduct "wrongful" because unsocial, but not "a wrong" to anyone. We are told that one who drives at reckless speed through a crowded city street is guilty of a negligent act and, therefore, of a wrongful one irrespective of the consequences. Negligent the act is, and wrongful in the sense that it is unsocial, but wrongful and unsocial in relation to other travelers, only because the eye of vigilance perceives the risk of damage. If the same act were to be committed on a speedway or a race course, it would lose its wrongful quality. 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 range of apprehension.
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[297] *Id.* at 346 (reversing the judgment and dismissing Palsgraf's Complaint).
[298] KAUFMAN, *supra* note 10, at 303. *See* White, *supra* note 72, at 279-80; *see also* POSNER, *supra* note 1, at 47-48 ("[I]t is highly misleading to call the Long Island Railroad 'rich.'").
[299] *Palsgraf*, 248 N.Y. at 344-45.
[300] *Id.* at 346-47.

> Negligence, like risk, is thus a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all. Negligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports the violation of a right, in this case, we are told, the right to be protected against interference with one's bodily security. But bodily security is protected, not against all forms of interference or aggression, but only against some.
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> * * *
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> 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. If there is no tort to be redressed, there is no occasion to consider what damage might be recovered if there were a finding of a tort.[301]

Are these statements analogous, somewhat facetiously reiterated by me, to a contemporary slogan of "no harm, no foul"?[302] Perhaps it should be the inverse of that phrase? But here Palsgraf was injured as the trial level jury so found.[303] Yet Cardozo found no connection between that harm and Palsgraf's injury and therefore no foul by the Long Island Railroad.[304]

In his initial factual recitation, Cardozo also said that the scale at the end of the other end of the platform was "many feet away."[305] But was it, as there was no exact testimony? The majority Opinion,

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[301] *Id.* at 341, 343-44, 346 (emphasis added).

[302] Cardozo uses an analogy of a speeding vehicle violation occurring on a speeding truck where there is no risk of danger to be perceived as it is not wrongful conduct. *Id.* at 344. Or, in this Author's words, Cardozo's analogy brings up the image of a tree falling in an empty forest. Does anyone hear it? In other words, I believe that Cardozo was saying, no matter your wrongful conduct, if no one is around to perceive or be exposed to that risk, then there was no duty.

[303] *Id.* at 347; POSNER, *supra* note 1, at 35-36.

[304] *See Palsgraf,* 248 N.Y. at 344-45.

[305] *Id.* at 342. Mrs. Palsgraf nor anyone else in the transcript ever said she or the penny scale was "far away" or "many feet from the explosion." *See* Scott & Kent, *supra* note 188, at 1068-73 (discussing Mrs. Palsgraf); *id.* at 1086-88 (discussing Elizabeth Palsgraf); *id.* at 1089-91 (discussing Lillian Palsgraf).

when read in tandem with the dissent, has Mrs. Palsgraf standing next to and likely injured by that penny scale.[306] Ergo, having Mrs. Palsgraf injured one does not necessarily have to accept that the penny scale, and by logic, were "far away."

As a commentator analyzing the *Palsgraf* case, I conclude Cardozo strategically and intentionally located plaintiff "far away" from the explosive blast.[307] Cardozo never provided any quantitative or specific descriptive locations to support this hypothesis.[308] Therefore, from my viewpoint, it does not take volumes of legal authoritative research material to conclude that when Cardozo said Plaintiff was not positioned in any "orbit" for an expected risk of harm, despite his terminology "far away," subjectively he meant exactly just that. He simply and arbitrarily placed Mrs. Palsgraf beyond the natural, continuity and sequential consequences which affected her by someone else's negligent act.[309] Because of this, any Railroad negligence was unrelated to her.[310]

Thus, I conclude that wherever Mrs. Palsgraf was positioned on that Platform, Cardozo determined her location was not where the Long Island Railroad owed her any duty of reasonable care, pure and simple. This is based upon his fundamental premise of no liability owed to Palsgraf.[311] Perhaps even more importantly to Cardozo was the uncontroverted fact the Railroad had no knowledge of any danger of an explosion.[312]

The absence of any risk by Cardozo's description of the harmless looking unmarked package presented no expected or observable risk or danger to Palsgraf, or to anyone. Thus, a distal location for Plaintiff under these circumstances provided no communicative portending of any imminent danger.[313] This snapped for him any connective chain of events from the Railroad employees' negligence with the moving rail car jumper to Palsgraf, who was on the platform and

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[306] *Palsgraf,* 248 N.Y. at 344.
[307] *Id.* at 343.
[308] *Id*. at 339-47. Cardozo did not quantify the distance, but instead chose to only used the words "many feet away." *Id.* at 343. Despite this, even Judge Andrews' dissent curtly surmises Mrs. Palsgraf was twenty-five to thirty feet or less away from the blast. *Palsgraf,* 248 N.Y. at 356 (Andrews, J., dissenting).
[309] *Id.* at 344-45.
[310] *Id.* at 345.
[311] *Id.* at 341.
[312] *Id.*
[313] *Id.* at 345.

deemed "far away" by Cardozo.[314] Nevertheless, these judicial platitudes, which became undisputed facts in the Cardozo case Opinion, must be microscopically broken down for accuracy of the events to occur since Cardozo's legalese were so generalized and nonspecific. This was the purpose of beginning this analysis with the trial record at the Supreme Court level broken down into individual pieces and parts. Cardozo did not do this at all in *Palsgraf*.[315] To rule otherwise would have required Cardozo to factually dive into the Record. Not doing so helps demonstrate in my belief the disconnect existing between the trial and the final Appellate Opinion.

Cardozo's firing synapses, from a legal analytical standpoint, would have established absolute liability, or the Long Island Railroad being deemed an insurer had there been no disconnect between the trial and the final Appellate Opinion. If so, both results were anathemas to him, I conclude, under these circumstances as he might be extending liability. Even if this had occurred, I do not think Cardozo's ultimate conclusion would have been different; the case was going to be dismissed. Cardozo would have found a different stylistic legal prose to use for justification because the danger of the dynamite or bombs was not labeled. Nor were they owned by the Railroad as Common Law absolute liability required.[316] Regardless, the trial and final Appellate results would have been different for Cardozo unchanged.

Cardozo determined duty by some unknown proximity to the negligent risk presented.[317] He unequivocally stated that Mrs. Palsgraf was "far away".[318] In his majority Opinion, Cardozo did not attempt to locate Mrs. Palsgraf in relation to the so-called risk or danger "orbit" he specifically alluded to (*i.e.,* the explosion).[319] He merely concluded that the passenger with the unmarked package who tried to jump onto the moving train was "far away" from Plaintiff.[320]

As I comprehend this analytical bottom line, Cardozo is clear where the negligent act occurred.[321] The negligence was instigated

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[314] *Palsgraf*, 248 N.Y. at 343 (Cardozo believed the duty where the negligence occurred to be the person with the package).
[315] KAUFMAN, *supra* note 10, at 297 ("Cardozo was allergic to lengthy statements of the Record.").
[316] *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 116-17 (1881).
[317] *Palsgraf*, 248 N.Y. at 344.
[318] *Id.* at 343.
[319] *See id.* at 341, 343, 346.
[320] *Id.*
[321] *Id.* at 340-41, 343, 346.

from the stranger who tried to surmount the moving train which had left the platform, the Railroad employees' helping in pushing and pulling him onto the train's open door gate, and the guard that was holding the door open.[322]

I represent the negligent act described of knocking the harmless looking package to the ground had no bearing as to Mrs. Palsgraf's safety and risk, so concluded Cardozo.[323] No one had knowledge or notice of any explosives contained therein, as it was just an ordinary plain package. Thus, what risk of danger existed by her innocent presence on the train platform was presented to Mrs. Palsgraf? None. Instead, this danger resulted from Cardozo. The Railroad owed no duty to her or risk of danger to which they exposed her.

By not providing dimensions, measurements, or locations, Cardozo's legal statements were not entirely consistent with the factual Record.[324] Cardozo was not entirely consistent with the Record or

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[322] Scott & Kent, *supra* note 188, at 1085 (providing Mrs. Gerhardt's testimony: "he [the guard] held the door open and the other men on the platform pushed him in"). In response to a juror question, the trial Judge said "[t]here is no evidence that the door of the train was closed, or, the gate of the door was closed–the gate of the platform was closed." *Id.* at 1096.

[323] *Palsgraf,* 248 N.Y. at 342-43.

[324] As will be seen, there was evidence in the Record of distances of objects to the explosion even of the penny scale and in relation to Mrs. Palsgraf. *Id.* at 355-56 (Andrews, J., dissenting); *see* POSNER, *supra* note 1, at 43 n.19; KAUFMAN, *supra* note 10, at 298 (there was no precise evidence directly pinpointing Mrs. Palsgraf's location, without indicating her exact position from what evidence was precisely known); *id.* at 655-56 nn.30, 31, 36. Early in the 1950s, Professor William Prosser began to question the issue of scope in *Palsgraf* due to the vague, undefined reference to the Plaintiff being "far away." William Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 3 (1953); *see* Scott & Kent, *supra* note 188, at 1094; POSNER, *supra* note 1, at 34; KAUFMAN, *supra* note 10, at 286, 652 n.1. As noted in the text of this Article, no witness testified exactly where Mrs. Palsgraf was on the Railroad Platform in relation to the train where the explosion occurred, nor did her lawyers establish this. *See also* KAUFMAN, *supra* note 10, at 287 ("Mrs. Palsgraf's evidence did not establish how close she was to the train."). *But see* POSNER, *supra* note 1, at 34 ("At the instant of the explosion, Mrs. Palsgraf was standing next to a penny scale approximately her height." According to the New York Times article, "the scale was 'more than ten feet away' from the site of the explosion," but the trial Record contains no indication of distance.). The fact of the matter was that Palsgraf's lawyers did not give the jury evidence of exactly where Mrs. Palsgraf was standing *vis-a-vis* the explosion. KAUFMAN, *supra* note 10, at 298, (the record, however, was not clear about the precise location of Mrs. Palsgraf). But outside the fast-moving moments of a jury trial, and lawyers' failure on evidence presentation, researchers and scholars, not so pressed for time, have the luxury of hindsight, and archaeological digging for

Case on Appeal by just remarking "far away" as to Plaintiff's location.[325]

Judge Andrews, having that same Record before him on Appeal as Cardozo, clearly stated in his dissent that Mrs. Palsgraf was twenty-five to thirty feet, or "[p]erhaps less" from the pyrotechnic explosion.[326] Unlike Andrews, Cardozo did not induce or deduce that. This is why I arrived at the metaphorical Rail Station that existed to Cardozo was being inconsistent to the Case on Appeal by him, ignoring certain facts, or just perhaps his being disingenuous about this case.

Coincidentally, Cardozo around this very same time period was working and attending meetings of the American Law Institute (ALI) discussing proximity of duty for the enactment of the First Restatement during October 1927.[327] At that time also *Palsgraf* was pending at the

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factual nuggets. *See* POSNER, *supra* note 1, at 33-48, and nn.2, 3, 6, 19. One of Palsgraf's daughters testified the latter was standing at a "newsstand and was close enough to see the bundle or package fall to the tracks." KAUFMAN, *supra* note 10, at 298. Daughter Lillian said that newsstand was "quite a distance" from the other end of the Platform where supposedly Mrs. Palsgraf was. *Id.* at 298, 655. But, because Cardozo bothered not to even attempt to quantify distances and locations, or triangulate them, if he [Cardozo] implied Mrs. Palsgraf was 150 to 300 feet away from the "unexpected explosion," the Record does not support him. *Id.* at 298. Palsgraf's placement in relation to the explosion was critical to the case. *Id.* at 297. Yet, whether it was a guess or a close survey of the Record, Judge Andrews got to his twenty-five to thirty feet" distance away. *Palsgraf,* 248 N.Y. at 356. Again, testimony at trial was there for a calculus as to where, or approximately how far Mrs. Palsgraf was from the explosion. Scott & Kent, *supra* note 188, at 1084-89; KAUFMAN, *supra* note 10, at 655 n.31. Another daughter of Mrs. Palsgraf, Elizabeth, testified alike, as Lillian, that the newsstand was "at the other end of the station" but was only twenty-nine "feet away" from her mom. Scott & Kent, *supra* note 188, at 1090. Daughter Lillian also gave evidence the newsstand was "approximately 29 feet away from her mother." *Id.* at 47; KAUFMAN, *supra* note 10, at 655 n.31. "There was also testimony that the Platform was 12 to 15 feet wide." *Id.* at 17, 37. Accordingly, "if the newsstand was nearly perpendicular to the location where the guard pushed the passenger, that would place Mrs. Palsgraf, approximately 25 to 40 feet from the location." *Id.* at 655 n.31. Accordingly, with a pick and shovel the facts unearthed in Scott & Kent, *supra* note 188, at 1078-79, 1090, were within the range of Judge Andrews -twenty-five to thirty feet away, or 25-40 feet away by mathematical analysis. *Palsgraf*, 248 N.Y. at 357 (Andrews, J., dissenting). If true, how could Cardozo take the position Palsgraf, unnamed in his Opinion, was "far away" or outside the orbit from the explosion?

[325] If you want to demonstrate inconsistency, as previously stated, Cardozo used no dimensions, digits, or measurement calculations anywhere in his majority Opinion. *Palsgraf,* 248 N.Y. at 339-47.

[326] *Id.* at 356.

[327] KAUFMAN, *supra* note 10, at 287-88, 652-54.

intermediate Appellate Court and may have been discussed at an ALI meeting allegedly attended by Cardozo.[328] Nonetheless, Cardozo was back in Albany in time for oral arguments in *Palsgraf,* authoring his decision in May 1928.[329]

### B. Andrews Dissent Not Great, But Gets Correct Result

Three of the seven Court of Appeals Judges dissented in an Opinion authored by Judge William Andrews.[330] Andrews said the Railway employee, who did not know what was inside the unmarked package, by helping the man onto the moving train directly caused the package to fall.[331] The continuity of this act, according to Judge Andrews's analysis, caused the resultant explosion which in turn injured Mrs. Palsgraf.[332] Judge Andrews's dissent framed the issue as one of proximate causation analysis rather than examining a threshold determination of whether any duty had been satisfied.[333]

It is undisputed that Palsgraf was on the train platform at the time of the explosion.[334] Just from common sense, quite naturally, how far would she be standing that "far away"? She was certainly not far away shopping at Macy's Department Store.[335] All pertinent *Palsgraf*

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[328] *Id.* at 287-95.

[329] *Id.* Although the Second Appellate Department argument in *Palsgraf* occurred while Cardozo was at this ALI meeting, where a discussion was held on proximity or foreseeability to establish duty for negligence. KAUFMAN, *supra* note 10, at 287-93. Some have made the contention, because the *Palsgraf* case intermediate Appellate decision was known of by the January 19-22, 1928 ALI meeting that Cardozo and others discussed the case. *Palsgraf,* with the intermediate Appellate decision, may have been discussed since it was decided December 7, 1927 (222 A.D. 166 (N.Y. App. Div. 1927)), they contend Cardozo was cornered by colleagues urging him how to decide in the *Palsgraf* appeal. KAUFMAN, *supra* note 10, at 287-95. But this accusation has been found to have no basis. *Id.* at 295.

[330] *Palsgraf*, 248 N.Y. at 340, 342 (Andrews, J., dissenting).

[331] *Id*. at 355.

[332] *Palsgraf*, 248 N.Y. at 355-56 (Andrews, J., dissenting). When the package was dropped, the train wheels ran over it and the explosion occurred. KAUFMAN, *supra* note 10, at 286 (noting "the train pulled away, and its wheels went over the package . . . There was a terrific roar").

[333] *Palsgraf*, 248 N.Y. at 348, 356 (Andrews, J., dissenting) ("We deal in terms of proximate cause, not of negligence.").

[334] *Id.* at 340; POSNER, *supra* note 1, at 33-34.

[335] *Palsgraf,* 248 N.Y. at 340 ("Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach.").

events occurred at the East New York Long Island Railroad Station located in Brooklyn.[336] In Judge Andrews's dissent, the concept of liability was not a spatial measurement arbitrarily to be gauged, contrary to Cardozo's finding of no negligence.[337] This was the result of Judge Andrews's assumption of negligence.[338]

The Andrews dissent could have been more powerfully presented; part of that deficiency was that he simply adopted Cardozo's terse factual recitation of the case.[339] Andrews did not contest any of Cardozo's cryptically-stated facts. More surprisingly, Andrews's version of the facts was less detailed than Cardozo's.[340] To the contrary, despite not going beyond Cardozo's recited facts in his dissent, Andrews asserted out of nowhere Mrs. Palsgraf was "twenty-five to thirty feet" away, "[p]erhaps less" from the explosion.[341] Certainly this was no affirmation of Mrs. Palsgraf being "far away."

