

# Richard Posner, the Decline of the Common Law, and the Negligence Principle

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## INTRODUCTION

Richard Posner was certainly the most able judge in the history of tort law and in the development and deployment of law and economics. Tort law is at the center of hundreds of Posner's judicial decisions, the best known of which concern the choice between negligence and strict liability. But mastery is not the same as influence, whether for an academic or a judge. Unlike Benjamin Cardozo, the most influential judge in the field of torts, Posner did not have the opportunity to influence law on a state court before moving to the federal bench. Moreover, as noted by Professor Douglas Baird, Posner operated in a post-*Erie Railroad Co v Tompkins*<sup>1</sup> environment, in which federal judges hearing diversity cases might constrain themselves, knowing that state courts could reverse and insist that they had been misconstrued.<sup>2</sup> Inasmuch as I doubt Posner would have been so easily constrained, I prefer to emphasize that by the time he was appointed to the judiciary, many of the significant innovations in tort law, including employer liability and products liability, had already been introduced by earlier courts and legislatures. These sources of law had brought about a multistate switch from contributory to various forms of comparative negligence. More fundamentally, earlier lawmakers had chosen negligence, rather than strict liability, as the central principle of tort law—in contrast to contract law, in which strict liability dominates.<sup>3</sup> Despite these hurdles,

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<sup>1</sup> 304 US 64 (1938).

<sup>2</sup> Douglas G. Baird, *Unlikely Resurrection: Richard Posner, Promissory Estoppel, and The Death of Contract*, 86 U Chi L Rev 1037, 1038 (2019) (suggesting that when Posner sat in diversity he was not in a position to “introduce striking new ideas or boldly reshape existing law”).

<sup>3</sup> But see generally George M. Cohen, *The Fault That Lies within Our Contract Law*, 107 Mich L Rev 1445 (2009) (showing hidden elements of fault in contract law).

Posner's impact in answering the question of negligence versus strict liability is greater than that of any judge in the last seventy-five years, and he eclipses both Judge Learned Hand and Judge Guido Calabresi, another founding star of law and economics.<sup>4</sup> Posner illuminated and championed the negligence principle during his academic career, and his understanding and intuitions about the negligence rule continued developing during his career as a judge. Earlier judges may have contemplated the division of labor between negligence and strict liability, but Posner refined this choice in ways that reflected a deep understanding of the choice between the two rules, and he did so with language that has guided other judges. His immediate influence might be described as incremental rather than monumental, but it is bolstered by the fact that he advanced a law-and-economics perspective in a manner that eliminated conceptual competitors.

The influence of Posner on torts will not be matched in the future. Posner's tort law decisions—distinctive, clear, and brilliant as they are—often expand or contract inherited principles. Significant decisions had already been made by earlier judges and legislatures, and these constrained Posner as well as his contemporaries and successors. His failure to shake the roots of tort law also reflects the decline of the common law over the last half century. He was part of an era in which the judiciary's energy and imagination were directed at constitutional law and questions of statutory interpretation rather than at any large-scale and novel transformation of torts, contracts, and other private law subjects. If the common-law era had a longer life, Posner might have redirected products liability, altered the structure of medical malpractice, and determined the scope of the least-cost-avoider principle. Had Posner not resigned from the judiciary at age seventy-eight, it is conceivable that he would have decided important cases involving autonomous vehicles or assigned the costs of adapting to and stalling climate change, and in this way influenced at least one country's reaction to this threat. Instead, these areas are destined to be guided by legislatures and administrative agencies rather than by confident and aggressive judges, whether

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<sup>4</sup> To be fair, Posner joined the judiciary thirteen years earlier than Judge Calabresi. The great Judge Hand is one of the most cited judges of all time, owing to his many contributions, including the Hand formula, which comes close to a statement of the negligence principle that dominates tort law. Of course, that principle predates Judge Hand. See Richard A. Posner, *Economic Analysis of Law* 194 (Wolters Kluwer 9th ed 2014) (pointing to specific cases using a cost-benefit analysis that were decided long before the Hand formula was articulated).

in the federal or state systems. As Professor Frederick Schauer has observed, the present age of lawmaking is one of specificity, of rules rather than standards, and with more extensive constitutions and statutes.<sup>5</sup> In the United States, with an old and relatively pithy Constitution, followed over time by active legislators and administrators inclined to respond to every perceived problem, judges are inevitably focused on extending constitutional rights and interpreting statutes. They are often appointed because of their perceived views about the administrative state and constitutional law rather than their experience with private law matters. They are neither inclined nor equipped to reformulate tort law.

Part I begins by describing tort law's choice between a negligence and a strict liability approach. Part II then explores some of Posner's best-known torts decisions in order to assess his impact and explain why he did not exert even greater influence—despite his willingness to describe facts and real disputes with Cardozo-like creativity.<sup>6</sup> Part II offers a law-and-economics twist to the question of why the common law of torts has declined in importance. Part III extends the idea to the common law more generally and argues that Posner's opportunity to boldly refashion tort law came too late for some matters and too early for others.

#### I. THE CHOICE BETWEEN NEGLIGENCE AND STRICT LIABILITY

Posner's obvious contribution was to push efficiency considerations to the center of tort (and other areas of) law. Beginning with his 1973 book *Economic Analysis of Law*, now in its ninth edition, he argued that as a positive matter, the common law, and tort law in particular, was largely efficient.<sup>7</sup> His discussion of the choice between strict liability and negligence and his explanation

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<sup>5</sup> Frederick Schauer, *The Failure of the Common Law*, 36 *Ariz St L J* 765, 769 (2004).

