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TRADITIONAL VERSUS ECONOMIC ANALYSIS:
EVIDENCE FROM CARDOZO AND POSNER TORTS OPINIONS

*Lawrence A. Cunningham**

Abstract

This Article contributes a new approach and evidence to the longstanding debate concerning the relative merits of traditional legal analysis compared to contemporary economic analysis of law. It evaluates prominent opinions of two judicial exemplars of the contending conceptions, the traditionalist Benjamin Cardozo and the economist Richard Posner, in torts, the field where economic analysis has greatest impact. Comparative critique of their opinions appearing in current torts casebooks, where they are the most ubiquitous judges, provides evidence that traditional legal analysis is a more capacious and persuasive basis of justification than contemporary economic analysis of law.

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I. INTRODUCTION

This Article contributes to the debate on traditional versus economic analysis in law,¹ presenting evidence from torts opinions of Benjamin Cardozo and Richard Posner. Proponents of economic analysis offer to show law's efficiency as a descriptive matter and prescribe using it,² especially in tort law,³ the field of its greatest impact.⁴ Skeptics question the method's descriptive accuracy and normative appeal, compared to traditional legal analysis,⁵ which has made similarly influential contributions to tort law.⁶ While other scholars use theoretical, philosophical, and doctrinal techniques to investigate,⁷ this Article

1. The referenced debate can be delineated in narrower terms than traditional versus economic analysis. *See generally*, LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002) (using the terms fairness versus welfare); Anita Bernstein, *Whatever Happened to Law and Economics?*, 64 MD. L. REV. 303, 311–16 (2005) (noting many ways economic analysis can be described); Joseph William Singer, *Normative Methods for Lawyers*, 56 UCLA. L. REV. 899 (2009) (using the terms normative versus utilitarian); Jules L. Coleman, *The Grounds of Welfare*, 112 YALE L.J. 1511, 1514, 1522 (2003) (reviewing KAPLOW & SHAVELL, *supra*) (using the terms deontology versus efficiency).

2. *E.g.*, ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 324 (5th ed. 2008); KAPLOW & SHAVELL, *supra* note 1; Keith N. Hylton, *Calabresi and the Intellectual History of Law and Economics*, 64 MD. L. REV. 85, 92 (2005).

3. *E.g.*, DAVID W. BARNES & LYNN A. STOUT, *THE ECONOMIC ANALYSIS OF TORT LAW* (1992); GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 39 (1970); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 312–13 (1987); John Prather Brown, *Toward an Economic Theory of Liability*, 2 J. LEGAL STUD. 323, 323 (1973); R. H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 1–2 (1960); Keith N. Hylton, *Duty in Tort Law: An Economic Approach*, 75 FORDHAM L. REV. 1501, 1501–02 (2006).

4. *See* STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 192–93 (2004). Within tort law, the referenced debate denominated as traditional versus economic analysis assumes yet other descriptions. *E.g.*, Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801 (1997) (using the terms efficient deterrence versus corrective justice).

5. *See* JULES L. COLEMAN, *RISKS AND WRONGS* 234–51, 374–82 (1992); ANTHONY T. KRONMAN, *THE LOST LAWYER* 237–38 (1993); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 148, 159–64, 195 (1995).

6. *E.g.*, JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE* 10–25 (2001); Shawn J. Bayern, *The Limits of Formal Economics in Tort Law: The Puzzle of Negligence*, 76 BROOK. L. REV. (forthcoming 2010); Izhak Englard, *Law and Economics in American Tort Cases: A Critical Assessment of the Theory's Impact on Courts*, 41 U. TORONTO L.J. 359, 359 (1991); Mark Geistfeld, *Efficiency, Fairness and the Economic Analysis of Tort Law*, in *THEORETICAL FOUNDATIONS OF LAW AND ECONOMICS* 234, 234–36 (Mark D. White ed., 2009); Mark F. Grady, *Efficient Negligence*, 87 GEO. L.J. 397, 397 (1998); Michael D. Green, *Negligence = Economic Efficiency: Doubts >*, 75 TEX. L. REV. 1605, 1605–06 (1997); John C. Moorhouse et al., *Law & Economics and Tort Law: A Survey of Scholarly Opinion*, 62 ALB. L. REV. 667, 667–68 (1998); Ronen Perry, *Re-torts*, 59 ALA. L. REV. 987, 988 (2008); Richard W. Wright, *Hand, Posner, and the Myth of the "Hand Formula,"* 4 *THEORETICAL INQUIRIES IN LAW* 145, 146–53 (2003); Benjamin C. Zipursky, *Tort Law: Sleight of Hand*, 48 WM. & MARY L. REV. 1999, 2001–02 (2007).

7. *See generally* CALABRESI, *supra* note 3 (using largely philosophical); LANDES & POSNER,

considers how the methods fare in opinions of judicial exemplars of the contending conceptions: Cardozo, quintessential traditionalist,⁸ and Posner, avatar economist.⁹ Comparative evaluation of those opinions, the most ubiquitous in torts casebooks,¹⁰ provides evidence that traditional legal analysis is a more capacious basis of justification than contemporary economic analysis of law and that this feature, though suffering from some indeterminacy, yields more persuasive justification in a wider range of cases.

Cardozo's distinctiveness is a grand rhetorical style exemplifying traditional method.¹¹ During a twenty-four-year career, he displayed pragmatic sensibilities blending intuitions of substantive justice with thick doctrine incorporating economic, moral and social factors.¹² In Isaiah Berlin's terms, Cardozo was a fox who knew many things.¹³ Cardozo frequently shifted among doctrines, rendering complex opinions that demonstrate the capacity, power, and limits of traditional legal analysis.

In contrast, Posner's distinction is economic analysis, a contemporary mode of justification he popularized as a scholar¹⁴ and judge.¹⁵ With

supra note 3 (using largely doctrinal); Bayern, *supra* note 6 (using largely theoretical); Coase, *supra* note 3 (using largely theoretical); Coleman, *supra* note 1 (using largely philosophical); Wright, *supra* note 6 (using largely doctrinal).

8. See, e.g., BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112 (1921); ANDREW L. KAUFMAN, CARDOZO 199–222 (1998); RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 20–57 (1990); Warren A. Seavey, *Mr. Justice Cardozo and the Law of Torts*, 39 COLUM. L. REV. 20, 20 (1939). Cardozo was a New York Court of Appeals judge for eighteen years (1914–1932) (the first three by designation from a lower court) and Supreme Court Justice for six (1932–1938, before *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938)).

9. See generally, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (7th ed. 2007) (Judge Posner's law and economics casebook); *Commentaries, Twenty-Five Years of Richard Posner, the Judge*, 120 HARV. L. REV. 1121 (2007) (symposium with more than a dozen articles, each dissecting one famous Posner opinion); *Special Issue, Commemorating Twenty-Five Years of Judge Richard A. Posner*, 74 U. CHI. L. REV. 1641 (2007) (same). Since 1982, Posner has been a judge on the Court of Appeals for the Seventh Circuit.

10. See *infra* note 34.

11. See KARL N. LLEWELLYN, THE BRAMBLE BUSH 157–58 (1951).

12. See, e.g., Walton Hamilton, *Cardozo the Craftsman*, 6 U. CHI. L. REV. 1, 17–18 (1938); William E. Nelson, *From Fairness to Efficiency: The Transformation of Tort Law in New York, 1920–1980*, 47 BUFF. L. REV. 117, 126 (1999); Edwin W. Patterson, *Cardozo's Philosophy of Law*, 88 U. PA. L. REV. 71, 72 (1939); John C.P. Goldberg, *The Life of the Law*, 51 STAN. L. REV. 1419, 1421 (1999) (reviewing KAUFMAN, *supra* note 8); Joshua P. Davis, Note, *Cardozo's Judicial Craft and What Cases Come to Mean*, 68 N.Y.U. L. REV. 777, 794–99 (1993).

13. ISAIAH BERLIN, THE HEDGEHOG AND THE FOX 1–2 (1953).

14. E.g., Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 452 (1974); Frank I. Michelman, *Norms and Normativity in the Economic Theory of Law*, 62 MINN. L. REV. 1015, 1040 (1978); A. Mitchell Polinsky, *Economic Analysis as a Potentially Defective Product: A Buyer's Guide to Posner's Economic Analysis of Law*, 87 HARV. L. REV. 1655, 1656–57 (1974).

15. E.g., Warren J. Samuels & Nicholas Mercurio, *Posnerian Law and Economics on the Bench*, 4 INT'L REV. L. & ECON. 107, 108 (1984); Jeanne L. Schroeder, *Just so Stories: Posnerian*

economic analysis being the predominant characteristic of Posner opinions, he may be classified, in Berlin's terms, as a hedgehog, who knows one big thing. Of course, during his twenty-seven-year career, Posner has also shown traditional skills of a legal craftsman and shrewd rhetorician.¹⁶ But Posner's opinions typically take a linear approach, following the orderly logic of contemporary economic analysis.