Cardozo said in his opening factual paragraph plaintiff was "many feet away."[342] In spite of this, Judge Andrews did not go into more detail[343] *ab initio,* about the Record and not just accept Cardozo's ambiguous and questionable factual description. Particularly this is pertinent since Andrews later in his Opinion was very specific as to Palsgraf's location.[344] Mrs. Palsgraf's position to the action with the

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[336] *Id.* at 340, 342; KAUFMAN, *supra* note 10, at 286 (noting that the explosion occurred at the "East New York Station of the Long Island Railroad"); Scott & Kent, *supra* note 188, at 1064 (including Palsgraf's Complaint).
[337] *Palsgraf*, 248 N.Y. at 347, 348-49 (Andrews, J., dissenting).
[338] *Id.* at 348, 355-56 ("The act upon which defendant's liability rests in knocking an apparently harmless package on the platform. The act was negligent.").
[339] POSNER, *supra* note 1, at 45-46.
[340] *Palsgraf*, 248 N.Y. at 355-56 ("Assisting a passenger to board a train, the defendant's servant negligently knocked a package from his arms. It fell between the platform and the cars. Of its contents the servant knew and could know nothing. An explosion followed. The concussion broke some scales standing a considerable distance away. In falling they injured the plaintiff, an intending passenger.") (Andrews, J., dissenting); *see* POSNER, *supra* note 1, at 45. Later in the dissent, Andrews demonstrates approximately where Palsgraf was, and it was not a "considerable distance." *Palsgraf*, 248 N.Y at 356 (Andrews, J., dissenting).
[341] *Id.*
[342] *Id*. at 341. Why didn't Andrews contest this? It is unknown, at least to this writer.
[343] POSNER, *supra* note 1, at 45 (suggesting that Andrews dissent was "inept"). "[Andrews] must not have bothered to record, or he neither contested the inaccuracies in Cardozo's Opinion nor addresses a single fact not mentioned in that Opinion." *Id.*
[344] *Palsgraf*, 248 N.Y. at 356 (twenty-five or thirty feet away).

passenger and the Railroad employees, ergo the explosion, was without question a critical case factor.[345]

Perhaps ironically, Judge Andrews's dissent is now followed more than Cardozo's majority view.[346] Andrews believed Mrs. Palsgraf fell within entitlement to a legal duty of reasonable protection because she was in a "zone of danger" (train platform) created by the negligent Railroad employees' acts.[347] As such, Andrews presumed negligence.[348] His legal principle, unlike Cardozo's, carried with it an arguable duty to essentially protect all members of society in general who were on the train platform that day if the explosion caused them injury.[349]

The *Palsgraf* dissent demonstrated that Cardozo did pick and choose certain facts to his liking or interpreted them ambiguously, as stated earlier, to the point of misstating that Palsgraf was "far away."[350] This use of terminology implied a substantial distance from "harm's way."[351]

Meanwhile, Judge Andrews's dissent acknowledges, not at the beginning of the Opinion but just at its ending Palsgraf was but twenty-

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[345] KAUFMAN, *supra* note 10, at 287 ("Even though Mrs. Palsgraf's distance from the incident was *critical*, Cardozo characterized the testimony in just a half sentence when the evidence would have justified a paragraph or two.") (emphasis added).
[346] *Id.* at 302.
[347] *Palsgraf,* 248 N.Y. at 349 (Andrews, J., dissenting).
[348] *Id.* at 355 (noting that "[t]he act was negligent."); *id.* at 356 ("I cannot say as a matter of law that the Plaintiff's injuries were not the proximate result of the negligence.") (Andrews, J., dissenting).
[349] *Id.*; *see also* KAUFMAN, *supra* note 10, at 296-97; *Palsgraf*, 248 N.Y. at 388 ("We deal in terms of proximate cause, not of negligence.") (Andrews, J., dissenting).
[350] The Record did not contain evidence specifically at the moment of the explosion where Mrs. Palsgraf was standing. *See* Scott & Kent, *supra* note 188, at 1060-75 (Mrs. Palsgraf's transcript notes that objects such as the penny scale, which Mrs. Palsgraf said she was standing next to, were dimensionally positioned.). Lillian Palsgraf, one of the daughters was at the newsstand twenty-nine feet from her Mother. *Id.* at 1089-90. From testimony related to such items Mrs. Palsgraf was by different accounts about than ten yards away. KAUFMAN, *supra* note 10, at 299; "25-30 feet"; *Palsgraf*, 248 N.Y. at 357 (Andrews, J., dissenting); or, by other Researchers, at the farthest 25-40 feet. KAUFMAN, *supra* note 10, at 655.
[351] *See Palsgraf*, 248 N.Y. at 341 ("[p]laintiff standing far away. Relatively to her it was not negligence at all"); *id.* at 342 ("If no hazard was apparent to the eye of ordinary vigilance, an act of innocent and harmless, at least to outward seeming, with reference to her [Palsgraf] . . . though not one involving "the risk of bodily insecurity[.]"); KAUFMAN, *supra* note 10, at 296 ("The conduct of the guard involved 'no hazard [to Mrs. Palsgraf] was apparent to the eye of ordinary vigilance.'").

five-to-thirty feet perhaps even "less" from the explosion.[352] This directly contradicted Cardozo's majority Opinion having the plaintiff "far away," which was one underlying rationale for his amorphous delineation of an orbit of danger (*i.e.,* the explosion) standard.[353] From my critical perch, consequentially, Cardozo was being instinctively subjective formulating his "orbit" metaphor when Case on Appeal record evidence at trial established specific dimensional distances."[354] Even without all this, I will still ask from my analysis, what the Long Island Railroad exactly did wrong. The Long Island Railroad without doubt knew nothing about the unmarked package being filled with explosives.[355]

## VII. THE MYSTERY OVER CARDOZO AND THE PALSGRAF OPINION

My suggested conclusion of emotional derivation as to Cardozo's motivation behind his decision is something about which I seem not to be alone. Over the many ensuing years since that fateful Sunday, August 24, 1924, and the exploding package, many researcher scholars have delved into Cardozo's motivations, almost like archeologists, to explain but for different reasons his basis for the *Palsgraf* decision.[356]

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[352] *Palsgraf*, 248 N.Y. at 343 (noting that Mrs. Palsgraf was "far away"); *id.* at 356 (noting that Palsgraf was at a distance of twenty-five or thirty feet) (Andrews, J., dissenting).

[353] *Palsgraf,* 248 N.Y. at 343 ("[T]he orbit of danger as disclosed to the eye of reasonable vigilance would be the orbit of duty."). Cardozo stated plaintiff was standing on the platform "many feet away[,]" or "far away," without any delineation of those boundaries. *Id.* at 341, 343 (noting that "[t]he passenger [was] far away"); POSNER, *supra* note 1, at 40, 43-44, 46-47 ("[Cardozo's] [O]pinion does not come to grips with the issues of policy that are raised by the problem of the unforeseeable plaintiff, and more broadly of the extremely unlikely accident.").

[354] *See id.* at 355-56 (Andrews, J., dissenting). Unstated in Judge Andrews's dissent was testimony from the Palsgraf family members that day, unrebutted by the Railroad who presented no case challenging that testimony. *See* KAUFMAN, *supra* note 10, at 652 nn.5, 30 & 31.

[355] *Palsgraf,* 248 N.Y. at 341; POSNER, *supra* note 1, at 36.

[356] *See generally, e.g.,* WILLIAM H. MANZ, THE PALSGRAF CASE: COURTS, LAW & SOCIETY IN 1920S NEW YORK (2005); William E. Nelson, *Palsgraf v. Long Island R.R.: Its Historical Context* 34 TOURO L. REV. 281 (2018); Walter Otto Weyrauch, *Law as Mask—Legal Ritual and Relevance* 66 CAL. L. REV. 699 (1978); William L. Prosser, *Palsgraf Revisited* 52 MICH. L. REV. 1 (1953); W. Jonathan Cardi, *The*

For sure there was an explosion, and people were injured at the Station.[357] However, beforehand, the Long Island Railroad was not on notice of a dangerously explosive package or the risk inherent of it being knocked to the ground by its employees or agents.[358] Certainly, Railroad employees were negligent in trying to squeeze the man, without an identity, carrying a harmless appearing package, his frame through rail doors on a moving train.[359] What did Mrs. Palsgraf have to do with any of this? Cardozo implied that she was simply, by destiny, implicitly at the wrong place at the wrong time, a victim of the winds of fate.[360] Cardozo was a person far from being publicly effusive with his emotions.[361] My analysis has thus far sought to uncover what forces drove the *Palsgraf* result. One, for sure, was Cardozo's hidden inner self.

### A. Divergences Over Cardozo And The *Palsgraf* Opinion

Original research into the Record on Appeal, Briefs, and secondary temporal sources of this event, have been examined extensively by others, including Judge Richard Posner.[362] The forever indefatigable Judge Posner, in his not-so-spare time, forensically examined much about Cardozo and his decision-making, including *Palsgraf*.[363] Posner

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*Hidden Legacy of Palsgraf: Modern Duty Law in Microcosm* 91 B.U. L. REV. 1873 (2011); Leon Green, *The Palsgraf Case* 30 COLUM. L. REV. 789 (1950).

[357] POSNER, *supra* note 1, at 34-35.

[358] *Palsgraf*, 248 N.Y. at 345 ("Here, by concession, there was nothing in the situation to suggest to the most cautious mind that the parcel wrapped in newspaper would spread wreckage through the station."); POSNER, *supra* note 1, at 36, 38.

[359] Judge Andrews in dissent presumed that was negligence. *Palsgraf,* 248 N.Y. at 347, 356 (Andrews, J., dissenting).

[360] Without any knowledge that the harmless looking package carried a certain explosive risk, my conclusion is that how would Cardozo connect a duty to plaintiff when there was no immediate risk of danger to her. But there was to the passenger carrying the bundle. However, Palsgraf had no knowledge of any danger. Posner, without saying it exactly, has also concluded the same as have I about the fickle finger of fate, articulating as much yet using different verbiage. *See* POSNER, *supra* note 1, at 41-45.

[361] *See* KAUFMAN, *supra* note 10, at 472-74, 484-85, 567.

[362] *Id.*; *see also* POSNER, *supra* note 1, at 33 n.2.

[363] *Id.* at 33-47. Richard Posner was a Federal Judge on the Seventh Circuit Court of Appeals. *See* Jeffrey S. Sutton, *A Review of Richard A. Posner, How Judges Think* (2008), 108 MICH. L. REV. 859, 859 n.1 (2010). The indefatigable reference in the text is to the fact Judge Posner wrote fifty-three books, "more than 168 articles,"

deeply examined Cardozo's wide array of decisions in many other areas of the Law and how his reputation as a Jurist has tested time.[364] As to *Palsgraf*, Posner points out what a critic might say were flaws in Cardozo's decisional reasoning in that case.[365]

My judgment is not from the isolated walls of Academia, nor derived from some Judge's aloof sitting plush chair where there is always a "View from the Bench" with pontifications on everything. As a trial lawyer, the *Palsgraf* decision has proven a deceptively and eerily complex case. I found Judge Posner's thorough legal and factual analysis of *Palsgraf* to be more than eye-opening beyond what law school matriculation tried to teach me in the past. One must tip a cap to Judge Posner, and those others much smarter than I for their intellectual, but powerful personal commentaries on Cardozo generally, and *Palsgraf* specifically.[366]

Despite these accolades, I strongly believe that some scholars in-academia simply do and did not like Benjamin Cardozo, either as a Judge, or a man; it is something reflected in their criticisms, including

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thousands of opinions, and blog articles. *Id.* at 859 n.2. Posner was a Circuit Judge on the Seventh Circuit Court of Appeals from 1981-2017, and its Chief Judge, 1993.-2000. *Richard A. Posner*, U. CHI. L. SCH., https://www.law.uchicago.edu/faculty/posner-r (last visited Feb. 22, 2023) (discussing his experience). *See also* KAUFMAN, *supra* note 10, at 569, 657 n.56 (referencing Posner's work on Cardozo).

[364] POSNER, *supra* note 1, at 20, 58, 74, 92.

[365] *Id.*

[366] *Id.* at 33-47; KAUFMAN, *supra* note 10, at 302. *See also* Albert A. Ehrenzweig, *Loss-Shifting and Quasi-Negligence: A New Interpretation of the Palsgraf Case,* 8 U. CHI. L. REV. 729, 737-43 (1941); MORTON J. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW 61-63 (1992).

of Palsgraf.[367] This bias has shown to be present[368] through their written critiques.[369]

At the polarity of spectrums are those who concluded, and then wrote of Cardozo as deserving the Parthenon recognition of an Olympian great Judge.[370] In that regard, Cardozo has been compared to Marshall, Holmes, Story, Brandeis, and Learned Hand.[371] As the decades roll past I fear that the criteria of who is a "Hall of Famer" Judge will be more decidedly based on judicial partisanship of deterministic outcomes to satisfy those to whom something is owed, like their Judgeship. They may also be based on the strong prevailing winds of personal legal views which carry over into Political rather than Judicial reasoning.

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[367] *See, e.g.,* Anon Y. Mous, *The Speech of Judges: A Dissenting Opinion*, 29 VA. L. REV. 625, 637-38, 641 (1943). This is the anonymous Article written by Jewish Judge Jerome Frank discussing how Cardozo's desire for clarity clashes with his own confounding writing. *See also* POSNER, *supra* note 1, at 10-11 n.20. As a personal note, I somehow sense an elitist academic serpent tongue of antisemitism based in part on this 1942-time frame. *See* POSNER, *supra* note 1, at 11 ("Whether it is just one postponed to later chapters. But the style of [Jerome] Frank's attack, along with his decision to publish it anonymously suggests Frank was jealous of Cardozo's reputation. If Frank hadn't himself been Jewish . . . [Frank] might invite an accusation of antisemitism.").

[368] POSNER, *supra* note 1, at 11-13. "[Grant] Gilmore, having attained eminence, succumbed to the temptation to write irresponsibly." *Id.* at 12-13 (citing GRANT GILMORE, *supra* note 105, at 76-77). *See* Peter R. Teachout, *Gilmore's New Book: Turning and Turning in the Widening Gyre*, 2 VERMONT L. REV. 229, 266-68 (1977) (describing Book as "allegory" and mythology). Jerome Frank was ambiguous about Cardozo yet focused his knives on "criticism of Cardozo's writing style." POSNER, *supra* note 1, at 10. Although Frank leaked out some praise on Cardozo, it was limited, and set it all out in an his anonymously written Article. *Id.* This anonymous article published after Cardozo's death, was written by Judge Jerome Frank, himself a prominent Judge and a Jew under the pseudonym, Anon Y. Mous, *supra* note 367, at 630, 637-38, 641; POSNER, *supra* note 1, at 10-11 n.20; *see also* GRANT GILMORE, *supra* note 105, at 74-77.

[369] GRANT GILMORE, *supra* note 105, at 74-77.

[370] POSNER, *supra* note 1, at 9-10 (Cardozo is generally placed in the highest rank of American Judges, along with (Holmes, John Marshall, Brandeis, and Learned Hand).

[371] *See, e.g.,* Paul A. Freund, *Homage to Mr. Justice Cardozo*, 1 CARDOZO L. REV. 1 (1979); Bernard Schwartz, *The Judicial Ten: America's Greatest Judges,* 4 S. ILL. L.J. 405, 424-28 (1979); Bernard Weissman, *Cardozo: "All-Time Greatest" American Judge,* 19 CUMB. L. REV. 1 (1988); Edgar Bodenheimer, *Cardozo's Views on Law and Adjudication Revisited,* 22 U.C. DAVIS L. REV. 1095, 1095-96 (1989); Richard H. Weisberg, *Law, Literature and Cardozo's Judicial Poetics,* 1 CARDOZO L. REV. 283, 283-84, 287 (1979).

I believe in the end these ballot casters want their political philosophies first, then a judicial skill to wrap fancy legalisms around what are essentially partisan hack decisions. After all, Federal Judges are life-termers.[372] As for me, I go back over fifty years to that nanosecond of first studying Cardozo in law school. From that instance onward, I believed Cardozo was a great Judge, *Palsgraf* and all.[373] I just wanted to follow in his footsteps.

One might criticize me for writing so much about Cardozo and his decisional propensity of not controlling human emotions in some Tort rulings. Perhaps you'd agree, I could have shortened all this by reverting to a long-departed law school professor's old Wisconsin adage, "Change the facts, and you change the Law."[374] If so, however, this Article would surely not progress to its dark print on white parchment if I was only echoing this singular law school edict.

