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TAKING ANOTHER RIDE ON FLOPPER: BENJAMIN CARDOZO, SAFE SPACE, AND THE CULTURAL SIGNIFICANCE OF CONEY ISLAND

Robert N. Strassfeld*

One of the most ubiquitous cases in the torts canon, Murphy v. Steeplechase Amusement Co., Inc.,¹ is, on its face, also one of the silliest in the casebooks.² The case, which involves a negligence suit brought by an amusement park patron after he fell and broke his knee on a ride, is quite slight. It is certainly not a doctrinal blockbuster like MacPherson v. Buick Motor Co.,³ Escola v. Coca Cola Bottling Co. of Fresno,⁴ Palsgraf v. Long Island Railroad, Co.,⁵ or Sindell v. Abbott

* Professor of Law, Case Western Reserve University School of Law. I am grateful to my colleagues at Case Western Reserve University for their participation and helpful comments at a faculty workshop relating to this work. I also thank Chip Carter, Erik Jensen, Marc Poirier, and Ken Simons for their interest and helpful suggestions. Andrew Kaufman, who has doubtless forgotten more about Benjamin Cardozo than I can ever hope to know was generous with his advice, despite his skepticism about my approach. I am grateful for his help to a total stranger. Max Thomas not only performed superbly as a research assistant, but drew on his vast knowledge of literary and cultural theory in enormously helpful ways. I thank him for his extraordinary help.

¹ 250 N.Y. 479 (1929).
³ 217 N.Y. 382 (1916) (essentially eliminating privity of contract as a bar to tort actions by an ultimate consumer against the manufacturer of a product).
⁴ 24 Cal.2d 453 (1944). Escola is not a blockbuster in the sense of adopting a major doctrinal change. Its importance is rather in Justice Traynor’s concurrence arguing for the adoption of strict products liability. Id. at 461.
⁵ 248 N.Y. 339 (1928) (transforming traditional proximate cause question into a question of whether or not a plaintiff was foreseeable and therefore owed a duty by the defendant).

*Murphy*’s place in the canon is secured for neither of those reasons. Rather, it has made its way into so many torts casebooks because of a combination of its setting (Coney Island), the mildly amusing name of the ride on which plaintiff was hurt (Flapper), the author of the Court’s decision (Benjamin Cardozo), and Cardozo’s graceful use of language in the opinion. Indeed, Cardozo biographer Andrew Kaufinan has included *Murphy*’s statement: “The timorous may stay at home,” in his

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6 607 P.2d 924 (Cal. 1980), cert. denied, 449 U.S. 912 (1980) (adopting market share liability in DES cases in order to overcome difficulty of matching individual plaintiffs with individual drug manufacturer defendants).

7 The phrase has been translated as “there is no injury to one who consents.” BLACK’S LAW DICTIONARY 1700 (7th ed. 1999). The Court actually decided the case on the alternative grounds of plaintiff’s assumption of risk and an absence of negligence on the defendant’s part. The case uniformly appears in the defenses section of torts casebooks, however, as an assumption of risk case.

8 33 Cal.2d 80 (1948). *Summers* is the archetypal causal uncertainty case. A hunter was negligently shot by one of two fellow hunters, with each being equally probably the shooter. Because they were each as likely as the other to have caused Summers’ injury, Summers was incapable of showing by a preponderance of the evidence which negligent shooter had injured him. The *Summers* court shifted the burden of proof to the defendants leaving them jointly and severally liable to Summers if neither could disprove that his buckshot pellet was responsible for the injury to Summers’ eye. The case both leads to more recent developments on the frontiers of tort causation and also suggests numerous hypotheticals to explore the problems of causal uncertainty and of statistical proof and the limits of the court’s approach. It is the sort of case that torts professors would have made up, had it not existed. For a similarly wonderful teaching vehicle in the area of causation, see *Dillon v. Twin States Gas & Elec. Co.*, 163 A. 111 (N.H. 1932) (involving a fatal fall from a bridge that suggests interesting causal overdetermination issues).

9 159 F.2d 169 (2d Cir. 1947) (in which Judge Learned Hand gave expression to the “Hand formula” for determining negligence).

10 43 N.Y. 502 (1871). Besides telling a wonderful story of a man who dies in a successful effort to rescue a small child from being run over by an oncoming train, *Eckert* is a terrific case to pair with *Carroll Towing* to explore the usefulness and limitations of the risk/utility balancing approach to negligence contained in the Hand formula. I teach both together with a short essay by Andre Dubus, which describes Dubus’ own experience as a rescuer. As a result of his successful rescue of an imperiled motorist on a highway in Massachusetts, Dubus was confined to a wheelchair for the remainder of his life. Dubus’ description of those events calls into question the usefulness of any model grounded in deliberate decision making, at least in the case of rescuers. See Andre Dubus, *Lights of the Long Night*, in BROKEN VESSELS 127-31 (1991).

11 232 U.S. 340 (1914). *LeRoy Fibre*, which involves the classic scenario of the steam locomotive that throws sparks onto the property of an adjoining landowner (here in a variation on the usual neighboring farmer theme, a manufacturer of tow from flax straw, whose stacks of flax went up in smoke), is a perfect opportunity to introduce the Coase theorem. The contrasting majority opinion by Justice McKenna, which emphasizes plaintiff’s absolute property rights, and the more flexible partial concurrence by Justice Holmes also provide an opportunity to introduce classical legal thought and legal realism.
list of Cardozoisms that merit a place in the "hall of fame" of legal writing.\footnote{See Andrew L. Kaufman, Cardozo 449-50 (1998).}

In focusing on the slightly comical aspects of the case, it is easy to overlook what is most interesting about Murphy: the undercurrent of contempt that Judge Cardozo expresses for both Murphy and Steeplechase Amusement Park. This article examines the history and cultural meaning of Coney Island and its amusement parks, as well as Cardozo's biography, in an effort to discover the basis for that feeling of contempt. It shows that a variety of attributes of Coney Island, most notably its embrace of what was, for its day, a robust and open sexuality and carnival spirit, were alien and threatening to Cardozo's Victorian values. It also shows how this clash of values would have naturally inclined Cardozo to think of Coney Island as a dangerous place and led him to Murphy's assumption of risk analysis. It further shows, however, that Steeplechase might have been thought of in a very different way, as a safe space in which park goers were invited to let down their guard and take apparent risks in a safe setting. In so doing, the article explores both the hidden history of the Murphy case and the suppressed alternative reading of law and facts that is similarly hidden by Cardozo's opinion.

Part I describes the Murphy case and analyzes the decision. It recounts the events of the accident and the litigation. It then considers the opinion from both a doctrinal and literary standpoint.

Part II then turns to the context of the case. It examines the history of Coney Island as a dangerous place, predating the establishment of its amusement parks, and explains why that early history may have had particularly strong resonance for Cardozo. It then turns to the amusement parks, and most specifically Steeplechase Amusement Park, the setting of the Murphy case.\footnote{During the relevant period, there were four separate amusement parks on Coney Island, though two had closed before Murphy's mishap on the Flopper: Sea Lion Park; Steeplechase Amusement Park; Luna Park; and Dreamland. Sea Lion Park had a short-lived existence. Dreamland was destroyed in a spectacular fire (a frequent problem for Coney's amusement parks) in 1911 and not rebuilt. In addition, there were numerous independent rides and other amusements outside of the parks.} Part II shows that the amusement parks were one front in the clash between an emerging mass culture and an older set of Victorian values. Notably, the amusement parks were an outlet for a youth culture, and in the case of Steeplechase Park in particular, of the working-class variant of that youth culture, which was quite different from that of Cardozo's youth. Indeed, the creators of Coney Island's amusement parks quite deliberately set out to mock the stiffness and pretensions of middle-class Victorian values.\footnote{This was especially true of Steeplechase and Luna Park. Dreamland, the most lavish, but least successful of the parks, outwardly made more of an effort to embrace middle-class values.} They
rejected the notion that recreation and amusement should be edifying and uplifting. Instead, they encouraged a sense of carnival, with its associated sense of social disorder, in which social roles, as well as patrons, were turned topsy-turvy and upended. Most significant, the parks openly embraced an atmosphere of sexuality and voyeurism by creating rides and amusements that were devised to throw men and women into each other's arms and to lift skirts and reveal flesh.

Part II next turns to Cardozo's life to examine how and why this place would have seemed especially alien and threatening to him. It shows that nothing in Cardozo's background would have inclined this former pupil of Horatio Alger and self-described celibate to embrace or even look neutrally at Coney Island.

Part III examines the different legal mappings of Steeplechase Amusement Park that coexisted or that were contended for at the time of the *Murphy* case. The owners of Steeplechase asserted a certain practical and legal meaning to its walls and the space within those walls. For instance, Steeplechase was both a public/private space dedicated to the commodification of amusement and recreation and a place where the owners attempted to assert considerable sovereignty, removing themselves from the tort law that governed outside of Steeplechase's walls. But Steeplechase's owners did not draw the legal map of their park alone. Central to the *Murphy* case, though not always at the surface, were competing conceptualizations of Coney Island as safe space or dangerous space. Part III analyzes the struggle to define Steeplechase in these terms. Drawing on recent work in legal geography, this section examines how Coney Island's image coalesced with Cardozo's inclinations and the Steeplechase's lawyers' litigation strategy to reinforce Cardozo's image of Steeplechase Amusement Park as a dangerously eroticized place, in which patrons assumed broad risks. It then explores an alternative reading of Coney Island's history to argue that buried beneath the decision was an alternative and opposite vision of Steeplechase as a safe place, one that went unrecognized or rejected by Cardozo, but acknowledged and described by the trial judge. Part IV addresses the inevitable "so what?" question. Of what use is it to us as lawyers, scholars, or teachers to examine a rather mundane torts case in this manner? Not surprisingly, I find a variety of reasons why the endeavor is worth the effort.

I. THE ACCIDENT, THE TRIAL, AND THE DECISION

A. Accident and Trial

Late in the evening of August 28, 1925, James Murphy and six
friends, one of whom he would later marry, bought tickets at the Boardwalk entrance to Coney Island’s Steeplechase Amusement Park.\textsuperscript{15} Entering the park through the “Barrel of Love,” a rotating cylinder of polished wood intended to throw entrants off balance and into each others’ arms, Murphy may have taken his first tumble of the evening.\textsuperscript{16} The savvy park-goer knew to walk on a diagonal in order to maintain his balance, if he wanted to, but Murphy was a first-timer at Steeplechase.\textsuperscript{17} He had come at the urging of his girlfriend, Rose, who was not a newcomer to the park.\textsuperscript{18} Perhaps they were seeking to make the most of a mild New York August evening, or perhaps the nineteen-year-old Murphy was seeking escape from the weariness of his job as a teamster at the 33rd Street Trucking Company.\textsuperscript{19}

The party of seven headed to the “Pavilion of Fun,” Steeplechase’s main building, which housed many of its rides. There they amused themselves mostly as passive observers, watching the merriment of others on Steeplechase’s various rides.\textsuperscript{20} This was not unusual behavior on their part. Park-goers typically found that much of the fun of Steeplechase was in watching the spectacle.\textsuperscript{21} Eventually, they made their way to a slide, which led them onto a ride known as the “Human Pool Table.”\textsuperscript{22} The ride consisted of a series of sixteen nearly contiguous rapidly spinning discs upon which the riders spun until tossed from disc to disc and ultimately to the edge of the pool table.\textsuperscript{23} Sometime later, after perhaps riding on one other amusement, the party

\textsuperscript{15} See Record at 12-14, Murphy v. Steeplechase Amusement Co., Inc., 250 N.Y. 479 (1929) (No. 37184/1926).
\textsuperscript{16} See id. at 13. Murphy referred to the entrance to Steeplechase by its alternative name, the “Barrel of Fun,” in his testimony. For a description of the Barrel of Love, see John F. Kasson, Amusing the Million 60 (1978); Edo McCullough, Good Old Coney Island, 314 (1957); Kathy Peiss, Cheap Amusements: Working Women and Leisure in Turn-of-the-Century New York 134-35 (1986).
\textsuperscript{17} See Record at 19. As Edo McCullough suggests, many a park goer also knew not to maintain their balance. He writes that it was placed at the main entrance of Steeplechase so that:

[T]wo or three girls coming giggling in together might enter the Barrel without escorts but find, before they negotiated the sliding, slippery, treacherous thirty feet that they had had the chance to twirl off-balance, clutching at the air, so that every line of their young figures was shown to best advantage, or to slip and embrace the nearest male, the excited laughter again rising high—but in any event to emerge from the Barrel complete with escorts.

McCullough, supra note 16, at 314.
\textsuperscript{18} See Record at 27.
\textsuperscript{19} See id. at 12. The New York World reported a high of seventy degrees that day. Official Weather Forecast, N.Y. World, Aug. 29, 1925, at 10.
\textsuperscript{20} See Record at 19-21, 28.
\textsuperscript{21} See Kasson, supra note 16, at 60-61; McCullough, supra note 16, at 286-87, 309-11; Peiss, supra note 16, at 134-35.
\textsuperscript{22} See Record at 19.
\textsuperscript{23} The ride was the focus of Burris v. Steeplechase Amusement Co., Inc., 48 N.Y.S. 2d 746 (1944), a case involving an accident on the pool table. See also McCullough, supra note 16, at 313-14 (describing the “Human Pool Table”); Peiss, supra note 16, at 135 (same).
left the Pavilion of Fun, and headed outdoors. According to Murphy's and his sister's trial testimony, they intended to make their way to another one of Steeplechase's rides, the Swings. Along the way, they stopped and watched other park patrons ride the "Flopper."

The Flopper was one of Steeplechase's newer rides, having opened just that season. The ride consisted of a narrow leather belt that ran for fifty feet along an incline, so that it rose approximately five feet from its beginning to its end. The belt moved at approximately seven miles an hour. Riders would either sit or stand on the belt as it moved. As the name suggests, many of those who started the ride standing, found that they had been thrown off balance before the ride's end. Some would land in a sitting position on the belt. Others would fall off the belt onto a padded area along its sides.

Sometime after midnight, Murphy and his friends decided to ride the Flopper. According to Murphy's testimony, which Steeplechase would contest, as they got onto the Flopper, it gave a sudden jerk and sent them tumbling down. Murphy testified that he was thrown off the ride and landed on his knee against a hard surface. Because of the fall, Murphy's friends took him to an emergency room maintained by Steeplechase. There, Murphy was attended to by Steeplechase's nurse, Blanche Roza, and its on-call doctor, Dr. Charles Hall, both of whom would testify at the trial. Dr. Hall splinted Murphy's leg and then sent him to Bellevue Hospital for further medical treatment.

While most of his friends suffered no serious injury, the less-lucky Murphy fractured his left kneecap. The knee required surgery, and Murphy remained at Bellevue for a month. Because of his injury Murphy was unable to work for approximately a year. When he returned to work, he was no longer capable of performing in his previous position. At the time of trial, more than two years after the accident, Murphy walked with a limp and complained of continued pain.