Cardozo's torts opinions used traditional legal concepts, like reasonableness, foreseeability, and duty. These perform admirably, if imperfectly, to analyze, classify and explain, though lacking formal economic theory. Posner's tort opinions reference the same legal concepts but displace, adjust, or rationalize them, using modern economic concepts, like cost-benefit matrices, incentive effects, and least-cost avoidance models. This approach sometimes enriches, but often impoverishes, analysis, classification, and explanation. These contrasts appear in their opinions confronting a range of tort law problems, from basic issues in negligence to intermediate concerns of liability to advanced challenges about when third parties can enforce duties against contracting parties.

Part II, on negligence, explains how Cardozo's practical reasoning led him to empower juries to review conduct under an open-textured standard hinging on reasonable care.¹⁷ Cardozo employed a standard of everyday experience—custom and natural behavior. In contrast, Posner brings to negligence analysis a rigid economic formula, resembling a rule not a standard.¹⁸ Thin compared to traditional legal analysis, it balances formal categories of costs and benefits whose abstractness can disregard factors traditional legal analysis stresses.¹⁹ The limited capacity of Posner's approach appears in how his approach is inapposite to many issues in negligence cases.²⁰ True, Cardozo offered economic insights, but they

Methodology, 22 CARDOZO L. REV. 351, 351 (2001); George M. Cohen, Comment, *Posnerian Jurisprudence and Economic Analysis of Law: The View from the Bench*, 133 U. PA. L. REV. 1117, 1117 (1985).

16. See Kate O'Neill, *Rhetoric Counts: What We Should Teach When We Teach Posner*, 39 SETON HALL L. REV. 507, 507 (2009).

17. See *Pokora v. Wabash Ry.*, 292 U.S. 98 (1934) (Cardozo, J.) (articulating jury reasonableness standard to assess negligence of driver crossing railroad tracks); *infra* text accompanying notes 35–64.

18. See *Wassell v. Adams*, 865 F.2d 849, 855–56 (7th Cir. 1989) (Posner, J.) (applying Illinois law and using version of the Hand formula to compare negligence of guest versus motel, estimating cost of guest's greater vigilance while overlooking cost to motel of installing phones in rooms); *infra* text accompanying notes 65–103.

19. See *McCarty v. Pheasant Run, Inc.*, 826 F.2d 1554, 1557–58 (7th Cir. 1987) (Posner, J.) (applying Illinois law and using version of the Hand formula in case of guest suing hotel for negligence, estimating costs of locks and notices but overlooking hotel's safety record); *infra* text accompanying notes 147–153.

20. See *Davis v. Consol. Rail Corp.*, 788 F.2d 1260, 1263–64 (7th Cir. 1986) (Posner, J.) (applying Illinois law and version of the Hand formula to rail car inspector's negligence claims against railroad and employer despite imperfect fit between that formula and the facts); *infra* text

never overwhelmed analysis,²¹ and moral intuitions enhanced his opinions.²²

Part II's negligence cases illustrate how doctrinal capaciousness is not inevitably virtuous. Its value arises from capacity to incorporate endless factors in a flexible way. But this comes at the cost of opacity and indeterminacy. In negligence, the traditional doctrinal formulation, "reasonable care under the circumstances" is vague and offers at best a weak constraint on jury discretion. Trouble lurks in so capacious a doctrine.²³ Contemporary economic analysis presents the opposite trade-off. It offers a formula exuding clarity and predictability, even a functional constraint on juries. Yet this virtue comes at the price of omitting relevant factors. Of course, it is difficult to say which is more important: flexibility or predictability. The ultimate test is whether applications in particular cases are more or less persuasive, and the side-by-side study of Cardozo and Posner opinions gives Cardozo the edge.

Part III, engaging liability, shows that Cardozo's rhetoric fortified legal analysis while Posner's economics antagonizes it and how Cardozo's framework accommodated contending values while Posner's exalts economic efficiency.²⁴ In cases concerning an attenuated relation between action and injury, it is hard to improve on Cardozo's traditional legal analysis,²⁵ and Posner's opinions that follow that analysis are stronger than those extensively supplemented by contemporary economic analysis.²⁶ Traditional legal analysis has an unrivaled capacity to adapt to changing socioeconomic conditions.²⁷ This is not to say economic analysis is anemic, as it can reinforce traditional legal principles such as American

accompanying notes 154–73.

21. See *Adams v. Bullock*, 125 N.E. 93 (N.Y. 1919) (Cardozo, J.) (evaluating electrocuted boy's allegations of negligence against electric railway using basic economic insights); *infra* text accompanying notes 104–25.

22. See *Wagner v. Int'l R.R.*, 133 N.E. 437, 438 (N.Y. 1921) (Cardozo, J.) (upholding jury verdict in case of rescuer suing railway given reasonableness of actions); *infra* text accompanying notes 126–146.

23. See Kenneth S. Abraham, *The Trouble With Negligence*, 54 VAND. L. REV. 1187, 1188–89 (2001).

24. Compare *Martin v. Herzog*, 126 N.E. 814, 816 (N.Y. 1920) (Cardozo, J.) (holding driver's statutory violation negligence per se as matter of legal duty juries cannot waive), with *Davis*, 788 F.2d at 1262, 1264–65 (Posner, J.) (treating inspector's regulatory violation as factor in negligence formula). See *infra* text accompanying notes 174–93.

25. See *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 99 (N.Y. 1928) (Cardozo, C.J.) (applying duty and foreseeability test to limit railway liability to remote passenger); *infra* text accompanying notes 194–215.

26. See *Stoleson v. United States*, 708 F.2d 1217, 1223–24 (7th Cir. 1983) (Posner, J.) (applying Wisconsin law and using traditional legal analysis to limit employer liability to hypochondriac employee); *infra* text accompanying notes 216–228.

27. See *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053–55 (N.Y. 1916) (Cardozo, J.) (rejecting privity defense to retail car buyer's negligence suit against manufacturer at dawn of mass production and consumerism); *infra* text accompanying notes 229–39.

tort law's preference for liability based on fault rather than strict liability.²⁸

But, as Part IV illustrates, traditional legal analysis is indispensable, and contemporary economic analysis cannot supplant it. Venerable legal principles like duty facilitate navigating challenges such as when third parties may enforce tort or contract rights against contracting parties.²⁹ Economic explanations of law, like least-cost avoidance models, support legal judgments³⁰ but cannot resolve disputes without the tools traditional legal analysis provides.³¹ Cardozo's opinions supply guidance for navigation;³² Posner's opinions offer economic accounts that can be persuasive, though less parsimonious, and only persuasive because they explain results traditional legal analysis yields.³³

Accordingly, comparative evaluation of leading torts opinions of these exemplary judges, both noted for tort law expertise,³⁴ provides evidence that traditional legal analysis is a more capacious and persuasive basis of justification than contemporary economic analysis. This Article's conclusion explains this evidence in terms of how traditional legal analysis

28. See *Ind. Harbor Belt R.R. v. Amer. Cyanamid Co.*, 916 F.2d 1174, 1180–82 (7th Cir. 1990) (Posner, J.) (applying Indiana law and using economic analysis to justify applying negligence, not strict liability, to switching line's claim against chemical manufacturer); *infra* text accompanying notes 240–255.

29. See *H.R. Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896, 899 (N.Y. 1928) (Cardozo, C.J.) (finding no duty in citizen's suit against city's water supplier); *infra* text accompanying notes 256–77.

30. See *Edwards v. Honeywell, Inc.*, 50 F.3d 484, 492 (7th Cir. 1995) (Posner, C.J.) (applying Indiana law and finding no duty in negligence claim by fireman's widow against fire alarm service); *infra* text accompanying notes 278–290.

31. See *Ultramares Corp. v. Touche*, 174 N.E. 441, 447 (N.Y. 1931) (Cardozo, C.J.) (denying lender's negligent misrepresentation claim against borrower's accountants); *infra* text accompanying notes 291–304.

32. See *Glanzer v. Shepherd*, 135 N.E. 275, 277 (N.Y. 1922) (Cardozo, J.) (finding breach of duty by seller's expert certifying product weight to buyer); *infra* text accompanying notes 305–17.

33. See *Greycas, Inc. v. Proud*, 826 F.2d 1560, 1565 (7th Cir. 1987) (Posner, J.) (applying Illinois law and finding breach of duty by borrower's lawyer who opined on security to lender); *infra* text accompanying notes 317–332.