Upon reading the published Opinion's factual narrative in *Palsgraf*,[375] like most, I initially surmised the rail station "explosion" was not a major event.[376] However, it was a major event.[377] Part of this has been caused by the sloppy and non-specific use of the words "firecrackers," "bombs," and "explosives."[378] As noted earlier, there are now, and were at the time, accounts of the explosion's significant magnitude both within and beyond the Record.[379]

Research, which has delved extensively into the *Palsgraf* phenomenon, further supports this conclusion.[380] Even the New York Times jumped in with a front-page story that the explosion blast was heard blocks away.[381] Based on these divergencies, although unstated

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[372] U.S. CONST. art. III, § 1.
[373] *See* POSNER, *supra* note 1, at 9-10 nn.19, 23; *Id.* at 143 ("The literary judge wears best over time."). *See also id.* at 9-10 n.19 (Cardozo placed in the highest rank of American Judges.).
[374] Professor Scott Van Alstyne, Corporations I, Author's Personal Notes, University of Florida, School of Law, Holland Law Center, Fall Quarter 1973.
[375] *Palsgraf*, 248 N.Y. at 340-41.
[376] *Id.* at 340-41. *Contra* KAUFMAN, *supra* note 10, at 652 n.3.
[377] POSNER, *supra* note 1, at 33-34. Witnesses at trial testified to the explosion, more than one, flying glass everywhere, ball of fire, and billowing black smoke both making it impossible to see and causing breathing and eye issues. *See* Scott & Kent, *supra* note 188, at 1071, 1075-77, 1084, 1086.
[378] *See, e.g.,* POSNER, *supra* note 1, at 43 ("How did a handful of firecrackers cause a heavy scale at the other end of a long platform to collapse?").
[379] *Id.* at 33 n.2, 33-37, 43; KAUFMAN, *supra* note 10, at 286-87, 652 nn.3-5.
[380] POSNER, *supra* note 1, at 43-48; KAUFMAN, *supra* note 10, at 657 n.56.
[381] POSNER, *supra* note 1, at 33-34.

in Cardozo's Opinion, it can still be postulated that Cardozo either ignored the Record on Appeal, did not read it at all, or chose not to believe certain factual aspects which did not fit into his predetermined decisional outcome.[382] For example, Cardozo blurred the actual distances from the explosion location *vis-à-vis* both Palsgraf and the penny scales.[383] I have surmised Cardozo simply arbitrarily chose the words depicting "far away"[384] to find no proximity thereby thwarting a judicially created overbroad extension of a duty.[385]

Despite the extensive writings on *Palsgraf* and its Record, I am persuaded that no one knows exactly what happened that day, August 24, 1924.[386] There was no instant replay, of course, of the incident. The bottom line was the unmarked package portending no danger was dropped beneath the train, followed by the explosion.[387] I would describe the ensuing events in *Palsgraf* as a "Ball of Confusion."[388]

The general public, wherever they were on the Platform that day, did not know what was in the unmarked but wrapped package.[389] This must have created certain surprise and panic from the unexpected explosion. Then there was Mrs. Palsgraf who said she knew nothing

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[382] Cardozo, whatever one might take from this, was said to be "allergic to lengthy statements of the record." KAUFMAN, *supra* note 10, at 297. Cardozo also had said about an Appellate Record "[t]here is an accuracy that defeats itself by the over emphasis of details . . . one must permit oneself . . . a certain margin of misstatement." CARDOZO, LAW & LITERATURE, *supra* note 151, at 7-8. "[T]he sentence may be so overloaded with all its possible qualifications that it will tumble down on its own weight." *Id.*

[383] *Palsgraf,* 248 N.Y. at 342-43.

[384] *Id.* at 341 ("[I]f a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff standing far away.").

[385] POSNER, *supra* note 1, at 33-34.

[386] KAUFMAN, *supra* note 10, at 286 ("On August 24, 1924, a late arriving passenger train at the East New York Station of The Long Island Railroad.").

[387] *Id.*

[388] THE TEMPTATIONS, *Ball of Confusion, in* GREATER HITS, Vol. II (Motown Records 1970). For those interested in additional readings, facts surrounding the *Palsgraf* case, both inside and outside the Record evidence or COA, such information does exist. *See, e.g.,* KAUFMAN, *supra* note 10, at 652 n.5; POSNER, *supra* note 1, at 33-37; Noonan, *supra* note 260, at 111-51; Jorie Roberts, *Palsgraf Kin Tell Human Side of Famed Case,* 66 Harv. L. Record No. 8 1 (Apr. 14, 1978). *See* AUSTIN WAKEMAN SCOTT & SIDNEY POST SIMPSON, CASES ON CIVIL PROCEDURE 891-940 (1950) (containing a lot of the Record, but not the appellate briefs in *Palsgraf*).

[389] Thirteen people hurt, none seriously. No deaths. "Although several taken to the hospital." POSNER, *supra* note 1, at 34-35. "[The] bundle gave no Notice of its explosive contents[.]" *Id.* at 36.

about the package.[390] Then as to her location, Cardozo less than sensitively, tersely stated she was "far away from the explosion."[391] Cardozo never cited supportive numerical information as to Mrs. Palsgraf's distance from the explosion, only generally concluding she was a distance away from the explosion.[392] Neither did he provide quantitative data to define, even in this particular instance, what was the range of his "orbit of risk" or danger, or what constituted being too "far away" here to create no scope of duty for a negligence claim.[393] Was it 150 feet? 200 feet? 300 feet?[394] Whatever the arithmetic, that answer lies buried with Cardozo.[395]

The Record on Appeal did not precisely pinpoint the exact location of Mrs. Palsgraf on the platform that day.[396] No exact GPS coordinates existed, for sure. There have been, however, calculations of proximal distances based on testimony pinpointing the location of a newsstand, width of platform, and one of the Palsgraf children on the platform in relation to the scales.[397] In turn, Mrs. Palsgraf, based on the Record, was standing directly alongside a scale.[398] Thus, there was some clarity about otherwise undeterminable distances using these survey points, in addition to the known dimensions of the rail platform itself. There is evidence and testimony Mrs. Palsgraf can be placed twenty-five-to-thirty feet, "perhaps less," from the explosion.[399]

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[390] Scott & Kent, *supra* note 187, at 1074 (stating that she did not see any man carrying "bundles" at the Station that day).

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

[392] *Id.* (noting that Palsgraf was "many feet away"); *id.* (noting the explosion blast in "its relation to plaintiff, standing far away"); *id.* at 342 (noting that Palsgraf was standing as a "distant passenger").

[393] *Id.* at 340-41, 343.

[394] If by "far away" or a long distant away, was a view of these distances consistent with such numbers perhaps meant by Cardozo, then we now understand that would not have been consistent with the Appellate Record. KAUFMAN, *supra* note 10, at 298. Andrews did no analytical calculations at least ostensibly to support his Palsgraf distances to the explosion. *Palsgraf,* 248 N.Y. at 356.

[395] KAUFMAN, *supra* note 10, at 578 (Cardozo was buried at the Shearith Israel Cemetery on Long Island).

[396] *Id.* at 298 ("The record, however, was not clear about the precise location of Mrs. Palsgraf.").

[397] *Palsgraf*, 248 N.Y. at 356 (Andrews, J., dissenting); KAUFMAN, *supra* note 10, at 298, 655 nn.30-31.

[398] *Id.* Scott & Kent, *supra* note 188, at 1071 ("Just walked up and went to where I stood at the scale[.]").

[399] *Id.* Mrs. Palsgraf's daughter Lillian said her mother was twenty-nine-to-thirty feet away. Scott & Kent, *supra* note 188, at 1090. Lillian was going to get a

Andrews also articulated similar figures in his dissent.[400] Other legal sleuths researching this issue and the Record testimony determined Palsgraf was only twenty-five-to-forty feet away[401] from the explosion.[402] As previously noted, Palsgraf was not the lone body injured that day, in fact, there were thirteen.[403]

In my opinion, twenty-five—forty feet does not sound, in an objective sense of truly being "far away" as Cardozo located Mrs. Palsgraf.[404] As a Commentator, looking back at the moving human parts of these momentous events in a legal sense all occurring seemingly at once, I personally analogize this to the game of chess. If *apropos* on the analogy, then like a pawn on his judicial chessboard Cardozo moved Mrs. Palsgraf into an unknown Tort space and distance to establish his theorem of no liability to the Railroad.

Other *Palsgraf* inconsistencies exist besides discrepancies in distance. Without doubt there were, however, two or more men running to catch a train, both carrying unmarked harmless-looking packages.[405] Cardozo has one of the men making the train without consequence.[406] It is written elsewhere that a third man carrying a bundle

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newspaper at the Newsstand. *Id.* at 1071. Per her testimony, the newsstand was on the other end of the platform. *Id.* at 1089. Lillian testified "other end of the platform. . . . Quite a distance from where my mother was." *Id.* at 1089. Just before the explosion she was about to get to the Newsstand. *Id*. This is when she stopped to look at her mother–twenty-nine-to-thirty feet away. *Id.* at 1090 (noting the number was based on the witness demonstrating twenty-nine-to-thirty feet demonstratively in court). This is what she testified. Scott & Kent, *supra* note 188, at 1088-89. Therefore, I believe it is safe to assume the platform for boarding, debarking and waiting for her train could not have been very long in its total distance.

[400] *Palsgraf*, 248 N.Y. at 356 (Andrews, J., dissenting) (noting position of Palsgraf as "apparently twenty-five or thirty feet" from the explosion).

[401] KAUFMAN, *supra* note 10, at 655 n.31.

[402] *Id.* Palsgraf's daughter testified that the newsstand was about twenty-nine feet from her mother. *Id*. "There was also testimony that the platform was 12 to 15 feet wide." *Id.* Accordingly, the newsstand "was nearly perpendicular to the location where the guard pushed the passenger, [which] would place Mrs. Palsgraf approximately 25-40 feet from that location." *Id.*

[403] POSNER, *supra* note 1, at 34-35; KAUFMAN, *supra* note 10, at 286 (suggesting that among the thirteen people injured was Mrs. Palsgraf).

[404] Of course, this is just my opinion. My reaction to the twenty-five to forty feet maximum distance Mrs. Palsgraf was believed to have been from the act of negligence causing the explosion is shared by all legal authors on this subject, and the Case on Appeal. *See, e.g.,* Prosser, *supra* note 324, at 3; KAUFMAN, *supra* note 10, at 298, 655 nn.30-31.

[405] *Palsgraf*, 248 N.Y. at 343.

[406] *Id.*

was also present,[407] but he fled from the station after the explosion before reaching the train.[408] He left his package at the station where police later found several bombs inside "about sixteen inches long and several inches in diameter . . . ."[409] None of the Opinions mentioned anything about "bombs." I therefore pose the query that if the packages were harmless, why did an abandoned one found along with other packages contain a bomb or explosives? After all, there was an explosion that day.[410]

The Dissent certainly could have strengthened their position by talking about "bombs" to help intensify the explosion. I submit that Judge Andrews used the blast, no matter its degree, to avoid having to discuss negligence. This is an important omission, for reasons I have found no support to explain. Bombs are not firecrackers, and experience would tell us firecrackers don't blow-up train stations.

Another line of inquiry concerns the nature of Mrs. Palsgraf's injuries and how she was injured.[411] Despite omitting injuries, Cardozo's cryptic factual recitation states that the explosive blast tore apart the penny scale which then descended and fell upon Mrs. Palsgraf.[412] A different scenario indicates Mrs. Palsgraf was trampled by the stampede of panicked passengers running wildly after the explosion, knocking her to the ground.[413] There is also a combination of these two different versions, having less credibility, according to the New York Times story explanation, wherein the rail platform's wood planks buckled and that became the mechanism of injury.[414] But inconsistently the New York Times story also surmised the explosive

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[407] KAUFMAN, *supra* note 10, at 286. Police found some smaller firecrackers and other fireworks. *Id.* Posner also has "two possibly three" persons running for the train." POSNER, *supra* note 1, at 33.

[408] POSNER, *supra* note 1, at 33-34 ("Two, possibly three persons . . . dashed through the waiting crowd to catch a train just pulling out.").

[409] KAUFMAN, *supra* note 10, at 286 (noting that Police also found some smaller firecrackers and other fireworks).

[410] POSNER, *supra* note 1, at 34, 33 n.2.

[411] *Id.* at 340.

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

[413] *See* William L. Prosser, *Palsgraf Revisited* 52 MICH. L. REV. 1, 3 n.9 (1953); KAUFMAN, *supra* note 10, at 652 n.3.

[414] KAUFMAN, *supra* note 10, at 652 n.3. The New York Times version has the wooden planks buckling and this is what injured Palsgraf. POSNER, *supra* note 1, at 34.

blast blew the scale onto Mrs. Palsgraf.[415] Perhaps more importantly, although not in the Record, the New York Times story said the penny scale was only ten feet from the explosion.[416]

Cardozo's Spartan factual explanation of these complex set of events in *Palsgraf*, despite Record of a jury trial, was a misstatement of facts at worst, or ignoring them at best as exemplified by his use of "far away."[417] His recital of that day's actions provided the launch point not to find liability. Beyond his prescribed orbited scope of danger,[418] I saw no evidence Cardozo examined the factual weeds of the case at all, or perhaps he chose to ignore them. For example, the penny scale, at least by one or more accounts to the event, was positioned elsewhere from where Cardozo's literary penmanship attempted to place it.[419]

In reality, is the scale within the *causa proxima*[420] from Palsgraf's proximal presence to the Long Island Railroad employees' negligence involving the man with the nondescript package to establish legal duty? I submit Cardozo devised his "orbit of danger" or "risk" to avoid establishing any hard and fast rule on scope of duty. That is to say he wanted no quantifiable boundary or fence trip wire beyond which no negligent liability would be attached. But it seems that Cardozo decided this result first, then used his considerable literary skills and flowing reasoning to justify the end. Still, he remained

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[415] KAUFMAN, *supra* note 10, at 652 n.3 ("But the New York Times story indicated that there was plenty of damage done to persons and property above the platform level, and it seems more likely the explosion blew over the scale.").

[416] POSNER, *supra* note 1, at 34 ("[T]he scale was 'more than ten feet away'").

[417] *Id.* at 43 ("Cardozo goes beyond omissions, even misleading ones, and makes up facts–to telling effect from a rhetorical standpoint. The inaccurate positioning of Mrs. Palsgraf at the other end of the platform many feet away from the explosion adds to the mystery, the fascination, of the case . . . Were the omissions and misstatements deliberate on Cardozo's part?"). *See* KAUFMAN, *supra* note 10, at 297-98. This last question needs a *sine qua non* as to what was going on within the soul of Benjamin Cardozo.

[418] KAUFMAN, *supra* note 10, at 297-98.

[419] *Id.* at 298, 655 n.31 (Cardozo in his opinion said, "far away," but that does not match up with the testimony at trial and the known dimensions of the platform). *See also id.* at 298, 655 n.31; *id.* at 583; Scott & Kent, *supra* note 188, at 1085, 1090. Posner has estimated that someone may have said something during oral argument to support Cardozo's "far away" description of the facts, but "there is no transcript of the argument" and he finds this doubtful it was not brought up earlier. POSNER, *supra* note 1, at 39-40 n.15.

[420] *Causa proxima*, BLACK'S LAW DICTIONARY, 248 (4th ed. 1968) ("[T]he immediate nearest or latest cause.").

consistent with saying very little about the actual *Palsgraf* facts and events.

By 1928, Cardozo had a nationwide reputation for his impenetrable judicial skill.[421] In conference, one can imagine the majority of Judges going with Cardozo as it was Cardozo saying it. Yet, there was still Andrews's three-judge dissent.[422] During the temporal era of *Palsgraf,* the New York Court of Appeals possessed a national reputation as the premier State Court of jurisprudence.[423] Any opinion or dissent could well-become a landmark decision. However, during that more collegial time amongst Appellate Judges, dissents were rare, not the norm.[424]

What about Andrews's dissent and its effect on *Palsgraf's* legacy? Andrews set forth what he believed was a more practical formula to impose liability, but he was speaking proximate cause.[425] The dissent referenced relative proximity to be just "practical politics" as to when a duty of care should be imposed.[426] Judge Andrews referred to "radius of danger," "danger zone," or "stream of events" in his dissent.[427]

The differences in judicial reasoning between Cardozo and Andrews were not at all subtle.[428] Andrews dealt with proximate cause and even opined so long as the injury was connected to the event it did not have to be foreseeable. Thus, it could be unforeseen.[429] His dissenting Opinion indeed presumed negligence.[430]

Andrews is consistent on foreseeability. As such, arguably everything is or was foreseeable. Accordingly, even unforeseen events could create liability to Andrews, at least per his *Palsgraf* dissent.

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[421] POSNER, *supra* note 1, at 3.
[422] *Palsgraf*, 248 N.Y. at 347, 356. (Andrews, J., dissenting).
[423] KAUFMAN, *supra* note 10, at 130; POSNER, *supra* note 1, at 29.
[424] *Id.* at 13.
[425] *Palsgraf,* 248 N.Y. at 354-55 (Andrews, J., dissenting) ("[W]e endeavor to make a rule in each case that will be practiced and in keeping with the general understanding of mankind.").
[426] *Id.* at 354 ("This is not logic. It is practical politics.").
[427] *Id.* at 347, 350, 355.
[428] *Palsgraf*, 248 N.Y. at 343, 345, 352-53.
[429] *Id.* at 347 ("We deal in terms of proximate cause, not negligence."); *id.* at 351 ("[U]nforeseen and unforeseeable.").
[430] *Id.* "The last suggestion is the factor which must determine the case before us. The act upon which defendant's liability rests is knocking an apparently harmless package onto the platform. The act was negligent." *Id.* at 355 (Andrews, J., dissenting).

