

Doctrinal Forks in the Road: The Hidden Message of *The Nature of the Judicial Process*

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Revisiting The Nature of the Judicial Process, the published version of four lectures Judge Benjamin Cardozo delivered at Yale Law School between February 14 and 18, 1921, presents a challenge to the contemporary reader. That challenge is to imagine how the lectures could have generated the strongly affirmative reaction that they apparently did. In this Essay, we seek first to recover that reaction and to juxtapose it against our initially far less enthusiastic response. We then identify a feature of the lectures that was not remarked upon when they were first published and has not been emphasized since: Cardozo's examination of how appellate judging is frequently about whether to extend what he called a doctrinal "path," or not to extend that path. If the path is extended, existing doctrinal propositions are treated as governing not only the case at hand, but also as applying to an expanded set of potential future cases. But if the path is not extended, the doctrinal principles embodied in a set of previous cases are deemed inapposite to the current case, and a developing doctrinal path is truncated, thus limiting its application to future cases.

*We then show how Cardozo employed the concepts of doctrinal paths and "forks in the road" in several of his most famous torts cases. We conclude that when Cardozo's discussion of those concepts is understood as one of the principal contributions of *The Nature of the Judicial Process*, the lectures can be understood to be of lasting as well as historical significance.*

I. INTRODUCTION

Revisiting *The Nature of the Judicial Process*, the published version of the four lectures Judge Benjamin Cardozo delivered at Yale Law School between February 14 and 18, 1921, presents a challenge to the contemporary reader. That challenge is to imagine how the lectures could

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We then illustrate Cardozo's concept of "doctrinal forks in the road" through an analysis of six of his most famous torts cases, which we present as three sets of pairs. By presenting the cases as pairs, we show how in each instance the latter case became the one in which the doctrinal path extended by the former was put under pressure, as the court—in opinions Cardozo authored—considered whether to extend or to cut off the doctrinal path marked off by the earlier case. We conclude that recognizing that this is occurring in many appellate decisions enriches our understanding of the way appellate judges worked in Cardozo's day and continue to do so. For this contribution, *The Nature of the Judicial Process* deserves our continuing attention and study.

II. UNPACKING *THE NATURE OF THE JUDICIAL PROCESS*

Recalling the first lecture that became part of *The Nature of the Judicial Process* forty years later, Arthur Corbin of the Yale law faculty, who had been influential in inviting Cardozo to give the lectures more than a year before they were delivered,¹ described the audience's reaction after Cardozo

1. It is uncertain exactly when the invitation was tendered to Cardozo. Arthur Corbin's 1961 recollection of the details which led to the lectures indicated that in 1918 the Yale law faculty was considering whom to invite to give the next Storrs Lectures, and Dean Thomas Swan had suggested Cardozo, who was approved by the faculty, but that Cardozo had initially declined. In doing so, Corbin recalled, Cardozo expressed an interest in meeting Yale faculty members, and subsequently came to New Haven, a visit that reinforced the interest on the part of the Yale faculty in having Cardozo as a Storrs Lecturer. Cardozo, however, continued to resist, saying "I have no message to deliver." At that point a faculty member suggested that Cardozo might "explain to our students the process by which you arrive at the decision of a case," and Cardozo responded, "I believe I *could* do that," in effect agreeing to give the lectures. Corbin then added that Cardozo spent the succeeding twelve months preparing his lectures.

Assuming Corbin's recollections to be accurate, Cardozo must not have definitively accepted the invitation until sometime in early 1920. That timetable assumes a rather long delay between the Yale faculty's resolution to secure a Storrs Lecturer in 1918 and Cardozo's eventual acceptance. But that delay might have been the result of Cardozo's initially declining but in doing so signaling that he wanted to meet Yale faculty members, a response that might have been taken by the Yale faculty as an implicit invitation for them to try to talk him into changing his mind. Thus it seems possible that the meeting in which Cardozo was persuaded did not take place until late 1919 or early 1920. See Arthur L. Corbin,

completed the first lecture, which he had read from a prepared text for an hour, with 250 people present, including Yale law students and faculty.

Standing on the platform at the lect[e]rn . . . he read the lecture, winding it up at 6 o'clock. He bowed and sat down. The entire audience rose to their feet, with a burst of applause that would not cease. Cardozo rose and bowed, with a smile at once pleased and deprecatory, and again sat down. Not a man moved from his tracks; and the applause increased. In a sort of confusion Cardozo saw that he must be the first to move. He came down the steps and left, with the faculty, through a side door, with the applause still in his ears.

The next day, each student must have brought a friend. The hall was jammed, with many more pushing to get in; and we transferred the lecture to the nearby Lampson Lyceum, with some 500 seats. For the remaining lectures that hall was filled to capacity; and each day at 6 P.M. the ritual of the first day was exactly repeated—the rising of the audience, the continuous applause, the smile of pleasure, the appreciative bow, and the leaving with the faculty while others stood and cheered. Never again have I had a like experience.²

In 1921, the year of Cardozo's lectures, there were 185 students attending the Yale Law School.³ For Corbin's memory to be accurate, every one of those students, and every law school faculty member, must have attended Cardozo's second lecture, and each of them must have brought a friend, as Corbin remembered. It seems possible to us that Corbin's memory, forty years later, was a bit exaggerated. In any event, juxtaposing the response of those who attended Cardozo's lectures—however many there were—against our experience of reading them a century later, the principal reaction that emerges is dissonance. In print—and orally they must have been at least similar—the lectures consist of a series of very lengthy paragraphs, interspersed with numerous quotations, many of them from French, Latin, or German. For the most part Cardozo operates at a level of considerable generality and abstraction, and when he descends to make a concrete observation, he typically qualifies it in the next sentence or paragraph. The published version of the lectures contains numerous footnotes, which Cardozo surely would not have read out orally, but many of the footnotes are to the sources of lengthy quotations that he used as part of the structure of his arguments. Did he stop and say “quote” and “close quote” after all of those quotations? Did he translate the ones in French, German, or Latin, or simply assume his audience knew those languages? The chapter outlines and running heads to the published version of *The Nature of the Judicial*

The Judicial Process Revisited: Introduction, 71 YALE L. J. 195, 197 (1961).

2. *Id.* at 197.

3. GEORGE WILSON PIERSON, A YALE BOOK OF NUMBERS: HISTORICAL STATISTICS OF THE COLLEGE AND UNIVERSITY 1701-1976 9 (1983)

Process indicate that Cardozo moved from one topic to another within the course of individual lectures. But there are no signals of his doing so in the text of the lectures themselves. Did he stop and say, “Now I’m going to move from a general introduction to discuss the method of philosophy?” If not, how was his audience able to grasp the organization of the lectures?

In short, if we adopt mainstream contemporary expectations about coherence and accessibility in oral lectures, there is almost nothing in *The Nature of the Judicial Process* to generate much beyond bafflement, certainly little to make an audience (especially an audience of students) inclined to stand and cheer for the lecturer. So the challenge is to recover what in the lectures made them seem so energizing, even inspiring, to those who heard them in person.

A. *The Nature of* The Nature of the Judicial Process

“Both what he said and his manner of saying it,” Corbin recalled, “had held us spell-bound on four successive days.”⁴ At the time Corbin delivered his reminiscences about the lectures, his view that they were substantively and forensically spellbinding seems to have remained in place. Three years after Corbin’s comments had appeared, Andrew Kaufman of the Harvard law faculty, who had been persuaded by Justice Felix Frankfurter to undertake a biography of Cardozo, wrote an overview of the judge for a volume containing essays on Supreme Court justices. In it, Kaufman said, of *The Nature of the Judicial Process*, “it still possesses the same validity and vitality . . . as it did when it was published.”⁵ As late as 1967 the Harvard faculty placed the lectures on a list of recommended summer reading for entering first-year students.