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24 See Record at 20-21. Murphy responded affirmatively to his lawyer's question asking whether he had gone on the "Whirlpool."
25 See id. at 13-14, 32.
26 See id. at 68.
27 See id. at 56-57.
28 See id. at 65. Thomas McGowan testified that the hundred foot belt made approximately six revolutions a minute. At that rate, the ride was moving at approximately seven miles an hour.
29 See id.
30 See id. at 28.
31 See id. at 21, 26.
32 See id. at 15. Murphy's wife and his sister both testified that they too had been thrown by a sudden jerk right after he got onto the ride. Id. at 27 (testimony of Rose Murphy); id. at 30-31 (testimony of Ellen Murphy Smith).
33 See id. at 15-16.
34 See id. at 8 (Plaintiff's Bill of Particulars). Murphy's sister testified that she landed on her back and was hurt for three months. On defense counsel's objection, that testimony was stricken from the record. Id. at 30-31.
in his knee.\textsuperscript{35}

That fall, Murphy filed a negligence suit seeking $20,000 for his injuries. Murphy asserted that the ride, mistakenly called the “Flapper” in his complaint, “was dangerous to life and limb in that the same stopped and started violently and suddenly and was not properly equipped to prevent injuries to persons using the same, and who were unfamiliar with its dangers.”\textsuperscript{36} He further alleged that when he got onto the ride, “he was suddenly thrown down without warning, by an unusual and violent jerk.”\textsuperscript{37} Murphy would subsequently elaborate on Steeplechase’s alleged negligence in a Bill of Particulars filed the following year in the New York County Supreme Court. Defendant, he alleged, had not equipped the ride with a safety guard or device to prevent riders from being thrown off; had run the ride at a “fast and dangerous speed;” and had failed to warn him of the dangers of the ride.\textsuperscript{38} Steeplechase’s answer was short and to the point. It denied any negligence and advanced the affirmative defense of assumption of risk.\textsuperscript{39}

Murphy selected Charles Kennedy, a Manhattan attorney, to represent him. Little can be said about Kennedy with certainty. A search of the Martindale and Hubbell legal directories reveals both a Charles J. Kennedy, and a Charles Kennedy. Of the two, it is likeliest that Charles, rather than Charles J. was Murphy’s attorney, but it is possible that neither of them represented him.\textsuperscript{40} It is not clear how or

\textsuperscript{35} See id. at 16-18; see also id. at 34-35 (testimony of Dr. William Egan).
\textsuperscript{36} Id. at 4-5 (Complaint).
\textsuperscript{37} Id. at 5.
\textsuperscript{38} See id. at 7-8 (Bill of Particulars).
\textsuperscript{39} See id. at 6-7.
\textsuperscript{40} See HUBBELL’S LEGAL DIRECTORY 786 (Supp. 1930). Charles J. Kennedy was an NYU Law School graduate. Apparently Charles Kennedy had not earned a law degree. Neither lawyer’s address in the 1930 Hubbell’s Directory matched Kennedy’s address on the court papers from the Murphy case. Charles Kennedy, however, was in the same general neighborhood. His address in Hubbell’s was listed as 11 Broadway, in Manhattan. His address on the court papers was 220 Broadway. According to Hubbell’s Charles J. Kennedy had his offices at 2804 Third Ave. The two legal directories had not yet merged, and their listings were very far from comprehensive. Most lawyers did not appear in them. Kennedy consistently referred to himself as Charles Kennedy, without a middle initial, in the Murphy pleadings and other papers. It seems unlikely that he was one and the same as Charles J. Kennedy. A Westlaw search reveals a handful of cases in which Charles Kennedy, in contrast to Charles J. Kennedy, was involved. Charles J. Kennedy, on the other hand, was involved in a considerable number of cases. He eventually became an Assistant Attorney General for the State of New York. Charles Kennedy’s cases, in addition to Murphy, were Tulk v. Steamship Dublin, Her Engine, etc., 28 F.2d 1010 (2d Cir., 1928); People v. Campbell, 248 N.Y.S. 866 (mem.) (N.Y.A.D. 2 Dept., 1931); Lynch v. 114 West 70th St. Corp., 243 N.Y. 533 (1926) (a personal injury case); Hammer v. Bloomingdale Bros., 213 N.Y.S. 743 (N.Y.A.D. 1 Dept. 1926) (same); Hubsch v. Fifth Ave. Coach Co., 185 N.Y.S. 475 (N.Y.A.D. 5 Dept., 1921) (same). In addition, Westlaw reveals four cases that involved C. Kennedy, including the Murphy case at the Appellate Division of the New York Supreme Court. See Pine v. Driveway Realty Corp. 246 N.Y.S. 811 (mem.) (N.Y.A.D. 1 Dept. 1930); Campbell v. Magoba Construction Co., 233 N.Y.S. 716 (mem.) (N.Y.A.D. 1 Dept. 1929);
why Murphy came to Kennedy.

Steeplechase Amusement Company turned to Gardiner Conroy, of the Brooklyn firm McCooey and Conroy, one of the two firms that Steeplechase routinely employed. Ultimately, Reginald S. Hardy of the McCooey firm, would assist Conroy. Steeplechase’s reasons for choosing McCooey and Conroy to handle Murphy, rather than Reed, Jenkins, Dimmick & Finnegans, a New York City firm that shared the Steeplechase caseload, are obscure. Reed, Jenkins represented Steeplechase’s insurer United States Fidelity & Guaranty (“U.S.F.G.”) and presumably was the insurer’s preferred firm to handle claims against Steeplechase. An entry relating to a different case in the diaries of James Onorato, who became Steeplechase’s General Manager in 1928, suggests the possibility that McCooey and Conroy handled those cases where either the insurance company denied coverage or took a strong stand against settlement.41

The case went to trial on December 5, 1927. Justice John M. Tierney of the New York County Supreme Court presided over the two-day jury trial. Tierney, who was near the end of a long career on the bench, actively participated in the examination of witnesses. In addition to his own testimony, Murphy offered the testimony of three witnesses: his wife, Rose Murphy; his sister Ellen Murphy Smith; and Dr. William Egan, a surgeon retained by Kennedy to examine Murphy and to testify as a medical expert.

Murphy essentially told the story he had outlined in his Complaint and Bill of Particulars. He said that he followed his wife, his sister, and two of their friends onto the ride. As soon as he got on, the belt gave a sudden jerk throwing all of the riders to the ground. He further stated that there was no padding to break the fall where he landed and his knee hit a hard surface.42 His wife and sister told similar accounts of the accident.43 On cross-examination Conroy attempted to discredit Murphy’s explanation of the cause of his accident. He challenged Murphy’s testimony regarding the “jerk,” but he was unable to shake Murphy’s consistency.44 He also challenged Murphy’s testimony that he had fallen on a hard surface. Again, Murphy persisted in his version of events.45 Finally, Dr. Egan testified regarding the nature and extent of Murphy’s injury.

43 See id. at 27 (testimony of Rose Murphy); id. at 30-31 (testimony of Ellen Murphy Smith).
44 See id. at 22-23.
45 See id. at 24-25.
TAKING ANOTHER RIDE ON FLOPPER

Steeplechase countered with testimony from its president, Thomas McGowan. In addition, a number of park employees or former employees testified regarding aspects of the ride and its safety. Dr. Charles Hall, who provided medical services for the park, testified regarding his treatment of Murphy, the nature of his injury, and Murphy's statements that night in the park's emergency room. Blanche Roza, the park nurse, also testified.

Through Hall's and Roza's testimony, Steeplechase offered an alternative explanation for Murphy's injury. Dr. Hall testified that Murphy probably broke his knee when he slipped in trying to sit down on the Flopper and landed with his knee under him putting too great of a strain on the knee. He also opined that Murphy's injuries were not as serious as Murphy alleged and that his limp was either feigned or exaggerated for purposes of the litigation. On cross-examination, Kennedy effectively suggested witness bias by showing that Dr. Hall's income largely depended on his long-standing relationship to Steeplechase and other Coney Island amusements and their insurers and by suggesting that Dr. Hall and Nurse Roza had been as interested in obtaining exculpatory statements from Murphy as in treating him on the night of the accident.

In addition to suggesting an alternative explanation for Murphy's injury, the defense attempted to establish that the park had not been negligent and that Murphy had assumed the risk of any injury. Park President, Thomas McGowan and a number of park employees testified that the ride was safe and could not have jerked in the manner Murphy and his witnesses had described. They also contested Murphy's assertion that he had fallen on something hard. The park's upholsterer testified regarding the thickness and uniformity of the padding around the ride.

See id. at 43, 55. According to Hall's and Roza's testimony, Murphy said that he had been trying to sit down on the Flopper when he fell. Id. at 43, 70. In his cross-examination of Dr. Egan, Conroy laid the groundwork for this theory. Id. at 36-37. Dr. Egan, conceded that it was possible, but improbable that Murphy could have broken the knee by sitting badly. Id.

See id. at 43-46. In answer to a question put to him by the Court, Dr. Hall stated, "I do the work for Feltman's [a large Coney Island restaurant] and most of those amusement places down there, for the insurance companies, and for that reason I am familiar with it." Id. at 51. Steeplechase made it a practice to try to settle cases before the accident victim ever left the park's emergency room, or at least to get a helpful statement from the patron for use in future litigation. Dr. Hall and Nurse Roza routinely testified in cases brought against Steeplechase. At times, Steeplechase's lawyers were also present. In the 1930s, the park adopted the practice of stationing an insurance adjuster in the emergency room in the hope of heading off any litigation, and settling cheap. See infra text accompanying notes 199-204.

See id. at 58-60, 65-66, 85 (testimony of Thomas McGowan); id. at 75-80 (testimony of Frederick Neusse, head foreman); id. at 91-92 (testimony of James Erllo, ride operator).

See id. at 86-88 (testimony of Max Alpern); see also id. at 56-57 (testimony of Thomas
which appeared to show padding around the surrounding area, though Kennedy established in cross-examination that the picture showed only a portion of the Flopper and that it dated from when the ride first opened. McGowan also estimated that a quarter of a million people rode the Flopper in 1925, and testified that there had been no other accidents on the ride, though Nurse Roza would subsequently testify that there had been other accidents on the ride, but none as serious as Murphy's.

Perhaps ultimately more important was the defense's efforts to build on the foundation they had laid during the cross-examination in plaintiff's case for a defense of assumption of risk. McGowan, especially, testified that the ride was open and extremely well lit, so that Murphy and his party could have had no doubt before hopping on that they risked a fall.

At the end of defendant's case, the Court denied Conroy's motions for dismissal and for a directed verdict. The judge then proceeded to summarize the evidence and charge the jury. Although coupled with disclaimers that the jury might remember the facts differently and were not bound by his description, Judge Tierney's summary of the evidence favored Murphy's case. Amongst other instructions, Judge Tierney

McGowan).

51 See id. at 67-69 Conroy showed the picture to Murphy during his cross-examination. Murphy denied that the picture accurately represented what the Flopper looked like. Id. at 25.

52 See id. at 58-59, 74 (testimony of Thomas McGowan); id. (testimony of Blanche Roza that others had been hurt in falls on the Flopper, but that she could not say how many).

53 See id. at 58-61 (testimony of Thomas McGowan). During plaintiff's case, Conroy established through cross-examination that Murphy and his compatriots had watched others ride the Flopper and saw some people take a tumble. See, e.g., id. at 23 (testimony of James Murphy); id. at 28 (testimony of Rose Murphy). Defendant introduced a sign that it had posted at the Flopper, similar to signs at all of its rides, stating that customers indulged at their own risk. Id. at 59-60; id. at 111 (Defendant's Exhibit B). Murphy denied that he had seen the sign. Id. at 21-22.

Judge Cardozo did not consider the sign in deciding the case.

54 See id. at 93-94.

55 While much of the charge was unremarkable, Judge Tierney's discussion of the contradictory testimony regarding the operation of the Flopper was strikingly friendly to Murphy's case. After describing the contradictory testimony and suggesting that the jury as "business men" rely on the same sort of judgment of the probabilities that they do in their own affairs, Judge Tierney instructed:

The plaintiff says that it jerked and he flopped and one of the defendant's witnesses said something about a flop, the Italian.

The defendant says it ran smoothly. Now, you see in the plaintiff an unusually big, strong, husky lad. Is it probable that he would have fallen down upon that ground and broken his knee unless there was some impelling cause producing that result? Would all of his companions be thrown down to the floor without some sudden jerk?

You men, in your own experience, perhaps, have put your foot upon moving platforms or escalators like those spoken of during the course of this trial. Did you fall if the thing ran smoothly? So, bring to your aid the probabilities in determining what was the cause of this lad's being thrown to his knee and receiving the injuries he got.

Now, this device was called a Flopper. You know the meaning of the word
included instructions regarding contributory negligence and assumption of risk, although he declined to use the language that Conroy asked for to describe assumption of risk.56 The jury returned a verdict for the plaintiff and a judgment of $5,000.57 A divided Appellate Division affirmed the judgment without opinion.58

B. Murphy as Law and Literature

When, on April 16, 1929, the New York Court of Appeals announced its decision reversing the Appellate Division and the trial court's judgment, its pronunciation did not create a ripple in public consciousness. The court's momentous decision that day, the one that did make the newspapers, cleared the way for the creation of Rockefeller Center.59 Nevertheless, it is Murphy that has found its way into the assumption of risk section of so many torts casebooks.

The decision is neither one of Judge Cardozo's best reasoned nor most noteworthy. While the casebook authors treat it as an assumption of risk case, the actual grounds of decision are somewhat murky. The court concluded, not completely consistently, that Steeplechase was guilty of no negligence because the ride was safe and not operated in an unreasonably careless manner and that Murphy had assumed the risk of his injury because the risks of the ride were so patent.60 Further, the decision appears to hold that Murphy failed to make out a prima facie case of negligence and that Steeplechase proved its affirmative defense of assumption of risk but then, without explanation, orders a new trial instead of dismissing the case outright.

At the outset, Cardozo discredits Murphy's account of events. He rejects Murphy's description of his fall as being prompted by a jerk of the belt. Cardozo writes, "We see no adequate basis for a finding that

"flapper." It is a perfectly good English word and has a dictionary definition, and then, in determining the probabilities of this situation, your inquiry is, why was it called a flapper if it ran smoothly? Id. at 100-02. In response to Conroy's exceptions, Judge Tierney modified some portions of his charge, including what defendant's witness had said about there being a jerk, but he otherwise overruled Conroy's exceptions to his characterization of these facts. Id. at 106-09.