Perhaps the sharpest difference from Cardozo was that Andrews focused on proximate causation, not on negligence.[431] In Judge Andrews's dissent, he works from the predicate, as he says, the Long Island Railroad employees were "negligent" for knocking the unmarked package from the grasp of the passenger they were trying to wedge onto the moving train's door.[432]

Andrews did not develop some vague notion of how far a person had to be from the negligent act to possess a claim. While Cardozo was fishing the pond to determine if a "far away" person had a negligence claim for an explosion emanating from unrelated individuals, Andrews clearly thought so.[433] It was the critical question, in my opinion, whether the expanse of the explosion caused whatever injury Mrs. Palsgraf sustained.

It was clear to Andrews that Mrs. Palsgraf would not have been injured [the "but for"] absent this explosion as she stood on the rail platform which the blast explosion penetrated.[434] Thus, I believe Andrews's overall theorem, as Cardozo's, was not a hard and fast inflexible rule to be established. Instead, it was a pragmatic one which could impose liability where facts are ever-changing, but where there was already negligence.[435]

Conversely, Cardozo focused only on the creation of a duty for the purpose of showing negligence.[436] He attempted a formulaic equation of analytical standardization for appellate review in determining this type of issue.[437] In that analysis, duty must come before causation.[438] Thus, Cardozo wanted to establish, as stated, a repeatable, usable, reasoned standard by which scope of a duty, under any set of facts could be ascertained–"orbit of danger."[439]

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[431] *Id*. at 350, 355-56.
[432] *Palsgraf*, 248 N.Y. at 356.
[433] *Palsgraf*, 248 N.Y. at 348 ("We deal in terms of proximate cause, not of negligence."); *id.* at 353-54, 356.
[434] *Id.* at 346.
[435] *Id.* at 354 ("We have in a somewhat different connection spoken of the 'stream of events'. . . . There is in truth little to guide us other than common sense.").
[436] *Palsgraf*, 248 N.Y. at 341 ("[I]f a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff standing far away."); *id.* at 343-44 (noting that Cardozo dismissed the underlying lawsuit on appeal).
[437] *Palsgraf*, 248 N.Y. at 342, 344-45, 346 ("The law of causation, remote or proximate, is thus foreign to the case before us.").
[438] *Id.* at 346.
[439] *Id.* at 343 ("Even these, the orbit of danger as disclosed to the eye of reasonable vigilance would be the orbit of duty."); *id.* at 346-47.

What Cardozo theoretically sought was a rule of Law determined by some mathematical formula which would lessen uncertainty and eliminate the vicissitudes of judgmental wanderings on duty.[440] This would depend, of course, upon different politically or emotionally bent judges who, if intellectually honest, would only need to fit but few factual pieces into a very small puzzle to resolve imposition of a duty. The legalese of Cardozo's intended *decidus* framework could be applicable to any similarly presented question of disputed factual Tort law on duty. It created an analytically intended framework for scope of duty owed from which proximal causation could thereafter be determined.[441] Nonetheless, I must ask how the word "orbit," possessing no dimensional limits, was a repeatable validated application of a distance being "far away" or a basis to conclude that no duty existed. Even Andrews's "stream of events" was not without its own vicissitudes of ambiguity.[442]

Historically, New York State courts did not regularly proclaim any broad sweeping new tort theories;[443] they instead decided on narrow grounds without a developed far-ranging legal theorem.[444] These New York courts generally stuck to the subject facts rather than trying to impose larger theories of Law to be applied across the spectrum of Torts.[445]

### B. Palsgraf—Analysis of A Runaway Train?

Cardozo's stylistic majority opinion in *Palsgraf* has engendered no lack of interest in dissecting it both inside and outside, and its longevity as any sort of precedent.[446] The *Palsgraf* decision was

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[440] *Id.* This is the conclusion of this Author's ponderings about duty and what is negligence, and when it applies as Cardozo did in *Palsgraf.*

[441] *Palsgraf*, 248 N.Y. at 346-47.

[442] *Id.* at 354 ("We have in a somewhat different connection spoken of the 'stream of events.' We have asked whether the stream was depleted, whether it was forced into new and unexpected channels . . . This is rather rhetoric than law. There is in truth little to guide us other than common sense.") (internal citations omitted).

[443] KAUFMAN, *supra* note 10, at 297.

[444] *Id.*

[445] *Id.* at 302. Before Andrews's dissent in *Palsgraf,* there had been rulings in New York based on public policy considerations like those in Andrews's dissent—not public policy in the broad sense of enterprise liability, but practical common-sense results. *Id.*

[446] *See e.g.,* Manz, *supra* note 356; Nelson, *supra* note 356; Weyrauch, *supra* note 356; Prosser, *supra* note 356; Cardi, *supra* note 356; Green, *supra* note 356.

judicial craftsmanship by Cardozo, perhaps the Nation's most pre-eminent literary jurist. From a public relations standpoint, most legal thinkers would reflexively think Cardozo had gone forth into the judicial sand dunes to return with what was an oasis of a legal gem. Right or wrong, the *Palsgraf* ruling further skyrocketed Cardozo's stature to even greater atmospheric heights in the field of Tort law.[447]

In *Palsgraf*, Cardozo portrayed himself to have made up his mind only after presumed analytical forethought that *Palsgraf* would be *reversed.* Apart from the cold, sterile operating room of his logical synapse machinations, in *Palsgraf* Cardozo at least fashioned a legal theorem to garner support of the majority of judges to reverse, taking a verdict away from the jury.

The Long Island Railroad was the purportedly "deep pocket" in the case. Cardozo held for them,[448] although he was not known to favor corporate liability enterprise broadly.[449] The stated reason given was because the danger of an explosion was unknown to the Long Island Railroad which had no knowledge of what was inside the harmless appearing newspaper wrapped boxes.[450] No evidence demonstrated any prior knowledge to establish the packages' contents.[451] So Cardozo found a way not to impose any duty to plaintiff "standing on the platform" which the Long Island Railroad had breached.[452]

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[447] POSNER, *supra* note 1, at 41 (noting that *Palsgraf* had been cited by 309 courts outside of New York by the time of Posner's book publication in 1990).

[448] *Contra* POSNER, *supra* note 1, at 47.

[449] KAUFMAN, *supra* note 10, at 301, 656 nn.43 & 45.

[450] *Palsgraf*, 248 N.Y. at 341 ("In fact it [the package] contained fireworks, but there was nothing in its appearance to give notice of its contents."); *id.* at 355 ("The act which defendant's liability rests in knocking an apparently harmless package onto the platform.") (Andrews, J., dissenting).

[451] KAUFMAN, *supra* note 10, at 299 ("No duty to Palsgraf as Railroad knew of no risk of harm to her was to be anticipated.").

[452] *Id.* at 296 ("The conduct of the guard involved 'no hazard [to Mrs. Palsgraf] that was apparent to the eye of ordinary vision.'"). Posner raises an interesting point based on the very precise language Cardozo used in this Opinion. *See* POSNER, *supra* note 1, at 42 ("A number of reasons for Palsgraf's celebrity can be conjectured . . . Second is the elliptical statement of facts which strips away the extraneous details [by Cardozo], except Mrs. Palsgraf's destination, and perhaps some essential facts as well.") (internal citation omitted). Cardozo used in the factual recitation plaintiff was "standing" on the platform. *Id.* at 39 ("The plaintiff is described [by Cardozo] as *standing on the platform rather than as waiting for a train*[.]") (emphasis added). According to Posner, at least by implication or inferential reasoning, the word use of "standing" on the platform was calculatingly used by Cardozo. *Id.* at 39. As Posner points out, the quote "[t]he plaintiff is described as standing on the platform rather

To Cardozo and the equation of scope of duty he crafted, Mrs. Palsgraf was not entitled to protection for any commission or omission of conduct by the Long Island Railroad.[453] This was because she was not within the "orbit" of risk or danger to an otherwise unanticipated explosion that was unknown and could not be attributable to that Railroad.[454] His decision, whether supportable or not, that Mrs. Palsgraf was "far away" by some unknown distance was enough to carry a Court majority and exonerate the Long Island Railroad, despite her receiving some form of arguably but perhaps questionable injuries.[455]

What if Cardozo feared in *Palsgraf* that by a contrary decision he would be establishing absolute liability applied to the exegesis of modern-day industrial realities and to a common carrier, or that of an insurer? An absolute liability already existed at common law, but under much different circumstances.[456] I believe, however, as to that Railroad, and from a standpoint of personal predilection Cardozo certainly had no interest in holding for plaintiff regardless of defendant's fault.

The more I read *Palsgraf*, the more I am convinced that Cardozo's theory of no duty owed was premised upon the purported unknown contents of the innocuous appearing box being carried. Consistent with this, there was not a plain spoken or unstated reasoning in all his legal discourse about when there was a duty to be imposed. The proximal location of Palsgraf at the time of the explosion, but some ten

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than as waiting for a train; the effect is to downplay the carrier–passenger relationship (created by the purchase of the ticket) that entitled Mrs. Palsgraf under traditional legal principles to the highest degree of care." *Id.* As noted, the Second Department Appellate Court Judge who wrote the opinion affirming the *Palsgraf* jury verdict stated that she deserved the highest degree of care as a common carrier. Palsgraf v. Long Island R.R. Co., 222 A.D. 166, 168 (N.Y. App. Div. 1927). But neither Cardozo nor Andrews at the Court of Appeals even mentioned this. In my opinion, if true, that the highest standard of care applied why would Cardozo not find for the plaintiff? It was undisputed that Mrs. Palsgraf had purchased train tickets to Rockaway for her and her two daughters. KAUFMAN, *supra* note 10, at 286, 293.

[453] KAUFMAN, *supra* note 10, at 286, 293.

[454] *Id.* at 299-300.

[455] *Id.* at 246 ("The fact that the guard's actions led to Mrs. Palsgraf's injury made no difference [to Cardozo].").

[456] HOLMES, *supra* note 316, at 116-17 (discussing liability without fault, that is to say, animals and sheep).

yards away,[457] and what she was doing, were an unstated *raison d'etre* for Cardozo's fictional legal construct. As to the unlabeled box of dynamite, no one knew what was in them except its holder.[458]

Some may say *Palsgraf* was a cold, theoretical decision, logical perhaps but prejudiced for one of the parties.[459] Cardozo, in *Palsgraf*, demonstrated a personal predilection for his reached result. After all, judges are only fallible and forlorn human beings, as he set forth in his *Judicial Process* and other lectures. As such, Cardozo and other judges were easily capable of applying deep seated subjectiveness which might be contrary to fair play and justice. Did Cardozo not recognize this from his own self-mirrored reflections from the *Judicial Process* essays? In the intricate workings of a Swiss clock-like efficient mind one could argue Cardozo did not formulate a uniform principle of Tort law that would salvage Palsgraf's jury verdict, and at the same time was always applicable and practical; the answer is self-evident.

As stated earlier, no one before in this factual screenplay of potentially liable players, which excluded the actual culprit with the package, knew anticipatorily what was in the unlabeled wrapped box. And those men who did were never identified, according to the Opinion and other sources, nor were they even injured.[460] So why should the Long Island Railroad be liable? The *sine qua non* of Cardozo's physical proximity or "orbit" of risk was arguably fabricated to hide a direct reason for his majority decision—that is, his fundamental, human emotional reaction to this particular set of facts and individual.

Regardless of the side plays and factual intellectual feints within *Palsgraf*, some have argued that Cardozo's personality and genetic ingrained characteristics were the only explanations for his decision-making.[461] It is interesting to note that despite the notoriety and

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[457] KAUFMAN, *supra* note 10, at 299 ("[T]hat no 'varying influences' could be drawn with respect to Helen Palsgraf, who seems to have been no more than ten yards away from the negligent conduct").

[458] *See* POSNER, *supra* note 1, at 37-39.

[459] There is debate whether Cardozo ultimately fell back on his personal predilections in fashioning his *Palsgraf* legal standard for scope of duty. POLENBERG, *supra* note 1, at 247.

[460] *Palsgraf*, 248 N.Y. at 340-41. *See also* KAUFMAN, *supra* note 10, at 303.

[461] POLENBERG, *supra* note 1, at 247-28 ("[T]he decision [Palsgraf] cannot be understood apart from 'Cardozo the person.'"). *See also* JOHN T. NOONAN, JR., *The Passengers of Palsgraf, in* PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS THE MAKERS OF THE MASKS 147-49 (1976) (further supporting this argument).

cause célèbre of *Palsgraf,* New York State Courts from 1928-1990 (when the last formal survey was taken) cited it only eighty-five times.[462]

## C. Palsgraf Derailed

### *1. Alternatives to Cardozo's Derailment*

Some certainly contend *Palsgraf* has not worn the test of time well. The First and Second Restatements of Torts were consistent with *Palsgraf.*[463] However, the Third Restatement did not follow *Palsgraf's* analysis.[464]

It is instructive, indeed, for jurists and litigators to conceptualize what *Palsgraf* formalistically already stands. Cardozo capriciously drew a line in the sand beyond which an imposition of a duty of reasonable care by a second party did not extend.

With no change in the facts there seems to me little question that if the man carrying the nondescript package was injured, regardless of any explosion, the Long Island Railroad would be liable.[465] After all, the train was already moving and the guard on the train was pulling the man from the front while a uniformed employee on the platform pushed from the posterior forward.[466] Had that same passenger, for instance, fallen from the train or the door closed on him the Long Island Railroad certainly had a defined reasonable care scoped duty ending in potential liability.[467]

The "mysterious" passenger carrying the secretive package, however, was to Cardozo the only one to whom the duty or primary scope of duty was bestowed.[468] However, that person never sued. He

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[462] POSNER, *supra* note 1, at 41.
[463] KAUFMAN, *supra* note 10, at 302.
[464] POSNER, *supra* note 1, at 41 (noting the *Palsgraf* analysis of scope of duty is the "Minority rule"); s*ee* Joseph W. Little, *Palsgraf Revisited (Again),* 6 PIERCE L. REV. 75, 83-88 (2007).
[465] *Palsgraf,* 248 N.Y. at 341 ("The conduct of the defendant's guard, if a wrong in its relation to the holder of the package . . . .").
[466] KAUFMAN, *supra* note 10, at 287 (stating that the man "jumped onto the train as it was already moving and that guard who had held the train door open, helped him on while another grounded on the platform pushed him into the car").
[467] *Id.*; *see also Palsgraf,* 248 N.Y. at 341, 343 ("The man was not injured in his person . . . . ").
[468] *Id.* at 343 ("The passenger far away, if the victim of a wrong at all, has a cause of action, not derivative, but original and primary.").

continued his train travel passing into historical anonymity after the explosion despite the physical mayhem left behind at the station platform.[469]

Now what if that same man had written boldly for all to see, "firecrackers," "bomb," or "explosives" contained within the newspaper wrapped box? This person then tried to jump onto the train then being pulled and pushed by the Railroad's employees who inadvertently and negligently knocked the hypothetically marked package from that gentleman's grasp. The explosion then occurred. Would Mrs. Palsgraf have then been owed a duty by the Long Island Railroad?

Contrary to the purported sequential blocks of logic Cardozo tried to construct in his majority Opinion, I conclude that Mrs. Palsgraf was owed a duty, and was within the scope of that legal dictum. By my analysis, Cardozo could have voted for a different outcome with circumstantial changes.

When closer to the facts, Cardozo focused only on the direct duty between the Railroad employees and the nameless passenger trying to jump onto the moving train before the doors closed.[470] Although, as previously highlighted, Cardozo in factual recitation never lost sight of the unmarked, unknown contents of the package.[471] By my estimation this was vitally important to him. This omission seemed to break any potential for the chain of duty from the Railroad to extend any further beyond the immediate one between Railroad employees and the unknown passenger running to catch the moving locomotive.

Would this quotient be any different if that passenger instead carried a package marked "Explosives, Dangerous"? Perhaps Cardozo's legal analysis might also have been altered, or he would have analyzed the case differently with an alternative legal prose.

What I believe, and have thus concluded, is that this missing factor synergistically voided any actual potential for a different outcome; the other, Cardozo's predisposition. The notice of a dangerous package to all was missing. If these different salient facts were present

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[469] *See* POSNER, *supra* note 1, at 43 n.19, 298-99. *See also Palsgraf*, 248 N.Y. at 343 ("The man was not injured in his person nor even put in danger.").

[470] *See Palsgraf*, 248 N.Y. at 342-43, 347 ("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 consequences that go with liability.").

[471] *Id.* at 340-41, 342-43, 345 (No one, "by concession," understood "in the situation to suggest to the most cautious of minds that the parcel wrapped in newspaper would spread wreckage through the station.").

and notice to the vigilant eye that a danger existed for all passengers, including Palsgraf, Cardozo would at least have had to address this issue. At a minimum, even if he still dismissed the case Cardozo would have had to distinguish and repose something specific to this instead of his legalistic generalities.

