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PERSONS AND MASKS OF THE LAW

Cardozo, Holmes, Jefferson, and Wythe as Makers of the Masks

With a New Preface

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The Passengers of *Palsgraf*

The most famous tort case of modern times—"the most discussed and debated," as Dean Prosser put it—is *Palsgraf v. Long Island Railroad Company*, decided in 1928 by the most excellent state court in the United States with an opinion by the most justly celebrated of American common-law judges, Benjamin N. Cardozo. The facts of the case as stated by Cardozo were these:

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 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 plat-
form many feet away. The scales struck the plaintiff, causing injuries for which she sues.

Cardozo held that the plaintiff could not recover. No negligence to her by the railroad had been shown. "The risk reasonably to be perceived," Cardozo wrote, "defines the risk to be avoided, and risk imports relation; it is risk to another or others within the range of apprehension." When the guard pushed the passenger with a package, he could not have apprehended that the plaintiff was endangered by his action. In his action he did not relate to her. As to her he could not have been negligent.

William S. Andrews, who wrote an opinion in the case no less eloquent than Cardozo's, saw negligence as a breach of duty of a man to observe care toward "his fellows," not toward specific persons he should have seen as endangered by what he did. If he breached the general duty, every consequence which followed had been caused by his negligence—"we cannot trace the effect of an act to the end, if end there is." Still, "practical politics" refused to hold the negligent person liable for every consequence, and so courts drew an "uncertain and wavering line," cutting off liability at a certain degree of distance in time and space—a degree of distance which could not be set with greater specificity. Here the injury to the plaintiff was close in time and space to the original act of negligence. The defendant (the railroad) was liable, and the plaintiff could recover compensation.

Disagreement between the judges did not depend on a different reading of the facts. As Andrews put it in dissent:

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. A violent explosion followed. The concussion broke some scales standing a considerable distance away. In falling, they injured the plaintiff, an intending passenger.

Both summaries of fact were wonderfully laconic. Andrews's was the superior in impersonality, eliminating even
the sex of "plaintiff." Compelled by grammatical necessity to use a personal pronoun, Cardozo did disclose that the plaintiff was female. Otherwise, neither judge said anything about her age, marital status, maternal responsibilities, employment, or income. What injuries she had suffered, whether she had been almost decapitated or whether she had been mildly bruised, could not be learned from either opinion. What compensation she had sought or what compensation she had been awarded—a jury had decided in her favor—was unmentioned.

No greater information was given about the defendant, except that it was a railroad or, as Cardozo chose to express it in his summary, possessed a railroad. The income and expenses, assets and liabilities, owners and directors of the defendant were unstated. Its officers and its guards or "servants" were anonymous. Defendant was as impersonally designated as plaintiff. P and D or A and B could as well have been written for their names.

The accident described by the judges had a timeless quality. It would have to have happened after 1830, since a railroad was involved. Otherwise it could have happened any time and, save for the mention of Rockaway Beach and the name of the railroad line, anywhere. Nothing was said of the hour, the day of the week, the month, the year. No notice was taken of when the plaintiff had begun her case, and of how many months or years it had taken her to reach the highest court of New York.

Cardozo and Andrews made no reference of any kind to the lawyers who had conducted the litigation. The editor of the printed report supplies their names—William McNamara and Joseph F. Keany for the defendant, Matthew W. Wood for the plaintiff. The judges made no comment upon their training, their competence, their presentation of the evidence, their relationship to their clients. No connection was suggested between them and the facts at the court's disposal. Nothing was said as to negotiations they might have conducted with each other. Their remuneration and the bearing of the decision upon it were not touched upon.
A fortiori, the judges said nothing of themselves—their own income and investments, their marital and parental status, their professional experience, their personal experience of New York commuter trains, their own study or debate over the case. The authors of the opinion and the dissent were, if possible, less visible than the plaintiff, the defendant, and the three lawyers. Who they were was not a fact of the case. Ignoring the lawyers and themselves, stripping the litigants to their status of plaintiff and defendant, Cardozo and Andrews had performed the standard operations of opinion writers announcing the rules of law which governed their conclusions.

THE COMMENTATORS’ HISTORY

The first writers about Palsgraf v. Long Island Railroad were students doing case notes in law reviews, the year following the decision. These authors did not go beyond the facts disclosed by Cardozo and Andrews. The Michigan Law Review followed Andrews in stating the case without revealing the plaintiff’s sex, while the Cornell Law Quarterly observed that Palsgraf was a woman. The Columbia Law Review noted that often defendants in suits for negligence were large corporations, but it said nothing in particular about the Long Island Railroad. Most law reviews noted that Cardozo had written the majority opinion. Occasionally the names of the dissenters in the Court of Appeal were listed. The lower-court judges and jurymen were not spoken of. No law student saw any point in mentioning the lawyers.

Their elders, the professional legal scholars, did not differ materially from them when they began their analysis of the case. Like the students, their interest was in the rule. The facts came, ready-made, from the opinion. Arthur L. Goodhart (a nephew of Irving Lehman, one of Cardozo’s majority) first pointed to the importance of Palsgraf in 1930 in the Yale Law Journal under the title ‘‘The Unforeseeable Conse-
quences of a Negligent Act.’” Goodhart, the American editor of the leading English legal journal, the Law Quarterly Review, identified Palsgraf merely as “the plaintiff.” Leon Green replied to Goodhart’s analysis in the Columbia Law Review with an article called simply “The Palsgraf Case.” Green, the new dean of Northwestern University Law School and a leading authority on torts, added one new fact to the discussion—Mrs. Palsgraf had won $6,000 in the trial court. He made nothing of his discovery.

In the next decade the case was the subject of comment, criticism, and speculation by professors of law, none of whom chose to tell more of the case’s history. W. W. Buckland, an authority on Roman as well as English law, discussed the decision in the Law Quarterly Review without so much as mentioning the plaintiff’s last name. William Prosser, who was becoming known for his work on torts at Minnesota University, exhibited the same austerity in referring to “the plaintiff.” Writing ten years after the decision, Thomas A. Cowan, then an associate professor at Louisiana State University, declared that Palsgraf was now “a legal institution.” Provocatively entitled “The Riddle of the Palsgraf Case,” his article solved the riddle by saying that the famous rule did not go beyond the case’s peculiar facts; but with everything made to depend on “the facts,” Cowan did not amplify those selected by the court. In 1939 the Columbia Law Review, the Harvard Law Review, and the Yale Law Journal commemorated the death of Cardozo by an extraordinary joint issue dedicated to his work. Warren A. Seavey, Professor of Law at Harvard, analyzed Cardozo’s contribution to the law of torts, of which Palsgraf was a capital example. Summarizing Cardozo’s summary of the facts, he referred to “the plaintiff, a woman.” Who the defendant was he saw no point in including in his précis, and he saw no need to mention the plaintiff’s lost $6,000 verdict or anything else not stated by the court.

In 1941 Albert A. Ehrenzweig, who was to make persuasive a new approach to negligence in America, made his
debut as author in an American law review with "Loss Shifting and Quasi-Negligence: A New Interpretation of the Palsgraf Case." A young judge in Austria, Ehrenzweig had left after the Nazi annexation, and when he wrote on Palsgraf was completing his third year as an American law student at the University of Chicago. He argued vigorously that liability in the case of accident to a customer should not be decided on the basis of perceived risk but should be allocated to the enterprise which generated the risk of accident: accidents caused by a business should be treated as a cost of the enterprise. His proposition was, however, general. He added no information on the Long Island Railroad. railroads in America, or Mrs. Palsgraf.