We are inclined to challenge current readers of *The Nature of the Judicial Process* to find it “spell-binding” in any way. As with Holmes’s *The Common Law*, the lectures contain some memorable rhetorical passages. But, as Grant Gilmore said in 1974 of Holmes’ *Common Law* lectures, those that composed *The Nature of the Judicial Process* “have long since become unreadable unless the reader is prepared to put forward an almost superhuman effort of will to keep his attention from flagging and his interest from wandering.”⁶

As an illustration, consider the following passage from Cardozo’s first lecture. At that point he had introduced his four “methods” employed by judges in deciding cases. He was then seeking to show that the “method of philosophy,” which emphasized precedent and “the rule of analogy,” was presumptively the choice for judges in most cases, but that it was not

4. Corbin, *supra* note 1, at 197.

5. Andrew Kaufman, *Benjamin Nathan Cardozo*, in ALISON DUNHAM AND PHILIP KURLAND (eds.), *MR. JUSTICE* 251 (1964).

6. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 46 (1974).

invariably followed. Other “methods” might be available if other considerations appeared to be relevant.⁷

He began his argument by suggesting that although some continental jurists “would dethrone [the method of philosophy or logic],” they “do not ask us to abstract from legal principles all their fructifying power.”⁸ He then supplied a lengthy quote from the French scholar Francois Geny (which he translated in the text but rendered in the original French in a footnote) maintaining that “there should be no question of banishing ratiocination and logical methods from the science of positive law.” For Cardozo this meant that “[e]ven general principles may sometimes be followed rigorously in the deduction of their consequences.”⁹ He then supplied a paragraph, extending for four printed pages, in which he attempted to show how the “method of philosophy” worked. Here is an excerpt from that paragraph:

In law, as in every other branch of knowledge, the truths given by induction tend to form the premises for new deductions . . . A stock of juridical conceptions and formulas is developed, and we take them, so to speak, ready-made . . . Those fundamental conceptions once attained form the starting point from which are derived new consequences, which, at first tentative and groping, gain by reiteration a new permanence and certainty. In the end, they become accepted themselves as fundamental and axiomatic. So it is with the growth from precedent to precedent. The implications of a decision may in the beginning be equivocal. New cases by commentary and exposition extract the essence. At last there emerges a rule or principle which becomes a datum, a point of departure, from which new lines will be run, from which new courses will be measured . . . You may call the process one of analogy or of logic or of philosophy as you please. Its essence in any event is the derivation of a consequence from a rule or a principle or a precedent which, accepted as a datum, contains implicitly within itself the germ of the conclusion.¹⁰

The above excerpt, the way it is introduced, and its place in Cardozo’s unfolding of arguments in *The Nature of the Judicial Process*, is typical of the lectures as a whole. He prefaces his arguments by stating them categorically (e.g., the method of philosophy is most common in the decision of cases, but not invariably followed), supporting that contention with quotations from a variety of other commentators, sometimes in languages other than English, and then refining and qualifying his categorical assertions. But the refinement and qualification takes place at a sufficient level of abstraction, and makes sufficiently heavy use of imprecise terms, that the reader cannot be sure what Cardozo is saying. “It

7. BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, 30-31.

8. *Id.* at 45-46.

9. *Id.* at 47.

10. *Id.* at 47-49.

sounds elegant,” one can imagine a 2022 listener to one of the 1921 Yale lectures thinking, “but what does it mean?”

As we will see, readers of some of Cardozo’s famous opinions, such as *Palsgraf v. Long Island R.R.*,¹¹ would be hard-pressed to connect this passage with any analytical moves Cardozo makes in the opinions. Consider the successive sentences in the quoted excerpt. There is arguably not a single one in which the pivotal terms—the ones that Cardozo wants his reader to ingest and bring along in the development of his arguments—are sufficiently concrete to make clear what Cardozo is trying to convey. The pivotal terms, as the excerpt proceeds, are “truths given by induction;” “premises for new deductions;” “juridical formulas and conceptions;” “new consequences, which . . . gain by reiteration a new permanence and certainty” and “become accepted themselves as fundamental and axiomatic;” and “a rule or principle which becomes a datum, a point of departure, from which new lines will be run, from which new courses will be measured.”

Although a listener or reader might gain a kind of immanent sense—very possibly the product of the constant juxtaposition of facts and doctrinal principles that takes place in teaching common law appellate cases—that Cardozo is talking about the interplay between generality and particularity in judicial decisions, the connection between that observation and the “method of philosophy” remains elusive. So when Cardozo seeks to describe the “essence” of that method, at the end of the excerpt, as “the derivation of a consequence from a rule or a principle or a precedent, which, accepted as a datum, contains implicitly within itself the germ of its conclusion,” a twenty-first century reader might be excused for thinking, “wait—what?”

We are not simply suggesting that this particular passage from *The Nature of the Judicial Process* is obscure, perhaps pardonably so because describing just how legal doctrine is embodied in prior decisions and interacts with the factual settings of new cases is complicated and treacherous. We are also suggesting that the entire argumentative structure of Cardozo’s lectures is comparably obscure, and when combined with Cardozo’s lengthy quotations from other sources and numbingly long paragraphs, makes *The Nature of the Judicial Process* “unreadable.” What, then, can be said about the lectures on their centennial anniversary? What made them so apparently “valid” and “vital” to audiences for decades after their initial publication, and, most importantly, what clues do they furnish about the way Cardozo operated as a judge?

One way to discern what may have made the lectures so compelling to their audiences is to recall the state of jurisprudential views about the nature

11. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

of judging in the early 1920s. Oliver Wendell Holmes, Jr.,¹² John Chipman Gray,¹³ and Roscoe Pound¹⁴ had each indicated that judging was not merely an exercise in “finding” preexisting legal principles and applying them to cases. Each had contended that there were elements of social policy in judicial decisionmaking and that the judge’s role was not sharply different from that of a legislator. Few judges, however, had gone on record confirming that view of the judicial function. Cardozo, from his first lecture on, seemed to be talking about judging as if it was in part an exercise in policymaking, one in which the judge not only consulted precedents and their doctrinal logic, but considered other factors, some of them seemingly external to the received “law” in which cases were situated. The very fact that a sitting judge was prepared to concede in public the existence of those other factors, and the fact that at least in some cases they influenced him, might have been sufficiently exciting to those who listened to the lectures to motivate them to show up for the next one.

Moreover, his audiences may well have thought that Cardozo’s outline of the process by which judges made decisions, at a time when the conventional view was that judges merely discerned and applied preexisting legal principles, was strikingly and engagingly bold. Corbin reported that when, after Cardozo’s fourth lecture, he and his faculty colleagues asked Cardozo for the manuscript of the lectures for publication by the Yale University Press, Cardozo said that he did not “dare to have it published,” and if it were “I would be impeached.”¹⁵ Corbin took Cardozo’s comments to have been in jest (the Yale Press published the manuscript a few months later), but the comments could signal how cutting-edge Cardozo’s posture had been.

So, it is quite possible that Cardozo’s audiences may not only have seen his description of judging as “valid,” getting beyond the conventional view of judging to illuminate the actual mindset of judges as they decided cases, but as “vital,” raising a whole series of questions about how judges juggled the various considerations at stake in their decisions. But if Cardozo was given ample credit by his audiences for his candor in seeking to set forth what judging was actually about, they might also have been frustrated by the imprecise fashion in which he adumbrated the judicial function.