34. See KAUFMAN, *supra* note 8, at 243 (stating that Cardozo's "most famous opinions were in the field of torts"); KAUFMAN, *supra* note 8, at 250 (referring to Cardozo's "fame as a torts innovator"); Andrew L. Kaufman, *Benjamin Cardozo as Paradigmatic Tort Lawmaker*, 49 DEPAUL L. REV. 281, 281–82 (1999). See generally LANDES & POSNER, *supra* note 3 (analyzing tort law from an economic perspective). Cardozo and Posner opinions are the most ubiquitous in current torts casebooks. On average, casebooks reprint more Cardozo torts opinions than any other judge's; Posner is second. Cardozo has an aggregate of ten opinions reproduced in the twenty-one current torts casebooks, of which six appear in more than one-fourth of them and one in all books. Posner has an aggregate of twenty-six opinions reproduced in the twenty-one casebooks, of which twenty-one appear in only one or two books and only one appears in more than one-fourth of them. This Article analyzes all but one of those ten Cardozo opinions. And of Posner's twenty-six opinions so appearing, those analyzed were chosen as substantive matches with Cardozo's to facilitate comparative evaluation. Review of their other reprinted opinions supports this Article's thesis. Compilations of the foregoing data are available on request.

promotes comprehending complex human reality that contemporary economic analysis oversimplifies. It also notes the declining utility of contemporary economic analysis in tort law and gradual absorption of its more useful parts into traditional legal analysis.

II. NEGLIGENCE

This Part identifies contrasting motifs Cardozo and Posner weave when addressing basic problems in ordinary negligence. Cardozo's traditional legal analysis used expressions of reasonableness and expectations, and invoked social norms, moral impulses, economic insights, and other intuitions of substantive justice. Posner's contemporary economic analysis rivets on economic points to speak of negligence in terms of a cost-benefit formula, seeking to overcome what Posner perceives as Cardozo's moralizing tendency and propensity to substitute words for thought. But Cardozo's traditionalism withstands Posner's scrutiny, attested by how Cardozo's approaches enjoy wide following while Posner's are iconoclastic.

A. *Juries and Standards*

Cardozo's influence on torts jurisprudence is epitomized by *Pokora v. Wabash Railway*,³⁵ an opinion on negligence and contributory negligence outlining the relation between judges and juries and establishing the appeal of standards over rules. A truck driver approaching a railroad crossing could not see the track line, blocked by box cars on the switch; he stopped in his truck to listen for a bell or whistle signaling an approaching train, but heard nothing. When the truck driver reached the track, a train hit him going twenty-five to thirty miles per hour. The issue was the railroad's defense of contributory negligence, which would bar recovery.³⁶ Lower court judgments that the victim committed contributory negligence relied on Justice Oliver Wendell Holmes' opinion in *Baltimore & Ohio Railroad v. Goodman*.³⁷

Holmes announced that the care required of motorists approaching rail crossings was clear and better handled by judges than juries. He said when drivers cannot be sure whether a train is dangerously near, they must stop, get out of their vehicle and look.³⁸ Cardozo called *Goodman* "correct in its result."³⁹ The driver in that case could have seen the approaching train and

35. 292 U.S. 98 (1934). *Pokora* predates *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

36. *Id.* at 99. Not in dispute, the railroad's failure to signal was negligence per se, as a state statute required trains approaching crossings to signal. *Id.* at 101 n.1. See generally, Martin v. Herzog, 126 N.E. 814 (1920) (treating statutory violations as negligence per se); *infra* text accompanying notes 174–84 (discussing *Martin*).

37. *Pokora*, 292 U.S. at 99 (citing *Baltimore & Ohio R.R. v. Goodman*, 275 U.S. 66 (1927)).

38. *Goodman*, 275 U.S. at 70.

39. *Pokora*, 292 U.S. at 102.

prevented the accident so failing to do so was negligent, which Cardozo said was “decisive of the case.”⁴⁰ Cardozo treated as dicta talk in *Goodman* suggesting that drivers, unsure based on sight alone whether a train is approaching, always must stop and get out of their vehicles and look. True, the *Pokora* driver had a duty to get out and look, if doing so would help avoid the accident. But that did not mean inability to see made proceeding any more negligent than if amid night’s darkness he relied on listening.

The precaution of getting out and looking is uncommon, according to “everyday experience,” Cardozo said.⁴¹ He gave a series of hypothetical scenarios to show how Holmes’ formulation “is very likely to be futile, and sometimes even dangerous.”⁴² For example, a driver could get out, look, and return to the car; yet a train, not visible during inspection, could then draw dangerously near.⁴³ Laws not based on experience are suspect as “not the natural flowerings of behavior in its customary forms, but rules artificially developed, and imposed from without,” Cardozo wrote.⁴⁴ Absent customs and ordinary circumstances, what people must or should do in extraordinary circumstances, like those in *Pokora*, are “for the judgment of a jury.”⁴⁵

Several motifs appear in *Pokora*. One concerns the role of judges and juries in negligence cases. In *Goodman*, Holmes said the care required in railway crossings is so clear that reasonable people would not differ about whether a breach occurred.⁴⁶ Cardozo took the opposite stance, saying “what is suitable for the traveler caught in a mesh . . . is for the judgment of a jury.”⁴⁷ This challenge to Holmes reflects Cardozo’s focus on roles, knowledge, and intentions of individuals whose conduct law governs. For Cardozo, people’s reasonable expectations should shape law, not the other way around, as Holmes advocated.⁴⁸ Those reasonable expectations are heterogeneous, informed by a complex of norms, ethics, morals, utilities, and other factors that best registered using juries.⁴⁹

Second, *Pokora* embodies Cardozo’s practical sense when embracing the flexibility of contextualized standards over rigid rules. Cardozo urged

40. *Id.*

41. *Id.* at 104.

42. *Id.*

43. *Id.* at 104–05.

44. *Id.* at 105.

45. *Id.* at 106.

46. *Baltimore & Ohio R.R. v. Goodman*, 275 U.S. 66, 70 (1927).

47. *Pokora*, 292 U.S. at 106.

48. See RESTATEMENT (THIRD) OF TORTS § 5 cmt. d (Discussion Draft 1999); Catharine Wells Hantzis, *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 NW. U. L. REV. 541, 572–75 (1988).

49. See Steven Hetcher, *The Jury’s out: Social Norms’ Misunderstood Role in Negligence Law*, 91 GEO. L.J. 633, 651–52 (2003).

development of law according to observations of behavior in customary forms, not according to an artificial formula. Cardozo's doctrinal chiding of Holmes reflects the multi-dimensional pragmatism Cardozo expressed in *The Nature of the Judicial Process*: "logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law."⁵⁰ The result is a flexible jurisprudence, though Cardozo was not dogmatically flexible, justifying clear results in certain cases, including statutory violations⁵¹ and contexts when action and injury are not closely connected.⁵²

Third, though the opinion appeared incremental, it markedly changed prevailing law. Cardozo distinguished *Goodman* by saying the rule it announced was dicta and thus, it must be limited to its facts. This, however, was less an overruling than discussion showing continuity.⁵³ Still it profoundly altered the course of jurisprudence in negligence cases by offering a convincing general rationale for favoring juries and standards over judges and rules to resolve them. Cardozo's more flexible approach to negligence has since been preferred over Holmes' rigid one.⁵⁴ This motif of incremental change, leading other courts to follow new paths, attests to the persuasiveness of Cardozo's traditional legal analysis.

Holmes long favored limiting flexible jury negligence determinations with legal rules,⁵⁵ and did so in a Massachusetts case predating *Goodman*.⁵⁶ Justifications include concern about inconsistent results juries may produce that would impair treating similar cases alike.⁵⁷ But judges exert control to change results by judgments notwithstanding the verdict or to preempt inconsistent results by directed verdicts. Moreover, inconsistent results can arise when judges decide negligence issues too. So putting power in judges does not eliminate the problem of inconsistency.

A related concern is how inconsistent results may be more likely when applying standards rather than rules. Rules promote more consistency and predictability than standards.⁵⁸ The trouble with Holmes' solution is it may

50. CARDOZO, *supra* note 8, at 112.

51. See *Martin v. Herzog*, 126 N.E. 814, 815 (1920) (Cardozo, J.); *infra* text accompanying notes 174–193.

52. See *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928) (Cardozo, C.J.); *infra* text accompanying notes 194–215.

53. See DAN B. DOBBS, *THE LAW OF TORTS* § 132, at 310 (2000); RICHARD A. EPSTEIN, *TORTS* 168–69 (1999).

54. KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 87–88 (3d ed. 2007); JOHN L. DIAMOND, LAWRENCE C. LEVINE & M. STUART MADDEN, *UNDERSTANDING TORTS* 69 (3d ed. 2007); EPSTEIN, *supra* note 53, at 168–69.

55. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 123–24 (41st prtg. 1948); O. W. HOLMES, JR., *The Theory of Torts*, 7 AM. L. REV. 652 (1873), *reprinted in* 44 HARV. L. REV. 773, 776 (1931).

56. *Lorenzo v. Wirth*, 49 N.E. 1010, 1011 (Mass. 1898) (Holmes, J.).