_Palsgraf_, meanwhile, had entered the casebooks to instruct students in the law of torts. The most conventional, that of Francis Bohlen, reporter of the _Restatement of Torts_, catalogued Cardozo's opinion under the heading "Acts Involving an Undue Probability of Material Harm to the Legally Protected Interests of Others," where the accident served as an example of an act found not to involve undue probability of harm. He filed Andrews's dissent separately under the title "Causal Connection between Misconduct and Injury Necessary to Maintenance of Action." Two essays in doctrine, Cardozo's and Andrews's expositions each served a doctrinal function in the casebook of orthodoxy. At Yale Law School, where if anywhere legal realists existed in 1931, Walter H. Hamilton and Harry Shulman presented the Cardozo and Andrews opinions without captions and with a note referring to the articles of Goodhart and Green: not a word of factual data was added. Leon Green, who held the view—atypical among teachers of torts—that torts should be analyzed not in legal categories so much as in terms of the activities where the torts had occurred, entered _Palsgraf_ in his casebook under "Interests of Personality and Property," in a chapter called "Traffic and Transportation," in a subsection called "Passenger Traffic." Nothing, however, was added by Green on the number of passengers the Long Island Railroad carried,
the number of accidents it annually had, or the nature of the railroad business. From the juxtaposition of the case and headings the student was expected to intuit connections which might exist between the rule and the activity of railroading. "Interests of Personality and Property," in the legal terminology adopted by Green, did not indicate any focus on the particular personality of Mrs. Palsgraf. "Personality" was employed as a synonym for "the body," and Green's general heading meant that injuries to the body would here be considered. Reproducing the text of Cardozo's opinion, Green, however, said nothing about the injuries of the plaintiff.

Ten years after the decision, the standard casebook treatment was in the orthodox vein of Bohlen. In a new edition of a Harvard Law School casebook which, in its original form, went back to James Barr Ames in 1874, Warren A. Seavey and Edward S. Thurston introduced Palsgraf with these captions: "Unintended Interference with the Person or Tangible Things" (the general heading), "Extent of Liability" (the chapter heading). "Person" in Seavey and Thurston, like "personality" in Green, was a synonym for "body." As in Green, injuries to the body were treated along with injuries to things without significant differentiation between them. In the classic Seavey-Thurston framework, Palsgraf was simply a leading case on risk.

Post-World War II law students were given a new source of facts from an unexpected quarter. Austin Wakeman Scott, Professor of Law at Harvard, and Sidney Post Simpson, Professor of Law at New York University, published the trial record of Palsgraf in a casebook on civil procedure. They did so not as historians but as professors of Procedure, illustrating the use of rules by setting out a case every first-year law student would know from torts. From 1950 on, there existed in this accessible form, obtainable without any special research, a multitude of particular facts unmentioned by Cardozo and Andrews. Would any law professor make use of them?
In 1953, William L. Prosser, then dean of Boalt Hall at the University of California, Berkeley, and by now the nation’s leading authority on the law of torts, delivered “Palsgraf Revisited” as one of the Cooley lectures at the University of Michigan. For footnotes to the published lecture, Prosser took from Scott and Simpson these facts: “The plaintiff was a Brooklyn janitress and housewife, 43 years of age. She was accompanied by her two daughters, aged 15 and 12.” The men running for the train with the package were “‘Italians.’” The scale which struck Mrs. Palsgraf was “‘an ordinary penny scale of the railroad platform type.’” It was either knocked over by the explosion, as Cardozo thought, or knocked over in the rush to escape by the crowd on the platform. The only fact from the record Prosser thought important enough to bring into the main body of his lecture was that the date was not the Fourth of July, when bundles with fireworks might have been anticipated, but August 24, 1924.

Prosser concluded a critical examination of the rule in Palsgraf: “It has been, I think, always the formula, the generalization which has been at fault, in a field where it seems impossible to generalize at all. ‘The mule don’t kick according to no rule’... There is no substitute for dealing with the particular facts, and considering all the factors that bear on them, interlocked as they must be.”

Prosser did not say how what he had added bore on “the facts” set out by the court or “interlocked” with them. Like Cowan insisting that the riddle was solved by the facts, he said nothing on “‘all the factors.” Presentation of the case in the casebooks and treatises on torts was unaffected by his article and unaffected by the availability of the record. None of the material he had added was picked up in the second edition in 1956 of The Law of Torts by Fleming James, Jr., and Fowler Vincent Harper, Professors of Law at Yale. When in 1968 a new edition of Leon Green’s casebook appeared, jointly edited by Green and five other law professors, the authors stated, “The literature dealing with the Palsgraf case is
now enormous.'" None of it apparently had added to the facts used by Cardozo.

A single addition did appear in Seavey and Thurston, now Seavey, Page Keeton, and Robert Keeton, on Torts—a cartoon of a railroad station platform with scales falling on a woman embracing a small girl. The cartoon, placed opposite the *Palsgraf* opinion, bore this caption: "And Lilian began to cry I want my mama! my mama!" The juxtaposition was mysterious, unless one had read the record of the trial and discovered that Mrs. Palsgraf had testified: "Well, all I can remember is, I had my mind on my daughter, and I could hear her holler, 'I want my mama!'—the little one." Her lawyer asked, "That was Lilian?" and she answered, "Lilian, yes." The cartoon was done by Leonard Bregman, a member of the class of 1954 at Harvard Law School. Its execution showed that students were relating the record set out in Scott and Simpson for the study of procedure to the famous opinion. Lightheartedly done, the cartoon testified to an unsuppressed interest in dimensions of the case unrecorded by Cardozo and the authorities on negligence.

Prosser's casebook had been edited jointly by himself and Young B. Smith, dean of Columbia Law School. In 1962, Smith was dead and Prosser spoke for himself with the boldness of a man who has long considered the matter: "The Record in this case is set out in Scott and Simpson, *Cases on Civil Procedure* (1950), pp. 891–940. A study of it indicates that as described in the opinion the event could not possibly have happened." What he had put as an alternative in his 1953 lectures was now a certainty: the scales must have been toppled *not* by the explosion of the fireworks but by the crowd running in panic on the platform. He asked if the change in facts "made any difference in the decision." The question had a certain pathos. Did it make any difference to the commentators and law teachers that the action perceived by the court "could not possibly have happened"?

In his hornbook on torts, the bible of students, Prosser per-
mitted his sense of the unreality of the event to show through. He explained why the case had been of such perennial interest. "What the Palsgraf case actually did," he wrote, "was to submit to the nation's most excellent state court a law professor's dream of an examination question."

Among all the persons who had shaped the rule and were ignored by the analysts, there was one exception. From the beginning Palsgraf was linked with Cardozo. In 1928 he had sat on the Court of Appeals for fourteen years, for four years he had been Chief Judge. He had delivered in 1921 the remarkable Storrs lectures at Yale which became The Nature of the Judicial Process. He had made other decisions commemorated as turning points. Law students knew his name better than they knew the name of any other judge of a state court. The student notes in the law reviews pointed out that Palsgraf was a Cardozo opinion. The professorial commentators referred constantly to Cardozo as its author. The excitement of Palsgraf was not merely that it was a brilliant examination question; it was an examination question answered by Cardozo.

The analysts did not, in the main, explore the relation of Cardozo the man to the rule he had framed. Warren Seavey, however, in his 1939 memorial essay "Mr. Justice Cardozo and the Law of Torts," made some general observations on his character which had a particular bearing on Palsgraf. Like most appellate judges, Seavey observed, Cardozo had "the unwelcome task" of taking away compensation awarded by a lower court. "In fact, in a majority of the tort cases in which he rendered opinions," the court denied the plaintiff recovery. The "entire record," Seavey wrote, showed that Cardozo reached these results, not "from some internal and inexplicable sense of justice" and not from "private opinions of policy," but from the consideration of "principles deduced from the cases" and the weighing of "competing interests." Cardozo "did his full part in causing the court to be a court of justice, but it was not by destroying it as a court of law. Personally solicitous for the poor and the
maimed, and in criminal cases eager to find the scintilla of
doubt which would keep from punishment one accused of
crime, he did not become the protector of the injured merely
because the defendant had ample funds to meet a judgment or
had an ability to spread the loss. His scales were those of
legal justice, not sentimental justice."

In the same memorial issue of the law reviews, Judge
Learned Hand paid tribute to Cardozo’s wisdom, a wisdom
which depended on more than detachment from self-advance-
ment. “I am thinking,” wrote Hand, “of something far
more subtly interfused. Our convictions, our outlook, the
whole make-up of our thinking, which we cannot help bring-
ing to the decision of every question, is the creature of our
past; and into our past have been woven all sorts of frustrated
ambitions with their envies, and of hopes of preferment with
their corruptions, which, long since forgotten, still determine
our conclusions. A wise man is one exempt from such a
handicap . . . Cardozo was such a man . . . I believe it was
this purity that chiefly made him the judge we so much re-
vere.” The tributes to Cardozo by Hand, one of his greatest
judicial contemporaries, and by Seavey, one of the greatest
of law teachers, recall the tributes to Wythe, a judge who
knew neither A nor B, and the biblical paradigm of the just
judge who does not accept persons. The portrait of Cardozo
traced by Hand and Seavey left little place for distinguishing
between the rule and the man. The person of Cardozo was
recognized only to identify the man so firmly with the mask
that the judge appeared merely to announce the truth.