There are only two places in *The Nature of the Judicial Process* in which Cardozo attempts a succinct statement of the various “methods” employed in deciding cases and how they might interact with one another. The first comes in his initial lecture when, after assuming that relevant precedents

12. OLIVER WENDELL HOLMES, *THE COMMON LAW* (1881).

13. JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF LAW* (1909).

14. Roscoe Pound, *The Scope and Purpose of Sociological jurisprudence*, 24 HARV. L. REV. 591 (1911); 25 HARV. L. REV. 489 (1912).

15. Corbin, *supra* note 1, at 198.

affecting the disposition of a case have been “known as [they] really [are],” and that “the principle latent within [those precedents], has been skillfully extracted and accurately stated,” he sought to characterize how “the directive force of a principle” was to be discerned.¹⁶ It is instructive that Cardozo thought of setting the “directive force” of a principle “in motion” as the equivalent of finding “the right path at the parting of the ways.” His description of a directing a principle forward, to illuminate future cases, as the equivalent of choosing a “path” at some doctrinal fork in the road is one to which we will return.

At this point Cardozo introduces the “lines” which might be taken in directing a principle forward, associating various lines with distinctive “methods.” There is a “line of logical progression” which he associates with “the rule of analogy or the method of philosophy;” a “line of historical development,” implemented by “the method of evolution;” a “line of the customs of the community,” embodied by “the method of tradition;” and “lines of justice, morals, and social welfare, the mores of the day,” to be implemented though “the method of sociology.”¹⁷

None of that terminology seems particularly helpful in clarifying exactly what Cardozo thinks is going on. As we will show in Part II, the terminology only barely illuminates some of the features of his famous torts opinions: not only *Palsgraf*, but also *MacPherson*¹⁸ and *Wagner*.¹⁹ The reader can recognize that the “lines” to which he refers amount to doctrinal or policy arguments for moving a legal principle forward to govern cases to which it has not yet been applied. But after that things get much vaguer. The “logical progression” of a principle is associated with “the rule of analogy,” but we are not told how that “rule” works or how it comes to be part of a “method of philosophy.” A line of “historical development” is linked to “the method of evolution,” but we are not told what is evolving or developing. The line of “the customs of the community” is identified with “the method of tradition,” but that method might seem more readily associated with history than with custom or practice. And although “justice, morals, and social welfare” might intuitively seem to be factors potentially influencing judicial decisions, Cardozo fails to clarify how “the method of sociology” that embodies them might go about identifying or weighing them.

For the next two lectures Cardozo elaborated upon the methods of “history, tradition, and sociology,” his presentation consisting of propositions expressed at a very high level of generality surrounded by lengthy quotations from others. Those listeners who were not deterred by that mode of delivery might have found a few of his observations cogent.

16. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, *supra* note 6, at 30.

17. *Id.* at 30-31.

18. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916).

19. *Wagner v. Int'l R. Co.*, 133 N.E. 437 (N.Y. 1921).

For example, an important function of judicial decisions is promoting certainty and predictability in the governance of human affairs, and thus adherence to precedent, with precedents being understood as embodying established doctrinal rules and principles was presumptively favored. The ability of the “method of philosophy” to direct the logical application of existing principles was therefore valuable, and that method could thus be seen as one of first recourse in the judicial decision of cases.

Despite Cardozo’s potentially confusing of the “method of history” with “evolution,” his subsequent discussion of that method helped clarify what he had in mind. There were a fair number of instances in which a doctrinal rule or principle could be seen as having its origins in particular historical circumstances, and in which the passage of time had revealed that those circumstances either no longer existed or had substantially changed.²⁰ The question in such instances was whether the rule should be retained in order to further predictability, or whether it should be discarded as a historical anachronism. Thus understood, the “method of history” was simply a way of understanding doctrinal propositions that at first blush might seem nonsensical. If it did not necessarily provide a reason for continuing to follow such propositions, it helped explain how they had come into being.

The same analysis could make sense of rules or principles whose primary characteristic seemed to be that they were in concordance with distinctive customs or practices in particular communities.²¹ Rules governing commercial transactions were an example: their apparent obscurity or excessive technicality could be ascribed to mercantile practices. In such settings it may have been worth more to persons whose affairs were regularly governed by such rules that they existed, rather than they were efficacious or even sensible. The “method of tradition,” better understood as a method of following established custom or practice, was a way of identifying that class of legal rules

Cardozo took more time discussing the method of sociology than the other methods, possibly because he sensed that infusing justice, morals, social welfare, and the “mores of the day” into judicial decisionmaking might have seemed more striking to some of his listeners. Most of his illustrations were drawn from constitutional law, a field in which it was comparatively easy, by the 1920s, to show that judicial interpretations of open-ended constitutional provisions such as the Due Process and Equal Protection Clauses were affected by attitudes toward “justice,” or “morals,” even if not made explicit. To hear a judge say “[t]he final cause of law is the welfare of society,”²² or “in every department of the law . . . the social

20. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, *supra* note 6, at 52-53.

21. *Id.* at 60-61.

22. *Id.* at 66,

value of a rule has become a test of growing power and importance,”²³ or “within the confines of precedent and tradition, [judicial] choice moves with a freedom which stamps its action as creative” could have been surprising, refreshing, or shocking. Similarly, “[t]he law which is the resulting product is not found, but made”²⁴ may have been an arresting, even exciting assertion. But there had still been precious little, in Cardozo’s exegesis on the method of sociology, about how its lines actually worked.

The second place in which Cardozo sought to summarize the contribution he was seeking to make in his lectures produced a somewhat less opaque statement of what he thought he was doing. “My analysis of the judicial process comes to this, and little more,” he wrote:

logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired.²⁵

This led him to a discussion of “the social interest” served by the law’s being “uniform and impartial,” which reinforced “adherence to precedent” and the “symmetrical development” of doctrine, “consistently with history or custom” when those phenomena had “been the motive force . . . in giving shape to existing rules” and to “logic or philosophy” when “the motive power has been theirs.” But “[t]he social interest served by symmetry or certainty” needed to be balanced “against the social interest served by equity and fairness or other elements of social welfare.” When those elements were present the judge might have a “duty . . . of staking the path along new courses.”²⁶

But then Cardozo retreated once more into opacity. “If you ask how [the judge] is to know when one interest outweighs another,” he wrote, “I can only answer that he must get his knowledge . . . from experience and study and reflection; in brief, from life itself.” Thus, in the end, Cardozo’s methods boiled down to a set of relatively commonplace features of judging, made spicier for his listeners, perhaps, by the addition of “justice, morals, and social welfare” to those features and the suggestion that judges might not only be paying attention to “the method of sociology” but might be “making” rather than “finding” law in their efforts to balance social interests.

We are suggesting, in sum, that what *The Nature of the Judicial Process* was best known for after its publication, and continued to be known for over at least the next four decades, its adumbration of “methods” employed by

23. *Id.* at 73.

24. *Id.* at 115.

25. CARDOZO, *supra* note 6, at 112.

26. *Id.* at 112-113.

judges in deciding cases, was not much of a contribution, even allowing for the possibly startling effect Cardozo's discussion of what he did as a judge might have had on the audiences who listened to his lectures. His description of the methods themselves was imprecise and potentially confusing. His subsequent discussion of each method was tedious, excessively abstract, filled with distracting allusions to the work of others, and containing very little substantive bite. And even when he boiled down his analysis to a more helpful form, it amounted, in the end, to identifying features of judging that could have been recognized as commonplace, suggesting that the "choice of methods" amounted to a balancing of social interests, and disclaiming any ability to generalize about how individual judges might engage in that balancing.