56 See id. at 96, 107-08.  
57 See id. at 109.  
58 See id. at 118; Murphy v. Steeplechase, 231 N.Y.S. 826 (N.Y. App. Div. 1928).  
60 For criticism of Cardozo's application of assumption of risk analysis in Murphy, in lieu of relying solely on a finding of no negligence, see Stephen D. Sugarman, Assumption of Risk, 31 VAL. U. L. REV. 833, 833-35 (1997). For a critical evaluation of Cardozo's analysis, and one that concludes that the Flopper was more dangerous than Cardozo believed, see Kenneth W. Simons, Murphy v. Steeplechase Amusement Co.: While the Timorous Stay at Home, the Adventurous Ride the Flopper, in TORTS STORIES 179 (2003).
the belt was out of order."61 He credits Steeplechase's argument that the belt necessarily ran smoothly, and he therefore describes the purported jerk as "unexplained" and seemingly "inexplicable."62 According to Andrew Kaufman, Cardozo was "confiden[t] in his own ability to grasp particular factual settings," and he was not averse to reversing a judgment on the basis of his own sense of what had happened where he believed the jury had simply gotten it wrong.63 That appears to be what Cardozo did here. He dismisses Murphy's testimony without a hint that two of Murphy's witnesses corroborated his story.64 He also demonstrates a faith in the flawless operation of modern machinery that borders on the naïve or the disingenuous. Additionally, Cardozo refers to McGowan's testimony that Murphy's was the only accident among the Flopper's approximately one-quarter of a million riders that year. While noting that the park nurse had partly contradicted that testimony when she stated that some park-goers had sustained other, more minor, injuries on the ride, he regards this overall accident record as further evidence that Steeplechase had taken all necessary steps to ensure the safety of the ride.65

Cardozo is similarly dismissive of Murphy's contention that the ride was unsafe because it was not equipped to keep him from falling or, more sensibly, to protect him from the consequences of a fall. He notes, here correctly, that Murphy's contention that he fell on hard wood was uncorroborated and was contradicted by defendant's witnesses and its photograph, though he does not mention the trial testimony that called into question the usefulness of the photograph in establishing the condition of the Flopper.66 Further, he notes that Murphy's bill of particulars did not advance this theory and the case did not go to the jury on the theory that the padding was defective.67

Though he judges the Flopper to be safe and carefully operated, Cardozo also concludes that Murphy had assumed the risk of his accident. The name, alone, must have alerted Murphy to what was in store. The point of the ride was to be flopped, to be thrown down indecorously, or at least to face the challenge of staying on one's feet.

61 Murphy, 250 N.Y. at 482.
62 Id.
63 KAUFMAN, supra note 12, at 254-57.
64 Murphy's witnesses were, of course, interested witnesses. None of the witnesses, on either side, however, were disinterested in the outcome of the case. Moreover, as the contradiction between Park President McGowan and Nurse Roza suggests, there was no apparent reason to credit the reliability of the defendants' witnesses over that of Murphy's. For an instance of clearly misleading testimony by Steeplechase's witnesses, see O'Leary v. Atlantic Amusement Co., 215 N.Y.S. 303 (1926) (denying plaintiffs' motion for a new trial due to defendants' witnesses' perjury due to incompetence and irrelevance of the prejured testimony).
65 See Murphy, 250 N.Y. at 483.
66 See id. at 484.
67 See id.
“A fall,” he writes, “was foreseen as one of the risks of the adventure. There would have been no point to the whole thing, no adventure about it, if the risk had not been there.” Moreover, Murphy and his friends watched others ride the Flopper before they chose to get on it. Cardozo emphasizes their observation of others and frames it in voyeuristic terms. Twice he refers to the crowd, including Murphy and his party, amusing themselves at the pratfalls of the riders. He writes, “Visitors were tumbling about the belt to the merriment of onlookers when he made his choice to join them. He took the chance of a like fate, with whatever damage to his body might ensue from such a fall. The timorous may stay at home.”

Cardozo quotes Rose Murphy’s testimony in response to the question whether she expected to fall on the ride, that she “took a chance.” As Professor Kaufman puts it, Cardozo concluded that “[t]he customer had more or less gotten what he asked for.”

Of course, the two grounds for decision need not be incompatible. Cardozo may be saying that the risks Murphy voluntarily took on were not unreasonable ones, but were nonetheless obvious and real. The Flopper could have been non-negligently constructed and operated, yet, there may have been some remote but real risk that Murphy assumed, which to his misfortune materialized into injury. That seems to be the gist of Cardozo’s comparison between riding the Flopper and fencing or ice skating. Neither is an inherently dangerous activity, and it is not contributory negligence to fence or ice skate. But sometimes, fencers get hurt by their opponent’s parry, and sometimes skaters fall. When they do, however, they cannot fault their opponent or the rink operator for their injury. Yet, the analogy seems somewhat strained. A fall on hard ice is different from a fall onto a padded surface where the fall is the ride’s intended result and one of the sources of the ride’s amusement. Moreover, Murphy contended, and the jury agreed, that the Flopper had been constructed or maintained and operated negligently.

In the end, therefore, the result is surprising and gives the appearance that Cardozo reached to overturn the judgment. It is certainly possible that Steeplechase had not been negligent, but Murphy’s evidence consisted of more than, in Cardozo’s words, a “facile comment that [the Flopper] threw him with a jerk.” Steeplechase’s evidence was not so strong and unproblematic to render the verdict unreasonable and unsupported. Awareness that the ride

68 Id. at 481.
69 Id. at 483.
70 Id. at 481.
71 KAUFMAN, supra note 12, at 261.
72 See Murphy, 250 N.Y. at 482-83.
73 See id. at 482.
might cause a fall is not the same as awareness that it might produce so
dramatic a fall as to break Murphy's knee. This is not to say that the
jury necessarily reached the right result, but given the limits on the
Court of Appeals' scope of review, the court could have easily affirmed.

Even more striking, and probably not unrelated to the outcome, is
the tone of the opinion. There is an undertone of contempt for Murphy
and for Steeplechase. Cardozo sets that tone at the outset when, in
the opinion's second sentence, he describes the Flopper as "[o]ne of the
supposed attractions." His subsequent descriptions of the Flopper and
of the merriment of its riders should be read in light of that introduction
as facetious and mildly mocking. Some riders, he tells us, were able to
sit down "with decorum" or to stand. The rest toppled indecorously.
Cardozo describes Murphy unflatteringly as "fin[ing] his heels above
his head," and therefore incapable of distinguishing "between the jerk
which is a cause and the jerk, accompanying the fall." This is an
amusing image, but it is also a made-up fact that is inconsistent with
any descriptions of Murphy's fall in the record. As noted above,
Cardozo dismisses Murphy's testimony with little more than the
adjective "facile."

Cardozo, who was a careful and deliberate wordsmith, repeatedly
uses words suggesting disorder and the unrestrained crudity and
coarseness of the ill-bred mob in his descriptions of Steeplechase and
the ride. His references to the "antics" of the clown, to the "rough
and boisterous joke," and to the "guffaws" evoked by the "horseplay
of the crowd," reflect class suspicions and condescendingly distance
Cardozo from the Steeplechase patrons. Most striking is his reference

74 Id. at 480 (emphasis added).
75 Id. at 481.
76 Id. at 482.
77 "Antic" originated as an architectural term and connotes the grotesque and bizarre. See 1 OXFORD ENGLISH DICTIONARY 520 (2d ed. 1989). A number of New York cases prior to Murphy used the word "antic" to describe "showmen, mountebanks or jugglers" and barkers and
crossdressers. People v. Tremaine, 222 N.Y.S. 432, 435 (Sup. Ct. 1927) (interpreting statute that, inter alia, prohibited throwing sharp objects or discharging firearms at another person as an
exhibition of skill); People v. Luechini, 136 N.Y.S. 319, 320-21 (Erie County Ct. 1912)
(reversing conviction under vagrancy statute of person who had donned makeup, a wig and
women's clothing and, standing in a theatre entry way purported to represent the "White Slave").
78 "Clown" originally meaning a "clod, clot, or lump," came to denote "an ignorant, rude,
uncouth, ill-bred man," as well as a "fool." See 3 OXFORD ENGLISH DICTIONARY, supra note 77,
at 364.
79 The Oxford English Dictionary defines "boisterous" as applied to "persons and their
actions" as "rough and violent in behavior and speech." See 2 OXFORD ENGLISH DICTIONARY,
supra note 77, at 364.
80 The Oxford English Dictionary defines "guffaw" as "a burst of coarse laughter; a loud or
boisterous laugh." See 6 id. at 927.
81 See Murphy v. Steeplechase Amusement Co., Inc., 250 N.Y. 479, 483 (1929). Andrew
Kaufman notes, Cardozo's comment that "The timorous may stay at home," was not similarly
disparaging. Writes Kaufman, "He was not disparaging 'the timorous.' He doubtless put himself
to horseplay, a word fraught with sexual overtones and images of unruly, misbehaving workers. In popular parlance to "horse," to "horse around," or to engage in "horseplay" meant to joke, but it also meant to have intercourse. Overwhelmingly, courts used the term "horseplay" in workers compensation cases in connection to workplace misconduct that led to harm. Horseplay, the courts generally held, was not within the scope of employment, and workers who engaged in such activity had invited their injuries.

Cardozo was not the first judge to insert class into the case. In his summary of the evidence for the jury, Judge Tierney invoked class in a very different way. His description of Coney Island emphasized democratic accessibility and youthful, romantic love. The Judge began this summary by telling the jury:

This young lad, with his sweetheart and some friends . . . came down to this park that night to be amused, to that playground of the world, Coney Island, providing as it does, all kinds of entertainment, liquid, solid, things that make life more enjoyable, especially to those whose conditions of life were like this lad's life was. He was a truck driver—he probably could not come to the Ritz-Carlton to a dance or anything of that kind, but he could go to Coney Island if he wanted to, and dance or do whatever else attracted him in the way of pleasure, and he could give the girl who was then his sweetheart, and now his wife, such delight as she could find in his companionship and participate with him in the joys of those who like that kind of
We do not know if Cardozo would have described Steeplechase and its patrons with so negative a tone without prompting. In a departure from earlier litigation, Steeplechase’s lawyers fueled this image by disparaging their client’s amusement park and its patrons in their brief. Conroy and Hardy asserted that amusement park patrons had insisted on “greater speed and more reckless pleasure” resulting, in the last ten years, in rougher rides and greater danger.86 Anticipating Cardozo’s description of the Flopper as a “supposed attraction” the lawyers noted that the public had developed a taste for rough rides that threw people around and that it “insists upon patronizing such devices and considers that it is enjoying itself in being so treated.”87 This was, of course, a careful balancing act for Conroy and Hardy. Elsewhere they insisted on the Flopper’s safety, and, indeed, it was a far milder ride than many of the others found at Steeplechase.88

Conroy and Hardy also emphasized the voyeuristic nature of the Steeplechase experience. Obviously, they did this to bolster the assumption of risk defense by reminding the court that Murphy and his party watched others fall on the Flopper and on other rides before they ever ventured onto the Flopper themselves. Given the nature of the spectacle, however, the voyeurism would take on an added potency. Steeplechase’s lawyers wrote that Murphy and his entourage mostly watched other people on Steeplechase’s rides, “deriving more enjoyment apparently from watching the discomfiture and grotesque tumbling of others than from personal participation.”89 The brief later repeated the image of riders “slid[ing] grotesquely down the [Flopper] to the starting point.”90

In general, commentators have not noticed or addressed the contemptuous and slightly sarcastic tone of the opinion.91 The decision’s tone was not lost on Steeplechase’s lawyers, however. Prior to Murphy, Steeplechase’s counsel had not sought to disparage either its  

86 Brief for Appellant at 16, 19, Murphy v. Steeplechase Amusement Co., 250 N.Y. 479 (1929) (No. 37184/1926).
87 Id. at 16 (emphasis added).
88 See id. at 7-16.
89 Id. at 2.
90 Id. at 5. Conroy and Hardy also introduced the word “antics” to describe the riders on the Flopper. Id. at 4.
91 But see Arthur N. Frakt & Janna S. Rankin, Surveying the Slippery Slope: The Questionable Value of Legislation to Limit Ski Area Liability 28 IDAHO L. REV. 227, 238 (1992) (describing the opinion as “suffused with sarcasm and barely concealed contempt for the hapless Mr. Murphy and his misadventures”). Anita Bernstein, on the other hand, reads the opinion as showing respect for Murphy. Anita Bernstein, Treating Sexual Harassment with Respect, 111 HARV. L. REV. 445, 502 n.342 (1997).
patrons or the amusement that it marketed. When Steeplechase next appeared before the New York Court of Appeals shortly after the court announced the Murphy decision, Murphy’s lesson had not been lost. That case, Reinzi v. Tilyou,92 involved an accident on the Steeplechase ride from which the park drew its name, in which plaintiffs asserted that they fell from the mechanical horse they were riding because the attendant had insisted on putting them on the same horse, despite their considerable size and contrary to their wishes, and because a footrest on the horse broke. Steeplechase was represented by its other lawyers, the firm of Reed, Jenkins, Dimmick & Finnegan, in Reinzi. Nevertheless, they followed the strategy of denigrating their patrons and the amusement that they sold. Quite gratuitously, Steeplechase’s lawyers described the ride as “a somewhat undignified amusement.”93 In Reinzi, however, the negative depiction of the ride was not sufficient to persuade the court to set aside a plaintiffs’ verdict.

II. THE CULTURAL SIGNIFICANCE OF CONEY ISLAND

A. Sodom by the Sea: Coney Island before Steeplechase

“Sodom was not a circumstance to the sin-debauched and crime-soaked Coney Island.”

-Thomas DeQuincy Tully, Secretary, Law and Order Society94

“[I]f this advertising goes on, Coney Island won’t be big enough to hold the crowds that want to go there.”

-Brooklyn Mayor Frederick Wurster, responding to Tully’s statement95

At the far south end of Brooklyn, a narrow sandbar that locals in the nineteenth century referred to as Coney Island extends from Gravesend Bay to the west to Sheepshead Bay to the east. George Tilyou opened Steeplechase Amusement Park on the west side of this “island” between the Boardwalk and Surf Streets in 1897. But Coney Island had a history that predates Steeplechase that likely resonated for Cardozo.