No law review, commentator, or casebook mentioned the
lawyers. Their names appearing in the printed opinion were
excised when the opinion was reproduced in casebooks. The
jury and the lower-court judges, even the composition of the
divided sides in the Court of Appeal, received little more at-
tention. Green’s casebook in 1931 was called The Judicial
Process in Tort Cases, a title invoking Cardozo’s Storrs lec-
tures, The Nature of the Judicial Process. Green made no
reference to the trial, the trial judge and jury, or the steps in-
olved in the appeal—in short no reference at all to the actual process. Prosser, in "Palsgraf Revisited," gave what he called "the alignment" of judges for and against the plaintiff, a bare listing of last names. Charles O. Gregory and Harry Kalven, in a 1959 casebook, printed portions of the Appellate Division’s opinions, and acknowledged their authors; beyond their names, nothing was mentioned.

The omissions of the casebooks and the commentaries are, of course, no criticism of writers for not doing what they did not conceive to be their function. They were concerned with doctrinal exposition, not with history. They were interested in a rule which could be described in terms of $P$ and $D$, an examination question. But what of the legal historians? If they ventured into the modern period at all, they wrote about larger matters like decisions on constitutional law by the Supreme Court. Fifty years after the accident had occurred, forty-six years after the famous opinions, no history of the case had been written.

THE PARTICIPANTS

_Counsel._ If we go no further than the record of the trial and material existing in print, the lawyers become visible. The railroad was represented by Joseph F. Keany and William McNamara, who gave their addresses as "Pennsylvania Station." Keany, the senior man, had the title of General Solicitor of the Long Island Railroad and was listed as an officer of the company, subordinate to C. B. Heiserman, the General Counsel. Heiserman was also the General Counsel of the Long Island's parent, the Pennsylvania Railroad, and had his offices in Philadelphia. It may be inferred that Keany had a fairly free hand in dealing with local tort litigation.

The actual trial was conducted by Keany's junior, McNamara. He was a recent graduate of New York Law School, a proprietary institution not to be confused with New York University Law School. McNamara introduced no witnesses,
cross-examined the plaintiff and her witnesses with moderate spirit but not exhaustively, and sought to bring out that a lot of people on the platform were carrying bundles. His summation to the jury, unreported, could not have taken more than fifteen minutes. He asked the judge to charge the jury that no inferences should be drawn from the defendant’s failure to present witnesses, and the judge so charged. He asked the judge to charge that there was no negligence unless the defendant should have known that the package contained fireworks, and the judge declined. He asked the judge to charge that the act of assisting the passenger onto the train thereby knocking over the package was not "the proximate cause" of the plaintiff’s injuries, and the judge declined. He asked the judge to set aside the verdict, and the judge refused. McNamara’s performance was that of a workmanlike lawyer earning his salary with an economy of motion. He spent part of an afternoon and a morning trying the case and had given, perhaps, half a day to preparing it. If his salary, which would not have been above $6,000 a year, is prorated to this time, the railroad had spent no more than $16 in defending itself.

Opposing him was Matthew W. Wood, a solo practitioner who had an office in the tallest building then in New York, the Woolworth Building on lower Broadway. He was from Middleburgh, a small town in upstate New York. A bachelor of science from the University of Pennsylvania, he had studied law at New York Law School but had graduated from Yale Law School. He had been admitted to the bar when he was twenty-eight, and he had been in practice twenty-one years when he took Mrs. Palsgraf as a client. His biography gives the outline of a boy from the country, making with diligence a modest legal career. Only his longevity and endurance are remarkable: until his death in 1972 at the age of ninety-seven, he was listed in the standard lawyers’ directory as in practice at the Woolworth Building.

Operating by himself, he was in the least prosperous category of urban practitioners and had to resort to stratagems to dig up business. The Canons of the American Bar Associa-
tion prohibited "advertising" by lawyers as unethical, but they did not prevent members of the bar from announcing their specialties in Hubbell's Directory. In the 1920's Wood's "professional card" in Hubbell's stated that he had "a commercial department" and handled "bankruptcy matters"; he pressed up to if not beyond the limits of propriety with the insinuating claim, "Special Attention Given to the Interests of Non-Resident Heirs." How he and Mrs. Palsgraf had come to each other's attention and why she thought he would be a good torts lawyer are not evident. He became her lawyer two months after the accident.

Wood's preparation of the case was not elaborate. He presented the plaintiff; her two daughters, Elizabeth and Lilian; her local doctor, Karl Parshall; an engraver and his wife, the Gerhardts, who had been on the platform too; and a neurologist, Graeme M. Hammond, for thirty years professor of nervous and mental diseases and chief of clinic at the Post Graduate, with a war service record of examining 68,000 soldiers, close to eighty years old at the time of the trial and still specializing in mental diseases on West Fifty-fifth Street in Manhattan. On the critical question of the plaintiff's injuries, Dr. Parshall, the local physician, thought they were permanent, but McNamara brought out on cross-examination that he had never treated a similar case; the jury could have taken his name as a significant pun. The testimony of the specialist, Dr. Hammond, that his patient was suffering from "traumatic hysteria" was vital. Hammond's services were obtained the day before the trial. Wood's case, like Keany's, was an economical one, sparsely presented and sparsely financed.

Fees contingent on success were forbidden by earlier ethics on the basis that they were an incentive to unethical behavior. American practice had swept away the ethical objection on the practical basis that such arrangements were often the only method by which the victims of torts could acquire legal representation. Contingent fees had been normal in New York for almost eighty years. It was also not illegal in New York for a lawyer to pay the expenses of litigation if the purpose of
the payment was not to induce the client to put the claim in his hands, but the state’s Penal Code made it criminal for a lawyer to pay the expenses ‘as an inducement.’ The fine line between advancing expenses and advancing expenses as an inducement must have been invisible to most clients. Occasionally, however, and as recently as 1922, the Bar Association brought charges against a lawyer explicitly contracting to finance a client’s case. Wood, no doubt, was familiar enough with what was tolerated to make his arrangements with Helen Palsgraf safe from the ineffectual prohibition of the Penal Code.

Filing costs and the clerk’s fee in the lower court came to $142. Dr. Hammond charged $125. Mrs. Palsgraf made $416 a year. At the time of trial, she had not yet paid Dr. Marshall’s bill of $70, now three years due. It is improbable to the point of implausibility that she would have had the cash on hand to pay the court and Dr. Hammond all of $267. It is unequally implausible that she would have had the cash to pay Wood. It is not inconceivable that her relatives could have funded the case, but it seems more probable that Wood had a fee contingent on his success and that he financed the litigation. It would not have been unusual if his contingent interest was one half the recovery after a trial—one third if a settlement was made before trial. In the words of her own physician, the plaintiff was ‘very poor.’

Wood asked for $50,000 in his complaint on her behalf. The discrepancy between this amount and any injuries he was able to show suggest strongly that he planned to bargain. As he did not get any expert medical opinion until the day before the trial, it may be inferred that Keany and McNamara were not interested in negotiating seriously short of what professional jargon denominates as ‘the courthouse steps.’ As McNamara’s time was cheap, they may have offered only out-of-pocket expenses. Their offer was too low or Wood’s expectations too high to produce a settlement at the last minute. Other negotiations, no doubt, must have gone on before the appellate division heard the appeal. The railroad would
not have risked a written opinion holding it liable if it could have settled for a moderate amount. Wood made a serious misjudgment in not compromising after the jury verdict. His mistake was the necessary condition of Cardozo stating the rule.

*Clients.* "Plaintiff," "Palsgraf," "Mrs. Palsgraf" bore the Christian name of Helen. She was forty-three and the mother of three children, of whom the younger two, then fifteen and twelve, were with her at the time of the accident. She was married, but neither side judged it desirable to ask who her husband was or where he was. It may be inferred that they had separated. She testified that she paid the rent, that she had always worked, and that she was "all alone."

At the time of the accident Helen Palsgraf lived in a basement flat at 238 Irving Avenue in Ridgewood, performing janitorial work in the apartment building, for which she was allowed ten dollars a month on her rent. She did day work outside the apartment, earning two dollars a day or about eight dollars a week. She spoke English intelligibly but not with complete grammatical correctness.