B. A Hidden Feature of Cardozo's Analysis

We want to suggest, however, that there is another, largely hidden contribution in the lectures, one that gets to the heart of how he fashioned the opinions in his most famous and celebrated torts decisions. To unearth that contribution, we need to return to the passage where Cardozo first introduces his "methods." Preparatory to introducing them, he imagines the prospective decision of an appellate case in which apparently relevant precedents have been sampled, their holdings understood, and the doctrinal propositions ("principles") they embody have been extracted. At that point, Cardozo says, "[o]nly half or less than half of the work has yet been done. The problem remains to fix the boundaries and tendencies of development and growth."²⁷

At that point Cardozo first begins to speak of "lines" of doctrinal development, and employs the metaphor of choosing a path "at the parting of the ways." He then moves on to discuss "methods." But let us not follow him; let us remain with the concepts of doctrinal lines and forks in the road. If one describes appellate judging as the constant "fixing" of "the boundaries" of doctrinal development over time, and thinks of doctrinal boundary-fixing as a choice between extending doctrinal propositions to new sets of cases or not doing so (thereby carving out another space for those cases), the metaphor of choosing a fork in the road seems apt. The fork is a "parting of the ways": a line of doctrine continues on into another area or is cut off. Every important appellate case—and for us, each of his important tort cases—is arguably one in which judges need to choose a doctrinal path, extending an established doctrinal proposition to cases in which it has not yet been applied or not doing so.

We have not seen analyses of *The Nature of the Judicial Process* that have emphasized this conception of appellate judging—at least in cases, as

27. *Id.* at 30.

Cardozo put it, “where a decision one way or the other, will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law,”²⁸—as a choice between extending or not extending a line of doctrinal development, or choosing a path when a doctrinal fork in the road is encountered. And yet references to the “path” metaphor are abundant in the lectures. Here are just a sampling, beginning with Cardozo’s introduction of his methods as “principles of selection to guide our choice of paths.”²⁹ He describes the situation in which “[o]ne principle or precedent, pushed to the limit of its logic” encounters “another principle or precedent, followed with like logic,” as creating a judicial choice “between two paths.”³⁰ He characterizes situations in which the logic of one principle “prevailed over the logic of the other” as representing “one path’s” being “followed,” and “another closed.”³¹ When such a conflict between two possible doctrinal lines occurs, he notes, “the paths . . . begin to diverge, and we must make a choice between them.”³²

He continues the use of the metaphor as he moves from a discussion of the method of philosophy to other methods. When judges “are called upon to say how far existing rules are to be extended or restricted,” he says, “they must let the welfare of society fix the path, its direction and its distance.”³³ In the course of arguing that a “conception of the end of law” was vital in “determining the direction of its growth,” he suggested that “there can be no wisdom in the choice of a path unless we know where it will lead.”³⁴ In discussing the balancing of social interests that helped judges determine their choice of methods in particular cases, he maintained that “the social interest served by equity and fairness” might “enjoin upon the judge the duty of . . . staking the path along new courses.”³⁵ And he indicated that in such balancing, between “worship of the past and exaltation of the present, the path of safety will be found.”³⁶

The metaphor of doctrinal development as taking place through a choice between two paths when a fork in the road is encountered, and that choice as either extending or cutting off a particular line of doctrine, goes, we think, to the core of what appellate decisionmaking is about, at least in those cases where a significant conflict between lines of doctrine and policy is posed. We believe that in forging that metaphor, rather than in setting forth methods for judicial decisionmaking, Cardozo revealed that he truly

28. *Id.* at 165.

29. *Id.* at 31.

30. *Id.* at 40.

31. *Id.* at 41.

32. *Id.* at 43.

33. *Id.* at 67.

34. *Id.* at 102.

35. *Id.* at 113.

36. *Id.* at 160.

understood his profession. We now turn to cases in the law of torts in which he encountered that conflict and sought to resolve it by choosing one path or another.

II. THE MAJOR TORTS OPINIONS

Although Cardozo's explanations and theory of judicial decision making were not, in retrospect, important contributions, the opposite is true of his most significant decisions in tort cases. His opinions in these cases are not only memorable. They are also important. In this Part we explain why.

The most salient point we want to make is that there is a connection between what Cardozo said in *The Nature of the Judicial Process* and what he says in his torts opinions, but that this connection is not very interesting or remarkable. Of course, two of his "methods"—logic and reliance on history and tradition, in the form of precedent—figure prominently in all of the opinions. The passages that reflect those "methods" are not labelled as such, though they are easily discernible. But all judicial opinions contain both logical reasoning and citations to precedent. There is also some reference in the opinions to social customs and customary experience. There is occasionally some unlabeled reference to what we would now call "policy," and that Cardozo called the method of "sociology."

But the opinions do not proceed as if they are invoking different categories of method. Although there are somewhat banal connections between what Cardozo says in *The Nature of the Judicial Process* and his opinions, the disconnect between the former and the latter is more worthy of note. What makes the opinions memorable and important has little to do with anything discussed in the lectures. We will contend that it is something else entirely.

To support our contention, we will focus on the six torts cases that are most often included in casebooks and cited in treatises, precisely because they are the most memorable and important. In chronological order, these are *MacPherson v. Buick Motor Co.*;³⁷ *Wagner v. Int'l R. Co.*;³⁸ *Glanzer v. Shepard*,³⁹ *H. R. Moch Inc. v. Rensselaer Water Co.*;⁴⁰ *Palsgraf v. Long Island R R. Co.*;⁴¹ and *Ultrameres Corp. v. Touche*.⁴² Shortly after Cardozo's death Warren Seavey wrote an extended analysis of those six cases, and no others, in an article on Cardozo's torts opinions, published simultaneously in the *Columbia Law Review*, *Harvard Law Review*, and the

37. 111 N.E. 1050 (N.Y. 1916).

38. 133 N.E. 437 (N.Y. 1921).

39. 135 N.E. 275 (N.Y. 1922).

40. 159 N.E. 896 (N.Y. 1928).

41. 162 N.E. 99 (N.Y. 1928).

42. 174 N.E. 441 (N.Y. 1931).

Yale Law Journal.⁴³ So the six core cases have been considered important for a long time.

Four other Cardozo opinions are perennially and prominently featured in most of the casebooks—*Adams v. Bullock*;⁴⁴ *Martin v. Herzog*;⁴⁵ *Pokora v. Wabash R. Co.*,⁴⁶ and *Murphy v. Steeplechase Amusement Co. Inc.*⁴⁷ We describe their significance in the foregoing footnotes citing them, but they do not, in our view, warrant the same attention. Those cases do not directly address the risk-and-negligence framework that is deployed in the six core cases, but they are not inconsistent with it. Though they address different doctrines, each is a reflection of Cardozo’s unsurprising but historically important attitude toward the difference between issues that should be decided as a matter of law and those that lie in the province of the jury. It is a mark of his eminence that these cases—as opposed any number of others that could be substituted—are fixtures in the torts casebooks.

A lot has been written about Cardozo’s torts opinions. He had a distinctive writing style that helps to make them memorable, involving among other things an often-unusual syntax.⁴⁸ But he also had a gift for

43. Warren A. Seavey, *Mr. Justice Cardozo and the Law of Torts*, 39 COLUM. L. REV. 20 (1939); 52 HARV. L. REV. 372 (1939); 48 YALE L. J. 390 (1939).

