Cardozo's Best-Known Opinion is probably *Palsgraf*, so let us begin consideration of his judicial technique with it. Although the witnesses at the trial agreed with each other on the essential points, and their testimony (although given almost three years after the accident) also agrees with the front-page account published by the *New York Times* the day after the accident, there are some maddening factual gaps.

On a Sunday morning in the summer of 1924, the Long Island Railroad's station in East New York (part of Brooklyn) was crowded with people who had bought tickets from the railroad and were waiting to take trains to Long Island beach resorts. Among these people were Helen Palsgraf, a forty-year-old Brooklyn janitor (separated from her husband), and her two daughters. Many of the people on the platform were carrying packages of one sort or another. Two, possibly three, persons who appeared to be of Italian origin (this is stressed in both the trial transcript and the newspaper article) dashed through the waiting crowd to

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1. *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928). It is either *Palsgraf* or *MacPherson*—the latter the more influential, the more heavily cited, of the two, as we shall see, but the former, I suspect, the all-round more celebrated.

catch a train that was just pulling out. At least one of the men was carrying a substantial bundle—a foot or more long, and several inches in diameter—wrapped in newspaper. When he reached the train, the door was still open. A conductor inside the train pulled him in while a guard on the platform pushed him from behind. He made the train but in the process dropped his bundle. It fell between the train and the platform (which was flush with the train at the door level) onto the tracks below. The rear wheel of the car hit the bundle a second or two later, causing the bundle—which was filled with fireworks—to explode with a blast heard blocks away. There was also much smoke and a fireball, and the force of the blast ripped up part of the wooden station platform.

At the instant of the explosion, Mrs. Palsgraf was standing next to a penny scale that was approximately her height. According to the newspaper account, the scale was “more than ten feet away” from the site of the explosion, but the trial record contains no indication of the distance. The explosion shattered the glass in the scale and knocked the scale itself over onto Mrs. Palsgraf, bruising her. It also caused a stampede of the crowd on the platform. There is conjecture that the crowd, rather than the direct force of the explosion, knocked over the scale. One source of this conjecture is that Cardozo’s opinion fails to convey an adequate sense of the explosion’s force. In addition, Mrs. Palsgraf’s complaint alleges that she was knocked down by either the scale or the crowd, or both. But at trial, none of the witnesses testified that it was the crowd that had knocked her down. The Times article reports that the platform was damaged, so maybe it buckled under the scale, tipping it over; but the trial record contains no mention of damage to the platform. Mrs. Palsgraf was one of thirteen people on the platform who were injured by the ex-

plosion (or, conceivably, by the stampede that it sparked), none seriously, although several, not including her, were taken to hospitals in ambulances called to the scene.

The train continued on its way, and the “Italians” responsible for the explosion were never identified. The newspaper account speculates that they had been on their way to a celebration of some sort, it being common knowledge that Italians were partial to celebrating with fireworks. Whether there was at the time such a custom among Italian-Americans, I have not been able to discover; there is no mention of the custom in the trial record or the briefs. If 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” were violating a city ordinance, but there is no indication of what the value was.

Several days after the accident Mrs. Palsgraf developed a bad stammer. This was the injury for which she sought damages. Her doctor testified that the stammer undoubtedly had been caused by the shock of the accident, but he was uncertain when, if ever, she would recover and on cross-examination unguardedly opined that it would not be “while litigation is pending. It has been my experience that it never is benefitted or relieved or cured until the source of worry disappears by the conclusion of the trial.” Professor Weyrauch reports that Mrs. Palsgraf became mute after, and—according to her daughter Lilian—because, she lost her case. For this information Weyrauch relies on an article by Jorie Roberts, but what the article actually reports is that Lilian, while indeed mentioning that her mother had become mute, attributed Mrs. Palsgraf’s diabetes to the trauma of the

accident. This is not credible. Diabetes cannot be caused by trauma—a blow to the pancreas strong enough to injure it would kill the person, so well shielded is the pancreas by the body—although trauma can cause latent or asymptomatic diabetes to become manifest. In any event there is no indication that the scale (or the crowd) struck her in the abdomen.

The likeliest explanation for Mrs. Palsgraf's speech difficulties is that the accident triggered a latent psychiatric problem that the litigation made even worse. For what it is worth, Lilian was definite in the interview that it had been the explosion, not the stampede of the crowd, that knocked over the scale, but she had been standing at some distance from her mother when the accident occurred. Roberts's article also makes clear that, with the exception of Mrs. Palsgraf, the Palsgraf family was thrilled by its association with a famous case, notwithstanding the outcome.