The day of the accident was a hot Sunday in August. She was taking Elizabeth and Lilian to the beach. It was ten o'clock. She carried a valise. She bought their tickets and walked onto the station platform, which was crowded. Lilian went for the Sunday paper. As a train started to pull out, there was the noise of an explosion. Then, "Flying glass—a ball of fire came, and we were choked in smoke, and I says 'Elizabeth turn your back,' and with that the scale blew and hit me on the side."

Fire engines and ambulances arrived. She was trembling. A policeman led her into the waiting room. A doctor from an ambulance gave her something to drink. She took a taxi home. On Monday a doctor from the Long Island Railroad Company visited her and asked her about what had happened. Tuesday she called her own doctor, Karl Parshall. He visited her several times at the house over the next two
weeks, and she came about twenty times to his office in the next two months.

Helen Palsgraf had been hit by the scales on the arm, hip, and thigh. The chief perceptible effect of the accident, according to the doctors, was a stammer. Dr. Parshall said that she began to stutter and stammer about a week after the event. Dr. Hammond declared that "it was with difficulty that she could talk at all." Oral incapacitation was not reflected in the transcript of the trial, but the stenographer may have decided not to try to reproduce the stammer. The neurologist took the position that the stammer was symptomatic of a deeper trauma, associated with the litigation itself: "While her mind is disturbed by litigation she will not recover, but after litigation—I don't mean by that her getting any verdict but as soon as the worry 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." On cross-examination, McNamara asked him "[M]ight this condition have been corrected before this time by medical treatment?" and he answered, "Not while litigation is pending. It has been my experience that it never is benefited or relieved or cured until the source of worry disappears by the conclusion of the trial." Dr. Hammond's answers were capable of a cynical interpretation. As a clinical description of a trauma and its possible resolution by reparation for the injury, his responses attributed no malingering motive to his patient. The jury did not understand him cynically. The only way it could have estimated how much Helen Palsgraf should receive was by translating Dr. Hammond's statements about her hysteria, which had lasted three years and which he thought would last three years after the verdict, into a cash equivalent.

The two most important facts of the case from Helen Palsgraf's perspective must have been the time it took to be heard and the size of the verdict she won. The accident took place August 24, 1924. The summons beginning her suit was
served on October 2, 1924. The trial took place on May 25 and 26, 1927. For anyone who has been injured and is awaiting compensation, two years and nine months is a very long time to wait. The testimony of Dr. Hammond that this wait contributed to the continuation of Helen Palsgraf’s hysteria was undisputed. When the trial was finally held, she won a verdict fourteen times her annual income. Even if she could keep only half for herself, she had a fortune in prospect. She was able to enjoy the thought of disposing of it for a whole year before the Court of Appeals took it from her, and she could nurse a faint hope for another five months until, on October 9, 1928, the Court of Appeals denied Wood’s motion for reargument.

The defendant operated 366 miles of track in New York State, including the Rockaway Beach Division, running from Glendale Junction to Rockaway Park, and carried annually over 80 million passengers. Since 1900 it had been a subsidiary of the Pennsylvania Railroad, which owned 99.2 percent of its stock. Its president was Samuel Rea, president of the Pennsylvania. Its first vice-president was Henry Tatnall, Vice-President in Charge of Finance of the Pennsylvania. Its second vice-president was A. J. County, Vice-President in Charge of Accounting and Corporate Work of the Pennsylvania. Its third vice-president, George Le Boutillier, was a railroad manager, based in New York City. The majority of its directors were officers of the Pennsylvania or the Long Island. The minority of “outside” directors were headed by August Belmont, the financier of the New York subways.

In 1924 the Long Island’s total assets were valued at $114 million of which $98 million was the valuation set on track and equipment. Net income from railroad operations was just over $4 million, reflecting a return just over the 4 percent that was usual for railroads of the period to show. Over 60 percent of the operating income was from passenger traffic. The parent Pennsylvania had a net income of $48 million and assets of $1.7 billion, of which almost one half billion represented capital stock and surplus; taking into account its reve-
nues from the entire system it controlled, valued at $2.2 billion, the parent made 4 percent.

For reasons originally connected with its state at the time of the Pennsylvania's takeover, and latterly either for reasons connected with its imminent insolvency (to believe Vice-President Le Boutillier) or for reasons connected with the obtaining of fare increases (to believe counsel for the Associated Commuters of Long Island), the Long Island had paid no dividends. It had a surplus in 1923, 1925, 1926, and 1927, and in May 1928 paid its first dividend in twenty-eight years, from a surplus of $3,839,646.

In 1924 the railroads of the United States killed 6,617 persons and injured 143,739 persons. A substantial number of those killed and injured were the railroads’ own employees and another large fraction were classified as “trespassers,” those who had no business on railroad property. Helen Palsgraf fell in the classification neither of employees nor of trespassers but of passengers, of whom 204 were killed and 6,822 were injured in 1924. The global figures suggested that the maiming and killing of passengers was a necessary by-product of the running of railroads.

If Helen Palsgraf’s accident was analyzed as a “non-train accident”—that is, one not caused by the movement or operation of a train but by such acts as “collapse, fall, etc., of objects” or by “explosives, and inflammable, hot, or corrosive substances,” she fell within a subcategory where the railroads, as a whole, had killed only 4 passengers and injured 669. From this perspective, it was arguable that death or injury to passengers was such a rarity in “non-train” situations that maiming and killing in this way should not be looked upon as necessary to the running of railroads. The precise number of passengers the Long Island had injured in this way was not set out in the annual reports of the Interstate Commerce Commission, but the grand total in 1924 was 5 killed, 492 injured in non-train accidents on the Long Island. If the Long Island was like other roads, a tiny percentage of these casualties were passengers. On the other hand, every
year there were some passengers killed and wounded in non-
train accidents, so that to suppose that such injuries were to-
tally avoidable by the railway system would be an illusion.

More probably Helen Palsgraf's accident fell within the
classification of a "train service" accident, that is, it was one
"arising in connection with the operation or movement of
trains," for the man would not have been pushed aboard if
the train had been stationary. The railroads in "train service"
accidents in 1924 had killed 108 passengers and injured
3,229, and the Long Island in particular had killed 4 and in-
jured 88. The number of "train service" injuries to passen-
gers, even more than the number of "non-train" accidents to
passengers, suggested that these injuries were necessarily in-
cident to the operation of a railroad.

Jury and Judges. Burt Jay Humphrey presided. A country
boy like Matthew Wood, from near Berkshire in Tioga
County, he had read law in a judge's office and then gone
west to Seattle for six years before returning to Jamaica,
Long Island, to practice. He had been nominated in 1902 as
county judge—a joke by the Democratic organization, which
intended his Republican opponent to win; but he had cam-
paigned so hard that he won the office in which he remained
twenty-two years. He had eventually been elected to the Su-
preme Court for Kings County with its higher salary of
$6,000 per year. For most of his judicial career his income
from the state was no larger, but he left an estate of
$200,000. When he conducted the Palsgraf trial, he was
sixty-four; he had been on the bench twenty-five years and a
judge of the New York Supreme Court for three.

Judge Humphrey's charge to the jury was balanced. He
emphasized that the defendant had no duty to examine the
packages of passengers. If every package was inspected,
"none of us would be able to get anywhere. The purpose of
railroad travel is that we can get some place." He said that if
"the trainmen of the defendant" omitted to do the things
which prudent and careful trainmen do for the safety of those
who are boarding their trains, as well as for the safety of
those who are "standing upon the platform waiting for other trains," and "the failure resulted in the plaintiff's injury," then the defendant would be liable. He described the harm done to Mrs. Palsgraf as "a nervousness which still persists and which, according to her claim, will persist for some time in the future."

The jury was drawn from Brooklyn, where Mrs. Palsgraf lived, where the accident had occurred, and where the trial took place. It would be too much to say that they were Mrs. Palsgraf's neighbors, but it may be guessed from the result that they were persons used to traveling on the Long Island and not overly sympathetic to railroads. They retired at 11:55 a.m. and returned with their verdict at 2:30 p.m.—time enough to eat lunch at the expense of the state of New York and to discuss liability and damages for at least an hour, and perhaps longer.