During the nineteenth century, this stretch of land became an increasingly popular destination for escape from the New York and Brooklyn summers, either for a Sunday day-trip, or for a longer stay in

92 252 N.Y. 97 (1929).
93 Brief for Appellant at 19, Reinzi v. Tilyou, 252 N.Y. 97 (1929).
94 Quoted in OLIVER PILAT & JO RANSON, SODOM BY THE SEA: AN AFFECTIONATE HISTORY OF CONEY ISLAND 117 (1941).
95 Quoted in id.
one of the several hotels that sprung up along its length. A tour along the length of this sandbar would mimic an exploration of New York's social hierarchy. Beginning at the far east, Coney Island's neighbors Manhattan Beach and Brighton Beach were thriving resorts, dominated by large hotels catering to the upper class in exclusive Manhattan Beach and to the middle class in Brighton Beach. Moving west from there beyond an undeveloped stretch was modern day Coney Island, at the time called West Brighton, and at the extreme west end, Norton's Point.96

While visitors to Manhattan Beach and Brighton Beach favored strolls in the hotels' well-manicured gardens, visits to the beach, and contemplation of the unspoiled vistas from the hotels' verandas, visitors to Coney Island preferred a very different sort of entertainment. From mid-century, the west end was associated with political corruption and a plentiful array of disreputable and illicit amusements. Norton's Point was said to be habituated by the "vicious classes."97 It was a popular resort, and sometime hiding place, of members of the infamous Boss Tweed Ring. Indeed, Tweed himself hid out on Coney Island and eventually fled from there to Cuba to escape prison.98

With time, the center of gravity moved east from Norton's Point to Coney Island (West Brighton). Before it became part of Brooklyn, Coney Island was part of the town of Gravesend. There, local political boss John Y. McKane ruled over a dominion of public corruption and private vice. One Gravesend resident complained:

The town might as well be owned by a close corporation, for we poor outsiders are denied all knowledge of where our money goes. McKane as Health Commissioner decides that such and such a thing is necessary; as Chairman of the Town Board he orders it done; as chief contractor of the town he does it; as Chief of Police he prevents any interference with his work; as Town Auditor he passes his own bills and as Chairman pro tem. of the Kings County Board of Supervisors he is careful to see that these bills are paid in full.99

Vice flourished to such an extent that Coney Island was dubbed "Sodom by the Sea." Prostitutes, con artists, gamblers, and petty crooks all flocked to Coney Island, and their patrons and marks eagerly followed.100 The New York Times lamented in 1887 that:

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96 For a discussion of Coney Island's unseemly past and of its more respectable neighbors, see KASSON, supra note 16, at 29-34; MCCULLOGH, supra note 16, at 15-113; Robert E. Snow & David E. Wright, Coney Island: A Case Study in Popular Culture and Technical Change, 9 J. OF POPULAR CULTURE 960 (1976).
97 See Snow & Wright, supra note 96, at 964; see also KASSON, supra note 16, at 29.
98 See MCCULLOGH, supra note 16, at 45-47.
99 M'Kane Greatly Alarmed: Exposing the Rottenness at Gravesend, N.Y. TIMES, Mar. 31, 1887.
100 See KASSON, supra note 16, at 33-34; MCCULLOGH, supra note 16, at 61-75; Snow & Wright, supra note 96, at 965. Not surprisingly, in a metropolitan area as populous as New York,
What might have been made a pleasure resort of lasting and increasing attraction—Coney Island and its beach—has been largely turned into a nest of dives, disreputable houses, gambling hells, and cheap and nasty shows. Security of person and property has been seriously impaired, order and decency have been violated with impunity, and respectable people have been steadily repelled.\textsuperscript{101}

McKane, who held amongst other official positions the office of Superintendent of Gravesend's Methodist Sunday Schools, was said to explain, "this ain't no Sunday school."\textsuperscript{102} He also said of "the Gut," the center of vice activities on Coney Island, that he did not "suppose there was a wickeder place on the globe than the Gut in its palmy days."\textsuperscript{103}

Public association of Coney Island with prostitution was so strong that when a New York newspaper mistakenly described a woman as a "concert hall singer and dancer at Coney Island," the New York Court of Appeals held that the news item constituted libel per se.\textsuperscript{104} The Plaintiff, Ida Gates, alleged in her complaint that a Coney Island concert hall

is a place of evil report, and a resort for disorderly and disreputable persons of both sexes; that the female singers and dancers therein are generally depraved and abandoned women, or are so regarded and understood to be, and as such are shunned and avoided by orderly and respectable people.\textsuperscript{105}

The Court explained that had the newspaper said that she sang in


\textsuperscript{101} Editorial, \textit{A Town Boss}, N.Y. TIMES, Apr. 1, 1887, at 4.

\textsuperscript{102} Attributed to McKane, see Snow & Wright, \textit{supra} note 96, at 965. McKane held a variety of offices, including Supervisor of the Town Board, Police Commissioner, and Chief of Police. Judge O'Brien of the New York Court of Appeals captured McKane's omnipresence and omnipotence in writing:

It would be quite tedious to enumerate all the various offices that he held with the important powers attached to them. It is . . . sufficient to say that there is scarcely any power of local government that can be exercised in a town, whether administrative or political that was not concentrated in his person . . . .

People v. McKane, 143 N.Y. 435, 469 (1894).

\textsuperscript{103} \textit{Quoted in} PILAT & RANSON, \textit{supra} note 94, at 99 (1941).

\textsuperscript{104} \textit{See} Gates v. New York Recorder Co., 156 N.Y. 228, 230 (1898). The holding that the statement constituted libel per se meant that Gates did not have to produce evidence of special damages in order to recover. The \textit{Recorder} story had characterized Ida Gates as something of a precursor of Anna Nicole Smith. Gates, the \textit{Recorder} stated in a story about her marriage, was a "dashing blonde, twenty years old, and is said to have been a concert hall singer and dancer at Coney Island." \textit{Id.} The newspaper also reported "that she had been secretly married to her husband [General Theodore B. Gates], who was 75 years old, and 'fond of pretty women'". \textit{Id.} The statements were incorrect. Apparently, Gates was thirty-five-years-old and new to Brooklyn, having grown up on a farm in upstate New York. She taught school until she married, and, the court tells us, "had never been on the stage in any capacity, never sung or danced at a concert hall or at any other place, and never had been in a concert hall even as a spectator." \textit{Id.} at 231-32.

\textsuperscript{105} \textit{Id.} at 230.
Manhattan or Brighton Beach, it would have done nothing to tarnish her reputation. But to place her in a Coney Island concert hall was tantamount to calling her a “woman of the pave,” and a member of “one of the lowest classes of the great army of fallen women.”

B. The Sins of the Fathers: Albert Cardozo’s Legacy

The spirit of reform that had been mustered against Boss Tweed and his Tammany cronies focused on Boss McKane and Coney Island as well. The push for reform led to a legislative investigation into McKane’s rule of Coney Island in 1887. Counsel for the committee investigating McKane and McKane’s interrogator before the committee was prominent New York lawyer John E. Parsons. Parsons, one of the founders of the Association of the Bar of the City of New York, was a veteran of such campaigns; he played a leading role in the battle with the Tweed Ring, and most notably, in the investigation that led to the impeachment of two judges associated with Tweed, George G. Barnard and John H. McCunn, and with the resignation in the face of impending impeachment of a third, Albert Cardozo, Benjamin Cardozo’s father.

The disgrace brought onto the family by the allegations that Albert had used his office on behalf of the Tweed Ring and their Robber Baron associates, Jay Gould and James Fisk, and that he had favored his nephew Gratz Nathan and in other ways engaged in political favoritism in appointing referees and receivers had a powerful impact on the family. Some have said that Benjamin Cardozo dedicated his career to undoing the taint brought onto the family name by these charges of corruption, though the family contended that Albert was innocent and had only resigned to spare his sick wife the ordeal of an impeachment trial. The investigation into McKane’s rule was featured prominently in the New York press, and given the familiar themes of boss rule and political corruption and the preeminent role of one of his father’s accusers, it seems unlikely that it escaped Cardozo’s attention.

106 Id. at 231-32. Coney Island concert halls catered to a variety of tastes. A number of them featured drag artists in addition to female performers. PILAT & RANSON, supra note 94, at 110-11.

107 See M’Kane Greatly Alarmed: Exposing the Rottenness at Gravesend, supra note 99 (discussing the Bacon investigating committee investigation of McKane’s rule).

108 See id.; MCCULLOUGH, supra note 16, at 72-75.


110 For a discussion of Albert Cardozo’s judicial career, the investigation and resignation, and their impact on the family, see KAUFMAN, supra note 12, at 9-20.

McKane's eventual downfall would have been much harder to have missed. The commission's report in 1887, which called for McKane's prosecution did not prompt legislative action, perhaps because of the influence of McKane's political allies. McKane's rule of Coney Island continued for another six years until his arrogance and the efforts of reformers led to his undoing. In November of that year, McKane and his cronies attempted to fix an election. McKane arrested a group of supporters of reform Supreme Court Justice candidate, William Gaynor, who had come to inspect the voter registration lists.\(^{112}\) Defying an injunction, McKane met an army of election observers sent on behalf of Gaynor, including Alexander Bacon, who had headed the committee investigation of McKane in 1887, and pronounced, "Injunctions don't go here." His police and cronies then beat and jailed the election observers.\(^{113}\) Ultimately, he was convicted of conspiracy to engage in election fraud and sentenced to six years in Sing Sing.\(^{114}\) The story was covered extensively throughout November and December of 1893, and into the early months of 1894, frequently making its way onto the editorial pages of the *New York Times* and other New York newspapers.

C. *Steeplechase and the New Coney Island*

Esther felt him over her, blocking the sun. She looked up and smiled to see him there—looking so solemn, in his flashy suit the color of peach ice cream and a brilliant blue bow tie. He tipped his hat to her, and held out his arm, and without even thinking about it she reached up and took it, and let him guide her back toward the parks.

Anyplace else, she would never have done such a thing. Anyplace else but on the beach on Coney Island, on a beautiful Sunday morning. She put the cheap, silver painted brush she had bought at Wanamaker's away, and took his arm, and let him lift her up, watching him watch the skirt of her costume slip slowly down over her bare, white legs.

*—Kevin Baker*\(^{115}\)

Coney Island changed dramatically in McKane's absence. To be sure, vice still abounded, and the phrase "going to see the elephant" a

\(^{112}\) See *McKane's Crowning Outrage*, *N.Y. Times*, Nov. 6, 1893, at 1; *Gravesend's Vote in Peril*, *N.Y. Times*, Nov. 7, 1893, at 1.

\(^{113}\) See *Coney Island's Brutal Boss*, *N.Y. Times*, Nov. 8, 1893, at 1. The headlines further proclaimed, "American Citizens Beaten by McKane's Ruffians," "Crowning Outrage at Gravesend," "Mr. Gaynor's Watchers Shamefully Attacked and the Supreme Court Defied." See also *McCullough, supra* note 16, at 83-113.

\(^{114}\) See *People v. McKane*, 62 N.Y. 829 (1894).

\(^{115}\) KEVIN BAKER, DREAMLAND 77 (paperback ed. 1999).
reference to the landmark elephant shaped hotel favored by prostitutes and their customers was understood to mean more than sight-seeing at an architectural oddity. Nevertheless, Coney was safer and more inviting because of the presence of the enclosed amusement park.

Captain Paul Boynton opened the first enclosed amusement park on Coney Island, Sea Lion Park, in the summer of 1895. There had been independent rides and amusements on Coney Island prior to 1895, but Boynton recognized the business value of bringing a group of amusements together within a single amusement park. Other parks followed. In 1897 George Tilyou brought his rides together and opened Steeplechase. Tilyou’s associates, Skip Dundy and Frederic Thompson left after the 1902 season to open Luna Park on the location of the struggling Sea Lion Park. Dreamland followed in 1904. Each new park was more spectacular than its predecessors.

As John Kasson has noted, part of Coney Island’s importance was the challenge that it presented to genteel Victorian culture. Victorian culture was rigid and formal in defining people’s roles. It emphasized restraint, self-improvement, sobriety, moderation, and self-control. The cultural standard setters were puritanical regarding sex. These cultural tastemakers rightly perceived their values and hegemony to be under assault in the late nineteenth and early twentieth century. They viewed with great concern social and cultural trends and feared the emerging commercial mass culture. Kasson describes amusement parks as “laboratories of the new mass culture.” Coney Island and its amusement parks represented one especially important battleground in the struggle between mass culture and the hegemony of older Victorian values.

As the average workweek declined and workers’ expendable income increased slightly, the issue of leisure became more prominent. Reformers and proponents of genteel culture saw leisure as both a problem and an opportunity. Play should ideally be put into the service of moral uplift. It could build character and encourage traits of discipline, fortitude, and self-control. Organized play in the workplace could encourage employee loyalty and help employers

117 See KASSON, supra note 16, at 57-58; MCCULLOUGH, supra note 16, at 300.
118 See KASSON, supra note 16, at 34, 61.
119 Id. at 8.
120 See id. at 9.
121 On trends in the length of the workweek and in worker income, see Snow & Wright, supra note 96, at passim and Appendix I at 974; see also ADAMS, supra note 116, at 60-65; PEISS, supra note 16, at 41-45.
identify natural leaders who might be promoted to supervisory positions. Indeed, proper recreation might blunt working class discontent by giving workers a greater appreciation for “life with all its drawbacks.”

So re-created, “his protest against conditions might be less bitter and perhaps be more effectively voiced, and he might be less often misled by delusive economic and social schemes.” Further, time dedicated to regulated, uplifting recreation and exercise, was time unavailable for the dissipation of the poolroom, beer hall, movie house, dance hall, or worse.

It is hard to overstate both the allure of Coney Island during this era and the challenge that it posed to genteel Victorian values. In 1909, for example, over twenty million people visited Coney Island. Adjusting for population increases, the number of visitors in 1909 exceeded by approximately twenty percent the total number of visitors to Disneyland and Disney World combined in 1989.


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123 Weaver Pangburn, The Worker's Leisure and His Individuality, 27 Am. J. Soc. 433, 441 (1922).
124 Id.
126 On one hot day during the 1947 season the attendance reached two and a half million. Adams, supra note 116, at 56.
129 See Aldous Huxley, Work and Leisure, Literary Rev., Aug. 30, 1924, at 1; Maxim Gorky, Boredom, 63 The Independent 309 (1907).
Steeplechase and its Coney Island competitors abandoned any pretense that recreation should uplift and encourage virtue. Amusements involved mechanical or gravity driven motion, loss of balance, and reckless gaiety. As Kasson writes, "Instead of games of competitive skill, which demanded self-control, Steeplechase emphasized games of theatricality and of vertigo, which encouraged participants to shed self-consciousness and surrender to a spirit of reckless, exuberant play."

Coney Island maintained an atmosphere of carnival and release. Patrons experienced this in a number of ways. Like carnival, Coney Island and its amusement parks were, in business historian Judith Adams' words, "a fantasyland of disorder, the unexpected, emotional excess, and sensory overload." Through their architecture and amusements, the parks engaged in displays of extravagance and grotesquery. George Tilyou had drawn his inspiration partly from the midway at the 1893 World's Columbian Exhibition in Chicago. Architecturally, the Columbian Exhibition and other period world's fairs adhered to the precepts of the City Beautiful movement. The City Beautifiers sought to use architecture and public art didactically to instruct and uplift. The amusement parks by contrast had no such pretensions. Yet, their owners were conscious of the importance of design. Indeed, in their architectural choices and use of elaborate ornamentation they deliberately mocked and parodied the City Beautiful movement with architecture that was intended to jar and disorient rather than uplift. Frederic Thompson, Luna Park's co-creator, and a former

130 Films included, the 1927 Paramount hit, It, starring Clara Bow, in which Clara, a shop girl who has "it," a euphemism for sex appeal, or sexual charisma, meets and woos the owner of the department store where she works at Coney Island. Bow was forever hence known as the "It girl." Another depiction of Coney Island was the Fatty Arbuckle and Buster Keaton short film, Coney Island (Parmount 1917). The short story writer, O. Henry, sets two stories in Coney Island, The Greater Coney and Brickdust Row. See 2 O. HENRY, COMPLETE WORKS 911, 1404 (Doubleday 1953) (1899).