Mrs. Palsgraf was on the train platform clearly within the protective aegis of the Railroad station as a ticket purchaser.[472] By every account she was waiting there, on the platform, after buying tickets to Rockaway waiting for her train to arrive.[473] Under my hypothetical paradigm of unused facts by Cardozo, would he have constructed an analysis which ended in the same result denying the plaintiff relief? Although not "The Gambler," I would wager that he may not have.

As to Cardozo, I also argue that there was not a scintilla of risk or danger indicated by the wrapped, but unmarked box carried by the man seeking to get on the train. If the secretive package had shown notice and lettering divulging the nature of its blasting contents, Cardozo would have had to feel uneasy about the facts. That would be his arbitrary, seamless and conclusory espousal of a blanketed legal fiction, without anything more, that Palsgraf was "far away" from the event.[474] But what if there was notice of the danger? The positioning, therefore, of figurines on Cardozo's judicial chessboard would have been completely altered.

I therefore submit for consideration, that Cardozo might loosen his restrictions on the scope of duty in *Palsgraf* upon these different facts. He alludes to this even in the *Palsgraf* Opinion, where he talks about the "blast."[475] The point is that even if the harmless-looking carried package contained some markings of explosives inside, then Notice would have to be given to some extent. By focusing on the plain package, Cardozo must have internally considered, or recognized, this alternative reality.[476]

For example, does a "cherry bomb" or firecrackers explosive mean, with labeling on the box, that Palsgraf is at risk for being at an arbitrary stated location of "far away," sustains injuries? My opinion

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[472] POSNER, *supra* note 1, at 33-34.
[473] *Id.*; *see also* KAUFMAN, *supra* note 10, at 286.
[474] POSNER, *supra* note 1, at 39-40.
[475] *See* KAUFMAN, *supra* note 10, at 355-56 (noting that the package exploded when it was run over by the train wheels).
[476] *Palsgraf*, 248 N.Y. at 344 ("This does not mean, of course, that one who launches a destructive force is always relieved of liability if the force, though known to be destructive, pursues an unexpected path.").

on this is less clear. This is partly because a cherry bomb or just firecrackers do not wreak havoc at a rail station platform. It is because of this uncertainty, and something not still known ninety years later is what was in the unmarked box that was not labeled at all. Were they firecrackers? A bomb? Dynamite? Fireworks? But if you believe most accounts cited herein, the explosives were substantial.

All this goes precisely to the heart of another of Cardozo's analytics. That is the extent and pervasive forcefulness of an explosive blast when the unmarked box interacted with the train wheels after being negligently cast onto the ground between the platform and the rails.[477] It is unclear if a large explosive blast meant negligence to Cardozo, while small rattling of sulfur firecrackers did not. This is why researchers have strived to determine the extent of the explosive blast.

Consider, based upon language in *Palsgraf,* how the "ordinary eye" would perceive such a massive explosion.[478] This tautology gets us back to that one essential question—how serious was the explosion?[479] This question is pristinely clear in the majority Opinion.[480] If truly violent and destructive, Cardozo downplayed it by using literary pictures, as being benign. Absent a truly destructive blast, the Long Island Railroad employees' actions would never be the but for cause of negligence for Cardozo. To the contrary, Andrews's dissent extended the risk of the Railroad employees' actions and flowed much further than just between the man running to catch a moving train and the Rail conductor.[481] For Cardozo that would be difficult.

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[477] Posner says Mrs. Palsgraf testified the penny scale injured her. POSNER, *supra* note 1, at 34 ("[K]nocked the scale itself over onto Mrs. Palsgraf, bruising her."). The New York Times said the platform buckling the planks tipped the scale, and other witnesses said the stampede of people did it. *Id.*

[478] *Palsgraf*, 248 N.Y. at 342 ("eye of ordinary vigilance"); *see id.* at 342, 343, 344 (noting how the "ordinary prudent eye" should be able to notice the possible danger).

[479] Thirteen people were injured, and some were taken to the hospital. KAUFMAN, *supra* note 10, at 286. Outside there were ambulances and what we would now call a triage center set up in the waiting room, as per the transcript. Scott & Kent, *supra* note 188, at 1072, 1088, 1089.

[480] *Palsgraf,* 248 N.Y. at 341 ("The fireworks when they fell exploded.").

[481] In his dissent, Judge Andrews opined: "But not merely a relationship between man and those whom he might reasonably expect his act would injure. Rather, a relationship between him and those whom he does in fact injure. If his act has the tendency to harm some one, *it harms him a mile away as surely as it does those on the scene.*" *Id.* at 349 (emphasis added).

### *2. Cardozo's Palsgraf Epitaph*

Nearly 100 years of cobwebs have wrapped themselves around *Palsgraf*. Nine decades after his death what might Cardozo think about all this ruckus, even up to the present time, *Palsgraf* has spawned?[482] I do not believe he would want a do-over. Cardozo, I can only surmise looking at all the legal analysis and literature directed at *Palsgraf*, might smirk a little. He would likely think he had indeed already achieved a legalistic goal that his Opinion so challenged the minds of others, whether they thought him right or wrong.[483]

I strongly believe, nevertheless, the type of legal acuity of other Judges and lawyers who nurture a legend of greatness have long since been lost to a modern Profession which has nothing but a short memory. *Palsgraf* is now only kept alive, as a generic example, by a few tweed-sport-coated law professors. Cardozo's proximity analysis and the presence of a scope of duty determined by some unknown "orbit of danger" or "risk" from a practical standpoint seems to me to have been left to formless dust. This is due to the staggering number of cases inundating today's Appellate Judges. Currently, judges are more concerned with statistical docket numbers, the presence of insurance to settle a case, and not about scope of duty in most Tort cases.

Cardozo's finely-crafted use of Appellate legal subtleties, like his piano playing,[484] I believe, has been lost in the fog of risk and cost benefit analysis occurring daily. Recovery frequently depends on the presence of deep pocket insurance, corporate net worth, or avoiding bad Press from a runaway verdict. Whatever logic which led Cardozo to reach his *Palsgraf* decision, I state they were arrived at first by his emotions, then afterward were neatly tied up using his considerable skills of literary legal prose setting forth a stone-cold judicial decision supported by only selective facts. Another purpose of this Article is to expose the reader to the full panoply and nuances of events which constituted *Palsgraf*. To that end, a primary aspect of Cardozo's legal decision making was based on raw emotion, or so it is my opinion.

In the end, *Palsgraf* and its dissenters created various unknown consequences. That is the ever-changing nature of the Law. I submit, proven Law here today but gone tomorrow. This same Law changes

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[482] POSNER, *supra* note 1, at 15-18 n.33.
[483] *Id.*
[484] HELLMAN, *supra* note 1, at 183. Cardozo played the piano. *Id.* at 192.

because of a new day's factual conundrum, and a different Judge from whom you had yesterday.

## VIII. CARDOZO, A DIFFERENT JUDGE IN THE *HYNES* CASE

Another Cardozo Court of Appeals Tort case, *Hynes v. New York Central Railroad Co*.,[485] proved less high profile than *Palsgraf*; it certainly did not muster a major New York Times article as the latter.[486] However, similarly in *Hynes*, Cardozo arbitrarily, but this time more overtly emotional, reached his decision for all to read. He then crafted a factual recitation at the beginning of the Opinion to telegraph his decision.[487] Again, Cardozo is shown throwing out archaic ritualistic restrictions on recovery imposed upon a Judge, as he hypothetically recognized in his extra judicial essays.[488]

Examining *Hynes*, and comparing Cardozo's almost gushing, factual sentimentalities to Harvey Hynes, the youthful victim, to the constricted, impersonal recitation to Mrs. Palsgraf is illuminating. Here is the Hynes friendly Cardozo scripted factual basis for his legal ruling:

> On July 8, 1916, Harvey Hynes, a *lad* of sixteen, swam with two companions from the Manhattan to the Bronx side of the Harlem River or United States Ship canal, a navigable stream. Along the Bronx side of the river was the right of way of the defendant, the New York Central railroad, which operated its trains at that point

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[485] 231 N.Y. 229 (1921). *Hynes* was rendered seven years before *Palsgraf*. *Id.* (the *Hynes* decision was filed on May 31, 1921); *Palsgraf*, 248 N.Y. 339 (decided on May 29, 1928).

[486] *See* POSNER, *supra* note 1, at 33 n.2 (referencing the *Palsgraf* train explosion at the Long Island Railroad). *Bomb Blast Injures 13 in Station Crowd*, N.Y. TIMES, Aug. 24, 1924, at A.1 (providing the full newspaper article about the explosion that day at the Long Island Railroad Station).

[487] POSNER, *supra* note 1, at 51, 53 ("Again it is Cardozo the rhetorician, rather than Cardozo pragmatic policy analyst, the sociological jurisprudence whose hand is visible."); *id.* at 54.

[488] *See supra* text accompanying notes 31, 32, 148 and 149 (referring to Cardozo's essays and extra-judicial writings). These footnotes refer to Cardozo's essays and extra-judicial writings such as The Nature of the Judicial Process. The reference to his extra-judicial intellectual writings is simply to remind the reader of Cardozo's protestations against exercising strict ritualistic and formulaic decisions. They simply serve to remind us how in *Hynes* he asserted that admonition exhaustively to favor the plaintiff.

by high tension wires, strung on poles and crossarms. Projecting from the defendant's bulkhead above the waters of the river was a plank or springboard from which boys of the neighborhood used to dive. One end of the board had been placed under a rock on defendant's land, and nails had been driven at its point of contact with the bulkhead. Measured from this point of contact the length behind was five feet; the length in front eleven. The bulkhead itself was about three and a half feet back of the pier line as located by the government. From this it follows that for seven and a half feet the springboard was beyond the line of the defendant's property, and above the public waterway. Its height measured from the stream was three feet at the bulkhead, and five feet at its outermost extremity. *For more than five years swimmers* had used it as a diving board without protest or obstruction.

* * *

On this day Hynes and his companions climbed on top of the bulkhead intending to leap into the water. One of them made the plunge in safety. Hynes followed to the front of the springboard, and stood poised for his dive. At that moment a crossarm with electric wires fell from the defendant's pole. The wires struck the *diver, flung him from the shattered board, and plunged him to his death below. His mother*, suing as administratrix, brings this action for her damages. *Thus far the courts* have held that Hynes at the end of the springboard above the public waters *was a trespasser on the defendant's land. They have thought it immaterial that the board itself was a trespass, an encroachment on the public ways*. They have thought it of no significance that Hynes would have met the same fate if he had been below the board and not above it. the board, they have said, was annexed to the defendant's bulkhead. By force of such annexation, it was to be reckoned as a fixture, and thus constructively, if not actually, an extension of the land. The defendant was under a duty to use *reasonable care that bathers swimming or standing in*

> *the water* should not be electrocuted by wires falling from its right of way. But to *bathers* diving from the springboard, there was no duty, we are told unless the injury was the product of mere willfulness or wantonness, no duty of active vigilance to safeguard the impending structure. Without wrong to them, crossarms might be left to rot; wires highly charged with electricity might sweep them from their stand, and bury them in the subjacent waters. In climbing on the board, they became trespassers and outlaws. The conclusion is defended with much subtlety of reasoning, with much insistence upon its inevitableness as a merely logical deduction. A majority of the court are unable to accept it as the conclusion of law.
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> *Bathers in Harlem River on the day of this disaster were in the enjoyment of a public highway*, entitled to reasonable protection against destruction by the defendant's wires. They did not cease to be *bathers* entitled to the same protection while they were diving from encroaching objects or *engaging in the sports that are common among swimmers*.[489]

One cannot cavalierly fail to see Hynes portrayed as a mere "lad" while Mrs. Palsgraf was not even mentioned by name in her case Opinion.[490]

Cardozo did not attempt to humanize or personalize Palsgraf in his Opinion. This was evident when he failed to mention her by name.[491] One might justifiably argue that he was younger at the time of the *Hynes* case.[492] During the latter decade of the 1920's he was perpetually distraught and distressed over his sister Nell's ill health and continued decline into heart-wrenching physical deterioration, which

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[489] *Hynes*, 231 N.Y. at 231-34 (emphasis added and internal citations omitted).
[490] Feminists have criticized Cardozo's treatment of and lack of empathy for Mrs. Palsgraf. POSNER, *supra* note 1, at 47.
[491] KAUFMAN, *supra* note 10, at 160-61, 192-94.
[492] The *Hynes* decision was filed on May 31, 1921. *Hynes*, 231 N.Y. at 229. Cardozo was fifty-one years old at the time of *Hynes*, and fifty-eight years old when *Palsgraf* was decided in 1928. *See Palsgraf*, 248 N.Y. at 339 (*Palsgraf* was decided on May 29, 1928). Cardozo and his twin sister Emily were born on May 24, 1870. HELLMAN, *supra* note 1, at 3.

included multiple strokes and an ultimate inability to speak.[493] These weighed heavily on him by the time of the *Palsgraf* decision in 1928.[494] Nell died on November 23, 1929,[495] less than one year after the *Palsgraf* decision.[496]

In this timeframe of *Palsgraf*, Cardozo was going through a very rough time due to Nell's relentless mortification of physical and mental health.[497] I agree with Judge Posner who pointed out that Nell's impact on his psyche, physiology, emotions and mental wellness was profound.[498] But Posner thought it best left for psychiatrists to unravel the tangled controlling bonds and emotions of this putative Mother and Son connexity between Nell and Benjamin.[499]

Perhaps looking at factual differences and similarities between *Hynes* and *Palsgraf* will provide a more easily understood insight. In both *Hynes* and *Palsgraf*, Cardozo's opinion overturned, or reversed, the trial court and intermediate Appellate Court.[500] Cardozo's decision in *Hynes* was that the "lad" was owed a duty and was not a trespasser.[501] In contrast, the lower courts held against Hynes, whom they determined was a trespasser, as the Railroad argued—no duty was owed to the trespasser.[502]

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[493] KAUFMAN, *supra* note 10*,* at 193 ("In February 1928, [Nell] suffered a stroke that greatly affected her speech").
[494] *Palsgraf*, 248 N.Y. at 339-47 (indicating that *Palsgraf* was decided on May 29, 1928).
[495] KAUFMAN, *supra* note 10, at 193.
[496] *Id.* at 193.
[497] Towards the end, strokes had left her lifeless, and unable to speak. *See* KAUFMAN, *supra* note 10, at 160-61, 192-94 ("she lost her speech"). In 1925, Cardozo wrote to his cousin about Nell, "I have been so upset and worried that I have had time and mind and heart for little beyond the sick room." *Id.* at 160, 626 n.68. During this period, Cardozo's health was not the best. *Id.* at 180, 195 (noting he suffered from angina and staphylococcus).
[498] POSNER, *supra* note 1, at 3-8.
[499] *Id.* at 6.
[500] *Id.* at 36 n.9. The Appellate Court affirmed the verdict, and the New York State Court of Appeals reversed, and dismissed the suit. Hynes v. New York Central Railroad Co., 231 N.Y. 229 (1921). In *Hynes*, the trial court dismissed the case. 188 App. Div. 179, 181 (N.Y. App. Div. 1919). That dismissal was affirmed on intermediate appeal. Hynes v. New York Central Railroad Co., 188 App. Div. 178 (N.Y. App. Div. 1919). The New York State Court of Appeals reversed, finding for plaintiff. *Hynes*, 231 N.Y. at 238-40; POSNER, *supra* note 1, at 50-51.
[501] KAUFMAN, *supra* note 10, at 231, 233, 234.
[502] POSNER, *supra* note 1, at 52.

In *Hynes*, Cardozo obviously delved deeper into the Record on Appeal as compared to *Palsgraf*.[503] In *Hynes*, he set forth minute details about the accident in his Opinion.[504] After unearthing the favorable facts he wanted, Cardozo found a duty owed by the New York Central Railroad to the "lad," where, contrary to the lower court's findings, Hynes was a trespasser and it mattered not whether defendant actually owned the property.[505]

Additionally, in *Hynes*, Cardozo's decision came down against the New York Central Railroad Company.[506] This time Cardozo was ruling against the putative "deep pocket" Railroad, different from *Palsgraf*.[507] Did the much more compelling emotional elements of the electrocution death play an underlying role to fashion the *Hynes* result quite unlike *Palsgraf*?

Further, *Hynes* involved the death of a young "lad," with Cardozo fully sensationalizing his youthfulness.[508] Perhaps some might characterize Hynes's actions as reckless, but this type of youthful exuberance obviously was a product of those times when no internet, electronic games, or TV were present. The victim was a youthful "lad," so sympathy and empathy undergirded the gory details of Hynes's demise which Cardozo laid out in graphic detail.[509] One cannot equate that to any comparable discussion in *Palsgraf*.

Fifth, and perhaps more legally germane, Cardozo presented an Opinion of detailed graphic prose describing the undergirding facts,

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[503] This can be readily seen by the factual introductions to the cases separately: *Palsgraf*, 248 N.Y. at 340-41; *Hynes*, 231 N.Y. at 231-34. *See* POSNER, *supra* note 1, at 48-52.

[504] *Id.* at 51-52.