57. ABRAHAM, *supra* note 54, at 87.

58. See John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with*

overlook context and how fact situations do not recur sufficiently similarly to be governed by a rule.⁵⁹ Cardozo's conclusion, usually followed by other courts, can be summed up: "reasonable people could consider the factual variations . . . to be sufficiently important to permit juries to decide them differently."⁶⁰ As a result, there has been no tendency to define negligence in rule-like terms and law gives juries discretion.⁶¹

These grounds favoring Cardozo's approach do not mean he or his followers show great trust in juries. Juries and standards may simply be better than judges and rules for reasons independent of jury trust.⁶² Still, given credible reasons to support Holmes' view, Cardozo's approach suggests he had some degree of trust in juries, tempered with tools of judicial review.⁶³ If so, Cardozo may have begun to buck the previous century's trend of heightened mistrust of juries, manifested in the rise of contributory negligence that he neutralizes in *Pokora*.⁶⁴

B. Judges and Rules

Pokora and its progeny that avoid providing clear rules of negligence force appellate judges like Posner into the trenches, reviewing jury verdicts on negligence. In some opinions, Posner encounters Holmes' *Goodman* and Cardozo's *Pokora* opinions. Posner sides with and echoes Cardozo by describing the "fallacy" in Holmes' stop-and-get-out rule that it can "be worse than useless" since by the time a driver returns to her car to cross, "a train may be bearing down."⁶⁵ But Posner does not welcome the resulting standard of reasonableness and its unruly quality, calling applicable state law "authoritative, but not clear."⁶⁶ Instead, in numerous cases, Posner developed a more rigid, rule-like, approach to negligence, based on the Hand formula.

Judge Learned Hand's initial formulation announced: "The degree of care demanded of a person by an occasion is the resultant of three factors: the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest

Legal Standards, 70 VA. L. REV. 965, 968 (1984).

59. ABRAHAM, *supra* note 54, at 88.

60. See ABRAHAM, *supra* note 54, at 88.

61. ABRAHAM, *supra* note 54, at 87–88; DOBBS, *supra* note 53, § 132, at 310; EPSTEIN, *supra* note 53, at 168–69.

62. Statutory schemes like worker's compensation may be better than either, and cheaper.

63. See KAUFMAN, *supra* note 8, at 253 (noting Cardozo's proclivity to affirm jury verdicts).

64. See *infra* note 193 and accompanying text (discussing *Martin v. Herzog* and Cardozo's engagement with contributory negligence).

65. Compare *Justice v. CSX Transp. Inc.*, 908 F.2d 119, 123 (7th Cir. 1990) (Posner, J.), with *Pokora v. Wabash Ry.*, 292 U.S. 98, 104 (1934) (echoing Cardozo's precise illustration).

66. *Trevino v. Union Pac. R.R.*, 916 F.2d 1230, 1234 (7th Cir. 1990) (Posner, J.) (applying Illinois law).

which he must sacrifice to avoid the risk.”⁶⁷ Hand refined the formula by designating likelihood of injury as *probability*, seriousness of injury as *loss* and the interest sacrificed *burden*.⁶⁸ The test asks whether the burden of precaution is worth taking compared to the probability times loss: $B < PL$. Hand did not intend to elaborate a formal or rigid economic model but an intuitive tool to be used flexibly.⁶⁹

The Hand formula suggests analytical rigor. But it and kindred risk-utility models have limits that do not plague traditional legal analysis. They concentrate on social wealth or utility maximization at the expense of other values tort law may advance.⁷⁰ These models risk denying individual justice in particular cases and failing to appreciate the value of equal freedom implicit in tort law’s role in promoting corrective justice.⁷¹ There can be doubt about how close a fit exists between the Hand formula’s three variables and incentives that influence behavior.⁷² Variables often cannot be quantified⁷³ or are incommensurate.⁷⁴ Evidence on cost of prevention (burden) may be elusive yet gets a pivotal place.⁷⁵ And focus on the formula can prevent evaluating factors traditional legal analysis stresses.⁷⁶

The Hand formula’s effectiveness in appellate review may therefore be limited.⁷⁷ Effectiveness depends on how rigorously it is conceived and applied. There is much debate about whether it should be used definitively as an economic test or loosely as a practical reference.⁷⁸ Posner favors a

67. *Conway v. O’Brien*, 111 F.2d 611, 612 (2d Cir. 1940) (Hand, J.), *rev’d on other grounds*, 312 U.S. 492 (1941).

68. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.).

69. *Moisan v. Loftus*, 178 F.2d 148, 149 (2d Cir. 1949) (Hand, J.) (stating that formula variables often do not “admit of even approximate ascertainment”); *see also* Wright, *supra* note 6, at 154–55 (noting that Hand mentioned the test in only eleven opinions from 1938 to 1949, never actually applied it, and in his last reference, abandoned it).

70. Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 336 & n.84 (1996); Richard W. Wright, *The Standards of Care in Negligence Law, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 249, 250–51 (David Owen ed., 1995).

71. George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 573 (1972); Ernest J. Weinrib, *Toward a Moral Theory of Negligence Law*, 2 L. & PHIL. 37, 52–53 (1983); Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2350–51 (1990).

72. DOBBS, *supra* note 53, § 146, at 344–47.

73. *See* DIAMOND ET AL., *supra* note 54, at 60–65.

74. Barbara Ann White, *Risk-Utility Analysis and the Learned Hand Formula: A Hand That Helps or a Hand That Hides?*, 32 ARIZ. L. REV. 77, 111 (1990).

75. DOBBS, *supra* note 53, § 162, at 393.

76. For a discussion of Posner’s opinions in *Wassell v. Adams*, *McCarty v. Pheasant Run, Inc.*, and *Davis v. Consolidated Rail Corp.*, *see supra* text accompanying notes 66–75; *infra* text accompanying notes 77–103 and 147–72.

77. *See* ROBERT L. RABIN, *PERSPECTIVES ON TORT LAW* 66 (4th ed. 1995).

78. *See, e.g.*, DIAMOND ET AL., *supra* note 54, at 64; Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 VAND. L. REV. 813, 819–20 (2001).

rigid version, attributing economic meaning to Hand's original formulations, in pre-appointment scholarship⁷⁹ and judicial opinions.⁸⁰ Yet many applications of the Hand formula are strained, a weakness compared to traditional legal analysis.⁸¹ A leading example of this weakness and other problematic features is *Wassell v. Adams*.⁸²

In *Wassell*, a twenty-one-year old woman from a small town stayed at a cheap motel in a high crime area of Chicago while visiting her fiancé. At 1 a.m., there was a knock on the door; the guest, thinking it was her fiancé, checked the peephole, saw no one, and opened the door. A stranger entered, attacked, and repeatedly raped the guest. There was no phone in the room and no security guard on the premises. The guest sought damages for post-trauma stress, alleging negligent failure to warn of danger or protect her from it. A jury found the motel and guest both negligent, setting the guest's fault at 97% and the motel's at 3%. With damages tallied at \$850,000, applying Illinois comparative negligence law, she won \$25,500, roughly equaling her medical expenses. The guest wanted a judgment notwithstanding the verdict or a retrial. Posner's court affirmed denial of both.

The opinion explains that a rational jury could have apportioned fault as the jury did.⁸³ To assess comparative fault, Posner assumes "the required comparison is between the respective costs to the [two sides] . . . of avoiding the injury. If each could have avoided it at the same cost, they are each 50 percent responsible for it."⁸⁴ Posner cites his illustration from a previous case supposing the cost of injury is \$10; the victim could have avoided it at a cost of \$1; and the injurer could have avoided it at a cost of \$2.⁸⁵ The victim bears a 2:1 comparative fault ratio

79. Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32 (1972) (stating that "Hand was adumbrating, perhaps unwittingly, an economic meaning of negligence").

80. See, e.g., *infra* text accompanying notes 82–91 (*Wassell v. Adams*); 147–53 (*McCarty v. Pheasant Run, Inc.*); 154–69 (*Davis v. Consol. Rail Corp.*); see also *Bhd. Shipping Co. v. St. Paul Fire & Marine Ins. Co.*, 985 F.2d 323, 329 (7th Cir. 1993) (Posner, J.); *U.S. Fid. & Guar. Co. v. Plovodba*, 683 F.2d 1022 (7th Cir. 1982) (Posner, J.).

81. See generally Izhak Englard, *The System Builders: A Critical Appraisal of Modern American Tort Theory*, 9 J. LEGAL STUD. 27 (1980) (claiming that dissatisfaction with existing tort law can be attributed to a shifting in the aims and functions of tort law).

82. 865 F.2d 849 (7th Cir. 1989) (Posner, J.) (applying Illinois law).

83. *Id.* at 854. Posner's apportionment review first notes how the common law rule that makes contributory negligence a complete defense produced harsh results and is abolished in most states, including Illinois. Harshness arose because it focused on the single narrow point of a victim's negligence; however that focus also made it simple and cheap to administer. Its replacement is comparative negligence which is costly and complex: it "requires a formless, unguided inquiry, because there is no methodology for comparing the causal contributions" of the two sides to a victim's injury. *Id.*

84. *Id.* (citing *Davis v. United States*, 716 F.2d 418, 429 (7th Cir. 1983) (Posner, J.) (applying Illinois law)).