131 To some extent, Dreamland, the last and least successful of the Coney Island parks adopted a veneer of respectability and bourgeois values. Its rides included morality tableaus depicting the Creation and the End of Days, complete with messages about the wages of sin and a requisite trip to Hell. PEISS, supra, note 16, at 131-32. Maxim Gorky wryly commented that "Hell is very badly done." Gorley, supra note 129, at 312. Perhaps because of this pitch toward middle-class respectability, Dreamland, despite its extravagance, was never as successful as Steeplechase and Luna Park. When it burned down in 1911, fire being an event common to the parks, its owners decided not to rebuild. PEISS, supra note 16, at 132.

132 KASSON, supra note 16, at 59.

133 ADAMS, supra note 116, at 41.

134 Among other things, he was inspired to try to bring the giant Ferris Wheel that he saw there to Coney Island. Unable to purchase the Ferris Wheel at the Chicago exhibition, he ordered another which he falsely trumpeted as the world's largest upon his return to Coney Island. KASSON, supra note 16, at 57.

135 For a discussion of Coney Island architecture as parody of the City Beautiful movement,
architect, explained that he used architecture to amuse and to "shout his wares."\textsuperscript{136} He added that he had "tried hard to make [architecture] as much a part of the carnival spirit as the band, flags, rides, and lights . . . and I have always preferred the remarks 'What is that?' or 'Why is that?' to 'Isn’t that a beautiful building?'"\textsuperscript{137} Creating this effect required a deliberate, disorienting jumble of architectural styles that would shock and dismay the City Beautifiers.\textsuperscript{138}

Coupled with this juxtaposition of styles was sheer extravagant display. The parks sought to be cities of light after dark. Luna Park boasted 250,000 light bulbs. Dreamland’s builders rose to this challenge and used one million light bulbs to illuminate brilliantly the Coney Island night sky.\textsuperscript{139} Nor did the parks leave the sideshow completely outside their gates. Again the amusement parks reached to take matters over the top, whether in highlighting the dramatic, the freakish, or the downright bizarre. Luna Park maintained premature baby incubators, which drew a steady stream of curious onlookers. Dreamland’s creators and its master of the exotic, Sam Gumpertz, had an especial fascination for these sorts of displays. Gumpertz imported "wild men" from Borneo and Ubangi tribesmen and women from Africa to display. He created, Lilliputia, a to-scale city, populated by 300 midgets and boasting a functioning fire department.\textsuperscript{140} Capitalizing on a widespread fascination with disaster, Luna Park and Dreamland staged recreations of such events as the Galveston and Johnstown floods. Each staged shows depicting fire fighters trying to control burning tenements. Dreamland’s “Fighting the Flames,” employed over 4,000 people, including acrobats who dived from sixth story windows to the fire fighters’ safety nets. In historian Ted Steinberg’s words: “No place was more calamity-ridden in turn-of-the-century America.”\textsuperscript{141}

All of the parks, but Steeplechase in particular, incorporated park goers into the show. Indeed, Tilyou’s marketing insight was that there was great opportunity for amusement in making the park goers in turn the show and the audience. The Steeplechase ride, the mechanical horse

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\textsuperscript{136} Frederick Thompson, \textit{Amusement Architecture}, 16 ARCHITECTURAL REV. 89 (1909), quoted in Bogart, \textit{supra} note 135, at 8.

\textsuperscript{137} \textit{Id.}

\textsuperscript{138} Thompson wrote that the architect "must dare to decorate a minaret with Renaissance detail or to jumble Romanesque with \textit{l'art nouveau}.” Thompson, \textit{supra} note 136, at 85, \textit{quoted in} Bogart, \textit{supra} note 135, at 8.

\textsuperscript{139} See PETER LYON, \textit{THE MASTER SHOWMAN OF CONEY ISLAND}, AMERICAN HERITAGE 14, 92 (1958); Snow & Wright, \textit{supra} note 96, at 967-68.


race ride that gave the park its name, as well as a number of other rides, emptied park patrons out onto the Blow Hole Theatre, also known as the Insanitarium, where both unsuspecting first-timers and veterans were put on public display as they tried to scurry to safety past an ominous cattle-prod or slapstick wielding midget, and past skirt-lifting air jets, all to the delight of an offstage audience. American painter Reginald Marsh captures this scene in his 1938 painting, *Airhole at Coney Island*, one of his many Coney Island paintings.\(^{142}\) Novelist Kevin Baker, also captures the experience magnificently in *Dreamland*, a novel situated largely in Coney Island. His protagonists, Kid Twist, a petty gangster who is hiding out on Coney Island, and Esther, a factory girl in the needle trades, who escapes the dual horrors of the sweatshops and her oppressive family in the excitement and romance of Coney Island have just met on the beach and gone off to Steeplechase. There, they ride together on the Steeplechase. Esther, a first-timer, has dismounted the horse and run off ahead of Kid before he can stop her, and she suddenly finds herself on stage. Baker writes:

She stopped to find herself on a stage—row after row of bleachers in front of her, every seat filled with laughing men and women pointing at her.

A terrible little man in a clown suit rushed up to her waving some kind of club in his hands, mongoloid face grinning hideously. He swung it at her, and she backed away, holding out her hands. He only kept advancing on her, swinging the cattle prod like a baseball bat.

"Piece of wretch!" she shrieked, barely dodging away in time.

"Wild animal!"

He laughed, calling her words back at her in his ridiculous, high, dwarf’s voice while he jabbed at her legs:

"Piece of wretch! Wild animal!"

She felt a terrible shock run through her body, as if a hand had wrapped itself around her heart. She fell back—and cold air rushed mortifyingly up her backside, blowing up the skirt of her mermaid bathing suit and making her jump in the air before the laughing crowd.

....

Kid came running onto the stage, shooing away the dwarf. The mongoloid clown smirked, and scooted around him—but there was something in his face that made him go on to torture the other riders. Kid wrapped his arms protectively around her, guided her out past

the Laughing Gallery and its barker:

"Come on in! Only a penny! You be the one laughing this time!"

It was fun, Esther told herself, feeling her heart pounding wildly. It was terrifying, she had beat it, she had got past the awful little man, had gone through it all and survived.

It was fun, and I liked it.¹⁴³

Recall that Murphy and his entourage spent most of their time watching others ride Steeplechase's various amusements. By alternating the roles of spectator and spectacle, Tilyou lessened the cruelty and sting of the moment. Patrons experienced release and hilarity rather than humiliation, though there was often something of a cruel edge to the humor. Kasson writes that:

[A] major attraction of Steeplechase was simply the sanctioned opportunity to witness the wholesale violation of dominant social proprieties. Momentary disorientation, intimate exposure, physical contact with strangers, pratfalls, public humiliation—conditions that in other circumstances might have been excruciating—became richly entertaining. The laughter of participants and spectators testified to their sense of release.¹⁴⁴

As in carnival, a trip to Coney Island was an invitation to shed conventional strictures and roles. As Russell Nye has described it, the amusement park gave those who visited it "a chance to be something other than what they are—workers, bosses, fathers, mothers, sons, daughters, anyone with responsibilities or socio-economic functions."¹⁴⁵ Edward Tilyou, George's son and successor as manager of Steeplechase, commented that factory girls in particular would get caught up in a "game of make-believe" putting on airs and pretending to have higher status jobs as office workers and summer vacation plans in the Adirondacks, while stenographers, in turn, pretended to be business women. But the loosening of social constraints affected everyone regardless of class or status, as explained by the school teacher who overtook by the "brakes off... spirit of the place," walked fully clothed into the sea.¹⁴⁶

In the end, however, much of the fun came down to sex and playful sexual titillation. Coney Island catered to the desire of young men and women to meet, and play in an exciting, yet safe, atmosphere. This was

¹⁴³ Baker, supra note 115, at 82-83.
¹⁴⁴ Kasson, supra note 16, at 61.
¹⁴⁶ Edward F. Tilyou, Human Nature with the Brakes Off—Or: Why the Schoolma'am Walked into the Sea, 94 Am. Magazine 19, 21 & 86 (1922). Coney Island as a place where people crossed barriers of class is a theme of the Clara Bow movie, It, discussed supra at note 130.
strategically located not only on the stage of Blow Hole Theatre, but at various locations within the park. Riders on the Dew Drop found themselves sent down a slide to the Human Pool Table, consisting of a set of large discs rotating in different directions that sent the riders sprawling into each other with skirts flying as they tried to make their way to the edge.\textsuperscript{160} In the eyes of one contemporary critic, these rides constituted, “Cupid’s heavy artillery.”\textsuperscript{161}

It is perhaps not surprising that when Sigmund Freud visited the United States in 1909 to deliver a series of lectures at Clark University, his American hosts took him to Coney Island. Regrettably, but understandably, they took him to Dreamland. Unfortunately, we have no real record of his impressions. In an interview in 1956, Freud’s biographer and American host, Ernest Jones, said that Freud, “wasn’t much amused.”\textsuperscript{162}

While all three parks attempted to appeal to a broad audience, there was a distinct difference in tone and appeal among them. Dreamland attempted to adhere more closely to genteel values, and perhaps, as a consequence, was the least successful of the three. Among its rides, for instance, was a trip to Hell, which showed the eternal fate of sinners. Perhaps many patrons agreed with Maxim Gorky, who dismissively said that Hell was “badly done.” At any rate, when fire destroyed the park in 1911, its owners decided not to rebuild.\textsuperscript{163}

By contrast, Steeplechase, the most enduring of the three, made a deliberate effort to attract working-class patrons. The combination ticket permitted patrons to ride once on each of Steeplechase’s amusements for the price of admission. The park advertised in working-class newspapers, and offered a variety of special rates.\textsuperscript{164} And, as Kathy Peiss notes, the park incorporated elements of working class culture, and particularly that of its youth subculture.\textsuperscript{165} Peiss argues that Steeplechase shared with that subculture, “familiarity between strangers, permitted a free-and-easy sexuality, and structured heterosocial interaction.”\textsuperscript{166}

By the 1920s, Coney Island’s place in popular culture and in the lives of New Yorkers had long been solidified. With the completion of the subway line to Coney Island in 1920, the number of annual visitors increased further.\textsuperscript{167} This period also brought to a head the conflict

\textsuperscript{160} See McCULLOUGH, supra note 16, at 309-10, 313. The Human Pool Table is depicted in a 1938 painting, entitled “Human Pool Tables”. See GOODRICH, supra note 141, at 123.

\textsuperscript{161} Croy, supra note 149.

\textsuperscript{162} Three Men, NEW YORKER, Apr. 28, 1956, at 34-35.

\textsuperscript{163} See PEISS, supra note 16, at 131-32.

\textsuperscript{164} See id. at 135-36.

\textsuperscript{165} See id. at 136.

\textsuperscript{166} Id.

\textsuperscript{167} See Snow & Wright, supra note 96, at 971.
between the defenders of genteel values and culture and the mass culture that Coney Island represented. One of the battlegrounds was the realm of amusements, especially amusements for immigrants and the poor.168

A variety of progressive-era social reformers condemned Coney Island (and such other popular entertainments as dance halls and movie theatres). They regarded such amusements as one more corrupting aspect of urban life. Reformers worried about the effect on the family of amusements that catered to groups of young people. They decried the free and easy sexuality in a setting where so many young people had escaped the oversight of their parents. They also brought to bear on commercial amusements the same skepticism that they had toward other unregulated commercial activity.

The reformers responded to the challenge of these commercial amusements in a variety of ways. As had earlier critics they importuned would-be indulgers (especially young women) to avoid the temptations of such places and cautioned their parents to keep their children from a path that led to dissipation. Robert Harland urged parents of daughters heading to the city: “Teach her that it is not the White Slave Traffic she must dread alone. Teach her that it is the place of amusement that seems innocent, the drinking of pleasant drinks, the association with characterless men.”169 They encouraged and pressured theatre owners and park owners to clean up the tawdrier aspects of their establishments and to remove sources of temptation for young men and women. Reformers also attempted to enact legislation requiring the provision of chaperones at amusements frequented by large numbers of unsupervised youth.170 Finally, and largely unsuccessfully, they tried to compete with these amusements by providing wholesome alternatives. Progressive reformers sought to substitute for amusement parks and similar amusements play that would serve as an instrument of uplift and moral development under the auspices of reform municipal governments, settlement house workers, and play experts. The “play-movement,” saw in control of play the ability to shape American culture and with it the American future.171 As Kasson notes:

Public parks and gymnasiums would replace city streets as the playgrounds of the poor and, by instilling habits of discipline and cooperation, help to eradicate poverty itself. Community centers would supplant poolrooms and saloons as agents in the acculturation of recent immigrants. Recreation programs for factory workers and their families would make employees more content and productive.

171 See id. at 180-84; KASSON, supra note 16, at 101-04.
In such ways, reformers wished to supercede amusement parks and other commercial recreations with more orderly and highly regulated amusements, designed to discipline instincts and institutionalize them.\footnote{Kasson, supra note 16, at 102.}

Though the reformers were fated to lose the battle against mass culture, they met the task with fervor and commitment.

D. Enter Cardozo: "The Timorous May Stay at Home"

A judge, I think, would err if he were to impose upon the community as a rule of life his own idiosyncrasies of conduct or belief. Let us, suppose, for illustration, a judge who looked upon theatre-going as a sin. Would he be doing right if, in a field where the rule of law was still unsettled, he permitted this conviction, though known to be in conflict with the dominant standard of right conduct, to govern his decision? My own notion is that he would be under a duty to conform to the accepted standards of the community, the \textit{mores} of the times.

-Judge Benjamin Cardozo\footnote{Benjamin Cardozo, The Nature of the Judicial Process 108 (1921).}

Cardozo was a mild progressive and highly literate. He was undoubtedly aware of the reformers' criticism of amusement parks, but to appreciate the source of his distaste for Steeplechase one must look more closely at his life.