[505] *Hynes*, 188 App. Div. at 181; POSNER, *supra* note 1, at 49.

[506] *Hynes*, 231 N.Y at 230, 233-34.

[507] POSNER, *supra* note 1, at 38, 46-48 (discussing Cardozo and the railroad corporation favorable ruling as a deep pocket).

[508] *Id.* at 53-54 ("In his soaring peroration Cardozo has given no reason why the plaintiff should win."). As Professor Weisberg commented about Cardozo's emotional language in *Hynes*:

> But as the term embraces all verbal methods of persuasion, including the emotive and deceitful, the normative implications of 'powerful rhetoric' are equivocal . . . We have before us not merely a lawsuit, a dry serious of issues, but a living lad, about to be killed by electrical wires falling from defendant's pole.

RICHARD H. WEISBERG, WHEN LAWYERS WRITE 10-11 (1987); *see also* POSNER, *supra* note 1, at 54.

[509] *Id.* at 51 ("[T]he wires struck the diver, flung him from the shattered board, and plunged him to his death below.").

even referring to precise and distinct measurements.[510] This is something Cardozo completely ignored and did not undertake in *Palsgraf.* There, Plaintiff was likely less than ten yards from the explosion,[511] which was reportedly heard blocks away.[512] The Record detail in *Hynes*'s facts would form the rebar strength for Cardozo's analytical Opinion. Of course, here is that old maxim, "the devil is in the details."[513]

In *Palsgraf*, Cardozo was likely working backwards from an already-known point, though I submit an arbitrary one instead of an unknown one. *Hynes,* I would offer for consideration, was just an emotional decision made by a man with conflicted emotional underpinnings, and not just some automata of logical analysis. To this end we do know Cardozo loved children.[514] No other literary scholarship has provided much greater insight into the *Hynes* result.[515]

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[510] These precise measurements such as the Springboard being seven and a half feet beyond the Railroad's property, and its height from the water to the Springboard's bulkhead being three feet are examples. *Hynes*, 231 N.Y. at 231-34.

[511] KAUFMAN, *supra* note 10, at 298 (noting that this geographic positioning of Mrs. Palsgraf was not "far away"). Had Cardozo examined or took the dimensions from the actual trial Record as to where Palsgraf might have been located, perhaps his cavalier statement might not have been made.

[512] POSNER, *supra* note 1, at 33. *See Bomb Blast Injures 13 in Station Crowd*, N.Y. TIMES, Aug. 24, 1924, at A.1; *see also* Alice M. Beard, *More on the Palsgraf Debate*, ALICEMARIEBEARD, http://www.alicemariebeard.com/onehell/palsg2.htm (last visited Feb. 23, 2023).

[513] The details here are antithetical to his approach in *Palsgraf* of obfuscating any measurement confirmations. In *Hynes,* however, Cardozo goes into precise miniscule factual description of details, distances and measurements which obviously were in the Record. *See* POSNER, *supra* note 1, at 47-53. Cardozo does this to support his pre-determined willingness that he was going to permit the "lad" Hynes, and his grotesque demise, to prevail, and not have the case dismissed. *Hynes,* 231 N.Y. at 231-34. Whereas Mrs. Palsgraf's alleged injuries were arguably suspect. POSNER*, supra* note 1, at 35-36, 42. Not only certainly they made no impact on Cardozo, but at the time, as noted, he was living through the horrifically tortured health decline of his beloved Nell, which was for real. KAUFMAN, *supra* note 10, at 162-63. The grotesque death of Hynes, I submit, Cardozo could relate to due to Nell. *Id.* at 160-62, 192-93. A questionable stammer and alleged traumatic dialects of Palsgraf he could not. *See* Scott & Kent, *supra* note 188, at 1091-94 (noting that Dr. Graeme Hamilton was the expert Neurologist who was called to testify by Palsgraf's lawyer); POSNER, *supra* note 1, at 9-10 (suggesting that traumatic diabetes was not a credible medical claim for Palsgraf to make).

[514] HELLMAN, *supra* note 1, at 193 (noting that "[t]he Judge always had a way with children.").

[515] *See generally* KAUFMAN, *supra* note 10, at 279-81, 572-73, 651.

It does seem that in formulating his *Hynes* decision Cardozo discarded the dispassionate and surgical precision for which he was known.[516] Thus, as you can read into the below quotation, Cardozo wrote rhetorically and effusively about Hynes the "lad."[517] This includes detailed Record evidence of dimensions, object placements, distances which support his finding that it was the New York Central Railroad that was trespassing on public property, not the "lad" Hynes.[518] This is a stark inversion from the detachment and lack of passion demonstrated in *Palsgraf's* majority Opinion.[519] As Cardozo pointed out in *Hynes:*

> The truth is that every act of Hynes from his first plunge into the river until the moment of his death, was in the enjoyment of the public waters, and under cover of the protection which his presence in those waters gave him. The use of the springboard was not an abandonment of his rights as bather. It was a mere by-play, an incident, subordinate and ancillary to the execution of his primary purpose, *the enjoyment of the highway*. The by-play, the incident, was not the cause of the disaster. Hynes would have gone to his death if he had been below the springboard or beside it. The wires were not stayed by the presence of the plank. They followed the boy in his fall, and overwhelmed him in the waters. The defendant assumes that identification of ownership of a fixture with ownership of land is complete in every incident. But there are important elements of difference.
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> This case is a striking instance of the dangers of "a jurisprudence of conceptions" [Pound], the extension of a maxim or a definition with relentless disregard of

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[516] *See, e.g.,* POSNER, *supra* note 1, at 53-54; CARDOZO, *supra* note 33, at 229; KAUFMAN, *supra* note 10, at 89-92, 43-96 (discussing a "Lawyer's Lawyer"); *id*. at 111-13, 133-39. Cardozo wrote a Book about the Court of Appeals when he was a lawyer. ("Focus on the facts, adaptation of doctrine to social conditions, emphasis on reason and a sense of justice, respect for the role of the legislature in law making, and rhetorical flourishes . . . [w]ould be hallmarks of Cardozo's judicial style.").

[517] "[A] living lad. Boyish fun[,]" before the electrocution. POSNER, *supra* note 1, at 54.

[518] *Hynes*, 231 N.Y. at 231-34.

[519] POSNER, *supra* note 1, at 50-51, 55.

> consequences to a "dryly logical extreme." The approximate and relative become the definite and absolute. Landowners are not bound to regulate their conduct in contemplation of the presence of travelers upon the adjacent public ways. There are times when there is little trouble in marking off the field of exemption and immunity from that of liability and duty. Here structures and ways are so united and commingled, superimposed upon each other, that the fields are brought together. In such circumstances, there is little help in pursuing general maxims to ultimate conclusions. They have been framed *alio intuitu.* They must be reformulated and readapted to meet exceptional conditions.
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> The law must say whether it will subject him to the rule of the one field or of the other, of this sphere or of that. We think that considerations of analogy, of convenience, of policy, and of justice, exclude him from the field of the defendant's immunity and exemption, and place him in the field of liability and duty.[520]

So how did a mind so brilliant, trained in strict judicial logic, come to a decision so filled with sophistry and emotions compared to *Palsgra*f? Was there something about the *Hynes* case which drew out from Cardozo the pathos of life, and colored his otherwise black and white analysis? I believe in the *Hynes's* instance to Cardozo it did.[521] Cardozo had to have feelings for this young boy, as he, himself, never experienced the exuberance of true youth.[522]

The defendant in *Hynes*, the New York Central Railroad Company, argued Hynes was trespasser to whom no duty was owed.[523]

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[520] *Hynes*, 231 N.Y. at 234-36 (emphasis added and internal citations omitted).

[521] Benjamin Cardozo never had a childhood of youthful exuberance and innocence as Harvey Hynes. POLENBERG, *supra* note 1, at 45-46 (one observer noted that he "lived almost the life of a hermit, spending all his spare time in the library"). HELLMAN, *supra* note 1, at 43 ("Those early years as a lawyer were a period of toil devoid of almost all the usual past times of youth.") (emphasis added).

[522] *Id.*

[523] *See* POSNER, *supra* note 1, at 49 ("The defense was that there was no duty of care to a trespasser.").

That was the result in the intermediate appellate decision, as they won dismissing on that issue.[524] Yet it was known, according to the Record evidence, that for five years people, like the "lad" in *Hynes,* used the plank as a diving board.[525] There was certainly notice since the Railroad Company had previously had five "trespassers" arrested at this site.[526]

What if the plaintiff was an older man who might have taken his kids for a day of board jumping into the Harlem River, but the father was the one electrocuted or drowned? An adult would likely sense the danger to be protected against without trespassing. Years later, in *Palsgraf*, Cardozo established a duty concept if someone was within the "orbit of danger."[527]

Despite the electrical wires falling, it is unclear where the New York Central Railroad was negligent to find duty *ab initio*—the fault, knowledge, lack of reasonable care of the electrical wires, or just because of its occupation of the land. There was nothing noted about this in Cardozo's Opinion. The best Cardozo did was cite a hypothetical about how negligence could occur in this situation.[528] In *Hynes*, to obtain the result Cardozo really wanted, one could argue that it consequently became a case seemingly of absolute liability without a breath from him saying so.

## IX. MUSINGS OVER *PALSGRAF* AND *HYNES*?

The danger to the swimmer of the electrical wires seems clear in *Hynes.* The "lad" was electrocuted and fell into the darkly deep Harlem River.[529] It was not clear if Hynes died from electrocution or from drowning.[530] Cardozo, in my analysis, did not write anywhere in *Hynes* what the true negligence was, or the existence of an actual

[524] *Hynes*, 188 App. Div. 188 (N.Y. App. Div. 1919), *rev'd*, 231 N.Y. 229 (1921); POSNER, *supra* note 1, at 49 ("The defense was that there is no duty of care to a trespasser. The lower courts agreed and dismissed the suit.").
[525] *Hynes,* 231 N.Y. at 231-32.
[526] POSNER, *supra* note 1, at 49. However, there was no record of prior injuries, from any of the Railroad contended prior trespassing.
[527] *Palsgraf*, 248 N.Y. at 344. Additionally, the overhead electrical lines in *Hynes* were clearly within the "eye of ordinary vigilance" which Cardozo used in *Palsgraf* to help support the limitation of a duty owed. *Palsgraf,* 248 N.Y. at 342.
[528] *Hynes*, 231 N.Y. at 234.
[529] *Id.* at 234-35.
[530] POSNER, *supra* note 1, at 49.

proximal duty that the New York Central Railroad had breached,[531] especially where it knew or should have known Hynes was trespassing.[532] These electrical cables had existed for many years.[533] Other "lads" had apparently been diving off the wood bulwark plank, which helped to support the electrical wires for at least five years.[534] But in one fateful moment, by electrocution or drowning caused by an electrical wire shock, the "youthful lad" Hynes was no longer existent in this world.[535]

Flashing forward to *Palsgraf* in 1928, this much larger event was minimalized by Cardozo despite the explosion leaving many injured.[536] In *Palsgraf,* whether the explosion was caused by firecrackers, dynamite, or bombs, the person carrying the newspaper wrapped package never identified the package's contents.[537] Neither was this unidentified perpetrator injured as the train rolled away down the tracks.[538]

In *Palsgraf,* nowhere in the Opinion was there attention given to any applicable New York Ordinance; at the time there was such an Ordinance.[539] This Ordinance pertained to permitting requirements for labeling packages of firecrackers, bombs and other explosives.[540] It was not mentioned at all in any *Palsgraf* final Opinion, but the Second Department Appellate Decision referred to it.[541] However, once this Ordinance is reviewed, although its requirements resolved many of Cardozo's uncertain comments, there was no evidence of anyone at the

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[531] *Hynes*, 231 N.Y. at 233-34.
[532] POSNER, *supra* note 1, at 53.
[533] *Id.* at 51 (the case disclosed a number of trespassers arrested before this mishap); *id.* at 49 ("The railroad presented testimony that it had tried to prevent trespassers on its right-of-way at this point and indeed that it had some trespassers arrested.").
[534] *Hynes*, 231 N.Y. at 231, 232-33 (bathers and using the board under the electrical wires had been going on at least "five years [of] swimmers had used it as a diving board without protest or obstruction [by defendant]."); *see also* POSNER, *supra* note 1, at 51.
[535] *See id.* at 48-49.
[536] KAUFMAN, *supra* note 10, at 286 (noting that "thirteen people" were injured by the *Palsgraf* explosion); *id*. at 656 nn.1-5. *See also* POSNER, *supra* note 1, at 34-35 ("[N]one seriously, although several, not including her [Mrs. Palsgraf] were taken to hospitals in ambulances called to the scene."); *id*. at 51.
[537] *Palsgraf,* 248 N.Y. at 340-41, 343, 345.
[538] *Id.* at 340-41.
[539] POSNER, *supra* note 1, at 35 n.4.
[540] New Code of Ordinance, City of New York, June 20, 1916.
[541] Palsgraf v. Long Island Railroad, 222 A.D. 166, 167 (N.Y. App. Div. 1927).

Rail Station there to enforce it, as it related to packages with explosives.[542] Despite the penny scale falling on her as Mrs. Palsgraf

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[542] The New Code of Ordinance of the City of New York, June 20, 1916, Ch. 10, Art. 6, 392(b) [hereinafter Ordinance]. This City Ordinance was also mentioned in the *Palsgraf* Second Department decision. *Palsgraf,* 222 A.D. at 167 (Seeger, J.). I have mentioned this ordinance with its specific requirements for metal packaging, express labeling and even prohibited locations where these explosive boxes could be taken within the confines of New York City. Art. 4, § 61(4),(5); *see also id.* at 276 (noting that the Ordinance's provisions which deal with prohibition of transporting and delivering into the City without certified supervision). A reference to the Ordinance is not found in the Case on Appeal, or the Briefs to the Court of Appeals. POSNER, *supra* note 1, at 35. The Ordinance would prevent the transportation of explosives on the streets, public convenance [*i.e.* trains], and other locations. *See* Ordinance, ch. 10, art. 4, § 61(4).

The reason this Author concludes the Ordinance would not have affected the outcome was based specifically upon the *Palsgraf* facts. There was apparently no one at the station checking packages, assuming someone with the Railroad or police security even knew of it. Scott & Kent, *supra* note 188, at 1095. I agree with Judge Posner's comments on this Ordinance. Posner did not think, with the havoc at The Long Island Station that day, even if the Ordinance had been somehow applied," there was no indication of what the value was." POSNER, *supra* note 1, at 35. The above reference to $10 of value was a component of the Ordinance. As to the requirements of this Ordinance, "[i]f the wholesale value of the fireworks exceeded $10 then, in carrying them through the streets of New York City without their being securely packed and properly labeled, the 'Italians' [the running train passengers] were violating a city ordinance, but there is no indication of what the value was." *Id.* at 35. Posner does not say anything about civil and/or criminal enforcement. POSNER, *supra* note 1, at 41. But had it been done, it could arguably fall within the scope of my hypothetical about the unmarked package being otherwise labeled to identify its potentially dangerous contents. It is my conclusion after all this research, that if the explosion from just one package was great enough to be heard blocks away, injure thirteen people, tear up the planks of the long wooden Rail station's wood platform and knock over a weighted penny scale then the value of the contents of our unmarked harmless looking package in *Palsgraf* would have been valued at more than ten dollars. This particular Ordinance covered many different topics that dealt with sanitary Building Code, and Park Regulations. ARCHIVE, www.https://archive.org/details/newcodeordinaceOOnygoog (last visited Feb. 8, 2023). Ordinance, ch. 10 referred to "Explosives and Hazardous Trades." *Id.* at 268. Article 6 of the Ordinance dealt with "Fireworks." *Id.* at 286. Section 92(6) is encaptioned as regulating "Local transportation." *Id.* at 288. Section 92(6) states in full:

> Local Transportation—No person shall carry or transport through the streets fireworks exceeding in wholesale market value the sum of $10 unless they are securely packed in spark-proof wooden or metal packages having plainly marked on the outside thereof in large legible letters the words FIREWORKS-EXPLOSIVE, but under no circumstances shall any person carry or transport in a tunnel or subway under the streets, lands or waters of the city, in which the public has access.

claimed, the medical care she sought were for seemingly minor injuries at first.[543] Two to three days later after the event, Mrs. Palsgraf claimed development of a "stammer from that explosion.[544] She also ultimately alleged traumatic diabetes resulting from this incident.[545]

Now think about what Cardozo emotionally had and was going through in terms of familial health. Contrast Mrs. Palsgraf with the gory details of Hynes, the young "lad" who was electrocuted, falling into a nameless watery grave.[546] Cardozo concluded the New York Central Railroad owed some nebulous duty of care to protect the singular safety of Hynes.[547]

But was that an emotional response? In comparison Cardozo seemed to treat *Palsgraf* as a frivolous lawsuit.[548] Consequently, his writing relies heavily on substituting euphemisms, metaphors and

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*Id.* Under the Ordinance "bombs and shells" were prohibited from being discharged altogether. *Id*. at § 2(f). That Section prohibited fireworks "5 inches or larger than three-fourths of an inch in diameter." In *Palsgraf*, Cardozo stated the unmarked package was about "fifteen inches long, and was covered with newspaper." *Palsgraf*, 248 N.Y. at 341. The only criminal penalty found by this Author in this Ordinance was "seizure" by the Fire Marshall. Art. I, § 5, at 267 allowed for seizure of contraband material and its disposal); Art. I, § 6, at 267 (Revenues, disposition of permits imposition of fines and forfeiture in all suits for penalties).