85. *Id.*

to the other. So the victim's damages should be reduced by two-thirds (she would bear \$6.66 in loss and recover \$3.33 in damages). The *Wassell* jury's fault apportionment at 97:3 meant, under this model, the issue was whether it could have found that the guest could avoid the attack at a cost less than 1/32 the cost to the motel. Posner asks: "Is this possible?"⁸⁶

The guest was careless opening the door at 1 a.m. without finding out who was there. But people are not so alert at that hour and "it wasn't crazy" for her to think it was her fiancé.⁸⁷ So the cost to a reasonable person is not necessarily zero nor slight. On the motel's side, costs of warning guests of dangers were trivial and would not have cost thirty-two times the cost to the guest of "schooling herself to greater vigilance,"⁸⁸ as Posner describes the victim's cost column. But such warnings are futile and Posner assumes "the jury was not so muddle-headed as to believe that the [motel's] negligence consisted in failing to give a futile warning."⁸⁹ So Posner considers lack of a security guard, the only possibility for which cost evidence appeared. This was perhaps merely \$50 per night but, even so, that "might be much greater than the monetary equivalent of the greater vigilance" on the guest's part "that would have averted the attack."⁹⁰ Based on this formal economic model, Posner decided a rational jury could have reached its verdict, though Posner said his court thought the motel was more than 3% responsible.⁹¹

Several features of Posner's *Wassell* opinion contrast with Cardozo's traditional legal analysis in *Pokora*. First, predecessor judges, including Cardozo in *Pokora*, contributed to the law that required Posner to review a jury verdict under an open-textured negligence standard hinging on reasonable care. Posner contributes to the law an economic tool, in form more resembling a rule than a standard, that judges can use to review jury verdicts. The rule shares with *Pokora* a degree of judgment for contextual reasonableness. Yet it assumes, he says, sophistication juries lack,⁹² in contrast with Cardozo's sense that juries are the place to resolve problems of human experience unsusceptible to rule-oriented resolution.⁹³ Although not as strong as Holmes' appetite for judges exerting control using rules,

86. *Id.*

87. *Id.* at 855.

88. *Id.*

89. *Id.* The guest thought her fiancé was knocking, so would have opened the door even knowing the neighborhood was dangerous. Such a warning might have kept her off local streets but that is not the pertinent danger. The motel could have warned her never to open the door in the middle of the night without knowing who was about, but it is "absurd to think" motels must give such obvious warnings, "any more than they must warn guests not to stick their fingers into the electrical outlets." *Id.*

90. *Id.* at 856.

91. *Id.*

92. *Id.* (stating it is "artificial" to assume juries are "clear-thinking" and follow instructions).

93. *See supra* note 63 (discussing Cardozo's proclivity to affirm jury verdicts).

Posner's model shows a taste for that appetite compared to Cardozo's opposite inclination favoring juries and standards.

Second, Posner's application of the Hand formula in *Wassell* seems strained. The formulaic approach to negligence expressed in the Hand equation is most persuasive when evaluating reflective decisions about precautions in advance of accidents, like whether a railroad should equip trains with warning signals.⁹⁴ The formula's value degrades when evaluating more spontaneous decisions; it loses practical appeal if applied to a momentary lapse when injury was imminent, as with the *Wassell* victim's weary decision in the middle of the night.⁹⁵ A more persuasive opinion would defend the jury's verdict using intangibles Cardozo referenced in *Pokora*, like everyday experience, natural behavior, and customary knowledge.⁹⁶ A persuasive opinion would likewise address the legal significance of the fact that the motel room had no phone.

Third, even concerning reflective decision-making, the Hand formula can lead analysis away from relevant factors, like absence of a phone in the *Wassell* victim's motel room, which Posner's analysis disregards.⁹⁷ Such problems with the formula attract extensive, often trenchant, criticism.⁹⁸ True, Posner is not the only judge who embraces the Hand formula, and the Hand formula still enjoys academic support.⁹⁹ Some scholars even argue that juries should be instructed to apply it.¹⁰⁰ But few

94. See Howard Latin, "Good" Warnings, Bad Products, and Cognitive Limitations, 41 UCLA L. REV. 1193, 1198–1206 (1994).

95. See DOBBS, *supra* note 53, § 145, at 340–43 (demonstrating the formula's use when contemplating advance decisions).

96. See *supra* text accompanying notes 41–45. *Wassell's* facts are difficult with the real culprit being the rapist, rather than the guest or motel, and writing the opinion was a tall order for any judge. But, given the difficult facts, a less abstract and more empathetic discussion would have been more persuasive. See Ellen M. Bublick, *Citizen No-Duty Rules; Rape Victims and Comparative Fault*, 99 COLUM. L. REV. 1413, 1434–37 (1999). Traditional legal analysis offers language for empathetic discussion that economic vocabulary lacks. See JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 133–36, 168–91 (1985); Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2101–02 (1989); Richard H. Weisberg, *Law, Literature, and Cardozo's Judicial Poetics*, 1 CARDOZO L. REV. 283, 309–15 (1979) (praising Cardozo's style and use of language in particular); Robin West, *Economic Man and Literary Woman: One Contrast*, 39 MERCER L. REV. 867, 868–73 (1988).

97. For additional examples, see *infra* text accompanying notes 154–69 (*McCarty v. Pheasant Run, Inc. and Davis v. Consol. Rail Corp.*).

98. See, e.g., Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 36–37 (1988); Keating, *supra* note 70, at 328–32; William E. Nelson, *The Moral Perversity of the Hand Calculus*, 45 ST. LOUIS U. L.J. 759, 759–62 (2001); Wright, *supra* note 6, at 151–53.

99. See BARNES & STOUT, *supra* note 3, at 35; DIAMOND ET AL., *supra* note 54, at 73–74.

100. See Stephen G. Gilles, *The Invisible Hand Formula*, 80 VA. L. REV. 1015, 1016–19 (1994).

judges use the Hand formula¹⁰¹ and rarely give jury instructions based on it.¹⁰² They prefer the traditional approach Cardozo pioneered using legal expressions.¹⁰³ That consensus testifies to which method the vast majority of judges deem superior; whether consensus is defensible can be tested by contrasting the substance of Cardozo's negligence analyses with Posner's Hand formula.

C. *Cardozo's Intuitions of Substantive Justice*

*Adams v. Bullock*¹⁰⁴ shows how traditional legal analysis can include economic insights only partly embracing elements in the Hand formula—and be stronger for it. A twelve-year old boy was electrocuted when he swung a wire into trolley wires that ran five feet under a rail bridge that spanned a roadway that pedestrians used and where children played. Cardozo's court reversed a trial verdict for the boy that a split intermediate court had upheld. The trolley company owed a duty to take “all reasonable precautions to minimize the resulting perils,”¹⁰⁵ but the evidence did not show it breached this duty. Wiring was placed so no one on the bridge could reach it. The wiring was not “a thing of danger” in the ordinary course¹⁰⁶ but only when “some extraordinary casualty, not fairly within the area of ordinary prevision” occurred.¹⁰⁷ Cardozo said of the probabilities:

Reasonable care in the use of a destructive agency imports a high degree of vigilance. But no vigilance, however alert, unless fortified by the gift of prophecy, could have predicted the point upon the route where such an accident would occur. . . . At any point upon the route a mischievous or thoughtless boy might touch the wire with a metal pole, or fling another wire across it.

If unable to reach it from the walk, he might stand upon a wagon or climb upon a tree. No special danger at this bridge warned the defendant that there was need of special measures of precaution. No like accident had occurred before. No custom had been disregarded. We think that ordinary caution

101. See Ronald J. Allen & Ross M. Rosenberg, *Legal Phenomena, Knowledge, and Theory: A Cautionary Tale of Hedgehogs and Foxes*, 77 CHI.-KENT L. REV. 683, 704–07 (2002); Wright, *supra* note 6, at 148; Richard W. Wright, *Negligence in the Courts: Introduction and Commentary*, 77 CHI.-KENT L. REV. 425, 442 (2002); Zipursky, *supra* note 6, at 2013–17.

102. Patrick J. Kelley & Laurel A. Wendt, *What Judges Tell Juries About Negligence: A Review of Pattern Jury Instructions*, 77 CHI.-KENT L. REV. 587, 618–19 (2002).

103. See Richard W. Wright, *Justice and Reasonable Care in Negligence Law*, 47 AM J. JURIS. 143, 145 (2002).

104. 125 N.E. 93 (N.Y. 1919) (Cardozo, J.).