<sup>6</sup> The strength of some of Cardozo's best-known opinions stems from his willingness to bend the facts. *Palsgraf v Long Island Railroad Co*, for example, ignores the small chance that Helen Palsgraf could have located the individual who carried the fireworks, or "bomb," as Cardozo calls it. He also mischaracterizes the events leading to Palsgraf's injury to ensure that a reader construes any harm as exceedingly unforeseeable. 162 *NE* 99, 99–100 (NY 1928). Cardozo himself acknowledged, with respect to the writing of opinions, that "one must permit oneself, and that quite advisedly and deliberately, a certain margin of misstatement." Richard A. Posner, *Cardozo: A Study in Reputation* 43 (Chicago 1990), quoting Benjamin Cardozo, *Law and Literature*, in Margaret E. Hall, ed, *Selected Writings of Benjamin Nathan Cardozo* 339, 341 (Fallon 1947).

<sup>7</sup> See Posner, *Economic Analysis of Law* at 31–33 (cited in note 4).

of why courts did not take activity levels into account in assessing negligence—topics later expanded upon and formalized by others—are remarkable for their clarity and insight.<sup>8</sup> As a judge, Posner brought these insights to the case law and then, often because of the clarity and openness of his writing, to law school courses. Through his skilled writing as both an academic and judge, his view of law, once radical in the eyes of lawyers and legal academics, became widely accepted, though often resented and disputed. It may be that other judges feared that they would look foolish if they created conflicts with Posner's Seventh Circuit decisions. Posner got to lawmaking before Calabresi and other potential rivals, and he wrote with enough reach and authority that it would have been difficult for any judge to undo his influence on the language and values of tort law. Academics occasionally took issue with him,<sup>9</sup> but he ignored or dismissed competitors, such as the civil recourse theorists, who sought to define and resolve private law disputes differently.<sup>10</sup>

That Posner's influence falls short of Cardozo's is in part because he arrived late on the scene and generally did not try to undo settled law, whether made by judges or legislators. As noted earlier, legislatures and agencies have reduced the reach of private law judges. In the case of Posner and tort law, there was a second constraint on judicial influence. Prior to his judicial appointment in 1981, he had encouraged a generation of law-and-economics scholars, including Professors Steven Shavell and Alan Sykes, to analyze the efficiency of alternative arrangements in

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<sup>8</sup> See id at 205–09 (cited in note 4). See, for example, Steven Shavell, *Strict Liability versus Negligence*, 9 J Legal Stud 1, 6–8 (1980). Shavell and others were surely influenced by John Prather Brown, *Toward an Economic Theory of Liability*, 2 J Legal Stud 323, 338–43 (1973).

<sup>9</sup> See, for example, J.M. Balkin, Book Review, *Too Good to Be True: The Positive Economic Theory of Law*, 87 Colum L Rev 1447, 1463–64 (1987) (poking holes in some of Posner's rational actor assumptions, including the fact that not all tort victims sue); Jed Rubenfeld, *The First Amendment's Purpose*, 53 Stan L Rev 767, 779–81 (2001) (criticizing Posner's cost-benefit approach to free speech); Jed Rubenfeld, *A Reply to Posner*, 54 Stan L Rev 753, 755 (2002).

<sup>10</sup> See Richard A. Posner, *Instrumental and Noninstrumental Theories of Tort Law*, 88 Ind L J 469, 471–75 (2013). Civil recourse theory, as popularized by Professors John Goldberg and Benjamin Zipursky, is the view that the law of torts is “a law of wrongs and recourse” among private individuals rather than a means for allocation of losses. John C.P. Goldberg and Benjamin C. Zipursky, *Torts as Wrongs*, 88 Tex L Rev 917, 918 (2010). Posner contrasts this theory with realist and economic approaches to tort law, characterizing it as predominately moralistic. Posner, 88 Ind L J at 470 (cited in note 10).

tort law.<sup>11</sup> Many breakthroughs in tort theory were thus influenced by Professor (rather than Judge) Posner, who may have scared off serious dissent because of his expertise and withering analyses, but who encouraged those who were comfortable with his method to add to the general understanding of law and economics. Posner may therefore deserve indirect rather than direct credit for some important developments in the law. Finally, Posner was less (directly) influential than he might have been because he understood and taught that alternative rules available in tort law were often reasonable, as there were a number of ways to promote economic efficiency. He had no reason or inclination to turn the field upside down when it had already found its way, through common law judging or market pressures, to one of several reasonable rules. Posner himself understood and explained the sense or genius of these inherited rules.<sup>12</sup>

Still, there were (and remain) areas of tort law that Posner could have influenced because they were unsettled or ripe for clearer rules. The most important of these was the extent to which strict liability ought to intrude on areas previously governed by a rule requiring plaintiff to show that a defendant had been *negligent* (and caused the defendant's loss) in order to recover for a loss.<sup>13</sup> Negligence was, and remains, the fundamental rule of the system, but just as an earlier generation had brought strict liability to bear on the manufacturers of consumer products, there remains room for other matters to be governed by—or freed from—strict liability. Some economists were quick to favor strict liability, albeit with a complete defense of contributory negligence,<sup>14</sup>

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<sup>11</sup> See generally Shavell, 9 *J Legal Stud* 1 (cited in note 8). See also Alan O. Sykes, *Strict Liability versus Negligence in Indiana Harbor*, 74 *U Chi L Rev* 1911, 1931 (2007).

<sup>12</sup> See, for example, Posner, *Economic Analysis of Law* at 300–01 (cited in note 4).