The case went from Judge Humphrey's court to the appellate division in Brooklyn, where two formal opinions were given by Judge Seeger and Judge Lazansky. Albert H. F. Seeger, born in Stuttgart, Germany, came to the United States as an infant, graduated from the Newburgh Free Academy, read law, and was elected to the Supreme Court of New York in 1917. Governor Al Smith had appointed him at the age of sixty-seven to the appellate division, and he was now enjoying the second year of this delayed promotion, one year short of retirement. Edward Lazansky had only that year been designated by Governor Smith as the presiding justice of the appellate division in Brooklyn, a post he was to hold for fifteen years. Of the judges below the Court of Appeals who considered the case, he had the most formal education, possessing both a B.A. and an LL.B. from Columbia. The son of Czech immigrants, he had been a Brooklyn lawyer, active in Jewish philanthropy and Democratic politics, and the Democrats' successful candidate for Secretary of State in 1911. He had been elected to the state Supreme Court in 1917, when he was forty-four, and became the presiding judge when he was fifty-five.
Seeger, joined by William F. Hagarty and William B. Carswell, decided in favor of Mrs. Palsgraf. He emphasized that the accident had been caused by the efforts of the railroad’s employees to assist someone onto a moving train, an act which “caused the bundle to be thrown under the train and explode.” He pointed out that businesses permitted to transport the general public—“common carriers”—had always been held to high standards of safety for those transported. “It must be remembered,” Seeger wrote, “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.” Lazansky, joined by J. Addison Young, dissented. The negligence of the passenger carrying the package of explosives had “intervened,” Lazansky said, between the negligence of the defendant and the injuries of the plaintiff. Hence “the negligence of defendant was not a proximate cause of the injuries to plaintiff.”

The Court of Appeals to which Keany and McNamara then took the railroad’s case had been composed with that attention to religious affiliation (Protestant, Jewish, Catholic) and regional origin (upstate, metropolis) which often has exhausted political wisdom in New York. Its members were exclusively white, male, and over fifty. It consisted of Benjamin N. Cardozo of New York City, Chief Judge; William S. Andrews of Syracuse; Cuthbert W. Pound of Lockport; Frederick E. Crane of Brooklyn; Henry T. Kellogg of Plattsburgh; John F. O’Brien of New York City; and Irving Lehman of New York City. In age they ranged from Andrews, seventy, to Crane and O’Brien, fifty-four; Cardozo, Lehman, and Kellogg were in the later fifties, Pound in his middle sixties. Two had not gone to a regular day law school—O’Brien had gone nights to New York Law School, while holding a job in the office of the Corporation Counsel of New York City; Pound had read law with his father in Lockport. Cardozo was technically a dropout, having studied only two years at Columbia Law School at a time when three years had just become the requirement. Andrews, Crane, and Lehman
were all actual law graduates of Columbia, as was Kellogg of Harvard.

The court was an elected body, to which no one radically outside the orbit of the Democratic-Republican norm could aspire, but an institution where electoral competition was often blunted by governors designating able men for vacancies and by the two parties agreeing, as in Cardozo’s run for Chief Judge, on the same candidate. Crane, Lehman, and O’Brien had been identified as Democrats; Andrews, Pound, and Kellogg were Republicans. Cardozo had begun as an independent Democrat on a Fusion ticket and had been advanced by both a Democratic and a Republican governor.

All were members of the upper middle class, the sons of prosperous fathers, although Cardozo’s father after his resignation had had to struggle; three were the sons of judges—O’Brien’s father had been for eighteen years a judge of the Court of Appeals himself; Kellogg’s and Cardozo’s fathers had been judges of the New York Supreme Court. All, save O’Brien, had been in private practice. All, save O’Brien, had been first elected to the Supreme Court before promotion to the higher level. All now received a salary of $22,000 ($500 more for the Chief Judge) and $3,000 in lieu of expenses. The richest was Lehman, the son of Mayer Lehman, founding partner of the investment bankers, Lehman Brothers. He had inherited $400,000 on his father’s death in 1897. His father-in-law, the New York merchant Nathan Straus, had contributed between $25,000 and $50,000 to the Democratic party in the year he was appointed to the New York Supreme Court. Irving Lehman considered the contribution to be causally related to his appointment, and Frederick Crane thought the relationship between a contribution and appointment not unusual.

Cardozo was a trustee of Columbia, Pound of Cornell. Neither university had in their portfolio of investments any stock in the Pennsylvania Railroad. All of the judges must, on at least a few occasions, have ridden the Long Island Railroad, but only one person on the Court of Appeals was
intimate with the locale of the case—Crane, who had grown up in Brooklyn, been an assistant district attorney in Kings County, and then lived in Garden City. To him the courts of Kings and the trains of the Long Island must have been as familiar as the law reports.

An observer detached from the system might have dared to predict the outcome on the basis of class interest, but the court was so closely split that such a prediction would have been temerarious. As for the Holmesian view that law is prediction, how would one have ventured to state the law at all—so mixed were the precedents, so divided was the mind of the court? The judge who wrote the opinion had to win and keep the votes of at least three other vigorous and experienced men—to do so required a skill distinct from judging yet indispensable. At such orchestration Cardozo excelled. "I wish," Irving Lehman later wrote, "that I could enable others to see and hear Judge Cardozo at these conferences as I have seen and heard him; then they would understand, I think, why the Court of Appeals was a really great court while Judge Cardozo sat there, and why Judge Cardozo's influence there was so great." What "saint" is in the religious vocabulary, "great" is in the judicial; and when a judge calls his court great, he has bestowed a canonical honor. In the final result, in Palsgraf, although every vote counted, what swayed Cardozo was decisive. He was joined by Pound, Kellogg, and Lehman.

THE INGREDIENTS OF THE OPINION

"[T]o determine to be loyal to precedents," Cardozo had written in The Nature of the Judicial Process, "and to the principles back of precedents, does not carry us far upon the road. Principles are complex bundles. It is well enough to say that we shall be consistent, but consistent with what? Shall it be consistency with the origin of the rule, the course and tendency of development? Shall it be consistency with logic or philosophy or the fundamental conceptions of justice? All
these loyalties are possible.’’ When, he continued, ‘‘the social needs demand one settlement rather than another, there are times when we must bend symmetry, ignore history, and sacrifice custom in the pursuit of other and larger ends . . . The final cause of law is the welfare of society.’’

The first, though not the final, loyalty was to precedents. Cardozo marshaled two dozen opinions—from his own court, the Supreme Court of the United States, the courts of Kansas, Maryland, Michigan, New Hampshire, North Carolina, and Great Britain—pointing toward the result he reached. American and English treatises on torts—Beven, Cooley, Jaggard, Pollock, Salmond, Shearman and Redfield, Street, and Wharton—he wove into the same coherent pattern. Leading law-review articles by Leon Green, Warren A. Seavey, and Jeremiah Smith he brought into the same seamless web.

No negligence, he declared, in Palsgraf, existed ‘‘in the air’’—the defendant must have caused a risk to a person he should have known to exist within the range of his act. Confirmation of this view, he wrote, was to be found ‘‘in the history and development of action on the case’’—that is, in the story told by legal historians of the procedural form, ‘‘case,‘‘ or ‘‘action on the case,‘‘ in which damages for negligence became recoverable in England. Cardozo cited John Wigmore in Essays in Anglo-American Legal History and, more heavily, the eighth volume of William Holdsworth’s History of English Law, a history in the classic pattern of Holmes’s The Common Law.

Very much as in Holmes, the history of the tort of negligence in Holdsworth was the account of the evolution of a ‘‘medieval’’ rule of strict accountability to a ‘‘modern’’ rule, where the true doctrine was that one was liable only for the harm caused if one ought to have foreseen it; biographical data on the judges who had shaped the rule was set out in a separate volume unrelated to the narrative of doctrinal development, the true history of ‘‘The Principles of Liability.’’ His account depended as much on the interpretations offered by modern analysis such as Pollock and Wigmore as on the
precedents he cited. What Cardozo meant by "history" was the story of evolution from "a very primitive basis," as Holdsworth put it, to modern orthodoxy.

Satisfied as he was that he was being loyal to precedent and "the course and tendency of development," did Cardozo consider other factors? "Affront to the personality," he wrote, "is still the keynote of the wrong." But by "personality" he meant "body." Not even mentioning Mrs. Palsgraf's physical injuries, he said nothing of the effect on her spirit of being kept suspended by the process for almost four years. What she had suffered was affront to the personality—traumatized, she had a sense of unrequited injury; but Cardozo used the phrase in a sense which put this problem out of his sight.