105. *Id.*

106. *Id.*

107. *Id.*

did not involve forethought of this extraordinary peril.¹⁰⁸

Cardozo added concerning the burdens of precaution:

There is, we may add, a distinction not to be ignored between electric light and trolley wires. The distinction is that the former may be insulated. Chance of harm, though remote, may betoken negligence, if needless. Facility of protection may impose a duty to protect. With trolley wires, the case is different. Insulation is impossible. Guards here and there are of little value.

To avert the possibility of this accident and others like it at one point or another on the route, the defendant must have abandoned the overhead system, and put the wires underground. Neither its power nor its duty to make the change is shown. To hold it liable upon the facts exhibited in this record would be to charge it as an insurer.¹⁰⁹

Cardozo thus offered a traditional, doctrinal resolution. The first pair of quoted paragraphs, on probabilities, anchor the opinion, using rhetoric, common sense (who has the “gift of prophecy”?), experience (what “mischievous or thoughtless boy[s]” might do) and “custom” (none disregarded here). The second pair, on burdens of precaution, reflects intuitive economic conceptions of the law’s underpinnings. It distinguishes, in practical terms, electric light that can be insulated from trolley wires that cannot.

Posner endorses *Adams* as “proto-economic.”¹¹⁰ Posner notes Cardozo emphasized that un-insulated electric wire is dangerous so a high degree of care is required. But wires were situated so that no one using the bridge could reach them even by bending over. The result: danger to people on the bridge was *slight*. Likewise, duty hinges on facility to protect, hinting at cost of prevention, found essentially *prohibitive*. Posner says *Adams*, and the Hand formula, “elaborate on the longstanding approach, inarticulately economic, used by common law judges to decide negligence cases.”¹¹¹

Maybe, but Cardozo only weighed two variables—probability and burden—of the three later appearing in the Hand formula, leaving out magnitude of loss.¹¹² There is nothing inevitable about including all three, weighting them equally or how to weight them. It is possible, for example,

108. *Id.* (internal citations omitted).

109. *Id.* at 94.

110. POSNER, *supra* note 8, at 117–18.

111. *Id.* at 117.

112. See DIAMOND ET AL., *supra* note 54, at 60.

to weight probability and magnitude more than burden.¹¹³ Justifications for putting responsibility on those at fault include efficiency, fairness or both.¹¹⁴ Alternative justifications can yield different components and weights assigned to them. Posner and contemporary economic analysis favor a singular conception: to achieve an efficient level of accidents.¹¹⁵ Cardozo and traditional legal analysis eschew singular conceptions, though emphasizing liability based on the notion of fault.¹¹⁶ True, the amorphousness of fault in traditional analysis can be frustratingly imprecise and allow indeterminate weightings while contemporary economic analysis can be appealing for its relative precision. The lingering problem is how much easier it is to speak of precision in negligence cases than to achieve it in fact.

Posner also takes *Adams* to suggest common law's congruence with economic theory, a scholarly theme in contemporary economic analysis of law offering to show law's efficiency as a descriptive matter.¹¹⁷ Posner cites *Adams* for offering "as clear a statement as one might ask of the proposition that the optimal level of care is a function of its cost."¹¹⁸ True, Cardozo finds no negligence as a matter of law, concluding that injury was unlikely and avoidance cost huge. But Professor Rabin points out how both *Adams* and Posner ignore the trivial cost of warning signs on the bridge.¹¹⁹ By not considering this alternative, *Adams* implicitly denies any legal duty to warn, but economic analysis would have to consider it. So the case is not an exhibit for law's economic efficiency.

Nevertheless, Posner clings to *Adams* as illustrating Cardozo's "intimations of the economic approach."¹²⁰ He says formal economic analysis would strengthen the opinion, lamenting that Cardozo's intuitions of substantive justice sometimes ran out and he lacked an "incisive" policy

113. *E.g.*, *Bolton v. Stone*, [1951] A.C. 850 (H.L.) (U.K.).

114. *See* DIAMOND ET AL., *supra* note 54, at 60.

115. *See* Posner, *supra* note 79, at 33 ("[T]he dominant function of the fault system is to generate rules of liability that if followed will bring about, at least approximately, the efficient—the cost-justified—level of accidents and safety.").

116. *See* KAUFMAN, *supra* note 8, at 252–53.

117. *See generally* George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977) (arguing that legal rules tend to achieve efficient, rather than inefficient, allocative effects); Paul H. Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977) (arguing that the common law's presumed efficiency is related to the decision to settle a dispute in court); Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551 (2003) (arguing that the common law tends to produce legal rules that enhance efficiency).

118. William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851, 894 (1981).

119. Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 955–56 (1981).

120. POSNER, *supra* note 8, at 116–18.

framework of the kind contemporary economic analysis provides.¹²¹ Though intuitions of substantive justice can run out, economic analysis can come up short too, posing opposite problems. First, Posner employs the framework Cardozo lacked, but doing so can subordinate intuitions of substantive justice to the formal model, as *Wassell* suggests.¹²² Second, applying the “incisive” framework to *Adams*, incorporating costs of warning signs, would undermine, not strengthen, Cardozo’s opinion.¹²³ Third, Cardozo’s expository writing, which roughly aligned with his opinions,¹²⁴ demonstrates that he would disfavor Posner’s purely economic approach to negligence as too narrow and simplistic.¹²⁵

Cardozo’s preference for traditional legal analysis over economics appears firmly in *Wagner v. International Railway Co.*,¹²⁶ where Posner’s critique reinforces the persuasiveness of Cardozo’s intuitions of substantive justice. In *Wagner*, a train crossing a bridge turned a curve with a violent lurch that threw a passenger from a car. From its stopping point, the passenger’s cousin walked back to the bridge, some four hundred feet, searching to rescue. He said the conductor asked him to and followed with a lantern, but the conductor denied both points. The rescuing cousin was injured after falling from the bridge, landing where a search party found the thrown cousin’s dead body. The trial judge told the jury the railway was not liable for negligence to the rescuing cousin unless the conductor invited him to proceed across the bridge and followed with a lantern. On that instruction, the jury exonerated the railway, but Cardozo said the instruction was wrong.

“Danger invites rescue,” Cardozo famously wrote, after a factual recitation setting the harrowing scene.¹²⁷ The railway owed the rescuing cousin a duty, given its breach of duty to the fallen cousin he sought to rescue.¹²⁸ The railway argued that its duty to rescuers may cover

121. *Id.* at 117–18 (“But fact and policy are opaque and elusive without a framework, and what Cardozo principally lacked in wrestling with cases in which intuitions of substantive justice ran out was an incisive framework for, or technique of, policy analysis such as modern economic analysis provides. He can hardly be blamed for failing to use tools developed long after his death, however, and we can find intimations of the economic approach, notably in *Adams v. Bullock*.”). *Id.*

122. See *Bublick*, *supra* note 96, at 1434–37.

123. See Robert L. Rabin, *Law for Law’s Sake*, 105 *YALE L.J.* 2261, 2275–76 (1996) (reviewing WEINRIB, *supra* note 5).

124. Gary T. Schwartz, *Cardozo as Tort Lawmaker*, 49 *DEPAUL L. REV.* 305, 306 (1999).

125. See BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 74–75 (1975) (describing negligence inquiries as “multiple and complex” and involving “a measurement of interests, a balancing of values, an appeal to the experience and sentiments and moral and economic judgments of the community, the group, [and] the trade”).

126. 133 N.E. 437 (N.Y. 1921). (Cardozo, J.).

127. *Id.*

128. Cardozo did not specify what duty the railway breached to the thrown cousin, but lists candidates as leaving car doors open, absence of guardrails between cars, allowing riding between cars, and taking the curve too fast. *Id.* at 437–38.

“spontaneous and immediate” action, but this rescuer had time to deliberate, walking 400 feet back across the bridge, and this terminated the railway’s duty.¹²⁹ Cardozo allowed that “peril and rescue” must be “one transaction” so there is “unbroken continuity” between a wrong and mitigation efforts.¹³⁰ But the link is not broken by exercising volition. Such an exception would swallow the rule. It does not matter whether a rescuer calculates the cost of rescue or is oblivious to it. Cardozo explained “It is enough that the act, whether impulsive or deliberate, is the child of the occasion.”¹³¹ Nor were the rescuer’s actions “a wanton exposure to a danger that was useless.”¹³² The rescuer thought his search on the bridge, not below it, would be productive, and his actions must be weighed in the context of the excited moment. Cardozo said people’s judgment errors resulting from that condition are not held against them.¹³³ The reasonable person standard adjusts to account for emergency.¹³⁴ Judgment errors are more tolerable, more expectable, in emergencies than in ordinary circumstances. Law does not assume people are rationally calculating cost estimators. In line with *Pokora*, Cardozo concluded that a rescuer’s actions “within the range of the natural and probable” made it a jury question whether his efforts were “foolhardy or reasonable.”¹³⁵

If extraordinary circumstances expand what is reasonable, recall the motel guest in *Wassell*, awakened by a knock at 1 a.m. Posner recognized the prospect of weariness and included that factor in the Hand formula assessment of precautions she reasonably could have taken. Though *Wassell* was not a rescue situation, Cardozo’s treatment of *Wagner’s* rescuer suggests he would recognize impaired capabilities in *Wassell*, let a jury hear the case and defer to its verdict. To that extent, Cardozo and Posner agree and likely would concur in results of each others’ opinions. But Posner probes using economic conceptions, estimating what it would cost the *Wassell* victim to “school[] herself to greater vigilance”;¹³⁶ Cardozo elucidated by rhetorical drama, “danger invites rescue.” These are both memorable and provide justification in the respective opinions, but which tools and vocabulary are more persuasive?¹³⁷

Posner cites *Wagner* to criticize Cardozo’s emphasis on tort law’s moral aspects and says Cardozo overlooked economic arguments

129. *Id.* at 438.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. DIAMOND ET AL., *supra* note 54, at 49.