44. 125 N.E. 93 (N.Y. 1919). *Adams* comes closest to the six core opinions in its subject matter. There Cardozo held that there was no negligence as a matter of law, because no significant risk of the kind of accident that injured the plaintiff could have been foreseen by the defendant. *Adams* is usually understood to illustrate the sense in which negligence involves the comparison of accident costs and accident avoidance costs—as a precursor to *Carroll Towing’s* negligence calculus. But Cardozo faced no doctrinal or substantive fork in the road in *Adams*.

45. 126 N.E. 814 (N.Y. 1920). *Martin* and *Pokora*, *infra* notes 44 and 45, are both about the circumstances in which contributory negligence applies as a matter of law, and they stay close to the factual circumstances each case presented. In holding that violation of a statute is negligence (or contributory negligence) *per se*, Cardozo was not breaking new ground; he was confirming and solidifying the law as it stood.

46. 292 U.S. 98 (1934). *Pokora* is noteworthy for its holding that it was a question of fact whether the plaintiff was contributorily negligent under the circumstances, despite not having stopped, looked, and listened, as seemed to be required by the decision in *Goodman* that had famously been written by Holmes. 46. And *Goodman* itself was famous not only because it had been written by Holmes, but because it echoed what he had said in favor of *per se* rules in *The Common Law*, nearly a half-century earlier. But as in *Martin*, Cardozo did not really break new ground. He recognized the general approach that courts had tended to take as time went on, sending negligence cases to juries to decide them based on their facts.

47. 166 N.E. 173 (N.Y. 1929). *Murphy*—the Flopper case—is also uncontroversial on its facts. What is perhaps most notable about Cardozo’s opinion is that he never used the phrase “assumption of risk” in the opinion, though that is exactly the subject location in which casebooks place the opinion. By the time of *Murphy*, non-negligent assumption of risk had acquired, and was continuing to acquire, a bad name. It had been used to deny employees recovery from their employers on the ground that mere awareness of the dangers being encountered constituted a defense to employers’ liability. Although workers’ compensation had by then largely rendered the doctrine moot in this context, Cardozo may well have desired to avoid giving it renewed life outside that context. We think that the decision sounds mainly in what would later be called assumption of risk in its “primary sense,” reflecting the idea that there was no breach of duty by the defendant in *Murphy* because people in *Murphy’s* position knew what they were getting into. The whole point of the Flopper was to be risky: *Volenti non fit injuria* was the doctrinal basis for the decision that the defendant had breached no duty. *Id.* at 174.

48. For illustrations, see ANDREW L. KAUFMAN, *CARDOZO* 449-450 (1998) (referring to “his inversions of word order and his archaisms”). Richard Posner commented, “Cardozo violates the standard precepts of good writing. But a good writer does not write to rule . . . and Cardozo’s prose

coining a memorable phrase that captured core of what he was holding. It is hard to beat “Danger invites rescue,”⁴⁹ “the timorous may stay at home,”⁵⁰ or “the risk reasonably to be perceived defines the duty to be obeyed”⁵¹ for being both memorable and succinct emblems of the rationales for the decisions in question. Even without these iconic adages, however, the opinions in which they are contained would be memorable and important.

We think that there are two reasons for this. The first reason, for which Cardozo should get only a little credit, is that he was on perhaps the most visible and important state court at the very time that tort law was working through a series of fundamental issues in the law of negligence that had to be decided in order for that body of law to become a mature doctrinal structure. When Cardozo became an appellate judge, the law of torts—with its centerpiece, the law of negligence—had been a recognizable field for only a few decades. The courts that answered the questions to which this developing body of law required answers would necessarily be important contributors to it and would be so recognized. The New York Court of Appeals would automatically have been a producer of important tort decisions during this period, no matter which Judge authored its opinions. So Cardozo was, in this sense, in the right place at the right time.⁵²

Cardozo does get credit, in contrast, for what he actually *did* with the opportunities that the situation presented to him. And what he did was a considerable achievement. We would summarize that achievement as follows. Cardozo resolved a series of doctrinal issues, laying out the alternatives clearly, if sometimes in a way that favored the result he was going to reach, and providing a forceful rationale for the result he chose. Within each opinion, Cardozo identified the doctrinal fork in the road that he had repeatedly referenced in *The Nature of the Judicial Process*, and that the case presented, and explained why the fork he chose was the correct

occasionally . . . rises to greatness.” RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 22, 57 (1990).

49. *Wagner*, 122 N.E. at 43.

50. *Murphy*, 166 N.E. at 174.

51. *Palsgraf*, 162 N.E. at 100.

52. Nor do we have a basis for giving Cardozo credit for selecting the appropriate cases for appellate review. The Court of Appeals’ docket during the years on which Cardozo sat on it (1914-1932) was partially discretionary. Since 1894 appeals of right were not automatically taken to it from the Appellate Division, the intermediate court in New York’s three-tier system of courts. But an appeal of right was possible any time that the Appellate Division reversed the judgment of a trial court or when judges on the Appellate Division differed among themselves. In addition, a 1915 amendment to the 1894 New York Constitution allowed the Court of Appeals to permit appeals in cases where the Appellate Division had been unanimous if it felt that a point of law needed to be clarified. See FRANCIS BERGAN, *THE HISTORY OF THE NEW YORK COURT OF APPEALS 1847-1932* 202, 255-256 (1985).

Of the torts cases we discuss, only two, *Pokora*, *supra* note 45, and *Murphy*, *supra* note 46, do not fall into one or the other of the first two categories, *Pokora* because it was decided by the Supreme Court of the United States and *Murphy* because apparently the Court of Appeals wanted to reach out to correct an erroneous understanding of “assumption of risk” that had resulted in a jury verdict for the plaintiff that the Appellate Division unanimously affirmed.

one.

We cannot and will not attempt to read Cardozo's mind. It may be that, in deciding how he would rule, he consciously employed the various methods that he identified in *The Nature of the Judicial Process*. But when it came to writing the opinions, he did not invoke the methods. Instead his opinions are pieces of rhetoric, designed both to explain the basis for the result and persuade the reader of its correctness. Although he regularly employed the commonplace methods of logic and precedent, often the logic he invokes and the precedent on which he chooses to rely are interpreted in light of an implicit policy preference. What Cardozo sees as the relevant logic and the message of the relevant precedents is presented in a way that seems to lead inexorably to a result that is actually anything but inexorable.

All of this choosing between forks in a road of doctrinal development takes place within each of the six core opinions on which we focus. And a striking feature of each of the six decisions in which he chooses a doctrinal fork in the road is that there is an alternative fork, and Cardozo uses a conceptual framework, adopted earlier in his opinion, to reach a particular outcome and to explain that outcome, harmonizing the decision he reaches with its alternative. The pairs we have in mind are not exact counterparts, and the harmonizing is sometimes more implied than expressed, but the point-counterpoint is definitely discernible.

Most of the opinions are independently important. But to appreciate Cardozo's contribution to the corpus of tort law, recognizing that most of his important tort opinions are book ends that have counterparts is useful. A single decision is just a point in space, usually with some dicta that may be more or less predictive of how cases with different facts will be decided. When such a case eventually gets an actually decided counterpart, however, then the two decisions are not merely points in space, but points on a continuum that has a line of demarcation at some point lying between them, and the actual operative significance of the decisions is much more clearly revealed. When the same judge is responsible for both pairs, and indeed for a series of significant pairs, his contribution becomes even more evident.

Finally, in the case of Cardozo's torts opinions the contribution is even stronger. The opinions address different doctrinal areas—products liability, foreseeable risk, rescue, liability for pure economic loss, assumption of risk, negligence per se, and duty/proximate cause. But, in fact, the six core opinions all deploy the conceptual structure that Cardozo began developing in *MacPherson* and that reached maturity in *Palsgraf*: the notion that negligence, and duty are relational, and involve unreasonable, foreseeable risk. The six core opinions are in effect a record of Cardozo's working through how that conceptual structure applies and dictates outcomes in different settings.