The jury awarded Mrs. Palsgraf $6,000 in damages (between $44,000 and $48,000 in today's dollars, depending on whether the GNP Implicit Price Deflator or the Consumer Price Index is used), and the intermediate appellate court affirmed, but the court of appeals reversed by a vote of four to three and ordered the suit dismissed. The ground was that the railroad owed no duty to Mrs. Palsgraf because it could not have foreseen that the carelessness of its conductor and guard, in pulling and pushing a man carrying a bundle that gave no notice of its explosive contents, would result in an injury to a waiting passenger standing some distance away. The court also awarded the railroad its costs of suit, which as Noonan emphasizes were equal to about a year's salary for Mrs. Palsgraf. Whether the railroad ever attempted to collect this award is unknown, but I would be astonished to

10. Noonan, note 2 above, at 144.
discover that it had. Although inferences from silence are perilous, had the railroad tried to collect the award it is unlikely that the Palsgrafs would have forgotten such rapacity or deliberately not have mentioned it to Roberts.

At the time Palsgraf was decided, the standard analysis in such cases was to ask first whether the defendant had been negligent and second whether, if so, that negligence had been the "proximate cause" of the plaintiff's injury. This was the approach taken in the intermediate appellate court, where the dissenting judge argued that the negligence of the railroad's employees was not the proximate cause of Mrs. Palsgraf's injury because the act of carrying the unmarked bundle of fireworks was an intervening cause.

This is just a conclusion. How the case should be analyzed is a difficult question. On the one hand, there is no doubt that the railroad's negligence (if negligence it was) in manhandling aboard the man with the parcel was a cause of Mrs. Palsgraf's injury. It made the injury more likely; and had the railroad not been negligent the injury probably would not have occurred. The concurrence of these two conditions makes the railroad's negligence a cause of the accident in an uncontroversial sense.11 Nor does either opinion in the court of appeals suggest otherwise. And it might seem that, unless the railroad is liable for all the consequences of its negligence, it will take insufficient precautions to avoid them; the costs it will consider in deciding how many resources to devote to accident prevention will be less than the costs of the accidents that its precautions would prevent. On the other hand, it is imprecise to speak of the railroad's negligence when the only negligence is that of the railroad's employees and

the railroad is liable only by virtue of the doctrine of *respondeat superior*, which makes an employer liable for the torts of its employees committed in the course of their employment. No large enterprise can prevent all its employees from ever being negligent. In such a setting, negligence liability is, realistically, strict liability—that is, liability despite lack of fault. Should a defendant be strictly liable for highly improbable, or in legalese "unforeseeable" (not worth trying to foresee?), consequences of its actions? Culpability is highly attenuated in such a case, and it may be "unfair," therefore, to make the defendant liable. More concretely, liability is unlikely to affect the defendant's conduct; it will only make him the involuntary insurer against a class of remote contingencies.

These doubts are reinforced by a point made many years later by Judge Friendly: "there was exceedingly little evidence of negligence of any sort" in *Palsgraf.* Cardozo himself seems to have been skeptical that there was negligence, for he said: "The man [carrying the bundle] was not injured in his person nor even put in danger. The purpose of the act [in helping him aboard], as well as its effect, was to make his person safe. If there was a wrong to him at all, which may very well be doubted, it was a wrong to a property interest only, the safety of his package." But Cardozo is speaking here of negligence toward the person carrying the bundle; the issue was whether the railroad had been negligent toward other passengers, such as Mrs. Palsgraf.

Let us see now what Cardozo did with the case. The first thing to note is the statement of facts, which is both elliptical and slanted:

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

13. Here as throughout this book I omit interior page references to Cardozo's opinions in the New York Court of Appeals; the opinions are short and the quoted passages easily located within them.
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.

The plaintiff is described as standing on the platform rather 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. The bundle is described as small even though the witnesses had described it as large. There is no hint of the magnitude of the explosion, a reticence that makes the collapse of the scale seem freakish. The scale is described as being “at the other end of the platform, many feet away,” but this characterization has no basis in the record, which discloses neither the location of the scale nor its distance from the explosion. The briefs do not supply this information either. Conceivably something was said in oral argument that supported Cardozo’s description; there is no transcript of the argument. But it is unlikely that the lawyers would have waited till the oral argument in the court of appeals to establish the location of the scale or its distance from the explosion, neither fact having been mentioned during the trial or in the briefs.

14. There is no reference to the fact that the man carrying the bundle appeared to be Italian or to the so-called Italian custom to celebrate with fireworks—facts (if the second is a fact) potentially relevant to foreseeability. But Cardozo cannot be criticized for this omission, since the trial record contains no mention of such a custom.