What place did "fundamental conceptions of justice" have? In Aristotle's classic analysis, commutative justice is equality of exchange between two parts, distributive justice is proportionate distribution from whole to part; a judge deciding between two litigants appears to be determining what is commutatively just, what is an equal exchange. When the transaction between the two parties has been involuntary, however, as it is in the case of an accident, it is not self-evident that commutative justice requires the party causing the loss to restore equality by making the victim whole—who would agree that if by chance he stepped on a firecracker igniting a blaze which destroyed the neighborhood, he should be liable for all the loss? To determine what is fair requires more than establishing who caused the injury. This intuition is clearly dominant with Cardozo. To make A pay B for causing a freak accident when A could have foreseen neither the accident nor its effect on B seems actually unfair—an inappropriate spreading to A of what is simply B's misfortune.

If one is in a business which unavoidably produces certain types of injury, however, it seems more consistent with the Aristotelian canon to conclude that compensation for them should be a cost of the business. Who ultimately bears the cost—the stockholders, the customers, or the taxpayer—is an
economic question subordinate to the larger question of fairness, of making one who voluntarily engages in an activity for his profit make restitution for injuries which are his activity's inevitable by-product. This line of argument was not considered by Cardozo, who thought in terms of P and D, not in terms of a business and its necessary accompaniments. Still less was he attentive to where the Augustinian definition of justice—"love serving only the one loved"—might have pointed.

But the final cause of law, Cardozo had said, is "the welfare of society." What was socially desirable—that railroads not have the added burden of compensating passengers for all train-service accidents, or at least not have the burden where the accident was improbable, or that the loss of an innocent victim of the line be relieved? Did the economics of railroads in the 1920's show that such a burden would be absorbed as an extra cost diminishing the stockholders' return, or passed on to all the passengers, or be so substantial as to drive the railroads to bankruptcy and public ownership? However this question was resolved, was it socially preferable to have loss incurred by the user of a necessary public service confined to that user, or passed on to a going enterprise with the capacity to distribute the loss to a larger number? Was it good to stimulate the railroads to higher standards of safety by the extension of liability or better not to discourage their zeal by the imposition of rules which did not discriminate between the probable and the improbable? Was a form of transportation which was known to kill several thousand persons a year and to injure many thousands more to be treated as responsible for the injuries it generated only when its employees could reasonably have foreseen the particular persons they might injure? Doing no more by safety legislation than to reduce the killing, Congress had, in effect, decided that railway transportation was worth six thousand lives a year, provided each killing was reported. The courts still had the option of deciding whether the social good was served if the railroads went without absolute liability, or if they should pay for all the
lives they took and all the injuries they unintentionally inflicted.

The social interests to be weighed were affected by the process by which they were presented to a court. A rule of absolute liability for injury to passengers might encourage claims against railroads by hungry tort lawyers. It might discourage delay and appeals by the railroad protracting the victim's trauma and intensifying it. If one looked at the lawyers actually before the court, circumstantial evidence, visible in the record, suggested that Matthew Wood had violated the penal code of the state, that he should not be permitted to practice as a lawyer. Should he be rewarded with a handsome fee, perhaps half of what Mrs. Palsgraf would receive, as much as half the salary of a judge of the state supreme court? Was there not a social interest in rebuking such a stirrer-up of litigation, such a harasser of corporate enterprise? On the other hand, it might also be suspected from the record that in this close case, where the railroad had caused an injury to a passenger, the railroad's lawyers had offered no reasonable settlement. Was it socially desirable that, to establish her claim to compensation, a woman earning $416 a year had to hire a lawyer on a contingency basis and wait four years, while the defendant, with assets of over $100 million, if taken by itself, or assets of over $1 billion, if more realistically regarded as a subdivision of its parent, prolonged the contest, using more experienced counsel employed at a lower cost? Granted that judgment should be even-handed between the rich and the poor, that the judge should not automatically favor David over Goliath, should not the judge take into account Goliath's advantages and frame a rule to make the contest even? If, under the present system, the rules as they actually were used by lawyers in the process favored the large corporate defendant, did not the social welfare require consideration of the process as well as consideration of the principles?

None of these social needs or interests, none of these components of the social welfare was discussed by Cardozo.
None of these questions was asked. Neither the economics of railroading nor the course of the judicial process as it affected the values at stake was mentioned. To have done any one of these things would have required looking at the litigants and their lawyers.

At the climax of his opinion, where he enunciated the central conclusion, "The risk reasonably to be perceived defines the duty to be obeyed," Cardozo cited the latest article of Warren Seavey in the *Harvard Law Review*, "Negligence—Subjective or Objective?" a masterful analysis of the mixed (subjective and objective) components of the Prudent Man, who was the standard by whom liability for tort was measured. Seavey's presentation was, in a Holmesian vein, so avowedly neutral that he concluded that it would do no violence to his analysis to return to the medieval rule of absolute liability and, with a certain unpleasantness, indicated that was likely to be the preference of a modern society with "a mechanistic philosophy of human motives and a socialistic philosophy of the state." If Cardozo had sought a reading of modern aspirations, he had it there. He did not use Seavey for this grudging insight but for what Seavey's article really focused on—the most general and therefore the most abstract considerations of fairness in framing a rule on negligence. Seavey's "personification of a standard person" was an individual, identified with no industry, capable of existing in any environment, variously described as "$A" or "the actor." By what was fair to this anonymous fiction Cardozo discovered the welfare of society.

**THE EYES OF THE ORACLE**

In the harmonious whole presented by his opinion, Cardozo acknowledged no divergence between history, the welfare of society, and his sense of fairness. In *The Nature of the Judicial Process* he had observed that they were not the same: "At first we have no trouble with the paths; they fol-
low the same lines. Then they begin to diverge, and we must
make a choice between them. History or custom or social
utility or some compelling sentiment of justice, or sometimes
perhaps a semi-intuitive apprehension of the prevailing spirit
of our law, must come to the rescue of the anxious judge,
and tell him where to go."

What Seavey later was to declare refuted by "the entire
record" of Cardozo's decisions was acknowledged by Car-
dozo himself as sometimes determinative in difficult cases—a
"compelling sense of justice" which could not be further
explicated, "a semi-intuitive [why semi?] apprehension of
the spirit of our law." Cardozo personified the sentiment or
intuition—they were outside the judge. Like history, custom,
or social utility, they came as objective inspirations. Learned
Hand in his memorial to Cardozo observed of a judge, "He
must pose as a kind of oracle, voicing the dictates of a vague
divinity." In The Nature of the Judicial Process Cardozo
dropped the oracular pose and spoke of what came from
within him as a human being:

More subtle are the forces so far beneath the surface that
they cannot reasonably be classified as other than subcon-
scious. It is often through these subconscious forces that
judges are kept consistent with themselves, and inconsistent
with one another. We are reminded by William James in a
telling page of his lectures on Pragmatism that every one of us
has in truth an underlying philosophy of life, even those of us
to whom the names and the notions of philosophy are un-
known or anathema. There is in each of us a stream of tend-
cency, whether you choose to call it philosophy or not, which
gives coherence and direction to thought and action. Judges
cannot escape that current any more than other mortals. All
their lives, forces which they do not recognize and cannot
name, have been tugging at them—inherit instcits, tradi-
tional beliefs, acquired convictions; and the resultant is an
outlook on life, a conception of social needs, a sense in James'
phrase of "the total push and pressure of the cosmos," which,
when reasons are nicely balanced, must determine where
choice shall fall. In this mental background every problem
finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own. To that test they are all brought—a form of pleading or an act of parliament, the wrongs of paupers or the rights of princes, a village ordinance or a nation's charter.

Who decided? The person who was the judge. The detachment, the self-effacement, the freedom from one's past that Hand celebrated in his praise of Cardozo was repudiated by him in advance. The insistence of Seavey that the judge knew only precedents and weighed only interests in producing rules was denied in anticipation. If the judge were a computer, he could have conformed to Seavey's idealization. Cardozo, writing autobiography, spoke differently. The more conscious a judge was, the more creative a judge's labor, the more was he personally involved. The judge's eyes might be on God or on the rule, but it was the judge who saw things: "we can never see them with any eyes except our own." The decision depended on his vision and his perspective. If Cardozo was taken as a guide, the creation of a rule could not be fully understood apart from its creator.