In the analysis that follows, we assume that the reader is familiar enough

with the opinions to be spared an extended recitation of the facts and the issues. We therefore go straight to what we have to add to what such a reader already well understands.

A. *Wagner and Palsgraf*

The *Wagner* case is properly understood to have clearly established the rescue doctrine. In fact, however, it was a lot more than that. In *Wagner* the plaintiff was a passenger on a train with his cousin, who had fallen out. The train moved forward several hundred feet after the fall and stopped. The plaintiff and others walked back, and plaintiff alone walked on an elevated trestle over which the train had passed rather than the surface below the trestle, where the cousin's body had landed. The plaintiff then fell from the trestle and was injured.⁵³

What makes *Wagner* so much more than a mere rescue case is never mentioned expressly in the opinion. But Cardozo faced a doctrinal fork in the road because the parties, and especially the defendant, presented the case as if the issue it raised involved proximate cause. They took an approach that we would now think of as foreshadowing the subsequent Andrews approach in *Palsgraf*. The defendant argued that the distance the plaintiff had to walk after getting out of the train, the time that passed, and the distinctive route he had taken, rendered any negligence on the part of the defendant in permitting him to join the rescue efforts too remote from his injury. Any negligence of the defendant, it contended, was not the proximate cause of the plaintiff's injury. The defendant argued that these factors broke the "chain" of causation; the plaintiff argued that they did not.⁵⁴

There was until this time in New York a history of analyzing rescue and other issues in terms of "chains" of causation, defining proximate cause as "that which in a natural and continuous sequence, unbroken by any new cause," produces an event.⁵⁵ Cardozo ignored this way of conceiving the issue almost entirely. Instead, he took a different fork in the road. He held that, in negligently endangering the cousin, the defendant had negligently endangered potential rescuers. The issue was one of risk and relation, not causation. He acknowledged that many of the precedents involved instinctive rescues, occurring during or immediately after the victim had been put in danger, but dismissed that feature as unnecessary. "We may assume, though we are not required to decide, that peril and rescue must be in substance one transaction . . . that there must be unbroken continuity between the commission of the wrong and the effort to avert its

53. *Wagner*, 139 N.E. at 437

54. We have discussed these considerations at much greater length in Kenneth S. Abraham & G. Edward White, *Recovering Wagner v. International Railway Corporation*, 34 *TOURO L. REV.* (2018):21

55. *Laidlaw v. Sage*, 52 N.E. 679, 688 (N.Y. 1899).

consequences.” But that did not matter: “[c]ontinuity in such circumstances is not broken by volition.”⁵⁶

This passage in the opinion was Cardozo’s rejection, not only of the defendant’s proximate cause argument, but a rejection of the effort to analyze rescue in proximate cause terms. Wagner, in short, was not only about rescue; it was about the need to analyze negligence cases in terms of risk, foreseeability, and relationality—not chains of causation.

That approach became the essence of *Palsgraf*, which is well known not only for its language but also for two other features: its approach to duty, negligence, and proximate cause and its holding that there is no liability in negligence to a wholly unforeseeable plaintiff. The approach was simply a more elaborate version of the approach Cardozo had taken in *Wagner*. The results in the two cases were different, because rescue by the plaintiff in *Wagner* was within the risk that made the defendant’s conduct negligent. In contrast, harm to Mrs. Palsgraf—standing some distance away on the train platform—was not within the risk that made the defendant’s conduct negligent, since that negligence was toward another passenger’s property and, arguably, the passenger. This was because “[n]othing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed.”⁵⁷

Rather, said Cardozo, “What the plaintiff must show is ‘a wrong’ to herself, i.e., a violation of her own right, and not merely a wrong to someone else . . . 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 reasonable apprehension.”⁵⁸ In *Wagner*, the risk to the plaintiff was within the range of reasonable apprehension; danger invites rescue. But not so in *Palsgraf*: “[n]egligence, like risk, is thus a term of relation.”⁵⁹

Then, in contrast to what had been only implicit in *Wagner*, Cardozo was explicit in *Palsgraf* that he was rejecting the proximate cause fork in the road and taking the risk and relationality fork: “The law of causation, remote or proximate, is thus foreign to the case before us. The question of liability is always anterior to the measure of the consequences that go with liability.”⁶⁰ By the “question of liability,” we think he meant the question of whether the defendant had breached a duty to the plaintiff—had wronged *her*. Some commentators have read this statement to mean that the question of “duty” is always anterior to the question of causation.

That is true, but in modern parlance we would probably say that the defendant did have a duty to Mrs. Palsgraf—to refrain from subjecting her

56. *Wagner*, 133 N.E. at 438.

57. *Palsgraf*, 162 N.E. at 99.

58. *Id.* at 100.

59. *Id.* at 101.

60. *Id.*

to an unreasonable risk of foreseeable harm. The point is not that the defendant had no such duty, but that under the circumstances, that undoubted duty was not breached. But in this context the distinction between no-duty and no-breach-of-duty makes no difference. The issue posed by *Palsgraf* was not to be analyzed in proximate cause terms.

B. MacPherson and Moch

The technique Cardozo used in *MacPherson* has been the subject of much analysis.⁶¹ It is seen as an example of what we have elsewhere called “cloaking”—characterizing legal change as being less a departure from past precedent than it actually was, often by interpreting precedents more broadly than might be plausible.⁶² In contrast, Cardozo adopted a conventional description of the standard form of common law development in *The Nature of the Judicial Process*, “[t]he work of modification is gradual. It goes on inch by inch. Its effect must be measured by decades, even centuries.”⁶³ But that was not how common law development occurred in *MacPherson*, which actually produced change much more quickly than that.

Beginning with *Thomas v. Winchester*,⁶⁴ in New York the privity rule of *Winterbottom v. Wright*⁶⁵ had been made subject to an exception for products that were “immanently dangerous” to life and limb, and then applied to a series of progressively less dangerous products. Cardozo took that exception and purported merely to be applying it to a suit against the manufacturer of an automobile that had injured its purchaser.

The exact basis for the original exception, and of its progeny, was not entirely clear. To reach the result in *MacPherson*, the most Cardozo was required to do was show that, if anything, an automobile was at least as dangerous as some of the products to which the exception had already been applied, such as coffee urns and scaffolds. But here he took another fork in the road by going further, and treating the exception as a rule in itself that was implied by the cases themselves, and contending (correctly), that the things subject to the exception had expanded over time. This was not quite a literal overruling of *Winterbottom*, but it effectively turned out to be just that, as other courts ignored the seeming limitations to which Cardozo had paid lip service. *MacPherson* is now understood to have held, at the least, that a manufacturer is liable in negligence for bodily injury to the ultimate purchaser of the product.

61. See, e.g., EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1948).

62. KENNETH S. ABRAHAM & G. EDWARD WHITE, TORT LAW AND THE CONSTRUCTION OF CHANGE: STUDIES IN THE INEVITABILITY OF HISTORY 11-13 (2022).

63. CARDOZO, *supra* note 6, at 11.

64. 6 N.Y. 397 (1852).

65. 152 Eng. Rep. 402 (Ex. 1842).