<sup>13</sup> Conventional tort law is based on the negligence principle, though products liability, employer liability, hazardous activities, and several other areas are governed by strict liability. For example, a leaking, exploding, or otherwise defective automobile that causes injury makes the manufacturer (or seller) liable even if it can be shown that the product was not negligently made. If, for example, one in a thousand of these products is defective because of a flaw in a metal component or some imperfect glass, and these defects could not be discovered except at inefficiently high cost, there is liability under strict products liability assuming that causation can be shown.

<sup>14</sup> See generally Simon Rottenberg, *Liability in Law and Economics*, 55 *Am Econ Rev* 107 (1965). Rottenberg regards strict liability as “The Rule of Economics” as opposed to a fault-based rule, which is denigrated as “The Rule in Law.” *Id.* at 107–08. However, he uses the example of international air transportation to make the case for liability regardless of fault without recognizing that passengers are unlikely to be able to vary their activities once aboard. *Id.* at 110–14. But see A. Mitchell Polinsky, *Strict Liability vs. Negligence in a Market Setting*, 70 *Am Econ Rev* 363, 365–66 (1980) (recognizing imperfections of both

while Posner generally celebrated negligence in his academic work and then in his judicial decisions. When he did expand the use of strict liability, he was thoughtful and cautious.<sup>15</sup> The conventional law-and-economics affection for strict liability had also become the everyman's intuition; most observers are quick to favor corporate and other liability on grounds that it will cause well-financed actors to take the cost of accidents into account. Only those well-tutored in law and economics come to see that precaution-taking is likely to be unchanged if strict liability rather than negligence is the governing rule.<sup>16</sup> Posner's influence in this important area of tort law is subtle and easily unrecognized.

Under the conventional view, the problem with a negligence rule is that it does not fully take activity-level effects into account.<sup>17</sup> It is easier to think about joint care with respect to taking *precautions* than it is with respect to engaging in *activities*—and this is especially true if one thinks about certain kinds of accidents. Consider for example A, the owner of a car, who drives perfectly well on a rainy day but slides and crashes into another vehicle, owned by B, or into a pedestrian, C. If the injured party

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rules in the long run, but showing why strict liability is preferable in the short run with a fixed number of entrants). To be sure, some law professors also preferred strict liability, though not always for the reasons discussed in the text. See, for example, Guido Calabresi, *Optimal Deterrence and Accidents*, 84 Yale L J 656, 668–70 (1975); Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J Legal Stud 165, 174–85 (1974); Richard A. Epstein, *A Theory of Strict Liability*, 2 J Legal Stud 151, 152–60 (1973); Guido Calabresi and Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 Yale L J 1055, 1075–76 (1972); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 Harv L Rev 537, 543 (1972). See also Keith N. Hylton, *A Positive Theory of Strict Liability*, 4 Rev L & Econ 153, 154, 162–65 (2008), which begins with an observation about economists' preference for strict liability and follows with an analysis of when that preference is misplaced.

<sup>15</sup> See, for example, *Navarro v Fuji Heavy Industries, Ltd*, 117 F3d 1027, 1029 (7th Cir 1997) (describing the relevance of manufacturer negligence in cases of strict liability in contrast to prior Illinois case law); *Bethlehem Steel Corp v United States Environmental Protection Agency*, 782 F2d 645, 652 (7th Cir 1986) (approving the EPA's rejection of an activity-level-based proposal regulating Indiana steel production). See also generally *Konradi v United States*, 919 F2d 1207 (7th Cir 1990); *Indiana Harbor Belt Railroad Co v American Cyanamid Co*, 916 F2d 1174 (7th Cir 1990).

<sup>16</sup> See Eric A. Posner, *Probability Errors: Some Positive and Normative Implications for Tort and Contract Law*, 11 S Ct Econ Rev 125, 137 (2003).

<sup>17</sup> Under a negligence standard, actors will be held liable only if they are found to have neglected cost-justified precautions in their activity and a wrong resulted; under a strict liability standard, actors will be held liable for *any* harms resulting from the underlying activity. As a result, a strict liability standard may discourage actors from engaging in the underlying activity, whereas a negligence standard will encourage precaution-taking but will not substantially impact activity levels. See Shavell, 9 J Legal Stud at 19 (cited in note 8); Polinsky, 70 Am Econ Rev at 366 (cited in note 14); Stephen G. Gilles, *Rule-Based Negligence and the Regulation of Activity Levels*, 21 J Legal Stud 319, 320 (1992).

cannot identify any negligence on A's part, there is no liability and no recovery against A. There has developed a strong presumption of negligence for car accidents, so it might be useful to substitute dogs for cars: while walking his dog, B's dog snarls, and A's dog leaps out of control and injures B's or knocks over a pedestrian, C. Economists have been quick to point out that perhaps A had no great need to be out that day (or no need to have a dog or car on a city street in the first place). A's behavior might have been selfish and inefficient because nothing encourages A to take account of the likelihood of injury to B or C so long as A is nonnegligent in his precaution-taking. If law would allow the jury to evaluate A's reason for driving or dog-walking, it might find that A's *activity* was itself negligent, or somehow antisocial. With fewer cars on the road, there would be fewer injuries and, to complicate things, less pollution. For the most part, law does not entertain such arguments about activity levels, perhaps for the same reason that it does not require A to show that owning a car or dog was in fact socially useful. Economists and environmentalists do take activity levels seriously,<sup>18</sup> but it is widely thought that a negligence rule does not capture activity levels properly.