Benjamin Cardozo and his twin sister Emily, were born on May 24, 1870, the fifth and sixth children of Rebecca and Albert Cardozo. Albert Cardozo was then serving as a New York Supreme Court judge, following a successful and lucrative career as a lawyer. The family had achieved a level of wealth sufficient to support a comfortable existence. Upon his death, Albert left the family a substantial inheritance. Benjamin was then fifteen. The family held a position of prominence within the Sephardic Jewish community of New York, which then constituted the elite of New York Jewry. Like many of the families in the Sephardic community, the Cardozos could trace their roots to colonial America. Albert had served in a leadership role in the Spanish-Portuguese Synagogue that was at the center of Sephardic communal life. He also was well-connected to the upper strata of gentile New York society.\footnote{See Kaufman, supra note 12, at 1-27; Richard Polenberg, The World of Benjamin Cardozo: Personal Values and the Judicial Process 6-7, 14 (1997).}

Cardozo's childhood was marked by family tragedy and turmoil. His mother suffered from chronic emotional and physical illnesses
before she died when Benjamin was just nine. The scandal that led to his father’s resignation forced the family to move to less opulent surroundings while Albert rebuilt his career as a lawyer. As noted above, he, too, died before Benjamin was out of his teens.175

The Cardozos found comfort in family and home. The family had always been private and home-centered. This tendency was only strengthened by the scandal swirling around Albert. Though obviously buffeted by tragic and challenging events, in many ways Benjamin grew up sheltered within the cocoon of his family. There is no record of his attending public school, and there is good reason to believe that Cardozo was tutored at home. We do know that when he was thirteen the family employed Horatio Alger, the author of inspirational rags to riches tales, to tutor him at home. That relationship continued until he entered Columbia College at age fifteen.176

Not surprisingly, the boy who left that cocoon and entered Columbia appeared shy and studious to his teachers and peers. He was respected and liked by his peers, but he did not participate with them in the social life of the college.177 He was frail, and in Columbia President Nicholas Murray Butler’s words, “desperately serious.”178 Looking back years later, his former classmates would use such phrases as, “frail,” “small of stature and looking like a mere boy,” “[not] very strong, physically,” and “such a delicate youth,” to describe him.179 One former teaching assistant would later recount the experience of watching a professor pose a difficult question to his freshman math students:

One after another the boys failed to answer, until it was the turn of a frail lad—fourteen or fifteen years old. I can still see him rising quietly, hardly more than a child. I remember his voice—a soprano voice like that of a choir boy. It was Bennie Cardozo, giving the correct answer.180

With time he would overcome the shyness, though not the seriousness. His escape from physical frailty would be short-lived. Cardozo’s family was plagued by ill health, and his health had probably begun to deteriorate by the time he decided Murphy. Unlike Murphy, no one would have described him as “a vigorous young man.”181 Indeed, the contrast between Cardozo and James Murphy, so young, strong, healthy, and comfortable with Steeplechase’s casual sexuality, was quite stark.

175 See KAUFMAN, supra note 12, at 19, 21; POLENBERG, supra note 174, at 31-32.
176 See KAUFMAN, supra note 12, at 21-26; POLENBERG, supra note 174, at 18-24.
177 See POLENBERG, supra note 174, at 37-38.
178 WHITE, supra note 111, at 256.
179 POLENBERG, supra note 174, at 37.
180 Id.
One can hardly imagine Cardozo frolicking at Steeplechase. Historian Richard Polenberg writes of Cardozo: "He had no thrilling dangerous adventures, because he disliked traveling and hardly ever went anywhere." Instead, he took his adventures "in the world of ideas." He worked long hours, first as lawyer and then as judge. Much of his spare time he dedicated to reading. Andrew Kaufman writes, "Reading was one of the great pleasures in his life, and there were not many others." It was said that "[h]e reads Greek and Latin for pleasure." The physicality of the Coney Island excursion and of Murphy was foreign to Cardozo. Walking was his only regular exercise. He was occasionally pressed into golf outings, but he enjoyed the conversation far more than playing the game. Otherwise, he had no desire to engage in exercise or other physical exertion. His pleasures were in conversations with his friends, and his time spent at home with his Sister Ellen (Nellie). His life was that of the "cloistered cleric," not of the "clown" or the boisterous "crowd." As Kaufman notes, Cardozo's comment regarding the choice of the timorous in Murphy was not meant disparagingly. "He doubtless put himself in that category."

For Cardozo, home meant home with his Sister Nellie. Eleven years his elder, Nellie had become the family's surrogate mother upon the death of Rebecca Cardozo. Her relationship with Benjamin evolved from that of surrogate mother to one of unusually intense filial love. According to Kaufman, who draws on the observation of those who knew them best, "Ben's life revolved increasingly around Nellie ... Ben shared the details of his day with her, and they played chess and the piano together." Not everyone in the family saw this relationship as a healthy one. Cousin, Adeline Cardozo, believed Nellie to be domineering. Nellie, she said:

"[M]onopolized his later life. She was always regretful on the few occasions when he could not spend the evening with her in their . . . home. There he played [piano] duets with her, and stayed reading with her or to her until she went to bed . . . So devoted was Ben to his sister that he called himself Nellie's doggie, and was amused

182 POLENBERG, supra note 174, at xi.
183 KAUFMAN, supra note 12, at 5.
184 Id. at 158. Cousin Adeline Cardozo, frustrated in her efforts to get Benjamin to participate in her social circle, commented to him, "[y]ou've got all the brains and we've got all the fun." Id. at 68 (quoting interview by George Hellman with Adeline Cardozo (Nov. 6, 1938), Columbia Cardozo Collection, Box 9).
185 POLENBERG, supra note 174, at 3.
186 See id.; KAUFMAN, supra note 12, at 148-49.
187 KAUFMAN, supra note 12, at 261.
188 See id. at 67-68; POLENBERG, supra note 174, at 8.
189 KAUFMAN, supra note 12, at 68.
when other members of the family teasingly and affectionately used this phrase.  

Cardozo never married. In speaking of his bachelor state he often described himself as celibate, and there is no reason to doubt the accuracy of his description. Indeed, there is no evidence that he ever formed a mature adult relationship with any woman, other than the non-sexual but intensely close relationship he had with Nellie. Cardozo’s friend, Judge Learned Hand observed that sex, “not just in the carnal sense alone but all that goes with it ... was as nearly absent from his [life] as it is from anybody I ever knew ....”  

Why the flight from sex is a mystery. Perhaps, as Judge Posner suggests, it is consistent with the experience of other boys who are raised by older sisters after their mother dies young. Cardozo confided to a cousin that he would never marry because he “could never put [Nellie] in second place.” Certainly, there is something more complicated at work here, however, since Benjamin’s twin sister, Emily, was the only one of the Cardozo children to marry. Her marriage out of the faith caused great family consternation and may have signaled to Cardozo the dangers of leaving the hearth to marry.  

Whatever the reason, Cardozo’s relationship with Nellie served as a safe substitute for a sexual relationship with a spouse. The closeness of that relationship mimicked that of a marriage, indeed exceeded that of many marriages, except for the absence of a sexual aspect to the relationship. It is not pushing the point too hard to say that from a mother-child relationship their relationship had evolved into a surrogate marriage, one that was nonsexual, and therefore non-incestuous, but resembling a marriage all the same. 

Cardozo’s sexual discomfort manifested itself in other ways, as well. He was prudish and judgmental in matters relating to sex. He reacted strongly and negatively to his cousin Annie Nathan Meyer’s play, “Black Souls,” which depicted a sexual relationship between a white woman and a black man. Reflecting the prejudices of his era, he wrote to her that: “The love of a white woman for a black man has in it something so revolting that many ... will not wish to hear of it. I know that you will say that such things exist in life. So do many sex

190 Interview by George Hellman with Adeline Cardozo (Nov. 6, 1938), Columbia Cardozo Collection, Box 9, quoted in POLENBERG, supra note 174, at 8-9.  
191 See POLENBERG, supra note 174, at 132.  
192 KAUFMAN, supra note 12, at 68. Hand’s comment continued with the heterosexist observation, “from anybody I ever knew that wasn’t gaited the other way.”  
194 GEORGE HELLMAN, BENjAMIN N. CARDozo 49 (1940), quoted in KAUFMAN, supra note 12, at 85.  
195 On Emily Cardozo Bent, see KAUFMAN, supra note 12, at 65-66.
perversions that it is unpleasant to think of . . . ."\(^{196}\) He was uncomfortable and unhappy when some United States Supreme Court clerks took him to a Noel Coward play that dealt with adultery.\(^{197}\)

More generally, he adhered to Victorian notions about women’s virtue and the dangers that threatened that virtue. Richard Polenberg’s explorations of some of Cardozo’s decisions dealing with matters of gender and sex reveal nineteenth-century notions about virtuous and fallen women and about women’s role within marriage.\(^{198}\)

As described above, Steeplechase flaunted a sexual ease and comfort that must have baffled and troubled Cardozo. My point is not that Cardozo responded to Steeplechase in a result-oriented manner. Indeed, had he wished to punish Steeplechase he would have affirmed the judgment. Neither am I arguing, however, that his reactions to Steeplechase only affected the tone of the decision. His worldview was relevant to the decision and may have affected its outcome. Given his background, beliefs, and proclivities, I believe that Cardozo was especially open to the argument that Steeplechase was a dangerous place and that Murphy had assumed the risk of his accident.

III. DEFINING STEEPLECHASE

A. Accidents Will Happen: How Steeplechase Dealt with Accidents and the Threat of Liability

Of course, accidents did happen at Steeplechase. The infirmary, to which Murphy’s friends brought him obviously served multiple purposes. People might be stricken by the heat of a summer day, by a bad plate of clams at Feltman’s Restaurant, or by over indulging in Nathan’s Coney Island hot dogs. The infirmary served those patrons along with Steeplechase employees who might get sick or hurt. But it also served those patrons who suffered the range of injuries from cuts and friction burns to broken bones and worse. Sometimes the accidents were grave. In August 1931, William Nevins lost his balance on the Venetian Gondola as he attempted to get to a seat and fell out of an open side to his death.\(^{199}\) Four years later, John Barke, a ten-year-old boy, fell to his death from a Steeplechase horse.\(^{200}\) An especially

\(^{196}\) Id. at 155.

\(^{197}\) Id. at 482.

\(^{198}\) See POLENBERG, supra note 174, at 124-56.

\(^{199}\) See Nevins v. Steeplechase Amusement Co., 273 N.Y. 554 (1937). For a different, though ambiguous, description of the accident, see ONORATO, supra note 41, at 74 (Sunday, August 16, 1931 entry). Nevins’ survivor brought suit in December 1931. Id. at 81 (December 5, 1931 entry).

\(^{200}\) See id. at 173 (August 6, 1935 entry).
dramatic accident occurred on August 1, 1933, when a pool balcony collapsed sending approximately 100 persons crashing down to the pool deck below.\(^{201}\)

The tort actions brought against Steeplechase are further evidence that serious accidents happened. Sometimes these resulted in reported cases.\(^{202}\) Beyond the reported cases, however, are numerous notations in James Onorato’s diaries of actions filed against the park and of his court appearances in tort actions.\(^{203}\)

The presence of Steeplechase’s lawyers, or their investigators, and its insurance company in the infirmary is further indication that accidents were part of the routine of running an amusement park. At the *Reinz* trial an investigator for Steeplechase’s lawyers testified that he just happened to be at the infirmary to investigate another case when the Reinzis’ were being treated. He further testified that he visited the infirmary between twenty and twenty-five times each summer season.\(^{204}\) In the 1940s, the park adopted the practice of stationing an adjuster from its insurance company in its infirmary full-time on weekends.\(^{205}\)

Steeplechase’s managers dealt with the risk and the reality of accidents in a number of ways. Onorato’s diaries indicate that management emphasized safety and careful upkeep of the rides. References to inspections pervade.

Additionally, managers acted to limit liability when the inevitable accident did occur. In effect, Steeplechase’s owners and managers attempted to assert their sovereignty (and with it their sovereign immunity) over the park, thereby removing it from the reach of New York State tort law. One method that they used was to post signs at every ride indicating that patrons rode at their own risk. It is impossible to assess how much control this gave Steeplechase over accident victims. Steeplechase attempted to rely on the sign posted at the Flopper in Murphy’s case, unsuccessfully. Murphy simply denied that he had noticed the sign and its message.\(^ {206}\) Moreover, there is some indication that New York courts were disinclined to give much force to such signs. Nevertheless, many hurt patrons, either aware of the signs,
or made aware of them by Steeplechase employees after the fact of an accident, may have agreed on the spot to accept minimal compensation for their pain in part because they assumed that the signs would negate any right to recovery they might otherwise have had.

There is also reason to think that Steeplechase was fairly aggressive about attempting to head off liability before the hurt patron left the park. According to Michael Onorato, park manager James Onorato's son, his father's practice for minor injuries, such as "a friction burn . . . or a scraped knee and torn pants or anything short of sutures and bone-setting," was to treat the person in the infirmary, and to "try to bring closure immediately, usually with a statement of release for the price of the trousers or dress together with $50 to $150 in today's dollars as compensation for the inconvenience." Onorato further notes that after 1946 the park stationed an insurance adjuster in the infirmary in order to fend off litigation by getting hurt patrons to sign a release. Apparently, the park's increased aggressiveness in obtaining releases while the patron was still in the park led to a significant decline in suits brought against the park.

It is also apparent that when it could not avert a lawsuit or settle a claim, Steeplechase defended itself forcefully in court. From the outset, Steeplechase prepared for litigation. It is clear from the trial record in both Murphy and Reinzi that the park's nurses and Dr. Hall were supposed to question the patron about the circumstances of the accident and make a record of the conversation in anticipation of possible litigation. Moreover, Onorato seemed to have enjoyed litigation as a competitive sport. His son recounts:

He usually went loaded for the kill, and he was quite willing to let the jury know that he won many cases of this kind. In later years, he would regale the family with how the plaintiff's lawyer would scream "Objection, Objection," and the Park's lawyer would laugh and the judge would admonish the jury to disregard the statement about how Mr. Onorato won cases such as these.

Of course, the Murphy decision may have enhanced the owners' exercise of sovereignty over Steeplechase. In his November 19, 1935, entry, Onorato recorded: "Went to court—Mildred Lucas v. T.R.Co. & S.A.Co.—$50,000. Whirlpool mixup—Murray Jenkins trying case for us. (Case dismissed on [Justice] Cardoza's [sic] decision by Judge Brennan.)" Onorato considered Murphy important enough to keep

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207 ONORATO, supra note 41, at 337 ("explanation of terms," "Accidents, Nurses, Emergency Room and Safety").
208 Id. at 335 ("suits & litigation"), 337 ("United States Fidelity & Guaranty (U.S.F. & G.").
209 See id.
210 Id. at 326 ("litigation and lawyers").
211 Id. at 182.
the Park’s original copy of the decision in his diaries.\textsuperscript{212} While \textit{Murphy} did not eliminate the prospect of liability, Onorato’s diaries suggest that Steeplechase won far more often than it lost. Whether or not the Park would have won most of these cases without the \textit{Murphy} precedent is impossible to tell. It is certainly likely, however, that \textit{Murphy} had some impact beyond the Lucas case.

B. \textit{The Perils of Dangerous Space}

The editors of \textit{The Legal Geographies Reader} observe in their preface that outside of the field of geography, most social analyses overlook “the importance, complexity, and dynamism of space.”\textsuperscript{213} Certainly, this is true of much of law and legal analysis. While some legal disputes are explicitly all about geography, in general, control and definition of space are often taken as an unexamined given. Sometimes, however, assumptions about space, whether or not consciously examined, have enormous impact on legal disputes. Though never expressly addressed in these terms, an issue at the heart of \textit{Murphy} was whether Steeplechase should be understood as either dangerous or safe space.