15. Apparently it was not the practice of the judges of the court of appeals to
Having by selection and alteration of facts made the accident seem unforeseeable, Cardozo has prepared the way for his audacious denial that the railroad had been culpably negligent. "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, standing far away. Relatively to her it was not negligence at all." The reason is that "nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed." The duty of care in the law of negligence is a duty of foresight; it is not violated by failing to take precautions against unforeseeable hazards. "The law of causation, remote or proximate, is thus foreign to the case before us . . . 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."

If Cardozo's statement of facts can be criticized for inaccuracy, his legal analysis can be criticized for gliding too quickly over the fact that the jury had found the railroad's employees careless in pulling and pushing the man with the bundle in an effort to help him get aboard a moving train. Their carelessness is a given (Cardozo is skeptical about this finding, as we have seen, but he accepts it as the premise of his opinion), and the question is whether only the foreseeable consequences of carelessness should give rise to liability. An affirmative answer may seem plausible; certainly Cardozo makes it seem plausible. But when looked at closely, "foreseeability" slips out of focus. All sorts of consequences may ensue, with varying degrees of likelihood, if you jostle someone carrying a package more than a foot long. The package may be heavy, and if dropped may injure someone's toe. Surely if the man with the bundle had as a result of being jostled by the railroad's employees dropped it on another passenger's toe,

the railroad would have been liable to that passenger. If the bundle had been glass and shards had injured another passenger, the railroad would have been liable to that passenger. Even if the parcel had contained a loaded gun that went off when the parcel hit the rail and a passenger had been shot, the railroad might well have been liable. What is special about what actually happened? A bundle can contain anything smaller than itself; it is as likely to contain fireworks as it is to contain a Ming vase.

Cardozo's "bottom line" is that there is no liability to an unforeseeable plaintiff, however that status be determined in a particular case—an issue to which Cardozo might have devoted more attention than he did, in light of the possible shadings just discussed. In any event, this rule, invented by Cardozo in Palsgraf though perhaps implicit in his famous earlier decision in MacPherson v. Buick Motor Co., has been followed by a number of states besides New York, but it remains the minority rule. Most states continue to muddle along with the nebulous "proximate cause" approach, which emphasizes the proximity in time and space of the defendant's careless act to the plaintiff's injury; that was the approach taken by Judge Andrews's dissent in Palsgraf.

So Cardozo engineered a minority solution, not markedly superior to the unsatisfactory majority solution, to a rather esoteric problem of tort law. Why then is the opinion so famous? And famous it is. It has been cited 309 times by state courts outside New York (85 times by the New York courts and 156 times by federal courts). This is almost as many times as MacPherson (381 citations by state courts outside New York, 179 within, 267 federal). And MacPherson is Cardozo's most influential opinion: by greatly limiting the requirement of privity of contract in products liability cases—the requirement that the injured consumer have a contract with the manufacturer he is suing—

17. 217 N.Y. 382, 111 N.E. 1050 (1916); see chapter 6.
MacPherson inaugurated fundamental changes in American tort law. Palsgraf is also the subject of a large scholarly literature and is, I believe, the only case reprinted in all American casebooks on tort law.

A number of reasons for Palsgraf's celebrity can be conjectured. The first is that Cardozo's enormous reputation—a reputation resting, to be sure, in part, but only small part, on Palsgraf itself—increases the probability that any opinion written by Cardozo will be cited and discussed more than the equivalent opinion of a lesser-known judge. To borrow the hagiographical imagery traditional in discussing Cardozo, Cardozo's name on an opinion has a halo effect.

Second is the elliptical statement of facts, which strips away all extraneous details, except Mrs. Palsgraf's destination, and perhaps some essential facts as well. This economical, indeed skeletal, presentation enables the reader to grasp the situation—or, rather, so much of the situation as Cardozo wants the reader to grasp—at a glance. The compact lucidity of the statement of facts is refreshing and is in striking contrast to the flaccid prolixity of ordinary judicial prose and the occasional plumminess of Cardozo's own prose. His artistry is nowhere better exhibited than in his omission of a fact that would have assisted the thrust of his opinion—namely, the injury for which Mrs. Palsgraf was suing. Mention that it was a stammer would have made the accident seem not only freakish but silly, a put-on, a fraud. The scale fell on Mrs. Palsgraf and made her stammer. Tell us another. Great cases are not silly.