One might expect Posner and other law-and-economics adherents to favor strict liability, here and elsewhere, on the ground that it (ostensibly) forces the driver, for example, to take all the externally imposed costs of car ownership into account. Posner could have moved much of tort law to a strict liability regime, albeit with a contributory negligence defense in the mix; judges and commonly held moral intuitions would restrict or deny recovery by B if B jumped into harm's way from between parked cars. A similar argument in favor of strict liability brought about a dramatic increase in liability for environmental harms in both judicial and legislative lawmaking during the same period. Closer to one of the themes advanced here, Cardozo moved products liability law away from the doctrinal requirement of privity—which often immunized the manufacturer of a consumer product—to strict liability.<sup>19</sup> Posner could have done the same for other slices of tort law.

In fact, the common intuition in favor of strict liability as a means of accounting for externalized costs is wrong, or at least misleading. Posner understood this, to be sure, but he doubted a

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<sup>18</sup> See David Gilo and Ehud Guttel, *Negligence and Insufficient Activity: The Missing Paradigm in Torts*, 108 Mich L Rev 277, 289 (2009).

<sup>19</sup> See generally *MacPherson v Buick Motor Co.*, 111 NE 1050 (NY 1916).

court's ability to calculate the optimal level of activity to be undertaken by likely "victims."<sup>20</sup> Thus, it is easy to think of A driving less if A is encouraged by a liability rule to consider risks to others by thinking of the possibility of injuring B or C, despite A's careful driving, once he chooses to drive at all. It is far more difficult to think about C's optimal amount of walking or of walking in dangerous places.<sup>21</sup> Indeed, there is the matter of calculating the other activities in which C might partake if C is discouraged from walking at a given time or in a given place, and those too might cause injuries. Consider in this regard Posner's decision in *Konradi v United States*,<sup>22</sup> a case that is especially important because it did not go further in the direction of strict liability.<sup>23</sup> Posner's decision, along with his fame and expertise, likely restrained other judges from doing more on the basis of a misguided intuition. Returning to the first case imagined previously, in which A damages B's vehicle, the problem with holding A strictly liable, in order to get the right amount of driving or car ownership on his part, is that doing so takes away some of B's *incentive* to drive less. Attaching strict liability to one party will normally encourage an activity by the other. Generations of law students have had trouble with this point, perhaps because they think of the injured party as a pedestrian, depicted here by C, rather than as another driver. It is hard to see how a mere pedestrian will change her activity level, which is to say her volume and path of walking, simply because full recovery from a negligent driver is unavailable if this walking is socially imperfect. Excessive driving by B is easier to comprehend than excessive walking.

The idea that a strict liability rule against A might lead to inefficient behavior by another party who must contemplate the prospect of recovery from A is not much of a problem in the case of most consumer products. The consumer will face a higher price for a good once the manufacturer and seller anticipate strict liability. This higher price discourages the likely victim's activity; more precisely, it will discourage car and dog ownership, but it will not influence the amount and location of driving or dog-walking.

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<sup>20</sup> See Posner, *Economic Analysis of Law* at 206–10 (cited in note 4).

<sup>21</sup> Nor is insurance any help. The owner of a car gets some information from insurance premiums because driving can be measured, but walking is not easily verified by an insurer.

<sup>22</sup> 919 F2d 1207 (7th Cir 1990). See notes 35–41 and accompanying text for discussion of the case.

<sup>23</sup> See *id* at 1210–11.



With respect to some activities, it is plausible that it is the negligence rule that best controls activity levels. Consider B's and C's behavior as well as A's. The two car owners, B and A, do not know which of them will be injured in a potential crash nor which would be more likely to have caused an accident in a nonnegligent fashion. As such, the negligence rule does control their activity levels, just as strict liability does, because each party knows that the likelihood of an accident in which one will be unable to collect from the (nonnegligent) injurer is greater on a rainy day, for example, and certainly greater than if one walks or takes a train instead of driving to the intended destination. But when A and C are considered, a strict liability rule is inefficiently one-sided, or shortsighted, because it addresses A's behavior and not C's.<sup>24</sup> Strict liability, through which parties who can expect to be injured do not pay upfront for expected recoveries, ignores the fact that it takes two to tort. The typical owner of a car does not know whether he or she will injure or be injured on the road. Still, tort law has external effects; the extension of strict liability to cover injured nonpurchasers raises the price of cars and toaster ovens but does not directly affect those who may benefit from strict liability without paying for it as purchasers.<sup>25</sup>

The most obvious way for a strict liability system to take B's excessive driving and C's unnecessary or careless walking into account would be to expand the reach of contributory and comparative negligence to cover everyone's antisocial activity level. But as Posner recognized, this asks too much of courts and would raise the administrative cost of the (strict liability and negligence) system yet further, as parties would have to litigate the difficult question of B's and C's optimal levels and styles of driving and walking.<sup>26</sup> We have already seen some of the complications that would arise if courts tried to calculate C's efficient level of walking.

Another way to take both parties' behavior and activity levels into account would be to require *both* to pay in the event of an accident, under a rule that might be called "double strict liability." The obvious moral hazard, or undesirable effect on activity levels,

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<sup>24</sup> This argument is suggested in William M. Landes and Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 Ga L Rev 851, 911 (1981). See also Shavell, 9 J Legal Stud at 7 (cited in note 8).

<sup>25</sup> See Richard A. Epstein, *Products Liability: The Search for the Middle Ground*, 56 NC L Rev 643, 647 (1978).