1. Dangerous Space in General

Whether or not it does so expressly, law sometimes demarks the boundaries of safe and dangerous space. For instance, at a time when tort law applied the impact rule to narrowly circumscribe the opportunity to recover for emotional distress claims, some judges carved out an exception for emotional injuries that occurred within the home.\textsuperscript{214} The home, in other words, was a safe haven, and one’s presence there had certain legal consequences. Interests in emotional security to which tort law accorded no legal protection in public byways, were protected within the boundaries of this safe space.

Our contorted history of vice regulation also involves the demarcation of safe and dangerous space. So long as the prostitute was considered a fallen woman, responsible for her own moral undoing, cities tolerated red light districts where one could indulge a taste for

\textsuperscript{212} See \textit{id.} at 343-44 n.89 (Michael Onorato’s explanatory endnotes).

\textsuperscript{213} Nicholas Blomley et al., \textit{Preface: Where is Law?}, in \textit{THE LEGAL GEOGRAPHIES READER} xvi (Nicholas Blomley et al. eds., 2001).

vice with only occasional legal penalty. Red light districts were a safe space for transgressive behavior. With the reconceptualization of the prostitute as a white slave, red light districts became dangerous places that could not be tolerated and had to be abated by law.\textsuperscript{215}

Characterization of a neighborhood as "bad" can have consequences for both criminal and tort law. Some courts have recognized a duty of premises owners to protect tenants or customers from the criminal acts of third parties if they knew or should have known that they were situated in a high-crime neighborhood. Taking a "totality of the circumstances" approach, these courts have held that even if the same or a similar crime had not occurred previously on the defendant's premises, it is appropriate to take into consideration the character of the neighborhood in determining what level of protection the defendant could reasonably have been expected to provide.\textsuperscript{216}

Considerations of neighborhood clearly have an impact on police practices, also. People who wander into the "wrong" space often do so at the risk of police attention. While racial profiling takes many forms, one common variant of the police stop for "driving while black" involves stops of African American motorists who drive in white, and especially in affluent white neighborhoods.\textsuperscript{217} These motorists have in the eyes of the police officer brought a bad neighborhood (embodied in themselves) to a good one, thereby incurring suspicion. The opposite scenario also occurs. The apparently affluent white driver, or just white driver, spotted by the police in a "high crime neighborhood" may also provoke police attention.\textsuperscript{218}

Being of, as well as being in, a "bad" or "high crime neighborhood" may trigger police attention. Chicago's anti-gang loitering ordinance, which was held by the United States Supreme Court


\textsuperscript{216} See, e.g., Delta Tau Delta v. Johnson, 712 N.E.2d 968, 973 (Ind. 1999); Seibert v. Vic Regnier Builders, Inc., 856 P.2d 1332, 1339 (Kan. 1993). For a thorough discussion of the varying approaches to this problem and rejection of the totality of the circumstances approach, see McClung v. Delta Square Ltd. Partnership, 937 S.W.2d 891 (Tenn. 1996).


\textsuperscript{218} Courts have condemned this police practice and ruled that this is an insufficient basis for establishing reasonable suspicion for purposes of a \textit{Terry} stop. See, e.g., People v. Bower, 24 Cal.3d 638, 649 (1979); Hughes v. State, 497 S.E.2d 790, 792 (Ga. 1998); State v. Nealen, 610 N.E.2d 944, 949 (Oh. App. 8th Dist., 1992).
to be unconstitutionally vague in City of Chicago v. Morales,\textsuperscript{219} did not distinguish between different Chicago neighborhoods. Nevertheless, the Chicago Police Department issued an order designating certain areas as the only ones in which it would enforce the ordinance.\textsuperscript{220} Similarly, while flight alone is not sufficient grounds for reasonable suspicion to justify a Terry stop, the character of the neighborhood in which this flight occurs may make a difference. In Illinois v. Wardlow,\textsuperscript{221} the United States Supreme Court held that flight that occurs in the face of a police convoy in a “high crime area” does create a reasonable suspicion sufficient to justify a Terry stop.

2. The Perils of Eroticized Space

Beyond treating certain areas as dangerous space, law has at times been especially wary of eroticized space. The status of gay bars, for instance, has often vacillated between that of safe and dangerous space. Gay bars can be a refuge from the hostile gaze of the law, and of society, which often has treated public expression of affection by gay or lesbian couples as, at best, distasteful and, at worst, legally sanctionable. In the past, city governments and police forces wavered between a policy of “benign neglect” and one of harassment and arrest of patrons and sanctions against the owners of gay bars. Neglect is double-edged. On the one hand, it allows these havens to function. On the other, neglect has often meant indifference to attacks on patrons. The combination of a desire to situate the bar in out of the way, and thus out of the public eye, places and under enforcement of the law to protect gay and lesbian victims of assault has often made the areas around gay bars dangerous space, where gay-bashers prey on patrons.\textsuperscript{222}

As Carol Sanger has noted in her insightful discussion of women and automobiles, the law has sometimes characterized cars as eroticized, and therefore, dangerous places. Like gay bars, cars could be both a “place of freedom and a zone of danger.”\textsuperscript{223} Indeed, precisely

\textsuperscript{219} 527 U.S. 41 (1999).
\textsuperscript{220} See id. at 48; see also Gary Washburn & Eric Ferkenhoff, City Targets 86 Hot Spots for Gangs, Keeps List Secret, CHI. TRIB., Aug. 23, 2000, at A1 (revised, post-Morales ordinance applied to designated publicly unidentified “hot spots” where drug trafficking is believed to flourish, mostly “crime-heavy neighborhoods on the West and South Sides,” prompting one resident to say, “It seems there are two laws. There’s one for this kind of area, and there’s another for everyone else.”).
\textsuperscript{221} 528 U.S. 119, 124-25 (2000).
\textsuperscript{223} Carol Sanger, Girls and the Getaway: Cars, Culture, and the Predicament of Gendered
as places of freedom, they also became dangerous places. In a culture that worried about the freedom to engage in unchaperoned courtship that the car offered young couples, the association of the automobile with sex was quickly established in our culture. Advertising campaigns in the 1920s characterized cars as “boudoir[s] on wheels.”\footnote{224} The association was not lost on parents or the courts. Parents seeking to have their daughters declared “incorrigible” by juvenile courts often invoked their unsupervised riding with boys in cars as evidence of their need for court supervision.\footnote{225} And FBI Director, J. Edgar Hoover, condemned autocamps in the 1930s as “dens of vice and corruption... haunted by nomadic prostitutes, hardened criminals, white slavers, and promiscuous college students.”\footnote{226}

As Sanger shows, this association of cars with sex has often made prosecution of men accused of rape difficult where a car figured in events. Defendants have used a woman’s willingness to ride in her attacker’s car or to give her attacker a ride to bolster their consent defense. Often courts have responded sympathetically. One British judge, for instance, declined to impose jail time for a rapist because the victim was “guilty of contributory negligence” for hitchhiking alone.\footnote{227} Some courts and juries have said, in effect, that a woman who gets into a male acquaintance’s car or lets him into hers knowingly enters dangerously sexualized space, thereby inviting and assuming the risk of her assault. In \textit{State v. Chaney},\footnote{228} the Alaska Supreme Court ruled that it was appropriate to consider in mitigation of sentencing that the victim had voluntarily entered the defendant’s car before he beat, robbed, and raped her four times. Similarly, courts that have focused on how the rape victim was dressed treat the victim’s body as sexualized space and apply an analysis akin to assumption of risk.\footnote{229}

Recently, in a Title IX case involving peer sexual harassment in the school setting, Justice Kennedy, writing in dissent, suggested that adolescence, and therefore, schools more generally, are dangerously eroticized places. In \textit{Davis v. Monroe County Board of Education},\footnote{230} Justice Kennedy argued that because adolescent behavior is so

\begin{itemize}
\item \textit{Id.} at 728.
\item \textit{See id.} at 732-33.
\item \textit{Id.} at 731 n.99 (quoting \textit{WARREN A. BELASCO, AMERICANS ON THE ROAD: FROM AUTOCAMP TO MOTEL, 1910-1945} (1979)).
\item \textit{See Sanger, supra note 223, at 744.}
\item \textit{477 P.2d 441, 446-47 (Alaska 1970)}
\item \textit{On the introduction of evidence in rape trials of “provocative” dress as an invitation to intercourse, see generally Theresa L. Lennon et al., Is Clothing Probative of Attitude or Intent? Implications for Rape and Sexual Harassment Cases, 11 J. LAW & INEQUALITY 391 (1993). On this and other rape myths, see Morrison Torrey, When Will We be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions, 24 U.C. DAVIS L. REV. 1013 (1991).}
\item \textit{526 U.S. 629, 654, 672-77 (1999) (Kennedy, J. dissenting).}
\end{itemize}
frequently "inappropriate," schools could not have clear notice of what constituted harassment in contrast to normal, if offensive, adolescent behavior. Much of this behavior, he noted, involves teasing, taunting, and clumsy, unwanted overtures to members of the opposite sex. Quoting from the amicus brief of the National School Boards Association, he noted: "The real world of school discipline is a rough-and-tumble place where students practice newly learned vulgarities, erupt with anger, tease and embarrass each other, share offensive notes, flirt, push and shove in the halls, grab and offend." 231 Plaintiff, by entering into the adolescent world of school, should not be heard to complain about harassment by a classmate, no matter how devastating its effects on her, because her classmate’s behavior was "an inescapable part of adolescence." 232

Space can be, in other words, safe, dangerous, or something in between. Often these characterizations can be ambiguous, shifting, or contested. Nevertheless, it can make a great deal of difference whether a legal decision-maker conceives of a particular place as safe or dangerous. Framing Steeplechase as dangerous space could, therefore, have an important legal impact.

C. Making Steeplechase Dangerous Space

At trial, Steeplechase’s lawyers, Gardiner Conroy and Reginald Hardy, emphasized how safe the Flopper was. By extension, they contended that Steeplechase was a safe place. Given this groundwork, how were they able to suggest to Cardozo and the Court of Appeals that Steeplechase was a dangerous place?

Unfortunately, there is no record of oral argument. We can only know what Steeplechase’s lawyers argued in their brief. Steeplechase never did relinquish the argument that the Flopper was perfectly safe. Their first argument for reversal was that there was no proof of defendant’s negligence. 233

The lawyers next argued that the court should find as a matter of law that Murphy had assumed the risks of riding the Flopper. In doing so, they spoke not merely about the Flopper and the patency of its risks, but of amusement parks more generally. Amusement parks, they asserted, had become increasingly risky places, and their patrons knew it, and, indeed, demanded it. Opening this section of the brief, they wrote:

231 Id. at 673.
232 Id. at 675.
During the past decade we have witnessed a considerable change in the type of amusement devices popular in the usual amusement park. The old-fashioned mild type of amusement device has given way to the modern "thriller" where breakneck speed, abrupt drops and dizzy curves satisfy the sensation seeker. The patrons of these devices demand considerably greater speeds and more breathtaking plunges and drops.

This transition, however, has not been accomplished without the addition of an element of danger, and the patron who insists upon participating in the pleasures of such a device necessarily assumes the risk of being injured because of the very nature of the device itself.

... The general trend of the public toward speedier and rougher amusements has produced devices that rely upon the fact that the patrons are thrown about considerably for their amusement features. The general public, however, insists upon patronizing such devices and considers that it is enjoying itself in being so treated. 234

Of course, the Flopper bore little relation to the rides that they described. It had no "abrupt drops and dizzy curves," and though it moved faster than a normal escalator, it hardly achieved "breakneck speed." 235 It was far tamer than the roller coasters and other thrill rides alluded to by Conroy and Hardy. 236 The point of the passage was not to describe the Flopper, but to situate it in a place brimming with risk and to deny Steeplechase's agency in creating this risk. Steeplechase, the lawyers insisted, followed, rather than created, demand for thrilling rides. The rides were risky because the customers insisted that they be risky. The customers, in turn, as the moving forces behind ever increasingly dangerous rides, surely were aware of the danger. Whether or not the "timorous" need "stay at home," they need not hop on and knowingly engage in "reckless pleasures." 237

As noted in Part I, Conroy and Hardy also denigrated the park's

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234 Id. at 16.
235 As Kenneth Simons has pointed out, the ride was quite different from the typical modern escalator. Assuming that standards for escalators have not changed radically since the 1920s, Judge Tierney's instruction to the jury that they might draw from their own experiences riding escalators in deciding whether or not Steeplechase was negligent is consequently flawed and misleading. The belt was narrower than current standards and the Flopper moved more quickly than today's escalators or moving sidewalks. Simons, supra note 60, at 183-88.
236 Steeplechase relied primarily on two roller coaster cases. One, Knottnerus v. North Park Street R. Co., 93 Mich. 348 (1892), did not involve assumption of risk. Instead, at issue was the liability of an resort owner for the negligence of a third party. The other, Lumsden v. Thompson Scenic Ry. Co., 114 N.Y.S. 421 (A.D. 1909), did involve plaintiff's assumption of risk. In Lumsden, the plaintiff's assumption of risk was unambiguous, though the defendant's negligence also seems shocking. In addition, Steeplechase invoked a New York Court of Appeals decision, Barrett v. Lake Ontario Beach Improvement Co., 174 N.Y. 310 (1903), a case involving a public toboggan run, in which the Court reinstated a jury verdict for the plaintiff.
237 The characterization of these rides as "reckless pleasures" is from the brief. See Brief for Appellant at 19, Murphy v. Steeplechase Amusement Co., Inc., 250 N.Y. 479 (1929).
customers. Using language that suggested the nightmarish aspects of carnival, they linked Steeplechase with the "grotesque." Murphy and his companions spent much of their time "deriving more enjoyment apparently from watching the discomfiture and grotesque tumbling of others than from personal participation." Riders on the Flopper who could not maintain their balance either "tumbled off on the upholstery or slid grotesquely down the device to the starting point." Using language that suggested the disorder of carnival, they spoke of the "antics" of the Flopper's riders under the gaze of the crowd.

Finally, at every opportunity Steeplechase's lawyers emphasized Murphy's and his friends' participation as observers. Doubtless, they had nothing more in mind than to bolster the argument that Murphy had assumed the risk of his accident. However, this emphasis on the important role that watching the activities and pratfalls of others played in Steeplechase and other early amusement parks bolstered the sense of Steeplechase as eroticized, and thus dangerous space. As Freud has noted, there is often a strong libidinal component to the act of watching others, and as fiction writers have also noticed, the gaze is often freighted with eroticism. Watching is often the first step toward possessing in an erotic encounter. Here, especially, in the context of young men and women playing and courting in a carnival atmosphere, the emphasis on Murphy's status as an observer carried with it notions of the erotic gaze.