135. *Wagner*, 133 N.E. at 437, 438.

136. *See supra* text accompanying notes 82–91 (analyzing *Wassell*).

137. *See supra* text accompanying notes 94–95 (amplifying the point on economic vocabulary compared to legal vocabulary).

supporting the outcome.¹³⁸ First, Posner detects in *Wagner* a sense that danger *should* invite rescue as a matter of moral duty—but urges qualifying this with an economic limitation, only so long as “the risk to the rescuer is commensurate with the likely benefit to the person sought to be rescued.”¹³⁹ Second, he says *Wagner* would also be stronger by noting that the railway’s own interest in promoting rescues supports holding it liable.

These two economic points would not improve the *Wagner* opinion and could undermine it. Rescue cases like *Wagner* present two challenges to efficiency-oriented cost-benefit analysis Posner recommends. First, descriptively, traditional analysis protects rescuers in more settings—all settings not involving actions rash, wanton, or reckless—compared to economic analysis—protecting only those settings passing a cost-benefit test.¹⁴⁰ The *Wagner* rescuer met Cardozo’s standard but, searching on the bridge when the place to search was down below, likely would fail Posner’s test. Second, as an empirical matter, it is difficult to believe that potential victims will take greater or less care depending on whether they would receive full or limited tort recovery later. If risk of self-injury does not encourage a person to take care, it seems doubtful that the prospect of a reduced tort recovery will change that propensity.

Normatively, Posner’s critique succeeds in portraying Cardozo as a moralist and himself as an economist. Posner also asserts his own capacity to blend moral and economic viewpoints into a “pragmatic jurisprudence” that is “more than mere words.”¹⁴¹ By the same token, pragmatic jurisprudence must be more than mere formulas.¹⁴² The degree of pragmatism that jurisprudence offers may be inferred from how useful it is in other jurisdictions—and many jurisdictions follow *Wagner*, one of

138. POSNER, *supra* note 8, at 102. Incidentally, Posner reports the facts of *Wagner* incorrectly, stating that the train was in a wreck due to the railway’s negligence. *Id.* at 101.

139. *Id.* at 102.

140. See Wright, *supra* note 6, at 228–38 (criticizing Posner’s analysis of the famous rescue case *Eckert v. Long Island R.R.*, 43 N.Y. 502 (1871)).

141. POSNER, *supra* note 8, at 102.

142. Pragmatic jurisprudence likely would exhibit a characteristic of doctrinal thickness useful to enable resolving similar disputes in similar ways without regard to doctrinal categories. Cardozo’s *Wagner* opinion illustrates this jurisprudence. It fits into several frameworks, all producing the same result. Doctrinally, rescue cases entice analysis using alternative tools, including duty or proximate cause, as in *Palsgraf v. Long Island Railroad*, 162 N.E. 99 (N.Y. 1928) (Cardozo, C.J.). See *infra* text accompanying notes 194–215. Each leads to talk of foreseeability. In *Wagner*, Cardozo uses duty, capturing in the phrase “danger invites rescue” a human proclivity to aid and, in the legal formulation, a normative judgment that neither causation nor foreseeability limits the duty that injurers owe to their victims’ rescuers. MARSHALL S. SHAPO, PRINCIPLES OF TORT LAW ¶ 63.05, at 347 (2d ed. 2003); see also ABRAHAM, *supra* note 54, at 128 (discussing how *Wagner*’s rejection of the railway’s causation argument enables conceiving of rescue cases using tort law’s harm-within-the-risk test and reconciling it with *Palsgraf*); DOBBS, *supra* note 53, § 184, at 456 (considering whether *Wagner* is an exception to *Palsgraf*’s foreseeable victim holding or whether rescuers are within the scope of foreseeable risk).

Cardozo's most famous opinions.¹⁴³ Courts usually recognize that negligent injurers owe a duty not only to their victims but also to those trying to rescue them, at least so long as the rescuer's steps are "not wholly abnormal or hopeless."¹⁴⁴ Contrary to Posner's prescription, this is so whether the rescuer acted based on instinct or after formulating a satisfactory cost-benefit calculation.¹⁴⁵ *Wagner* and *Adams* demonstrate the reliability of Cardozo's intuitions of substantive justice, supplemented but not overwhelmed by economic insight, and infused equally with moral impulses expressed in distinctive but traditional style.¹⁴⁶

D. Posner's Hand Formula

In contrast to Cardozo's traditional legal analysis, consider two Posner opinions extending the Hand formula to translate legal principles into economic concepts. *McCarty v. Pheasant Run, Inc.*¹⁴⁷ involved a fifty-eight-year old business traveler who was assaulted at a large resort hotel. The guest's second-floor room had a sliding door opening to an outside walkway from which stairs led to a courtyard with public access. That door had a lock and chain. After the guest returned one evening, a stranger attacked her. The sliding door had been closed and chained but unlocked, enabling the assailant to enter and await the guest's return. A jury found the hotel not negligent; Posner's court affirmed denying a judgment notwithstanding the verdict.

Posner applied the Hand formula by determining "whether the burden of precaution is less than the magnitude of the accident, if it occurs, multiplied by the probability of occurrence. . . . If the burden is less, the precaution should be taken."¹⁴⁸ He acknowledged that applicable law does not define negligence this way, using the familiar "failure to use reasonable care" legal formulation. But that does not matter, Posner said, because both tools comprehend the same factors. The Hand formula translates legal formulations into economic terms. Posner accepts that the translation may be imperfect because lawyers do not routinely present

143. See ABRAHAM, *supra* note 54, at 128; DOBBS, *supra* note 53, § 184, at 456; EPSTEIN, *supra* note 53, at 266–67; SHAPO, *supra* note 142, ¶ 63.02, at 342–43. Many jurisdictions follow virtually all Cardozo opinions discussed in this Article. Although *Wagner* is among Cardozo's most-cited opinions, most others discussed in this Article are even more frequently cited, and Cardozo's opinions tend to be cited more, on average and adjusted for time, than Posner's opinions. See *infra* note 338.

144. DOBBS, *supra* note 53, § 184, at 456.

145. EPSTEIN, *supra* note 53, at 266.

146. See generally Stanley C. Brubaker, *The Moral Element in Cardozo's Jurisprudence*, 1 CARDOZO L. REV. 229 (1979) (arguing that the moral element in Cardozo's jurisprudence complements his pragmatic approach to the judicial process).

147. 826 F.2d 1554 (7th Cir. 1987) (Posner, J.) (applying Illinois law).

148. *Id.* at 1556.

juries with quantitative evidence the Hand formula contemplates.¹⁴⁹ But the formula offers useful analytical avenues, Posner suggests.

The guest lost because she did not show the attack “could have been prevented by precautions of reasonable cost and efficacy.”¹⁵⁰ She offered no evidence on the cost of changing locks, which Posner acknowledges was irrelevant because the door was unlocked. But this type of evidence exemplifies the sort of evidence the Hand formula probes. More on point, the guest did not offer evidence concerning other security measures the hotel could have taken. Posner searches for some. He mentions posting notices in all rooms warning guests to lock doors. He says this would be costly and, anyway, people know this so imposing such a cost would be wasteful. On the other side, the hotel provided a lock but the guest did not take the nearly costless precaution of using it, Posner reasoned.¹⁵¹

Applying the Hand formula in *McCarty*, Posner says the common law and the Hand formula yield identical results. That may merely make economic analysis redundant; but if so, it is not obvious how applying it helps, except possibly to make explicit elements traditional analysis obfuscates. Offsetting the virtue of such clarity are adverse effects, such as how contemporary economic analysis led Posner to focus on factors the Hand formula probes (like locks or notices) and to disregard those outside its purview (like a hotel’s safety history, allocation of duties between

149. Posner explains:

Ordinarily, and here, the parties do not give the jury the information required to quantify the variables that the Hand Formula picks out as relevant. That is why the formula has greater analytic than operational significance. Conceptual as well as practical difficulties in monetizing personal injuries may continue to frustrate efforts to measure expected accident costs with the precision that is possible, in principle at least, in measuring the other side of the equation—the cost or burden of precaution. For many years to come juries may be forced to make rough judgments of reasonableness, intuiting rather than measuring the factors in the Hand Formula; and so long as their judgment is reasonable, the trial judge has no right to set it aside, let alone substitute his own judgment.