Why are Helen Palsgraf's children relevant to the judgment any more than the color of her hat? Holmes or an analyst of the school of Seavey may ask. If they are not relevant to the judgment, why are they relevant to the history of the case? But such impatient questions assume that the historian will agree with Cardozo. As Fuller observes, as he defends the "skeletonizing" of cases, reduction of the facts "is a delicate business, and necessarily anticipates the analysis which will be applied to the simplified situation." Facts which cannot be shown to be crucial to the disposition of a case are important in grasping how person affected person; Mrs. Palsgraf's children, Cardozo's preeminence, and others I have stated are among them. Even details which are purely extrinsic to any participant in the process have an effect on the understanding of the case. The day of the accident was "hot"—a detail of consummate irrelevance in terms of any legal principles but suggestive of the circumstances in which
Urban users of public transportation need to travel, a reminder of the innocence of Helen Palsgraf’s seaside excursion. How such a fact should affect the outcome is nondemonstrable, yet it will play a part in the process by which judgment is reached. What is true of each additional fact is equally true of a philosophical perspective different from that enjoyed by Cardozo: it cannot be demonstrated that a shift to a less rule-focused jurisprudence would require a different judgment—it cannot be demonstrated, but having had the experience of making such a shift, I can say that my conclusion would not be Cardozo’s.

The easiest way of misinterpreting such a shift is to frame a rule that persons injured on hot days should always win or that very poor persons should always win. Speculating in terms of such rules, a law professor would ask, “Suppose the day had been mild and overcast, suppose the passenger had been Mrs. Cornelius Vanderbilt, would the judgment be the same?” Such questioning is intended to force us back to the blank faces of $P$ and $D$. To resort to the hypothetical, escaping the actual facts, is the mark of the mind oriented to rules. But when, in writing the history of Palsgraf, I call attention to the facts known to the judge and not considered relevant by him, my purpose is not to offer a new rule but to increase our understanding of the legal process. My concern is what a legal historian should record, what a legal philosopher should explain, what a law professor should teach. Only indirectly do these matters suggest how a judge should judge.

As evidence that consideration of actual persons makes a difference, I mention my modest experiment in the rewriting of Palsgraf. If a judge could look at all these facts available either in the record of the trial (as far as Mrs. Palsgraf is concerned) or in standard reference works (as far as the railroad is concerned) and still hold that the railroad had no liability, one could not show that he was wrong by pointing to the atmosphere of the day or the income of Mrs. Palsgraf. If, however, a judge, as he pondered these facts, was uncomfortable with reaching a result of no liability, then the enlargement of
his focus would mean, perhaps, that he would select a different rule. At no point could the judge act without using a rule. Exercising his option to select a rule, the option commonly present in contested litigation, he would act less blindly the more conscious he was that he was acting as a person, using his "own eyes," and affecting other persons.

Cardozo as a person was involved in deciding *Palsgraf v. Long Island Railroad*. An account of all the influences upon him must await the conclusion of the biographical labors of Andrew L. Kaufman, now in progress. Three public facts stand out. First, Cardozo never married and never had any children. He lacked the experience of conjugality and the experience of fatherhood. These lacks are not disqualifications for shaping social conduct. The judgment of the unmarried has sometimes been the finer for freedom from domestic involvement—that of St. Paul, for example, on charity, or of Tomás Sanchez on marriage. Childless, Holmes, Cardozo, and Frankfurter prescribed for generations of Americans yet to come. Personal experience is scarcely necessary to judge the quality of an act or relationship. Empathy suffices. The way accidents are perceived, the way sharing of risks is visualized, the way responsibility for a mess is understood, will be affected by the experience of marriage and fatherhood. The childless and *a fortiori* the unmarried will have an approach to a chain of calamities like *Palsgraf* different in outlook and emotional context from that of the reflective spouse and parent.

Second, Cardozo was the son of a Supreme Court judge, Albert Cardozo, who was a sachem of Tammany Hall when Tammany was ruled by Boss Tweed, and who as a judge was believed to have done the bidding of Jay Gould in the fight with Vanderbilt for the control of the Erie Railroad; he resigned from office after a committee of the legislature had recommended his impeachment for corruption. No further distance could exist between father and son in the universe of justice than that which seemed to exist between this father and son. No further distance could be put between himself
and his father than for Benjamin Cardozo to take no interest in the identity of the contestants before him. In his court was to be only A or B. The wonderfully abstract world of the opinion in *Palsgraf* was created in a well-established judicial style, but that Cardozo should create it was not the mechanical following of tradition. Contrary to Hand’s contention, Cardozo was affected by his past. He wrote as the son of Sisamnes.

Severe impartiality led in *Palsgraf* to the aspect of the decision which seemed least humane: the imposition by Cardozo of “costs in all courts” upon Helen Palsgraf. Under the New York rules of practice, costs were, in general, discretionary with the court. An old rule, laid down in 1828, was that when the question was “a doubtful one and fairly raised, no costs will be allowed.” In practice, the Court of Appeals tended to award costs mechanically to the party successful on the appeal. Costs here amounted to $142.45 in the trial court and $100.28 in the appellate division. When the bill of the Court of Appeals was added, it is probable that costs in all courts amounted to $350, not quite a year’s income for Helen Palsgraf. She had had a case which a majority of the judges who heard it—Humphrey, Seeger, Andrews, Crane, and O’Brien—thought to constitute a cause of action. By a margin of one, her case had been pronounced unreasonable. If Cardozo thought Matthew Wood’s behavior had been unethical, a judgment against Helen Palsgraf would not reach him. The effect of the judgment was to leave the plaintiff, four years after her case had begun, the debtor of her doctor, who was still unpaid; her lawyer, who must have advanced her the trial court fees at least; and her adversary, who was now owed reimbursement for expenditures in the courts on appeal. Under the New York statute the Long Island could make execution of the judgment by seizing her personality. Only a judge who did not see who was before him could have decreed such a result.

Third, Hand again to the contrary, Cardozo had ambitions, although they were of the most exalted character. He wanted
to be a reader, as he put it, of "signs and symbols given from without," a judge who would objectify not only his own "aspirations and convictions and philosophies, but the aspirations and convictions and philosophies of the men and women of my age." In this spirit, he had been in 1922 one of four reporters of a committee formed for the "Establishment of a Permanent Organization for the Improvement of the Law" and in 1923 became a member of the council, a member of the executive committee, and vice-president of the American Law Institute, which became the "Permanent Organization." The intention of the Institute, according to the organizing committee, was to remedy the principal defects in American law, and in that perspective "the most important task that the bar can undertake is to reduce the amount of the uncertainty and complexity of the law." To that task the A.L.I. and Cardozo were devoted.

There were those in America who believed that the great failing of American law was to give effective access to the courts to people of small means. In a famous study Justice and the Poor, sponsored by the Carnegie Corporation in 1919, Reginald Heber Smith concluded that "the administration of justice is not impartial"—it discriminated against the needy. Delay in deciding cases, court costs, counsel fees—these three were the chief defects of the system. They were all defects which "weigh heavily upon the poor."

Henry W. Taft, with Cardozo one of the founders of the American Law Institute, dismissed Smith's work, now "being used by radicals to aid them in their attacks upon our institutions," as based on "a few striking, though hardly typical instances of delay and expense." Elihu Root wrote an introduction to Smith's report, but his sympathies were with his old friend Taft. As far back as 1904, when he was counsel for Speyer and Company, Root had celebrated the faith of the people in "the supreme value of the great impersonal rules of right." To preserve that faith, he told the graduating seniors of Yale Law School in June 1904, was "the highest and ever-present duty of the American lawyer." He took a prin-
principal place in the formation of the A.L.I. In an address inaugurating the new society, Root observed that, in a five-year period, 62,000 decisions of courts of last resort had been printed. It was apparent, he said, that "whatever authority might be found for one view of the law upon any topic, authorities could be found for a different view upon the same topic." It was evident, he declared, "that the time would presently come, unless something were done, when courts would be forced to decide cases not upon authority but upon the impression of the moment, and that we should ultimately come to the law of the Turkish Kadi, where a good man decides under good impulses and a bad man decides under bad impulses, as the case may be; and that our law, as a system, would have sunk below the horizon, and the basis of our institutions would have disappeared." The preeminence of rules, the stability of rules, the meaning of rules were threatened—everything would depend on the person choosing the applicable rule. To prevent this debacle, to turn back, as it were, the waves, the American Law Institute would make "a restatement of the law." In place of conflicting authorities there would be the Restatement saying what the right rule was. The Restatement—authoritative because of the men who prepared and approved it—would identify the true principle, the better rule, the wider generality.