In sum, the argument furthered the notion of Steeplechase as dangerous and eroticized space, thereby making it easier for the court to credit the park's assumption of risk argument.

D. A World of "Riskless Risk": A Different Vision of Steeplechase

Cardozo and the Court of Appeals need not have seen Steeplechase as a dangerous place. Indeed, in a variety of ways, Steeplechase and the other Coney Island parks represented themselves as the opposite. Judge Tierney, for one, did see Steeplechase in this happier light. In his jury instructions he emphasized the romantic and pleasurable aspects of the park. He repeatedly presented it as a place for "sweethearts," and he described it as "the playground of the world" and as a place that provides "all kinds of entertainment, liquid, solid, things that make life

238 Id. at 2.
239 Id. at 5.
more enjoyable, especially to those whose conditions of life were like this lad's life was.\textsuperscript{241} The Court cannot be faulted for failing to see that which Charles Kennedy, Murphy's lawyer, neglected to point out to them. It is useful, however, to consider how Kennedy might have presented Steeplechase.

At the most basic level, the parks capitalized on their difference from the "old Coney Island." Both symbolically and actually, the walls that enclosed Steeplechase and the other parks, also served to send a message of safety by excluding the pickpockets, gamblers, petty thieves, and other unsavory elements of the old Coney Island.\textsuperscript{242} Tilyou and his competitors recognized that their parks would attract more patrons if they were perceived as clean, safe, and family-friendly. Luna Park's Frederick Thompson took pains to point out in his writings on Coney Island that the parks had put the unsavory amusements of old Coney Island behind them. Noted Thompson, "The clean show pays; the other goes to the wall."\textsuperscript{243} Albert Bigelow Paine reported reassuringly that the trip home at the end of a long day at Coney Island showed that the patrons were not the "old Coney crowd." Adults and children, both, were orderly, and men behaved like gentlemen and gave up their seats to women.\textsuperscript{244}

Indeed, some observers found that the sanitizing effect of the parks reached beyond their walls to the formerly tawdry sections of Coney Island. Albert Bigelow Paine wrote:

By some process the petty grafter seems to have been eliminated, and to have taken his victims and confederates with him. . . . Now we found that the lemonade was real lemonade in reasonably clean, large glasses, the restaurants were wholesomely kept, while the concert-halls supplied decent, even if not the highest order of, dramatic entertainment, and were patronized by thoroughly respectable men and women.

Remembering that the Bowery used to be the worst section of old Coney, we went over there. But even the Bowery was changed,—laundered, as it were. . . . Of course it was still a whirl of noise and exhibition and refreshment, but the noise was within the limits of law

\textsuperscript{241} Record at 98-99, Murphy v. Steeplechase Amusement Co., Inc., 250 N.Y. 479 (1929) (No. 37184/1926).

\textsuperscript{242} See Albert Bigelow Paine, The New Coney Island, 68 CENTURY MAG. 528, 533 (1904); Frederick A. Thompson, The Summer Show, 62 THE INDEPENDENT 1460, 1462 (June 20, 1907)[hereinafter The Summer Show]. Russel Nye has written, "[a]nd by enclosing the park and charging admission, operators immediately established control of who entered and what went on inside—creating an engineered environment, carefully planned to manipulate visitors into having fun but also spending money in an orderly, safe, relaxed atmosphere." Nye, supra note 145, at 65-66.

\textsuperscript{243} The Summer Show, supra note 242, at 1462; see also Frederick A. Thompson, Amusing People, METROPOLITAN MAG. 601, 608-09.

\textsuperscript{244} See Paine, supra note 242, at 538.
and order, and the exhibition and refreshment were more wholesome. Indeed, kinetoscope shows of a gay but harmless variety seemed to prevail where once painted and bedizened creatures attracted half-besotted audiences with vulgarity and display.245

In order to foster this sort of wholesomeness, Tilyou instructed vaudeville performers at Steeplechase that:

Performers playing in this house are requested not to use any Vulgarity or Slang in their act and to kindly omit the words Damn or Liar or any saying not fit for Ladies and children to hear . . . . Our audiences are mostly ladies and children, and what we want is only Polite Vaudeville.246

To be sure, Steeplechase emphasized couples and sensuality, but it was a sanitized sensuality, rendered harmless by the spirit of play. As Thompson wrote, "Coney Island is frisky, but it knows where to draw the line . . . ."247

More important, the parks gave patrons a variety of reassurances of the safety of their rides. Tilyou and his competitors quickly understood a fundamental maxim of the amusement industry: that people wanted to be temporarily frightened, but they wanted to know that no harm would befall them. A year before the Murphy decision, writer and newspaper reporter Homer Croy would capture this point quite clearly:

The strange fact about people is that they want to think that they are going to get hurt, and yet know they are not. Then they will laugh long and loud. A ride that gives all the thrills of a terrific danger and yet is as safe as a rocking chair is a sure romance maker, and a romance maker is a money-maker.248

Patrons craved thrills and the near miss, but they would only ride because they knew it was a pseudo-danger. The formula has not changed in the modern amusement park, and the sensation is familiar to any connoisseur of thrill rides. Albert Paine described one such ride, the Chutes, a water ride at Luna Park. Paine described reaching the summit of the ride from which riders briefly had a view of all of Coney Island before the boat in which he and his fellow passengers were riding plunged headlong downward. Then, "Ladies screamed, children clung wildly to anybody within reach. One great shocking plunge, a leap in the air, a heaving and a tossing, and the boat glided into the waters of the lake, to be brought to a safe landing. The frightened children pleaded to 'go again.'"249 According to Paine, the riders were "affrighted and delighted."250

245 Id. at 533.
246 PEISS, supra note 16, at 129.
247 The Summer Show, supra note 242, at 1462.
248 Croy, supra note 149, at 8.
249 Paine, supra note 242, at 537.
250 Id. at 536.
In order to reassure riders, the parks emphasized the safety of their rides. An advertisement for the Loop the Loop, for instance, stated: "No Danger Whatever." Some of the evidence adduced by Steeplechase’s lawyers looks quite different through this lens. For example, they argued that the padding around the Flopper must have alerted Murphy to the risks of the ride. To the contrary, one might view the padding as reassurance that the park had anticipated the risks and carefully eliminated them.

Similarly, both Steeplechase and Cardozo made much of the time that Murphy and his friends spent watching other people ride the Flopper and other amusements. Surely this must have alerted him to the risks. Of course, there is a difference between the risk of falling (perhaps the point of the ride) and the risk of breaking one’s knee. Moreover, the creators of the parks had designed them to encourage patrons to watch the activities of others. As noted above, their intent was partly because of their recognition that patrons enjoyed alternatively playing the roles of spectator and part of the show. Additionally, however, they recognized that watching others would lead patrons to venture onto the rides themselves. Thomson explained that the "opportunity to view things, . . . exercises an influence in inducing other people to ‘do’ them too." Consequently, Thomson, noted, park planners made sure to place their amusements in open spaces where park-goers could watch the "merriment" of others.

In his description of the "new Coney Island," Albert Bigelow Paine recounted such an experience of watching leading to doing. The illustrator who accompanied Paine suggested that they take a look at the "Loop the Loop," an independent ride that was outside of Luna Park. Paine describes the scene:

‘Of course we won’t ride,’ [the artist] said, ‘but it is worth while to see the others.’

We entered the inclosure and gazed up at the pair of great steel loops around which the cars are carried by the force of their own momentum. A loaded car was at the brink of a long incline. Suddenly it shot down; then for an instant it was in the circle, ascending, hanging, descending,—and straight away up another incline, passing beyond our view. We declared strenuously against this appalling amusement. Another car went around, and another, and another. We became silent in the sort of fascination that awaits impending disaster.

Finally I felt the thing fermenting in my blood. Nobody seemed

251 See KASSON, supra note 16, at 82. Similarly a brochure for St. Louis’ Forest Park Highlands promoted L.A. Thompson’s New Scenic Railway, as not only the “longest” and “finest,” but as the “Safest in the World.” Johnson, supra note 149, at 73.

252 Amusing People, supra note 243, at 608.
to be getting hurt, and I should like to have the record of that trip. I expected the artist to demur when I announced my intention, but he did not. Perhaps he was hypnotized. We buttoned our coats, as if starting on a cold voyage. I had an impulse to leave some word for the folks back home. Then presently we were seated in a car, slowly ascending the preparatory incline. 253

The builders of the Coney Island amusement parks created an "alternative world." To be sure, the park owners were motivated not by some interest in conducting a social experiment, but by the desire to make money. Park owners commodified amusement and competed to sell that commodity to as many patrons as possible. But their success depended on their ability to create a series of illusions. Important among these was the illusion that the park was different from the day-to-day world.

Steeplechase’s patrons entered a world in which the rules appeared to be relaxed. The formality of every day life gave way to open interaction with strangers. Behavior that would have been unthinkable outside the boundaries of the park was expected and encouraged and therefore went unsanctioned. One could be part of the spectacle, play the buffoon, expose a shocking amount of flesh as skirts billowed, spin to the point of vertigo, enter into casual conversations and flirtations and maybe find a companion for the evening, satiate the "hungering for terror," 255 laugh at the embarrassment of others without being rude, get caught up in the carnival spirit, and while away one’s time engaged in useless, but utterly satisfying, merriment without consequence. Moreover, as many contemporaries noted, Steeplechase drew out the child in its patrons. It encouraged childlike abandon and play. Perhaps, in doing so, it also encouraged youthful feelings of safety and invulnerability. Steeplechase, and the other parks were, in Russel Nye’s words, a world of "riskless risk, a place where one may take chances that are really not chances." 256

At least in tone and spirit, this artificial world was a long ways from the every day world of arms-length bargaining and contract, which gave root to the idea of assumption of risk. That is not to say that the doctrine of assumption of risk, or for that matter, the doctrine of contributory negligence, had no place on Coney Island. Rather, my point is that these doctrines ought to be understood and applied in the context of the inducements and representations of the parks.

253 Paine, supra note 237, at 533 (emphasis added).
254 The phrase is Russel Nye’s. Nye, supra note 145, at 66.
255 The term "hunger for terror" is from Thompson’s Amusing People, supra note 243, at 607.
256 Nye, supra note 145, at 71.
Perhaps none of this could have persuaded Cardozo to see Murphy's accident any differently. Perhaps his disbelief of Murphy's story, or unhappiness with Judge Tierney's one-sided jury instructions, or his distaste for the disorder of Coney Island made him immovable. However, one year before he wrote Murphy, Cardozo took the opportunity to recast the doctrine of proximate cause in Palsgraf v. Long Island Railroad, Co., 257 where he argued that risk and negligence were both relational concepts, dependent on context and the relationship between the parties. Given that vision in Palsgraf, he certainly might have been persuaded to regard assumption of risk, and its correlative concept of the extent of the duty owed by the defendant to the plaintiff, as similarly relational. Perhaps Cardozo could have been persuaded that the representations that Steeplechase was a safe space for merriment, risk-taking, and childlike play, where one could, in Rose Murphy's words, "take a chance" without anticipating real danger, meant that the threshold for knowing acceptance of risk would be very high. Perhaps, he might have also been persuaded that the creators of these artifical worlds of seemingly riskless risk owed a heightened duty to their patrons by virtue of the reliance in the sense they had created that this was safe space. Perhaps further, he might have been persuaded that there is an important difference between the open and obvious risk of falling, and the risk of breaking one's knee. After all, at Steeplechase nearly everything was possible.

IV. CONCLUSION: DOES ANY OF THIS MATTER?

"Danger: New York teemed with it at the turn of the century. It sped through the streets, spun on industry's shafts, fell from the buildings above, grabbed from the ground below."

-Randolph E. Bergstrom

By now, I hope, it is not necessary to mount an extensive defense of looking at cases and law historically. Others have already demonstrated the value of showing the contingent nature of legal decision making and the importance of context and of judicial temperament and biography in understanding law.259 Recognizing this

257 248 N.Y. 339 (1928).
contingency helps us to uncover the suppressed alternatives hidden in the language of appellate decisions and to see that which judges labor hard to make appear logical and inevitable as anything but.

Beyond these messages, Murphy's story raises the important issue of persuasion. Murphy's lawyer and Steeplechase's lawyers both faced the problem of persuading legal decision makers, both judges and a jury, that their client's story was the truer depiction of the events of that August night and that the law favored a judgment for their client. Each side had mixed success, as the litigation history makes clear. The Murphy story illuminates the importance of legal storytelling. It suggests that matters of backdrop and color, which seem incidental to the story that lawyers develop at trial and in their briefs and arguments, can have important persuasive effect.

Finally, Murphy's story highlights the importance of spatial thinking in the law and the broader question of how the law deals with safe and dangerous space. I have argued that the characterization of Steeplechase as dangerous space made it easier for Cardozo and the Court of Appeals to accept the park's argument that Murphy had assumed the risk of his accident. If I am right, then perhaps Murphy is but one of many cases that we might better understand through the prism of spatial assumptions.

More important, Murphy suggests the usefulness of thinking broadly about how tort law has dealt with safe and dangerous space. During Steeplechase's heyday, one could find plenty of danger lurking in New York City. Indeed, it is likely that during the late nineteenth and early twentieth century, the city was becoming increasingly dangerous. New construction, industrial expansion, the crowding of tenement housing and sweatshops, the introduction of automobiles, elevator trains, and subways, and the turf wars of established and upstart criminal gangs all contributed to this increased danger.

There were very dangerous places in New York. The New York Central Railroad's tracks ran down the center of Eleventh Avenue, resulting in countless accidents, and earning it the nickname, "Death Avenue." The number of industrial accidents increased. Near the end of Dreamland, Baker recounts the tragic events of the Triangle Shirtwaist Factory fire, in which 146 workers, predominantly young women, and for purposes of his novel, possibly including his protagonist Esther, lost their lives. The fire stands in contrast to his description of the fantasy tenement fire staged at Dreamland, "Fanning

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261 See generally BERGSTROM, supra note 258, at 31-57.
262 A 1927 Reginald Marsh painting depicting Eleventh Avenue is titled "Death Avenue." See GOODRICH, supra note 141, at 17.
the Flames," which always ended happily and safely, as acrobats employed by the park dived into firemen's nets. Outside of the park, the danger was real, not pretend, the ladders and nets were inadequate, and firemen watched helplessly as young women, not hired acrobats, jumped to their deaths.263 Tenements built quickly to nineteenth-century standards and filled beyond capacity with the immigrant poor seeking affordable housing were often fire traps, used dangerous, sometimes deadly elevators, and through their overcrowding and poor ventilation, helped to spread tuberculosis and other infectious diseases.264

The legal responses to these dangers and the effectiveness of those responses were varied. Needless to say, they are beyond the scope of this article. Perhaps, however, by looking beneath the appellate decision in Murphy, and beyond Cardozo's felicitous turn of a phrase, we will begin a conversation about our legal responses to safe and dangerous space.