<sup>26</sup> See Posner, *Economic Analysis of Law* at 200 (cited in note 4).

under such a rule could in theory be overcome by having both parties' payments made to the state or to a designated charity. Alternatively, a third party could pay in advance for the right to these payments.<sup>27</sup> Even less popular would be an economist's dream: law could demand cash from both parties and have some or all of the currency destroyed. The point is to avoid the moral hazard of someone hoping to be injured in order to collect double payment while fully deterring antisocial behavior. The important idea is that all parties are encouraged to drive both carefully and moderately. Needless to say, no court or legislature has been inclined to try either of these fanciful, academic solutions.<sup>28</sup>

It is worth repeating that strict liability does not misfire when it raises the cost of goods in anticipation of its application. These higher prices naturally control the activity level of most of those likely to be injured. The genius of negligence is that it imposes at least a partial activity-level effect on all parties, including C and passersby who are injured and did not pay for a good. It is fair to say that it is not obvious whether to prefer negligence or strict liability, and the prevalence of negligence is probably best understood on administrative grounds; both rules require investigation into parties' behavior, but a strict liability rule obviously requires more inquiries into damages. More interesting, I think, is the possibility that there is a universally held intuition that negligent people should pay for the harms they cause and then a fairly common intuition, perhaps (ignorantly) redistributive at its root, that businesses should pay for the harm their products cause even if there is no proof of negligence. The pockets of strict liability that are observed might conform to ethical sentiments as well as consideration of when one party or the other can vary activity level or think ahead about likely accidents.<sup>29</sup>

The argument can also be seen in terms of Calabresi's famed least-cost-avoider principle<sup>30</sup>—easily mistaken for a brief in favor of strict liability.<sup>31</sup> Imagine that X, a guest at a hotel, is injured

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<sup>27</sup> Versions of this clever idea are explored in Robert Cooter and Ariel Porat, *Total Liability for Excessive Harm*, 36 J Legal Stud 63, 75–77 (2007).

<sup>28</sup> An optimist might say that activity levels are controlled by such things as congestion pricing, gas taxes, and tolls, but these are surely much lower (at least in the United States) than required for this purpose.

<sup>29</sup> Insurance here is also not of help, as previously discussed in note 21.

<sup>30</sup> See Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* 136–38 (Yale 1970).

<sup>31</sup> See, for example, Stephen G. Gilles, *Negligence, Strict Liability, and the Cheapest Cost-Avoider*, 78 Va L Rev 1291, 1338–39 (1992).

by pollution encountered while swimming in a lake bordered by the hotel. Multiple factories contribute to the pollution. Even if the hotel owner is not a negligent polluter, it might be held liable as the party best able to warn X against swimming. I think Calabresi would favor this result on least-cost-avoider grounds, which he might link to his proposed “reverse Learned Hand” rule,<sup>32</sup> even though liability might reduce X’s own ability to learn about unsafe swimming areas or lead X to engage in more swimming than is optimal. If swimmers are informed of the risk by a factory or by the hotel, but X swims anyway, it is unlikely that Calabresi would deny recovery even though it is X who is now likely the least-cost avoider. In any event, if safe swimming is a valuable activity that attracts guests, then in a simple application of the Coase Theorem<sup>33</sup> it should be noted that the hotel owner might bargain with the nearby factories to engage in less pollution. But this is a difficult set of bargains; the hotel may be the least cost avoider in some sense, but it is unlikely to know much about the precaution costs of the various factories. In practice, the problem is dealt with by the legislature and by administrative agencies, but the point is that a strict liability rule applied to the hotel, or to any of the factories, is unlikely to yield an efficient result. Activity levels are interactive, and a rule that limits liability to parties that are demonstrably negligent might be more likely to bring about optimal activity levels by all concerned.

There are of course other reasons to favor either negligence or strict liability. The latter saves courts and parties the cost of litigating negligence, although they will still need to litigate the question of contributory negligence. On the other hand, a strict liability rule necessarily comes with the cost of calculating damages in a greater number of cases.<sup>34</sup> Posner’s opinions rarely turn on these questions, and there is no reason to assess them here.

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<sup>32</sup> Calabresi and Hirschhoff, 81 Yale L J at 1059 (cited in note 14). A “reverse Learned Hand test” is one in which the injurer bears the cost of an accident unless the victim knew or should have known that accident avoidance by her was cheaper than the cost of the accident.

<sup>33</sup> R.H. Coase, *The Problem of Social Cost*, 3 J L & Econ 1, 6–8 (1960).

<sup>34</sup> See Steven Shavell, *Liability for Accidents*, in A. Mitchell Polinsky and Steven Shavell, eds, 1 *Handbook of Law & Economics* 142, 155 (Elsevier 2007).

## II. POSNER'S APPROACH TO NEGLIGENCE AND STRICT LIABILITY

One of Posner's best-known opinions is *Konradi*, a case that involved early-morning negligence by a rural mailman (as the letter carrier was called in the case) who, while driving to work, killed Glen Konradi.<sup>35</sup> The plaintiff sought to recover from the wrongdoer's employer, the United States, but respondeat superior, or vicarious liability, is traditionally restricted to work done by the employee in the scope of employment and for the benefit of the employer. Commuting to work is normally thought to be too removed from the scope of employment for liability to be imposed on the employer. Exceptional cases involve an employee who was driving home from a client meeting at lunchtime and one who used the employer's vehicle.<sup>36</sup> In his decision in *Konradi*, expanding strict liability to the employer, Posner quickly turns to the likelihood that strict liability would bring about a more efficient activity level.<sup>37</sup> It is one of the few judicial decisions that notices or has the courage to think about the choice between negligence and strict liability on activity-level grounds. Posner suggests that liability might lead to more efficient dispatching of salesmen<sup>38</sup> or perhaps more efficient rules about working from home. But did Posner also consider the likelihood that strict liability on an employer might lead to excessive driving by an employee, who may be freed from liability when a plaintiff chooses to sue the employer due to a sympathetic jury or the employee's inability to pay? There is also the question of whether Posner considered the activity level of drivers who might expect to be hit by postal employees on their way to and from work. Finally, there is the danger that strict liability will push employers to spend excessive time and energy on indemnification provisions in their contracts with employees.