MacPherson is an example of what Cardozo would do repeatedly—encounter a body of precedent that was subject to either a broad or narrow interpretation, acknowledge both alternatives, but then characterize the precedents in a manner that left no doubt that the interpretation he was rejecting was flawed. His opinions were legal arguments for the result he had reached. They put the best face possible on Cardozo's contentions, attempting to do so without being intellectually dishonest, but seeking not only to explain, but also to justify and persuade the reader of the correctness of the result.

We cannot say if Cardozo's method of sociology always figured in his decision process. In *MacPherson* he may well have considered whether it was sensible, as a matter of policy, for auto manufacturers to be liable to those their product injured, despite the absence of privity. And he might then have looked at the existing precedents creating exceptions to the privity requirement to see whether they supported him. Or he might have engaged in an iterative process in which sociology and precedent interacted in his mind until he arrived at what he thought was the best outcome in light of what space the precedents gave him, all things considered.

Either way, our point is that the opinion in *MacPherson* is not a record of his decision process, but an effort to justify his decision in light of the material that he must have thought would be most persuasive. Did he interpret the precedents in light of a pre-existing policy preference, or did he read them neutrally, whatever that might mean, and reach a conclusion regardless? There is a hint in the opinion: "the things subject to the principle [of *Thomas v. Winchester*] do change. They are whatever the needs of life in a developing civilization require them to be."⁶⁶ Is this evidence of the method of sociology, a factor in Cardozo's decisionmaking process, or merely a summary of a decision reached for other reasons? We don't know, cannot know, and don't need to know. More importantly, we are not aided in knowing by anything in *The Nature of the Judicial Process*.

What we do know is that *MacPherson* is the first major evidence of Cardozo's conception of the nature of negligence. "We have put aside the notion," he said, "that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We put its source in the law."⁶⁷ And by the law he meant the law of torts.

It is easy to see the focus of this memorable language as being mainly a rejection of the privity requirement, because it was. But there are two steps involved. It was one thing to say that (1) privity is not required. But it was quite another to explain that (2) if injury is a foreseeable consequence of negligence, then liability follows. And it is the latter point that he would

66. *MacPherson*, 111 N.E. at 153.

67. *Id.*

elaborate in his subsequent decisions.

A counterpoint to *MacPherson* is *Moch*, a classic example of the manner in which Cardozo declined to expand liability, resting on a narrow interpretation of existing precedent. This was the fork in the road that he did not take in *MacPherson*. It is always an easier task for a judge to interpret precedent narrowly, as opposed to expanding liability while contending that the expansion is already immanent in existing case law.

The formal, structural parallels between *MacPherson* and *Moch* clearly exposed the same fork in the road. In *MacPherson* the defendant made cars, whereas in *Moch* the defendant sold water. In both cases the party injured, the car owner and a company whose property was damaged by fire, respectively, was not in privity with the defendant. In both cases the plaintiff suffered physical injury. Yet in *MacPherson*, Cardozo held, the plaintiff had a cause of action in negligence, but did not in *Moch*.

In *Moch* Cardozo explained why he was not following the *MacPherson* fork on the ground that the defendant had merely failed to confer a benefit (water) on the plaintiff, whereas in *MacPherson* the defendant had injured the plaintiff.⁶⁸ Explaining the difference, Cardozo said that “[i]f conduct has gone forward to such a stage that in action [sic] would commonly result, not negatively merely in withholding a benefit, but positively or actively in working an injury, there exists a relation arises a duty to go forward.”⁶⁹

That was at the time and largely still is an accepted distinction, but it is not always easy to maintain. Why not say that the defendant in *MacPherson* had withheld the benefit of providing a safe vehicle? And why not say in *Moch* that the defendant had injured the plaintiff by causing it to rely on a working fire hydrant, to its detriment? Cardozo could have held that the difference was wafer thin and difficult to maintain philosophically, continuing the rejection of the privity limitation that had begun in *MacPherson*.

Calling into question the distinction between misfeasance and nonfeasance in cases involving physical injury would have been a doctrinally dramatic move, and out of keeping with the scattering of case law that Cardozo cited, but not much more so than in *MacPherson*. As in *MacPherson*, however, Cardozo interpreted the case law against a background consideration that falls into his method of sociology. Speaking of the “crushing burden” that would result, Cardozo said that “[i]f the plaintiff is to prevail, one who negligently omits to supply sufficient pressure to extinguish a fire started by another assumes an obligation to pay the ensuing damage, though the whole city is laid low.”⁷⁰

68. Cardozo rejected two other grounds as well, third-party beneficiary and breach of statutory duty, *Moch*, 159 N.E. at 897-98.

69. *Id.* at 898.

70. *Id.* at 897-98.

All this was said in connection with the contention that the plaintiff was a third-party beneficiary of the defendant's contract with the city, but it is clear that the same rationale applied to plaintiff's separate contention that there was liability in negligence under *MacPherson*. The defendant had no duty to consumers of water, Cardozo said, because there was not a sufficient relation between them: "[t]he plaintiff would have us hold that the defendant, once it entered into the performance of a contract with the city, was brought into such a relation with every one [sic] who might potentially be benefited through the supply of water at the hydrants."

Exactly. Just as the defendant in *MacPherson* was brought into such a relation with everyone who might be benefited by a nonnegligently-made car. The difference had to do with the consequences: "We are satisfied that liability would be unduly and indeed indefinitely extended by this enlargement of the zone of duty."⁷¹ That is why *MacPherson* went one way and *Moch* went the other.

When we put *MacPherson* and *Moch* together, we can see them clearly as bookends. Structurally they pose analogous issues, and the issues must be analyzed in terms of duty and relationality. But that is merely the conceptual framework in which analysis takes place. In *MacPherson*, Cardozo was not concerned about a crushing burden that liability would impose on the manufacturer. The vehicle that caused the plaintiff's injury had what we would today call a manufacturing defect, a one-off defect. He did not and probably could not have envisioned what today we would call a design defect that would affect every car owner and threaten to injure large numbers of people. We wonder what he would have said in *MacPherson* if, somehow, that issue had been presented. In contrast, in *Moch* he was able to envision an analogous phenomenon—liability to every property owner in a city that had burned to the ground—and consequently he declined to read the case law to support an extension that would formally have resembled *MacPherson*.

C. *Glanzer and Ultramares*

The decision of Cardozo's that is most of a piece with *MacPherson* is *Glanzer v. Shepard*. Its counterpart, *Ultramares*, closely parallels *Moch*. In *Glanzer* the question also was whether a plaintiff not in privity with the defendant could recover for negligence. The distinction was that the defendant in *Glanzer* was not a product manufacturer but provided a service (weighing), and the plaintiff in *Glanzer* did not suffer bodily injury, but economic loss.⁷² Those distinctions could have made a difference, but they did not.

71. *Id.* at 899.

72. *Glanzer*, 135 N.E. at 275.

The basis of Cardozo's holding was that the defendant had a duty of care to the plaintiff, despite the absence of privity, because the defendant knew that providing the plaintiff with a weight was the "end and aim of the transaction." There were precedents supporting him, Cardozo said, and though they did not involve those particular facts, "[t]here is nothing new here in principle." Rather, "[c]onstantly the bounds of duty are enlarged by knowledge of prospective use." Immediately he cited case law support that proposition, and the first case cited was *MacPherson*.⁷³

The analogy is obvious. The whole point of the transaction in *MacPherson* was for a car to end up in the hands of the owner. The whole point of the transaction in *Glanzer* was for the plaintiff to have the results of the defendant's weighing of the beans. For this reason, the defendant had a duty to the plaintiff to exercise reasonable care. "[c]onstantly the bounds of duty," Cardozo indicated, "are enlarged by knowledge of a prospective use."⁷⁴

But was not the defendant in *Glanzer* merely conferring a benefit on the plaintiff, in the same way that the defendant in the later *Moch* case was merely conferring a benefit? Cardozo seemed not only to admit as much, but to make it a basis of the holding in *Glanzer*: "It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully."⁷⁵ Here he was choosing to extend the duty to act carefully in conferring a benefit, whereas in *Moch* he would not.