The idea of a Restatement was to be scoffed at by the realists who became articulate in the decade following its launching. An article by a psychologist, Edward S. Robinson, in the *Yale Law Journal* struck two persistent themes of realist criticism: the enterprise reflected the unwillingness to face the fact that the law was "full of normal conflicts"; to decree the true principle by committee vote was not unlike the Council of Nicea defining the true nature of God by majority action of the council. Objections of this character did not trouble Cardozo, nor did the distance between the Restatement and a realist's reading of Holmes's teaching: Cardozo took the teaching of Holmes as Holmes had lived it—law lay in the law reports. To be sure, in *The Nature of the Judicial Process* he
gently derided the view of law as prophecy—"Law never is, but is always about to be"—without mentioning that this was Holmes’s definition. But his evasion of direct criticism was consistent with his general evaluation of Holmes—"the greatest of our age in the domain of jurisprudence, and one of the greatest of the ages." In a sense he was as much Holmes’s pupil as Thomas Jefferson was George Wythe’s: in each case a strong man learning from a strong man, in each case the pupil not being comprehensible without the teacher. When Cardozo acknowledged his own yearning "for consistency, for certainty, for uniformity of plan and structure," when he spoke of "the constant striving of the mind for a larger and more inclusive unity, in which differences will be reconciled, and abnormalities will vanish," when he sought this unity in the universe of law, he spoke for himself, he expressed desires which were personal and religious, but he was fortified by Holmes’s example of satisfaction. Like the master, in "the remoter and more general aspects of the law," he sought "an echo of the infinite, a glimpse of its unfathomable process." That Holmes could inhabit the legal universe as its "overlord" was a sign and promise to Cardozo that pursuit of rules would produce such a resonance, that the comprehensive generality would yield such a vision.

In the formation of the American Law Institute, Cardozo was a leader, and to the work of restatement of the rules he gave his devoted support. The "task of legal science," he told another Yale audience in 1923, in words almost identical with the A.L.I.’s program, is to "bring certainty and order out of the wilderness of precedent." The need, "deeply felt and widely acknowledged"—he repeated himself and Root—would be met by the Institute. As adviser to the Restatement of Torts, Cardozo participated in "a very considerable number of the conferences" in which the restated rules were given shape. In this capacity, he attended a meeting on Section 165 of the Restatement of Torts while Palsgraf v. Long Island Railroad was being appealed to his court.

The case had been twice decided in Mrs. Palsgraf’s favor,
by the trial court and the intermediate court, when it came to
the attention of the reporter for the Restatement of Torts,
Francis H. Bohlen, professor of law at Pennsylvania Univer-
sity Law School, then working on what the Restatement
should say on duty to "an unforeseeable plaintiff." Palsgraf
was "a perfect illustration" of the problem. He presented the
case to his advisers on the Restatement, along with the draft
of a text contrary to the position adopted by the lower courts
which had heard the case.

By convention embedded in the view of law as rules, the
facts of a case are distinct from the law governing a case. It
would be improper for a judge about to decide a case to hear
new versions of the facts out of the presence of the lawyers
responsible for the cause. It is not considered improper for a
judge to hear argument about the governing law outside of
the interested lawyers’ presence, for in hearing others debate
the rule applicable in a real case the judge is supposed to be
looking at principles larger than particular litigants. It has,
for example, not been uncommon for judges to hear issues
argued by students in a moot court in fact situations not much
different from the real case they must decide. The propriety,
of course, depends on keeping firm the distinction between
the rules and the process in which they are applied, or sup-
posing that "the facts" are frozen and that the judge is only
seeking counsel about their proper categorization; that facts
and categorization reciprocally affect each other is not ac-
knowledged. Bohlen invited Cardozo to attend a meeting of
"an eminent and entirely impartial group" of his advisers—
lawyers, law professors, and judges—who would consider
what the correct law in the Palsgraf type of situation should
be. Cardozo came.

A "long and lively debate" ensued. The kind of argument
advanced by those denying liability may be inferred from
Seavey’s article "Negligence—Subjective or Objective?"—it
had originally been written precisely for use by the Re-
statement group. Cardozo listened. He did not vote. By a
margin of a single person the group recommended a rule of no liability.

The incident was not publicly reported until 1953, when Prosser gave his Cooley lecture "Palsgraf Revisited." He then recounted it on the basis of information provided by his collaborator, Young B. Smith, who was present at the meeting of the reporter and his advisers.

The way this story was received was revealing of the values of law teachers. They were uncomfortable with the anecdote and, on the whole, did not care to discuss it in print. Prosser himself did not bring it into the casebook jointly edited with Smith. In 1959, Harry Kalven of the University of Chicago Law School and Charles O. Gregory of the University of Virginia Law School referred to it in this fashion in their casebook: "Dean Prosser reports some scuttlebutt that is interesting if true." Why the skepticism as to what a witness of the scene, a disinterested professor of law, had reported to another? Why the derogatory characterization "scuttlebutt"? Kalven and Gregory made manifest the hostility of the orthodox teacher of doctrine to information about the play of persons in the process.

Prosser himself described Cardozo's presence, when he mentioned it in his lecture, as "one of those accidents which shape the course of the law"—a strong characterization of the importance of the incident but one he did not choose to develop. In 1962, Smith no longer alive, he brought the story into the references in the casebook itself. He now described it as "the process by which Cardozo's opinion and section 281 of the Restatement of Torts elevated one another by their own bootstraps." In other words, in the view of the most knowledgeable academic authority on Palsgraf, the work of the Restatement and the opinion in Palsgraf were vitally interdependent.

The problem of determining the cause of a rule is not unlike determining the proximate cause of an injury. Was the nomination of Burt Jay Humphrey in 1902 as a joke the cause
of the *Palsgraf* case, because but for it a different judge would have sat in the Supreme Court in Kings County? Was Matthew Wood’s determination or self-interest, or Keany and McNamara’s stinginess in their settlement offer, the real reason why the rule was formulated? Was Helen Palsgraf’s poverty and inability to present an overwhelming case, or the court’s identification of the Long Island with the needs of a mobile society the decisive factor? Were Cardozo’s celibacy, paternity, and idealism important to the result? No cause acts alone, and the chain of causation is endless. There is no reason, however, to limit the causes of a rule so narrowly that one looks only at the books the opinion writer cites.

Out of a sequence of events as improbable as a Rube Goldberg cartoon, reconstructed by lawyers seeking partisan advantage, on a factual basis that was probably inaccurate, above the pain of Helen Palsgraf and the plodding of Matthew Wood and the calculation of the Long Island, Cardozo fashioned a statement of clarity, symmetry, simplicity. Presented with that pervasive problem of sociology, government, and law, the “unintended consequences” of a social action, he imposed order and aesthetic design and generality.

“Many a common law suit can be lifted from meanness up to dignity,” so Cardozo wrote of Holmes, “if the great judge is by to see what is within.” As “a system of case law develops,” so Cardozo declared at Yale, “the sordid controversies of the litigants are the stuff out of which great and shining truths will ultimately be shaped.” The particular facts which interlocked were not all the circumstances of the case but the construction of events he made as he molded his opinion to lift the case up to dignity, to create a great and shining truth.

When Section 165 of the *Restatement of Torts* was presented at the May 1929 meeting of the members of the American Law Institute, Cardozo’s opinion in *Palsgraf* appeared in this form as an Illustration of Clause b of the rule:

* A, a passenger of the X and Y Railway Company, is attempting to board a train while encumbered with a number of
obviously fragile parcels. B, a trainman of the company, in assisting A does so in such a manner as to make it probable that A will drop one or more of the parcels. A drops a parcel which contains fireworks, although nothing in its appearance indicates this. The fireworks explode, injuring A's eyes. The railway company is not liable to A.

Matthew Wood, Joseph Keany, and William McNamara, adventitious figures, had disappeared. The judges no longer disputed. Helen Palsgraf had become the injured A and the Long Island Railroad the X and Y.

It was not only the eyes of A which had been blinded.