It is significant that in *Konradi*, Posner does not attempt to create a rule of strict employer liability for all commuters. By limiting the decision to an employee who drives for a living,<sup>39</sup> Posner gives other drivers little reason to think that they can drive more and collect from another. He says:

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<sup>35</sup> *Konradi*, 919 F2d at 1208.

<sup>36</sup> See *State v Gibbs*, 336 NE2d 703, 705–06 (Ind App 1975); *Gibbs v Miller*, 283 NE2d 592, 594–95 (Ind App 1972).

<sup>37</sup> See *Konradi*, 919 F2d at 1210–11.

<sup>38</sup> *Id* at 1211.

<sup>39</sup> *Id* at 1212.

If it is true that one objective of the doctrine of respondeat superior is to give employers an incentive to consider changes in the nature or level of their activities, then “scope of employment” can be functionally defined by reference to the likelihood that liability would induce beneficial changes in activity. It becomes apparent for example that the employer should not be made liable for a tort committed by the employee . . . [when there is very low probability that the employer] would substantially reduce the likelihood of such a tort.<sup>40</sup>

It is apparent that Posner did incorporate the argument that activity-level considerations should be applied on both sides. If noncommuters know they can be compensated by even nonnegligent commuters, with no corresponding risk of paying for similar harms they themselves cause, they will engage in too much driving. Note that Posner avoids the conventional and simplistic thinking regarding strict liability in favor of some faith in the common law. When other judges, including Cardozo and Calabresi, might have used the case to expand strict liability, and when most judges would have abided by the rule that commuting activity is always outside the scope of employment, Posner allowed the case to go forward against the employer. However, he did so in a way that teaches other judges how to think about strict liability. Posner’s strategy here, as in so many other cases, was to use the case as an opportunity to interpret inherited law as efficiency enhancing and then to make modest changes consistent with this efficiency-minded approach.<sup>41</sup>

In another well-known torts case, *Indiana Harbor Belt Railroad Co v American Cyanamid Co*,<sup>42</sup> Posner again resisted the opportunity to follow conventional and mistaken economics. In this case, he refused to deploy strict liability, though it was arguably called for by conventional tort law’s rule—that a “dangerous” activity be governed by strict liability<sup>43</sup>—because doing so would discourage plaintiffs from searching out negligent parties

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<sup>40</sup> Id at 1210–11.

<sup>41</sup> See, for example, Posner’s reframing of the traditional negligence standard in *Brotherhood Shipping Co, Ltd v St. Paul Fire & Marine Insurance Co*, 985 F2d 323, 327 (7th Cir 1993), or his distinction between punitive and restitutionary damages paid in case of “efficient” copyright infringement in *Bucklew v Hawkins, Ash, Baptie & Co*, 329 F3d 923, 931–32 (7th Cir 2003).

<sup>42</sup> 916 F2d 1174 (7th Cir 1990).

<sup>43</sup> See, for example, *Rylands v Fletcher*, LR 3 HL 330, 339–40 (1868), affirming *Fletcher v Rylands*, LR 1 Ex 265 (1866); Restatement (Second) of Torts § 520.

who caused their harm. The case involved the allocation of cleanup costs following a spill from a railroad car.<sup>44</sup> Posner recognized that imposing strict liability on the manufacturer and shipper of chemicals, American Cyanamid, could be justified by the long-standing rule attaching strict liability to a dangerous product. Strict liability might control the amount and location of travel. But Posner argued that the default rule of negligence is adequate for the job in this case, and he noted that any of three other parties' negligence might have caused the spill.<sup>45</sup> Thus, even if strict liability has an activity-level effect, it is useful to revert to the negligence inquiry in order to deter a plaintiff's or a third party's negligent behavior. Posner declines to force American Cyanamid to bear the cleanup costs because it was not negligent, and another party might well have been at fault.

Again, a negligence rule gives both parties an incentive to behave in a desirable way. A strict liability rule puts all the burden on one side (assuming no contributory negligence) when a prospective plaintiff or another tortfeasor might be the superior cost-avoider. Posner again discovers and advances the cause of negligence when the law-and-economics approach might have been expected to favor strict liability. He finds new beauty in old law and thus outshines or refines Cardozo's reasoning. Posner sees that when multiple causal agents are in play, a strict liability rule attached to just one of several involved parties would give another injured party no incentive to point to negligence on the part of a third party. In such settings, the law ought to look first for negligence and only then, if there is none, deploy strict liability if that will affect the activity level of the party most likely to assess potential accidents and adjust its activity level accordingly.

In sum, Posner's tort law cases sometimes restrain the expansion of strict liability even when conventional economic thinking and moral intuitions favor it.<sup>46</sup> He came early to conclusions that are now found in the most sophisticated law-and-economics literature.

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<sup>44</sup> *Indiana Harbor*, 916 F2d at 1175.

<sup>45</sup> *Id.* at 1179.

<sup>46</sup> See Stephen G. Gilles, 21 *J Legal Stud* at 333 (cited in note 17).