More than artistry is at work in the omissions. The more facts that are stated in an opinion, the easier it is for judges in subsequent cases to distinguish, narrow, confine, and otherwise diminish the scope and impact of the opinion. If Cardozo had

18. A parallel example—Learned Hand's truncation of the facts in his celebrated T.J. Hooper opinion (60 F.2d 737 [2d Cir. 1932])—is discussed in Landes and Posner, note 11 above, at 133–135.
mentioned Mrs. Palsgraf's stammer, later judges might have limited the holding of the case to situations in which the type of injury that occurs is unforeseeable.

Third, however, 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. How did a handful of firecrackers cause a heavy scale at the other end of a long platform to collapse? At once the reader is intrigued. In addition, the more tenuous the causal linkage, the more natural a characterization of the accident as unforeseeable appears.

Were the omissions and misstatements deliberate on Cardozo's part? In his essay "Law and Literature," Cardozo defended the right of a judge to deliberately misstate facts: "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" (Selected Writings 339, 341). It is statements like these that mark Cardozo as our most self-consciously literary judge. But whether the factual inaccuracies in Palsgraf or any other opinion were conscious or not is impossible to say.

A fourth reason for Palsgraf's fame is the opinion's eloquently pedagogic character. Cardozo has set out to teach us some basic

19. If not misled, I mentioned the conjecture that the stampede of the crowd rather than the explosion had knocked over the scale. And here is Professor Epstein's comment: "The case involved a freak set of events: indeed the facts as stated seem to violate the laws of physics. How, for example, could Mrs. Palsgraf have been the only person on a crowded platform injured by the explosion, had there been an explosion?" Richard A. Epstein, "Two Fallacies in the Law of Joint Torts," 73 Georgetown Law Journal 1377 and n. 2 (1985). Yet there undoubtedly was an explosion—a big enough one to earn page-one treatment by the New York Times—and Mrs. Palsgraf was one of thirteen people injured by it. The railroad's lawyers did not deny that there had been an explosion, and Mrs. Palsgraf may have been standing not much more than ten feet from it. Epstein is correct that the facts as stated in Cardozo's opinion make the accident seem exceedingly freakish, but those facts are misstated. Professor Landes and I were similarly misled. See note 11 above, at 246 and n. 39.
truths about the law of torts—in particular, what negligence really is and how it is related to the concept of duty and to the scope of liability. “The orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty.” “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 danger.” Here, by the way, are good examples of Cardozo’s most common deviation from standard prose—the inversion of subject and predicate. This puts the reader off at first but turns out to be an effective method of emphasizing key words (“negligent” and “wrongful,” in the passage just quoted). The departures from standard word order, and the frequent use of metaphor and aphorism, are what people have chiefly in mind when they criticize Cardozo’s style as being “ornate.” It is not ornate. An ornate style is one rich in subordinate clauses, parentheses, digressions, redundancies, and other curlicues. Cardozo’s inversions of standard word order and his use of metaphor and aphorism make for brevity and vividness. His style is not hectoring—the Brandeisian jackhammer. But neither is it decorative, florid, luxuriant, rococo. It is, however, on occasion exotic; for Jerome Frank’s suggestion that Cardozo wrote with an alien grace we may substitute the suggestion that he sometimes wrote with an exotic grace.

I continue with the gnomic utterances in Palsgraf. “The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension.” “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.” Less is being said than appears, but Cardozo’s evident confidence sweeps the reader along, assisted by such minatory reminders—potent

21. On the characteristic “rhetoric of inevitability” in judicial opinions, see
deterrents to disagreement—as "A different conclusion will involve us, and swiftly too, in a maze of contradictions." "Life will have to be made over, and human nature transformed, before prevision so extravagant can be accepted as the norm of conduct, the customary standard to which behavior must conform." "The argument for the plaintiff is built upon the shifting meanings of such words as 'wrong' and 'wrongful,' and shares their instability." All this is subtler bluff than "as a matter of strict fact," but it is bluff.

With its bold generalizations about negligence, the opinion resonates beyond the esoteric issue of liability to unforeseeable victims. Professor Freund is correct: Cardozo like Holmes had the gift of being able to see the general in the particular—in Palsgraf he saw instantiated the basic principles of negligence law and was able to articulate them in prose of striking freshness, clarity, and vividness. The opinion is short and consists mostly of short sentences. There are no footnotes, block quotations, headings, or other impedimenta characteristic of the modern opinion (and block quotations were as popular in Cardozo's time as they are in ours). The opinion owes, by the way, nothing to the briefs, which are competent and well written, but nothing more; alongside Cardozo's opinion they are pedestrian.