In researching Chapter 10 on Explosives and Hazardous Trades, it is really a permitting Regulation and designation of approved use Ordinance. There are no criminal aspects or penalties to it. *Id.*, ch. 10, at 271, arts. 1-26. This entire Ordinance, mostly not dealing with Explosives or Hazardous Trades, can be found within New Code of Ordinances of the City of New York, adopted June 20, 1916, with all amendments to January 1, 1922. In terms of locating the large array of provisions in this Regulatory Ordinance, it is noted that this Ordinance was compiled and annotated by Arthur S. Cosby, published by The Bank Law Publishing Company, 1922 www.https://ia601604.us.archive.org/22/items/newcodeordinanc00nygoog.pdf (last visited Feb. 8, 2023).

[543] POSNER, *supra* note 1, at 34-35.

[544] *Id.* at 35.

[545] *Id.* at 36. The diabetes claim from any trauma was questionable at best. *Id.* at 35-36.

[546] *Id.* at 54-55.

[547] *Hynes*, 231 N.Y. at 233-34.

[548] POSNER, *supra* note 1, at 34, 42 ("His artistry is nowhere better exhibited of a fact that would assisted the thrust of his opinion. Namely, the injury for which Mrs. Palsgraf was suing. [Cardozo's] [m]ention that it was a stammer would have made the accident seem not only freakish but silly, a put-on, a fraud"); POLENBERG, *supra* note 1, at 247 (Cardozo did not become "the protector" of the injured).

hypotheticals for any empathy and detailed facts.[549] Still, the bottom line for *Palsgraf* was the fact that no one knew what was in that package.[550]

Cardozo's *Palsgraf* words established a stratagem for analyzing a theorem for liability based upon scope of a duty.[551] But even an admirer of Cardozo, like myself, must critically ask whether his emotions about Mrs. Palsgraf's case had to do with her as an individual plaintiff and the scope of his legal duty. Nearly a century later and the question is still debated.[552]

Perhaps Cardozo should have utilized in *Hynes* the same schematic of legal reasoning as he did later in *Palsgraf*. However, would that calculated quotient have brought the same result? As to the latter, it is doubtful to apply the Black Letter Law of *Hynes*, without its shades of grey to the problem of a perceived *Palsgraf* "nuisance" or frivolous suit which Cardozo may well have secretly believed.

Cardozo does not get a do-over, or a mulligan in either situation. What about our current trial judges granting a motion for summary judgment to a defendant on either the *Palsgraf* or *Hynes* factual scenarios?

Judges today would rarely ever punch a summary judgment ticket in either case—the scare of reversal is too great and keeping it on a trial docket is too easy in hopes the cases settle. It seems to me that a jury could very well relate to Mrs. Palsgraf, although the damages testimony would greatly affect her credibility and likeability. For the *Hynes* "lad," prior knowledge of five years of swimmers' use without apparent incident, and the graphic death details, could easily carry the day at least at the trial level.

It is my belief and judgment, in support of my hypothesis of what has changed over these many years, that Judges of today have become more emotionally uneven, and less machine-like automatons

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[549] POSNER, *supra* note 1, at 4-5 ("Cardozo's inversions of standard word order and his use of metaphoric and aphorism make for brevity, and vividness"); KAUFMAN, *supra* note 10, at 296-97.

[550] *Id.* at 298-99.

[551] *Palsgraf*, 248 N.Y. at 343-45.

[552] Metaphorically, and in reality, Benjamin Cardozo has been lying silently and peacefully since 1938, at the Shearith Israel Cemetery on Long Island. KAUFMAN, *supra* note 10, at 578. Cardozo left us all the legacy of *Palsgraf* no matter what you might think of him as a Judge, or of that Opinion. Lawyers and others are still digging into its nuances. I venture to say few Judges remain in this type of spotlight as does Cardozo although he left us so long ago.

of superior reasoning and brain power. Too many trial judges today never grant a summary judgment for a defendant on an issue related to duty, and particularly no one would on causation. Let the jury decide factual disputes, and for all practical purposes nearly every other contested issue in Tort suits. It is easier all around for today's judges, in my experiences.[553]

I think that no Cardozian literary craftsmanship and intellect today, at least personally and professionally, are present amongst our Appellate Judges. This is particularly true of State Appellate Courts who are mired in the quicksand of endless criminal cases and a claimed massive overload of cases. The normal reaction to this, at both the federal and state levels, is just to add more Judges. That solution, however, of appointing excessive numbers of Judges only creates more of a chance for judicial mediocrity.

My perception is that Benjamin Cardozo would not want to decide judicial cases today. His view might be that the rule of Law, or even "*The Science of Law*," no longer exists in our legal system, particularly the field of Torts. This is due to the more pronounced inextricably related judicial and political connections resulting in partisan decision making, *i.e.*, before a vote for your nomination. If there ever was a purity of intellect and logical reasoning in judicial decision making, in my view it no longer exists.

## X. CONCLUSIONS

### A. The *Palsgraf* "Mutara Nebula"

Yes, this is a pop culture reference to the movie "Star Trek II: Wrath of Khan." To bring this to the real or legal world in which my Article is written, the reference to Mutara Nebula means nothing works, you're flying blind, no sophisticated equipment operates because it is all useless.[554] You don't even know where you're going

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[553] "It is well established that summary judgment is a drastic remedy in that it deprives the non-movant party of her day in court and should only be granted if there are no material of triable issue of facts." *See generally* Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.S.2d 395, 404 (N.Y. 1957); Alvarez v. Prospect Hosp., 68 N.Y.S.2d 320, 324-25 (N.Y. 1986).

[554] The Mutara Nebula "renders shields useless and compromise targeting systems." *Star Trek II: The Wrath of Khan*, WIKIPEDIA, https://en.wikipedia.org/wiki/Star_trek_II:The_wrath_of_khan (last visited Mar. 6, 2023). "A nebula is a giant cloud of dust and gas in space. Some nebulae come from the gas and dust

once inside an ionized black cloud of galactic dust. Nothing can be seen. Nobody knows what's happening, or more aptly, happened. Colloquially, everything is out of whack, out of kilter.

That is a depiction of *Palsgraf.* Thus, the result is that one is in the dark on everything—even legal logic doesn't work. And certainly nothing is seen clearly. It's all about luck, blind as it is within the Nebula. For *Palsgraf* there was no luck either, or even a wild swing for it to be accurate here.

After over a year and half of work on this *Palsgraf* and Cardozo project, I arrived at this Conclusion herein which is relevantly analogized to the Palsgraf Mutara Nebula. That is because, perhaps except for the Jury of Twelve who decided for Mrs. Palsgraf,[555] the rest of the so-called theoreticians, brilliant legal scholars and minds all have been without operational bearing or compass analyzing the *Palsgraf* Nebula. This also unfortunately includes Cardozo, Andrews, and all the above-referenced higher intellect legalists who have both written about and taught every wet behind the ears nascent Law Student now for nearly one hundred years.

Once one has the opportunity to actually read transcripts, Case on Appeal, and perhaps get out of their lawyer outfits, I argue that *Palsgraf* never should have been made eternal with a forever lifespan through its appellate review. That's because the Jury which heard the evidence, determined credibility of witnesses, and resolved the disputed facts should have returned a verdict for Mrs. Palsgraf at the end of that train line, the last Station.

The Long Island Railroad Company, and its lawyer, tried to beat her down, a working eight-dollars per week "janitor" woman, which was her second job.[556] This was after the Railroad failed to put on a defense.[557] After all, in 1924, money the Railroad got pummeled

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thrown out by the explosion of a dying star, such as a supernova. Other nebula are regions where new stars are beginning to form." *What Is a Nebula*?, NASASPACE, https://spaceplace.nasa.gov/nebula/en/ (last visited Mar. 6, 2023).

[555] Scott & Kent, *supra* note 188, at 1067 (noting in the "Extract from Clerk's Minutes" that "twelve jurors" were "empaneled and returned" a verdict for the plaintiff in the sum of six-thousand dollars").

[556] *Id.* at 1070.

[557] *Id.* at 1094 ("The Court: Have you anything to rebut this Mr. McNamara? "Mr. McNamara: "No, I rest your Honor, and renew my motion"). It was denied. *Id.* ("I will let it go to the jury"); *id.* at 1067 (noting that a motion to set aside the verdict was also denied).

pretty good in terms of this Verdict,[558] especially when it was being claimed Mrs. Palsgraf was faking her injuries.[559]

Even from the partial transcripts I can now see, like today, even in 1927, some trial lawyers were not at the top of their game. Both plaintiff's and defense lawyers lacked laser-like focus on dimensions, location, and placement.[560] Even by not presenting a defense to the claims, the Railroad lawyer preserved every issue for appeal. However, the defense attorney, Mr. McNamara, did not have the omniscience or prescience on May 25, 1927, when the jury was empaneled that Benjamin Cardozo on May 29, 1928, would be edifying literary prose on orbits of liability to vindicate his client.[561] Maybe his actions were just preventative malpractice 1927 style.

In my considered judgment, after this journey afar taken, the Jury Verdict without doubt should have been ultimately confirmed. And I believe so without all the pomp and ceremony its appellate fate has forever generated. *Palsgraf's* adverse result should not have emerged from the Nebula. If so, I would not have been writing this now, or stressed out and strained about it, and being uncompensated for over a year trying to explain *Palsgraf* and Cardozo but for the Mutara Nebula.

Without question, Cardozo's Court of Appeals had the entire Record[562] before it when the final decision dropped on May 29, 1928.[563] The Railroad's lawyer, in his Notice of Appeal to the New York State Court of Appeals,[564] lodged broadly all motions for new trial and dismissal, but also all rulings of the Second Department Appellate Court's decision.[565]

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[558] In today's dollars the verdict of $6,000 would be valued at about $103,308.88, DOLLARTIMES, https://www.dollartimes.com/inflation/ (last visited Mar. 2, 2023),
[559] Mrs. Palsgraf testified she was black and blue all over, had nervous tremors, and could not work her jobs. Scott & Kent, *supra* note 188, at 1072-73. Her regular treating physician confirmed this. *Id.* at 1078-81.
[560] *Id.* at 1075 (providing the cross-examination transcript of Mrs. Palsgraf).
[561] *Id.* at 1069; *Palsgraf*, 248 N.Y. 239 (1928).
[562] Scott & Kent, *supra* note 188, at 1061 n.1.
[563] *Palsgraf,* 248 N.Y. 239 (1928).
[564] Scott & Kent, *supra* note 188, at 1099.
[565] *Id.* at 1099 (suggesting that this fact is contained in the Notice of Appeal to the Court of Appeals which is in the reprinted Record published in Scott & Kent's Civil Procedure Book); *see also* Scott & Kent, *supra* note 188.

**B. *Palsgraf* is a false celebrity:**

a. Cardozo made up his "orbit" of danger and risk when he did not have to. Whatever he meant by "far away" or a "great many feet" was not per se in the Record.[566]

b. Tangible evidence was presented to the jury of Palsgraf's injuries.[567] The Jury who saw the witnesses had to have believed her and the others. She sought medical help at the scene.[568] Cardozo simplistically, contrary to the Jury verdict, accepted the only isolated testimony, a neurologist, who testified Mrs. Palsgraf's complaints would last only as long as the lawsuit.[569] The fact-finding jury saw and heard him, and discounted at least to some degree his testimony.[570] This helps explain the absence of any Cardozo empathy.

c. Cardozo, in establishing his orbit of risk, or eye of vigilance, said that no one knew what danger rested inside the unlabeled box.[571] The trial judge instructed the jury that the Railroad had no duty to inspect any packages.[572] That could have terminated the negligence claim right there. Thus, why did Cardozo then fashion a legal construct on the scope of duty to determine negligence when it was arguably not necessary? It was a singularity unique factual case, not a test case. Cardozo, however, then never mentioned this jury instruction. If the jury verdict was inconsistent with the law, the trial judge charged the jury that could have been easily dealt with on the appeal without articulating some new abstract legal duty principle.

d. In the dissent, Andrews said there was negligence, without elucidating the point.[573] He then just dealt with proximate cause which was a jury issue yet never addressing that.[574] Again, another example

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[566] *Palsgraf,* 248 N.Y. at 341, 342-43.
[567] Scott & Kent, *supra* note 188, at 1072, 1079-82, 1092.
[568] *Id.* at 1071-72, 1089.
[569] *Id.* at 1093-95.
[570] *Id.* at 1094, 1101.
[571] *Palsgraf*, 248 N.Y. at 341, 344.
[572] Scott & Kent, *supra* note 188, at 1095 (regarding the Jury Instruction, "[t]here was no duty on the part of defendant to examine each passenger as he entered the platform to see what was in any package he might be carrying . . . No such duty involves upon the railroad company in this case, and no negligence can be predicted upon the failure of the defendant to stop a passenger while moving across its platform and examining what he might have with him.").
[573] *Palsgraf*, 248 N.Y. at 348 ("We did in terms of proximate cause, note of negligence.").
[574] Kent & Scott, *supra* note 188, at 195 (providing the jury charge).

of an overbroad wordy dissent that was not necessary. His view, I proffer, was you can't let the Railroad off when due to their employees' actions the train station was at least partially blown up.

e. That same intermediate Appellate Court made mention of the Ordinance on "Explosive and Hazardous Material" discussed earlier in the Article.[575] The Majority did not find evidence of value to violate the Ordinance.[576] But Plaintiff's lawyer never pursued this Ordinance at trial.[577] The Judges of the Court of Appeals were mute on this point. The Ordinance says the package can only be five inches;[578] yet, Cardozo wrote it was at least fifteen inches long.[579] And the Ordinance barred even any five-inch package of firecrackers from being in a place like a Railroad station platform, or on a train.[580] If evidence was presented to the jury about this Ordinance, which was not in the instructions, they would have found that Ordinance violated. At trial the subject package was described as "quite a large bundle,"[581] "fifteen to twenty inches."[582] Common sense tells me the description of a "bundle" characterized that the newspaper wrapping was cover for dynamite or bombs, not simple firecrackers.[583] That's consistent with bombs found in the newspaper-wrapped package left behind.[584]

The Ordinance said even "firecrackers" not be in public conveyances.[585] And, of course, it had to be in a certain box[586] and clearly labeled.[587] So, even if the trial judge instructed the jury the Railroad had not any duty to search packages, what about joint and several

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[575] Palsgraf v. Long Island R.R. Co., 222 A.D. 166, 167 (N.Y. App. Div. 1927).
[576] *Id.* at 167. Even though this passenger had no permit, "it does not appear the provisions of such Code or Ordinance were violated." Ordinance, *supra* note 542, at ch. 10, art. 6, § 72(6)).
[577] Scott & Kent, *supra* note 188, at 1083-84, 1094-96.
[578] Ordinance, *supra* note 542, ch. 10, art. 6, § 93(2)(c), § 94(b).
[579] *Palsgraf*, 248 N.Y. at 341 (noting it was a small size package, "about fifteen inches long").
[580] Ordinance, *supra* note 542, ch. 10, Art. 6, § 92(3l), at 288-89; Art. 4, § 61(4), at 276 (regulating and prohibiting certain public conveyances).
[581] Scott & Kent, *supra* note 188, at 1083.
[582] *Id.* at 1083 (providing the testimony of Mr. Gerhardt, a trial witness).
[583] *Id.* at 1078. Ordinance, *supra* note 542, at art. 6, § 93(2(c), at 288 ("[F]irecrackers [can't be discharged] larger than five inches or larger than three-fourths in diameter.").
[584] POSNER, *supra* note 1, at 33, 42-43.
[585] Ordinance, *supra* note 542, art. 4, § 61(4), at 276.
[586] *Id.* at § 62.
[587] *Id.* at § 62(1) & (2) &(3) (noting how dynamic, blasting compounds and sticks of explosives are to be packaged).

liability for which recovery might be made against the Railroad by Palsgraf? Then let the Long Island Railroad go after contribution from the vanished passenger–the price everyone has suffered under the Law of Contribution wherever it exists.[588] The point here would have been, on duty, the Railroad allowed violations of a lawful Ordinance to occur

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[588] Contribution in the Law is formally defined as follows:

> (1) The right that gives one of several persons who are liable on a common debt the ability to recover ratably from each of the others when that one person discharges the debt for the benefit of all; in the right to demand that another who is jointly responsible for a third-party's injury supply part of what is required to compensate the third-party. . . (2) A tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault.