### III. POSNER AND THE DECLINE OF THE COMMON LAW (IN MATTERS OF PRIVATE LAW)

If Cardozo's opinions are read generously—as I have encouraged elsewhere<sup>47</sup>—then Posner is a distinguished runner-up in the competition for the most influential judge in tort law, though Posner deserves credit for the openness of his decisions as opposed to Cardozo's obfuscation. Posner was simply too late to take the prize. Cardozo operated in the era of the common law, but by Posner's time the federal government was much larger, its statutes and agencies were ubiquitous, and the reach of federal constitutional law was also greater. In the Posner period, as compared to the Cardozo age, the federal courts (like law reviews) devoted far more effort to public law, and constitutional law in particular, and much less attention to torts, contracts, trusts and estates, and other private law matters. Posner himself might be best known for his public law decisions, as discussed elsewhere.<sup>48</sup> In the domain of private law, Posner operated at a time when the judiciary invested in statutory interpretation rather than common law decision-making.<sup>49</sup> Legislatures had taken over many fields, and law was expected to produce rules rather than standards and, more generally, to solve problems rather than to leave them to markets, evolutionary pressure, and common law decision-making. The golden age of the common law had ended. Judges were (and remain) evaluated on the basis of their constitutional law and administrative law decisions. It is worth considering whether this was inevitable and whether Posner could have reversed the decline of the common law.

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<sup>47</sup> Saul Levmore, *The Wagon Mound Cases: Foreseeability, Causation, and Mrs. Palsgraf*, in Robert L. Rabin and Stephen D. Sugarman, eds, *Torts Stories* 129–50 (Foundation 2003).

<sup>48</sup> Posner has written extensively on issues of public law, particularly with respect to intelligence agencies. See generally, for example, Richard A. Posner, *Uncertain Shield: The U.S. Intelligence System in the Throes of Reform* (Rowman & Littlefield 2006); Richard A. Posner, *Preventing Surprise Attacks: Intelligence Reform in the Wake of 9/11* (Rowman & Littlefield 2005); Richard A. Posner, *Remaking Domestic Intelligence* (Hoover 2005). Posner's prolific public law canon also includes Richard A. Posner, *Law, Pragmatism, and Democracy* (Harvard 2003) (representative democracy); Richard A. Posner, *Sex and Reason* (Harvard 1992) (sexuality and reproduction); Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 *BU L Rev* 59 (1987) (adoption and family law).

<sup>49</sup> This may or may not be because of the *Erie* doctrine, as previously mentioned in the text accompanying note 2.

The common law's decline can be traced to several things. The first is the growth of the full-time judiciary and of government itself.<sup>50</sup> In turn, this growth can be explained by public choice theory and is therefore a topic beyond the scope of the present Essay. It is apparent that interest groups more often seek government involvement than they do government neutrality. There is something of a predictable pattern to the subjects left untouched by government and thus open to credible political promises. Another strike against the common law is that it promises change in a world in which citizens and businesses think they want legal certainty.<sup>51</sup> Legislatures are perhaps more inclined to provide certainty, both because serious changes might be regarded as takings, triggering payment or discouraging change, and simply because interest groups are more likely to form to protect against losses than they are to organize to acquire new benefits. Identifiable losers will organize more than inexperienced and often uncertain winners.<sup>52</sup> This is ironic and debatable because on the surface it is judges who follow precedent and thus promise certainty. Finally, and perhaps most convincingly, the remarkable growth of arbitration has meant a reduced role for courts in the domains previously occupied by the common law.<sup>53</sup> If private parties take their disputes to less expensive, better informed, and more reliable private dispute-resolution mechanisms, there is less opportunity for common law evolution. Had judges been paid by the piece, they might have competed with private arbitrators, but instead judges have welcomed arbitration, perhaps because it reduces their workload or allows them to avoid areas in which they have little expertise. It should be noted that arbitration is usually unavailable or shunned by one or both

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<sup>50</sup> See Neal Devins and David Klein, *The Vanishing Common Law Judge?*, 165 U Pa L Rev 595, 624–25 (2017) (emphasizing the growth of the administrative state and how this, in combination with other factors including the proliferation of law clerks and lower courts' embrace of judicial hierarchy, is at odds with the common law style of judging).

<sup>51</sup> See Frederick Schauer, 36 Ariz St L J at 779–81 (cited in note 5).

<sup>52</sup> See Saul Levmore, *Voting Paradoxes and Interest Groups*, 28 J Legal Stud 259, 274 (1999).

<sup>53</sup> See Richard M. Alderman, *Consumer Arbitration: The Destruction of the Common Law*, 2 J Am Arbitration 1, 14–15 (2003), archived at <http://perma.cc/Z4GU-7JNG> (focusing on consumer protection law); David L. Noll, *Arbitration Conflicts*, 103 Minn L Rev 665, 670–74 (2018) (discussing the regulation of arbitration and its rise in several specific areas).



parties for matters associated with public law.<sup>54</sup> Either may seek to establish precedent, and that is not something arbitration offers. More generally, the decision in a private law case is likely to be context specific; an arbitrator can look into the facts of the case, and precedent would in any event be less valuable than it is in public law matters.

In short, Posner's talents and influence were constrained because his capacity for unpredictable analysis and judging was precisely the sort of thing that shifted power from judges to legislatures and agencies. In many areas of law, judges can be seen as competitors of legislatures and their agencies. At the very least, the two branches are alternative means of addressing private and social problems. Legislatures often act slowly, whereas a single judge can innovate at the request of an energetic litigant. This innovation can then spread through the judiciary and seem sufficiently sensible and effective that legislatures and agencies stay away or codify what the judge has advanced.