In fact, since *Moch* involved physical loss, and *Glanzer* involved economic loss only—though by a professional—the argument for extending duty in the former case but not the latter might be thought stronger. But in *Glanzer* there was a single plaintiff, and on its facts there usually would be only a single plaintiff or a small number of them. In situations like *Moch*, by contrast, there could be hundreds.

That difference emerged clearly in *Ultramares*. As in *MacPherson*, *Moch*, and *Glanzer*, there was a contract, but not with the plaintiffs, who had relied on a balance sheet of defendant accountants' client that defendant negligently certified. One of the questions was whether the defendants were potentially liable to the plaintiffs for fraud. The court answered that question in the affirmative. But were they liable in negligence?⁷⁶

Cardozo, incongruously, cited *Moch* for the proposition that "[a] force or instrument of harm having been launched with potentialities of danger manifest to the eye of prudence, the one who launches it is under a duty to keep it within bounds," but noted that this principle applied to physical

73. *Id.* at 276-77.

74. *Id.* at 276.

75. *Id.*

76. *Ultramares*, 174 N.E. at 442-43.

forces.⁷⁷ The question was whether it applied “to the circulation of a thought or a release of the explosive power resident in words.”⁷⁸

He recognized that *Glanzer*, and several other prior decisions, had already answered that question in the affirmative. At least in principle, there could be liability for a negligently circulated thought. And that is exactly what had happened in *Ultramares*. But in contrast to *Glanzer*, in which there was no wrong on anyone’s part but that of the defendant, in *Ultramares* the underlying wrong was that of the client, who had committed fraud not only on the plaintiffs, but also on the defendant, whose alleged negligence had failed to detect that fraud. Still, as in *Glanzer*, it seemed that the end and aim of the certification by the defendants was to give the plaintiffs information.

Nevertheless, Cardozo was not ready to extend a duty to the plaintiffs, because “[i]f liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class.”⁷⁹ This posed the spectre of the same “crushing burden” of liability as in *Moch*, which by then had already been decided.

All that remained was to distinguish the precedents that could have been interpreted to support liability. In *Glanzer*, Cardozo said, a single third-party was effectively the intended recipient of the information. And in two other cases there was a single intended party, though that party’s identity was indeterminate.⁸⁰ But in *Ultramares* that was not the case—there were multiple possibly affected parties.

In the article we mentioned earlier, Seavey criticized Cardozo for not being clear about the distinction between *Ultramares* and the other cases, contending that Cardozo should have indicated that “practical reasons require that the liability for causing merely pecuniary loss should be more limited than the liability for causing physical harm. . . .”⁸¹ But that would not have explained the distinction between *Glanzer* and *Ultramares*, which ultimately rested on a question of degree. And it is difficult to formulate rules that apply as a matter of law to issues that hinge on questions of degree. Cardozo had sidestepped the problem in *Moch* by resting on the distinction between nonfeasance and misfeasance. But whatever kind of feausance occurred in *Ultramares* was the same kind of feausance that had occurred in *Glanzer*.

The best Cardozo could do in *Ultramares* was to note that liability “if

77. *Id.* at 445.

78. *Id.*

79. *Id.* at 444.

80. *Id.* at 446.

81. Seavey, *supra* note 42, 39 COLUM. L. REV. at 49.

recognized, will be an extension of the principle of those decisions to different conditions, even if more or less analogous.” Subsequent case law has been similarly unable to resolve this difficulty with a bright-line rule.⁸²

D. Appraisal: On Taking a Fork in the Road

We have contended that, in the major torts cases that he decided, Cardozo in each instance faced a fork in the road. At times he chose the road to greater liability, and at times he did not. It would be easy in retrospect to take the view that our fork-in-the-road metaphor is contrived. On this view, there was a fork in the road only in the sense that one of the parties was arguing for a position that Cardozo rejected. But in each instance, this view would contend, the choice was not meaningful or serious; the road Cardozo took was clearly the one that had to be taken.

We reject this view as anachronistic. If Cardozo’s choices seem inevitable in retrospect, that is at least in part because he established the direction that negligence law would take from then on. By mapping out doctrines that have been in the mainstream for so long that they now seem to be incontestable, he helped to make them so. That is one of the reasons that his opinions endure.

Thus, it was no means inevitable that, as a matter of law, danger would invite rescue. That could have been an issue of fact in every case, much the way the question of whether it is contributorily negligent not to stop, look, and listen became a typical question of fact after *Pokora*. It was also by no means inevitable that there would be no liability, as a matter of law, to a wholly unforeseeable plaintiff. Some courts still adhere to the Andrews’ time-and-space approach to proximate cause, but the view Cardozo took in *Palsgraf* is dominant.

Similarly, it was not at all inevitable that manufacturers would be immediately liable to those injured by their products, regardless of privity. Without the decision in *MacPherson*, there could have been decades of more litigation over the scope and application of the concept of “imminent” danger, further development of warranty and indemnity up and down the chain of distribution, and a quite different system for dealing with manufacturer negligence. It is equally plausible to imagine utility companies facing liability to their customers, especially for physical loss resulting from negligent provision of water and power, with the consequent growth of liability insurance covering such loss, rather than as it turned out—the use of property insurance to insure those kinds of losses.

Finally, though the decision in *Glanzer* was a small step and what we would now call a no-brainer, but for Cardozo’s limitation of liability in

82. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 5, providing for liability to a “limited group of persons for whose benefit and guidance” the information is supplied.

Ultramares it is not inconceivable that things might have developed otherwise. The consolidation of large accounting firms that took place decades later might have been hastened, with insurance against liability for negligence developing in a manner resembling what happened to corporate Directors & Officers insurance beginning in the 1980s. After all, liability for securities law violations actually does seem to be the very liability for an indeterminate amount to an indeterminate class about which Cardozo was warning in *Ultramares*.

In short, Cardozo did encounter forks in the road, and it is a measure of his distinction and significance that the choices he made now seem to have been easy ones. But they were not so easy at the time, though he crafted his opinions to make them seem easier than they were. He was extremely skillful at the very tasks he outlined in *The Nature of the Judicial Process*: extracting doctrinal propositions and principles from lines of apparently apposite cases, and then, having recognized that there were alternative propositions that might be equally applicable to a case before him, choosing which path to take in a fork in the road and making it seem as if that was the obvious path to take.

CONCLUSION

When one reconsiders the lectures that became *The Nature of the Judicial Process* a century later, and thinks about the career of the judge who wrote them, one is left with one of the recurrent ironies of history. The dimensions of Cardozo's 1921 lectures that apparently made them unforgettable to eyewitnesses, and added to his reputation as one of the eminent jurists of his time, are now virtually unrecoverable: a series of abstractions whose meaning collapses under close scrutiny. But at the same time there was a contribution which Cardozo made in the lectures, not treated as noteworthy at the time and not emphasized since, that goes to the heart of appellate judging. And a comparison of some of Cardozo's best known opinions in one common law field, torts, with that contribution reveals that Cardozo not only understood the doctrinal "forks in the road" that his form of judging was all about, but proved himself eminently skillful in choosing pathways offered by those forks. That is why his opinions in torts and other common law subjects continue to be anthologized, speaking to lawyers and law students over the generations in a way that the once-celebrated messages of the lectures no longer can.