Fifth, the fame of Palsgraf owes much, I believe, to Judge Andrews's dissent, which although much praised is inept. To begin with, Andrews concedes the facts to Cardozo. He must not have bothered to read the record, for he neither contests the inaccuracies in Cardozo's opinion nor adduces a single fact not mentioned in that opinion. After some meandering, Andrews does make the commonsense point that "due care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B or C alone." But immediately he concedes that "the right to recover damages rests on additional considerations,"

summarized in the phrase "proximate cause." Andrews can give no meaning to the phrase, however, thereby making Cardozo's essential point. All that "proximate cause" means to Andrews is that "because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics." By saying this, Andrews cedes the legal high ground to Cardozo, who at least has proposed a criterion for determining the scope of liability—foreseeability. It may conceal all sorts of uncertainties, but Andrews does not bring them out, instead offering the unprincipled-sounding alternative of "practical politics." (Andrews seems to think that logic and politics are the only tools of decision available to judges.) Andrews finds proximate cause in the proximity in time and space of the injury to the explosion, and like Cardozo but less excusably he makes nothing of the fact that the injury was a stammer and didn't begin till three days after the accident, which would weaken his point about proximity. He undermines his position by letting pass Cardozo's groundless statement that the accident had occurred at the other end of the platform many feet away from the explosion, and he misconceives the proximate-cause issue: it is not the proximity of the injury to the explosion that matters but the proximity of the injury to the negligent act of the railroad's employees.

A dissent that fails to land a heavy blow on the majority opinion strengthens that opinion by making it seem invulnerable; such a dissent is, from the dissenter's own standpoint, worse than futile, though few judges realize this. And a dissent that, also like Andrews's, is longer than the majority opinion, and treats its disagreement with the majority as fundamental, magnifies the importance of the majority opinion. It also plays into the hands of law professors on the lookout for good teaching cases by providing a vivid picture of the contestability of legal doctrine at an apparently fundamental level and, in Palsgraf, a vivid contrast between styles of legal reasoning ("legal" versus "political") as well.

So Palsgraf's celebrity is due in part—but only in part—to
Cardozo's technique. And that technique is quintessentially rhetorical in a sense that cannot be taken as wholly complimentary in evaluating a judicial opinion, for one element of the technique is the selection of facts with a freedom bordering on that of a novelist or a short-story writer, and another is outright fictionalizing ("at the other end of the platform, many feet away"). Moreover, despite Cardozo's professed (and, so far as I am able to determine, sincere) pragmatism, his opinion 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. Indeed, one of the rhetorical skills deployed in the opinion is that of avoiding practical considerations while sounding practical, hardheaded. And Cardozo was lucky not only in his dissenter but also in the draw of cases. Even after he became chief judge, all cases in the New York Court of Appeals were assigned by rotation. But we should not think that the luck of the draw was decisive. Had the writing of *Palsgraf* fallen to any other judge on that court it might well have sunk without a trace, while if Cardozo had drawn another tort case instead of *Palsgraf* he might have made of it a *Palsgraf*. To see how ordinary a case *Palsgraf* would have been in the hands of an ordinary judge, one has only to read the majority and dissenting opinions in the intermediate appellate court. Cardozo could make silk purses out of sow's ears—a gift vouchsafed to few judges.

I end my discussion of *Palsgraf* with a glance at the suggestion by Noonan and the feminist critics that Cardozo showed a lack of empathy for Mrs. Palsgraf. The charge has not been sustained. Judges take an oath to render equal justice to rich and poor, so the fact that Mrs. Palsgraf was poor would not have been a principled ground for bending the rules in her favor. What is more, it is highly misleading to call the Long Island Railroad "rich" just because it was a large corporation affiliated with a still larger one (the mighty Pennsylvania Railroad). A corporation is a gan-

glion of relations with people, most of whom, in the case of a railroad anyway, are not rich—shippers, railroad workers, passengers, employees of suppliers, shippers’ customers, and families of the foregoing. Even if all the corporation’s shareholders are rich, it is by no means certain that the predominant part of any increase in the corporation’s costs that is due to more extensive tort liability will come to rest on them rather than on the other persons with whom the corporation is economically entwined. Then too the large corporation will on average be a defendant in more suits than will a small one; the total burden on it may be no less. Maybe there are economies of scale in litigation that enable the frequent defendant to obtain more effective representation than the infrequent plaintiff or to overawe the plaintiff with predatory discovery. If so, there is no evidence of it in Palisgraf. The railroad’s brief is not markedly superior to the plaintiff’s, and the railroad did not beat down Mrs. Palisgraf and her lawyer with a barrage of discovery requests or high-priced experts. Indeed, the railroad called no witnesses at trial but was content with cross-examining the plaintiff’s witnesses. It put on a bargain-basement defense.