This last point suggests that an activist and confident judge can innovate where legislatures fear to tread. These matters are most likely to be found when changes in technology, demography, or scientific understanding bring about new questions for law or a rethinking of old rules. Consider, for example, the challenge of climate change. The phenomenon is widely thought to require international cooperation—and thus global negotiations followed by legislative action.<sup>55</sup> At the same time, and especially in a large economy like the United States, there is room for national and local precautions. Climate change is anticipated to impact citizens unevenly, and there are groups eager to support candidates who offer ameliorative regulations, subsidies for relocation, or other means of changing business and personal behavior. Legislators are likely to respond to the threat with statutes and rules regulating emissions and land use, and they may promise to expend resources in order to encourage cleaner energy usage or shifts in production and residential practices. The problem is political, intergenerational, and international—and therefore of growing interest to politicians and especially to insurgents.

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<sup>54</sup> See Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U Ill L Rev 371, 391 (noting that the Court historically held that Congress did not intend public law causes of action to be arbitrated).

<sup>55</sup> See, for example, David Cipler, *Rethinking Cooperation: Inequality and Consent in International Climate Change Politics*, 21 *Global Governance* 247, 253–55 (2015) (acknowledging the need for international cooperation in climate change policy).

It could have been otherwise. Just as environmental conditions are increasingly subjects of public law, influenced by legislatures and sometimes restricted by courts, tort law could have been used by aggressive litigants and courts to respond to the threat of climate change. With some changes in rules of standing and the measurement of damages, courts might have allowed suits against developers who eliminated trees or used one form of energy rather than another. As the planet warms, judges might take the lead in avoiding disaster by imposing liability on those who engage in antisocial activity, broadly defined. But this is the sort of judicial activism that requires a Cardozo or a Posner. Cardozo was on the scene before climate change was recognized, and Posner, or at least the early Posner, hesitated to tread where administrative agencies had failed even to investigate.<sup>56</sup> It is possible that as agencies and legislatures failed to take dramatic steps despite growing awareness of climate change, Posner would have used tort law to address the problem if given the opportunity by insightful and daring litigants. Courts have rarely addressed climate change head on,<sup>57</sup> but if Posner served another ten years, things might be different. Had he had the opportunity to address

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<sup>56</sup> See, for example, *Cronin v United States Department of Agriculture*, 919 F2d 439, 444 (7th Cir 1990) (“Administrative agencies deal with technical questions, and it is imprudent for the generalist judges of the federal district courts and courts of appeals to consider testimonial and documentary evidence bearing on those questions unless the evidence has first been presented to and considered by the agency.”).

<sup>57</sup> One obvious exception is *American Electric Power Co, Inc v Connecticut*, 564 US 410, 422, 429 (2011), in which claims were brought by a number of states and land trusts against American Electric for contributing to the alleged public nuisance of global warming. While the Supreme Court found that any federal nuisance claim was precluded by the existence of federal legislation on emissions regulation, it nevertheless was divided on the issue of Article III standing by the claimants and declined to determine the availability of state nuisance claims. *Id.* at 420. A number of courts have since taken on the question of environmental nuisance claims, including the Seventh Circuit. See, for example, *Michigan v United States Army Corps of Engineers*, 758 F3d 892, 898 (7th Cir 2014) (finding availability of nuisance claims despite failure to allege sufficient evidence of public nuisance in the instant case); *Washington Environmental Council v Bellon*, 732 F3d 1131, 1141–46 (9th Cir 2013) (finding that plaintiffs failed to allege sufficient causal nexus to substantiate nuisance claim); *Merrick v Diageo Americas Supply, Inc*, 805 F3d 685, 695 (6th Cir 2015) (finding that plaintiffs were not precluded from bringing common law nuisance claims for emissions under the Clean Air Act). Finally, *Juliana v United States*, 217 F Supp 3d 1224 (D Or 2016), may be a sign that “new era” cases will eventually find some courts willing to address climate change when the other branches of government have avoided either action or open rejection. *Id.* at 1261 (denying a motion to dismiss in a case alleging substantive due process violations on the basis that the federal government has failed to adequately respond to the threats of climate change). See also David Markell, *Can Non-statutory Federal Climate Litigation Drive Federal Climate Policy?* (ABA, Nov 9, 2017), archived at <http://perma.cc/K527-TCBY>.

the growing problem, Posner would have undeniably been the most influential tort law judge in history. He was on the bench a bit too early for this to occur.

Posner was not too early to take up the contemporary challenge of income inequality. But here too the legislature is firmly in control, and indeed Posner as an academic had argued that private law is not the proper engine for wealth redistribution.<sup>58</sup> It would have been surprising if his judicial decisions innovated in a way that was inconsistent with his academic writing. In any event, it is hard to imagine judges openly deciding cases as a means of bringing about large-scale wealth redistribution.

A more plausible counterfactual claim is that, with more time, Posner would have had great influence on the development of autonomous vehicles. These vehicles promise to reduce the costs of road accidents and deaths, but their development depends in part on changes in law, and tort law in particular. A judge (or legislature) with Posnerian courage and confidence might find a company negligent for *not* converting its fleet to autonomous vehicles. Again, a strict liability rule might do this painlessly—though there is the question of whether a victim could also have switched to a self-driving vehicle or other technology. Autonomous vehicles raise many such questions on a smaller scale. There will be accidents between these vehicles, and between conventional and autonomous cars, and there will be traffic delays caused by imperfect software. If we are willing to bring activity levels into the negligence calculus, it might simply be negligent not to recycle one's owner-controlled vehicle and switch to an autonomous transport. At present, it seems that these questions will be decided by legislatures. It might have been very different, and probably better, if Posner's brilliance and fearless judicial character had continued to influence law.

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<sup>58</sup> See Richard A. Posner, *Wealth Maximization Revisited*, 2 Notre Dame J L, Ethics & Pub Pol 85, 104–05 (1985).