Black's Law Dictionary 353 (8th ed., Bryan A. Garner, ed. in chief 1999) [hereinafter Black's Law Dictionary]. "[W]here a party is held liable partially because of its, contribution against other culpable tortfeasors is the only available remedy." *Glaser v. Fortunoff*, 71 N.Y. 2d 643, 646 (1988). The Law of Contribution did not fully exist in New York state at the time of *Palsgraf* in 1928, see Fox v. Western New York Motor Lines, Inc., 257 N.Y. 305, 308-09 (1931) (indicating that payment by one tortfeasor relieved liability of all tortfeasors). The normal practical procedure, based on my forty years of litigation and trials where the State had the Law of Contribution, would be for the plaintiff to sue the deep pocket, whether or not he/she knew the other join tortfeasor. Black's Law Dictionary, at 1527 ("Two or more tortfeasors who contributed to the claimant's injury and who may be joined as defendants in the same lawsuit"). Then the defendant tortfeasor who got a judgment against them, which could be for the full amount of the damages would then have to sue and go against other tortfeasor(s) to recover that portion of the judgment they were not responsible for. Again, from my practice experiences, this was hard to do. Thus, it could provide for harsh results to a defendant. For example, joint tortfeasors where one is insured and the other not, plaintiff could go after only the insured defendant, not the judgment proof other joint tortfeasors. *Palsgraf* provided a double blow to the Long Island Railroad if it would have ultimately lost. If it paid the judgment it would then also eliminate any chance at contribution, although New York Law apparently at the time provided to obtain relief from the other tortfeasor the Railroad would have to show it was only a passive tortfeasor, then be eligible for indemnity. *See* Dole v. Dow Chemical Co., 30 N.Y. 2d 143, 148-52 (1972). In *Palsgraf*, the Railroad was stuck either way since no one knew the identity of the man carrying the bundle which was knocked onto the railroad tracks. Posner *supra* note 1, at 35 ("the 'Italians' responsible for the explosion were never identified"). So it was not possible for the Railroad to go after the irresponsible party carrying the bundle of some kind of explosives which caused a major explosion within the rail station at the platform area. *Id.* at 34 ("Cardozo's opinion fails to convey an adequate sense of the explosion's force"). Whether full Contribution law, or modified as in New York the results could be unjust, all consistent with my own experiences in tort lawsuits.

on its premises. And it really knew since its own Lawyer established at trial how everyone was carrying packages and valises.[589]

f. Cardozo did not address intervening cause since he was deciding only extent of negligence.[590] The Second Department Appellate Court dissenter said the explosion was an intervening cause exonerating the Railroad.[591] Andrews blatantly said the man with the package and the ensuing explosion was not an intervening cause–it all followed from one act of negligence.[592] In essence, Judges Cardozo and Andrews were writing about two different cases.

g. Beyond the boundary of everyone involved with the *Palsgraf* decision caught up in the process of being myopic, some common sense and life's experiences would have been helpful. One would know then that a box, or even a "bundle" as testified, if firecrackers, does not partially blow up a Railroad platform nor could have the magnitude or the blast come from outside.[593] So, a lawful ticket holder, standing on the inside platform waiting for her train gets injured by a sudden large explosion as Mrs. Palsgraf, what happens? The jury must have thought that merited Railroad liability. But for someone's negligence, or even an intentional act, such will not occur. I argue from this that Cardozo's eye of vigilance of no danger could be then turned on its head to make the contrary argument supporting liability. Palsgraf was certainly not expecting some type of bomb going off. The innocent lawful bystander, who does nothing is entitled, it would seem, to some degree of safety from harm, particularly at a public conveyance.

h. Neither Cardozo nor Andrews dealt with the "highest standard of care" owed by a common carrier to which the intermediate Appellate Court referred.[594] The Railroad incorporated this issue by

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[589] Scott & Kent, *supra* note 188, at 1075, 1078, 1085.

[590] *Palsgraf*, 248 N.Y. at 346-47.

[591] *Palsgraf*, 222 A.D. at 168 (Lazansky, P.J., dissenting) ("Between the negligence of defendant and the injuries, there is intertwined the negligence of the passenger carrying the package.").

[592] *Palsgraf*, 248 N.Y. at 355 ("The act was 'negligent' which is what Judge Andrews referred to as the actions of defendant's employee knocking the package 'onto the platform.'"); *id.* at 356 ("The only intervening cause was that instead of blowing her to the ground the concussion smashed the weighing machine which in turn fell upon her.").

[593] POSNER, *supra* note 1, at 43 ("How did a handful of firecrackers, cause the heavy scale damage at the other end of the platform?").

[594] *Palsgraf*, 222 A.D. at 168 ("It must be remembered that the plaintiff was a passenger of the defendant and entitled to have the defendant exercise the highest degree of care required of common carriers.") (Seeger, J.).

inclusion into its Notice of Appeal.[595] If this had been used, it would be easier for Cardozo to affirm. And most certainly write a different opinion on these facts. But speculation wonders what else was going on?

i. Finally, maybe the darkness and imbalance of my metaphysical Nebula simply has Cardozo not wanting Palsgraf to win? After all, her claims of stammers and traumatic diabetes were not rock solid.[596] So Cardozo had to hear this argument when from inside his own home he was internally dealing with gut-wrenching sights of horror exhibited by Nell's debasement during this very time.[597] Cardozo himself suffered an episode of paralysis of his face by staphylococcus during 1928.[598] Then Nell, in February 1928, suffered yet another of many strokes, lost her speech and essentially was confined to bed. On a scale of equities and compassion, Nell's saga made that of Mrs. Palsgraf seem a bit of an inconvenience, or a transitory situation ended when the litigation is over.[599] Maybe on educated speculation this is the bottom line for the recognized legal prosaic written masterpiece of the Cardozo *Palsgraf* Opinion?

### C. The Cardozo Mythology

This Article has been no attack on Benjamin Cardozo. As I say in my first sentence, Cardozo was only human. Therefore, putting on a judicial robe, despite all his physical, personal and intellectual positives and negatives, still does not deny him an exceptional judicial standing.

Years of real-life legal and litigation experiences have taught me there are no judicial free zones of intellectual decision-making untouched by human emotions, prejudices, and biases. They are borne from, and nourished by, organic minefields of internal predispositions and personality genes of Judges.

Cardozo, in my opinion, despite his apparent public granular lack of normalcy with the remainder of the human race should be, and

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[595] Scott & Kent, *supra* note 188, at 1099.
[596] POSNER, *supra* note 1, at 36.
[597] *See* KAUFMAN, *supra* note 10, at 159-61.
[598] *Id.* at 160.
[599] Scott & Kent, *supra* note 188, at 1091-92 (providing trial testimony of Dr. Hammond, the Palsgraf neurologist).

is, considered within the Acropolis Hall of judicial primacy.[600] Even his well known, but often criticized *Palsgraf* opinion, is today still mostly lauded despite the detractors.[601]

As I have tried to demonstrate, a Judge's, even Benjamin Nathan Cardozo's, decisions may come across as he or she may be prejudicially or otherwise pre-disposed. And every year it seems to me, younger jurists arrive equipped with their black regal robes, but most having less and less experience in the professional, legal, and real worlds.[602] The Judicial and Legal Professional Bar has been lowered, in my judgment, based on my forty plus years of high stakes and hard-core litigation.

This has led me to witness the exercise of legal decision-making more based on judges' rank personal emotions, or rote political viewpoints without any strategic intellectual legal inquiry upon which to begin what should be, metaphorically, that lonesome decisional journey towards the pole.[603] Having witnessed and experienced it

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[600] POSNER, *supra* note 1, at 9-10 n.19; GUNTHER, *supra* note 10, at XV; KAUFMAN, *supra* note 10, at 568-69.

[601] POSNER, *supra* note 1, at 16-17 nn.33-34 (referencing a list of research Articles providing Analytical insights, criticisms, and justification for the *Palsgraf* result).

[602] As I have witnessed over decades of the most cut-throat of any of the trial lawyer and litigation modalities, one cannot stay forever ensconced in law faculty or student lounges and understand the perpetually-ugly secrets of what the Judicial System truly is. And even the fact as to the of times schizophrenic ruthlessness of Lawyers. If you continue to live that secluded Academe or Ivory tower life in your mind, I ultimately postulate a rude awakening awaits all of you who come in the future.

[603] Oliver Wendell Holmes, Jr., Commencement Speech at Brown University Commencement 1897 *reprinted in* MAX LERNER, THE MIND AND FAITH OF JUSTICE HOLMES. HIS SPEECHES, ESSAYS, LETTERS AND JUDICIAL OPINIONS 36 (1943). Holmes's statement about the "pole" was part of that Commencement Address he gave:

> In the first stage one has companions, cold and black though it be, and if he sticks to it, he finds at last there is a drift as was foretold . . . But he has not yet learned all. So far his trials have been those of his companions. But if he is a man of high ambitions he must leave even his fellow-adventurers and go forth into a deeper solitude and greater trials. He must start from the Pole. In plain words he must face the loneliness of original work. No one can cut out new paths in company. He does that alone.

*Id.* at 52; *see also* Oliver Wendell Holmes, Jr., THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES 47, 48 (Mark Howe ed. 1962). It is my sincere belief that these words could have been written for Benjamin Cardozo. In the loneliness of his human journey, despite his intellectual fortitude and presence, he also sailed alone for the "pole." One has to do that oneself. And Cardozo was a

personally, lawyers, judges and the Profession are uncivilized animals like creatures controlled by the survival of the fittest in an untamed Serengeti world of litigation plains. Accordingly, almost always the darkest course taken is due to money.

Regardless of one's view of *Palsgraf*, Cardozo's work promulgated a nearly bottomless frontier of common law and judicial history. He possessed an aptitude for legal reasoning using a style of literary expression that pushed him far into the forefront of his peer Judicial Officium. After all, through his writings, scholarship, personal experiences, and intellectual pursuits Cardozo sculpted an exemplary purified judicial life. It was such a life to eradicate whatever internal shame he felt by his father's public betrayal of a judicial sacred trust.[604] Cardozo left his legacy in a beautifully wrapped, yet sometimes often hard to decipher, written legal tapestry scribed with a formulaic, legal certainty which today remains remarkably unique, unequaled, and I submit unparalleled by anyone.

Despite his erudition, perceived aloofness and brilliance of mind, I believe the man himself had a deep sadness and morosity around his human existence. This included a life fraught with his own fragile health concerns, and suppression of personal desires and pleasures. Benjamin Cardozo walked a lonely path, as it were, which only further distinguished and distanced him from others.

Cardozo, to the world's view, was a different man altogether, hiding his many layers of basic inert existence of a lonely, unfulfilled soul.[605] Cardozo's worldly contacts, constant work and judicial devotion masked his inner existence. I recognize I have no special prescience of mind, or a Century's omniscient vision into the bone marrow of Benjamin Cardozo. Too many self-penned letters written in the dim glow of his solitude unfortunately have not survived to provide further insight or window into Cardozo's true heart and emotions.[606]

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fundamentally a lonely man, based upon my Research, and my opinion. *See* HELLMAN, *supra* note 1, at 178-79.

[604] POLENBERG, *supra* note 1, at 247 ("Moreover, his desire to avoid any hint of the kind of favoritism that had led to his father's disgrace disposed him to view legal contests in highly abstract terms.").

[605] HELLMAN, *supra* note 1, at 179 (Cardozo was a "preeminently lonely man"); KAUFMAN, *supra* note 10, at 499; POLENBERG, *supra* note 1, at 244-45 (Cardozo was "a lonely but heroic figure whose moral force was 'contiguous' and who radiated human warmth and had the Power to Charm.").

[606] Cardozo wanted after his death for his personal letters to be destroyed, although not all were. *See* POLENBERG, *supra* note 1, at 244-45.

I located a remaining letter to a cousin of his, contemporaneously written during Cardozo's adult life.[607] I believe even this small piercing ray of sunlight supports Cardozo's final example of one lonely intellect's soul who left an indelible mark on our law:

> Your letter charms but does not comfort me. I sit upon my little handful of thorns and look with sad eyes upon the glories of creation. Dante reserved a special place for those who sulked under the sunshine, and doubtless the hot corner is held for my use.
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> I suppose the difference is just what you point out, that you don't know the meaning of the word loneliness. To me it is a very vivid thing. The sense of being an atom in all this vast universe without any other atom traveling the same daily orbit is annihilating. . . It doesn't help me much to know that atoms more or less akin are traveling orbits not very distant with feelings of atomic friendship.[608]

This reference above to Cardozo's "orbit" is different from that in *Palsgraf*.[609] It is, instead, a metaphor for the loneliness of a cosmic "orbit" of the real life within which Cardozo traveled. But that "orbit" is what has persisted, I believe, to make Cardozo both a legal giant, yet a historical anomaly.[610]

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[607] HELLMAN, *supra* note 1, at 179.
[608] *Id.*
[609] *See Palsgraf*, 248 N.Y. at 343 (discussing the "orbit of danger").
[610] *Author's Note*: There are few things this old dog lawyer learned through this writing and researching process. First, the result and the appellate courts chances of getting it right are so dependent on the lawyers. The better the lawyer, the better the chances of success. Now obviously I may be in my advanced years, but in 1927, I knew neither Mssrs. Wood or McNamara, the lawyers respectively of Palsgraf and the Railroad. At the Trial level they certainly were no Cousin Vinny's, and this writer thought from the Record reviewed they did a yeoman's job. Not a deep one, sparse but enough to get by. There was no yelling at each other in the transcript, not even an objection! My have things changed. But they left out of the testimony so much that was needed, perhaps so much that without there would never had been a *Palsgraf* appellate decision. But somewhere from Flatbush in Brooklyn where the trial was held to Albany and The Cardozo squad, something got terribly lost. Cardozo and Andrews even in dissent their Opinions seemed somewhat made out of whole cloth, where there was a lot of Black Letter law recited but hardly any facts. The two Opinions were like Academic exercises to land as guiding law on Torts for the

upcoming ALI. As I said, Helen Palsgraf was a pawn on a judicial chessboard. But the absent satisfaction of *Palsgraf* connecting truly with the Kings County, Brooklyn Courthouse partly had to be the fault of the lawyers. I didn't see the Briefs at the Court of Appeals. However, Richard Posner saw the Briefs and they were adequate. Yet, to Cardozo, "pedestrian." POSNER, *supra* note 1, at 45. Yet stellar, clear, sharp, and illuminating they could not have been as it seemed at that level of at least Cardozo's jurisprudential excellence. Whatever they gave those seven Judges did not help the decision making. So, I guess, the moral of this version of the story is to hire, despite the money if you want to win, a very good appellate lawyer. Don't let the trial lawyer do your appeal. Use their knowledge and experiences of course. But they are too close to the subject, and it's too personal.

*My Second Point:* Well, it became clear to me that the Appellate Judges live more cloistered and detached from the human flow of actions and events than does the Pope himself. They seem clueless to everyday life, and the dynamics, at least in the Tort field, which collide in different vectors to create such concepts as duty, negligence, and proximate cause. In my humble view unless they are exactly spoon fed correctly and well by the appellate attorneys, they can't see the entire picture to save their lives. They maybe see one or two pieces of a complicated puzzle. And so they are left to conjecture, speculate, even made up things. Every lawyer these days knows an appellate judge never reads a Record. Even if their elf-like brilliant law clerks do, what do they knows about all this just having graduated Law School? And some Appellate Judges never ever tried a case previously. So, who is selected for that limited coveted seat as an Appellate Judge must be "truly" the Best in Class, and not a political hack judge. Because they are there doing time. In the final analysis, trust that the good Appellate Lawyers open Judges' eyes, and make them the wise people they are supposed to be.

Aside from the instant Article, I have authored many others. I don't know if any were ever read, except by me and my transcriptionist. But perhaps along this arduous, and mostly unfulfilled legal journey I have traveled, perhaps one day something I have said in writing will ripple waters of the otherwise staid and immovable legal universe. Time has not permitted me to research and write a polemic exposé on how the Constitution should be changed to eliminate lifetime appointments of Federal Judges (the original constitutional postulate to have lifetime appointments developed by the Framers has long since vanished), and to place no more than twelve-to-fifteen-year finality on their terms. At the State level, either appointed or elected, I believe one should never serve more than two full complete six-year terms, plus the one-to-two years one might get in fulfilling a vacancy. I was gladly prepared to abide a self-imposed term limitation myself, Federal or State. No judge, at any level, should be serving twenty, thirty, or forty years which so often happens, particularly on the Federal bench: but these lengths also occur in the States. Without restrictions, usually, any departure date is timed for full pension vesting wherein one can be, by today's actuarial standards, still young because you started a judgeship during your youth. A judgeship should not be a ticket to leave reality, and become a petrified tree in the forest, to live forever off taxpayers and ultimately forget, if they knew in the first place, how to earn a living wage as a lawyer or any other endeavor, and what practicing law is really like. We certainly will be no worse off if what I advocate occurs. I doubt this comes to pass, but I earnestly hope one day it will, and

term limitations for judges will be intellectually taken on. "These are the last words I have to say." Billy Joel, "Famous Last Words" on ("River of Dreams" Columbia Recording Co. 1993).