Id. at 1557 (internal citations omitted). Some detect in this statement a softening of Posner’s commitment to the Hand formula’s rigid versions compared to his pre-judicial scholarship. *E.g.*, Jane Stapleton, *Choosing What We Mean by “Causation” in the Law*, 73 MO. L. REV. 433, 469 n.132 (2008).

150. *McCarty*, 826 F.2d at 1557.

151. Connecting these examples of economic costs to traditional legal expressions of due care, Posner says the required care is that “which is optimal given that the potential victim is . . . reasonably careful; a careless person cannot by [being careless] raise the standard of care of [others].” *Id.* at 1557–58 (citing *Davis v. Consol. Rail Corp.*, 788 F.2d 1260 (7th Cir. 1986)). Posner’s “no duty” formulation, repeated in several opinions, may overlook law requiring corrective precautions in response to negligence of others. *See* David W. Barnes & Rosemary McCool, *Reasonable Care in Tort Law: The Duty to Take Corrective Measures and Precautions*, 36 ARIZ. L. REV. 357, 374–79 (1994).

hotels and guests, or comparative knowledge).¹⁵² Therefore, despite what Posner said, traditional law and the Hand formula do not necessarily comprehend the same factors, and imperfections translating law into economics are deeper than lawyer reticence to present quantitative evidence to juries. That reticence, moreover, is justified by how people (lawyers, judges and juries) focus not on artificial cost-utility matrices but, as Cardozo understood, on the roles, knowledge and intentions of individuals whose conduct law governs.¹⁵³

Furthermore, the Hand formula's analytical avenues may lead to dead ends, as Posner's opinion in *Davis v. Consolidated Rail Corp.*¹⁵⁴ illustrates. It affirms a jury verdict for a rail car inspector against his employer and a railroad arising from an accident when a long train in a rail yard moved while the inspector was under it. The inspector did not signal his presence under the train as federal law required¹⁵⁵ and the train did not signal before moving as custom may have dictated. The inspector offered three grounds to support the verdict and Posner found one convincing.

The winning argument asserted the railroad's crew should have sounded the train's horn or bell before moving it. Posner acknowledged the crew had no reason to believe anyone was in danger on the tracks. But there was a possibility someone needed warning about the moving train. Applying the Hand formula, Posner found the burden on the railroad, sounding an alarm, "vanishingly small."¹⁵⁶ Probability of loss was "significant, though not large," considering accidents that could be averted by signaling.¹⁵⁷ To determine benefits of precaution, Posner assessed not only the actual accident, but the "expected cost of any other, similar accidents that the precaution would have prevented."¹⁵⁸ In the nomenclature of Posner's Hand formula, $B < PL$, so the defendants were negligent.

Posner's application of the Hand formula to the inspector's two losing arguments shows how the formula can be irrelevant or unhelpful to negligence analysis. His disposition relied on rhetorical characterization and practical sense. First, the inspector argued that an employee who saw

152. For example, the *McCarty* guest presented evidence of nine break-ins through sliding glass doors at the hotel in the previous two years and that hotel managers expressed concern about defective locks on those doors. Wright, *supra* note 6, at 263. In addition, it may have been the hotel, not the guest, who failed to lock the door; the guest may not even have known the door was there, for it was covered by drapery. *Id.* at 264–65. Posner's failure to evaluate these factors may suggest it is difficult to incorporate them into the Hand formula, though traditional legal analysis makes it easy to do so.

153. See *supra* text accompanying notes 46–47.

154. 788 F.2d 1260 (7th Cir. 1986) (Posner, J.) (applying Illinois law).

155. *Id.* at 1262 (citing 49 C.F.R. § 218).

156. *Id.* at 1264.

157. *Id.*

158. *Id.*

him drive in to the yard should have alerted those preparing to move the train that he was on the tracks. Posner rejected this, noting how the employee could not reasonably have assumed this driver would leave a vehicle to crawl under rail cars.¹⁵⁹ The Hand formula could be used to classify this risk as too slight to take precaution against, but Posner dismisses it instead by simply calling it “rather absurd.”¹⁶⁰ The appeal to what common sense deems absurd is persuasive, without needing to measure the risk or its relation to requisite precaution.¹⁶¹

Similarly, the inspector claimed a train crew member should have investigated the track to see if anyone was on it. Posner rejected this claim as “even more fantastic.”¹⁶² The train spanned a mile and required an hour for someone to check under every car. This argument echoes Holmes’ stop-and-get-out rule from *Goodman* that Cardozo rejected, on pragmatic grounds, in *Pokora*—¹⁶³ a rejection Posner endorses.¹⁶⁴ This is a practical rejection of an impractical ironclad rule that would often be futile and sometimes dangerous, besides too costly. Again, the Hand formula could be fashioned to evaluate the cost part of the argument but it is not necessary and is not obviously helpful.¹⁶⁵ After all, in *Pokora* Cardozo convincingly rejected the *Goodman* rule using traditional legal analysis, as Posner acknowledges. In *Davis*, Posner rejected the echo of the *Goodman* rule by calling it “fantastic,” not exactly quantifying it in the Hand formula.

Further qualifications on the Hand formula appear from defense arguments in *Davis* based on federal law’s requirement that inspectors working under rail cars post blue flags in plain view to those in the yard.¹⁶⁶ This was defendants’ “strongest argument,” Posner said.¹⁶⁷ Even so, blue flags were not as commonly used as defendants suggested. The inspector often worked under rail cars without posting flags and railroad employees knew this. Moreover, sometimes flags would not be “handy,” but inspectors still would work under cars, Posner said.¹⁶⁸ Forcing this analysis into the Hand formula, Posner concludes: “[t]he burden of sounding the horn would have been trivial, and the expected benefits

159. *Id.*

160. *Id.* at 1263.

161. See Wright, *supra* note 6, at 258–61 (noting how this purported application of the Hand formula shows the formula is “superfluous and implausible”); Gideon Yaffe, *Reasonableness in the Law and Second-Personal Address*, 40 LOY. L.A. L. REV. 939, 963–65 (2007).

162. *Davis*, 788 F.2d at 1264.

163. See *supra* text accompanying notes 40–45.

164. See *supra* text accompanying notes 64–65.

165. See Wright, *supra* note 6, at 258–61 (noting how this purported application of the Hand formula seems correct in result but “for reasons independent of” it).

166. *Davis*, at 1262 (citing 49 C.F.R. § 218).

167. *Id.* at 1265.

168. *Id.*

positive; for despite the blue flag rule there was some probability that an employee or invitee was working in or dangerously near the train”¹⁶⁹

Posner’s opinions in *Davis*, *McCarty* and *Wassell* illustrate innovative economic technique, but as justification, their relative narrowness makes them less persuasive than Cardozo’s broadly-framed opinions in *Wagner*, *Adams* and *Pokora*. Posner’s opinions evoke a sense that economic analysis should shape people’s reasonable expectations rather than that law should reflect those expectations, as Cardozo thought.¹⁷⁰ Cardozo stressed everyday experience as fundamental to negligence determinations,¹⁷¹ yet laypeople lack experience with formulaic expressions like $B < PL$. True, the basic formula reflects a lot of common sense and intuition and people need not be trained economists to appreciate that value. The trouble is how economic analysis can overwhelm legal principles at stake, disregarding important factors and exaggerating others, all of which can create tension with intuition. It seems defensible, then, that the vast majority of courts follow Cardozo’s traditional approach to negligence, with Posner among a handful of judges who prefer the Hand formula.¹⁷²

III. LIABILITY

Differences between traditional legal analysis and contemporary economic analysis of law permeate many tort doctrines, beyond basic issues concerning ordinary negligence and the Hand formula. Three contrasts concerning liability issues illustrate. The first concerns statutory violations, which Cardozo treated as negligence per se but Posner treats as factors in a Hand formula analysis. The second involves foreseeability and causation, contexts in which action and injury are not closely connected and where traditional legal analysis, in both Cardozo’s and Posner’s opinions, provides pragmatic solutions that elude contemporary economic analysis. The third raises matters more of technique, where Cardozo’s analysis, imposing negligence in a product liability case, shows capacity and persuasiveness less evident in Posner’s analysis, when determining whether to apply a standard of negligence or strict liability.

A. Statutory Violations

169. *Id.* at 1266. In *Davis*, Posner allows the overlooking of the inspector’s negligence when evaluating the defendants’ breach of duty, though in *McCarty* his formulation of the no-duty rule sets an injurer’s standard of care based on the assumption that others are careful and not negligent. Had the *McCarty* dictum been applied to *Davis*, the outcome would have been the opposite. *See Barnes & McCool, Corrective Precautions*, *supra* note 151, at 374–79; *infra* text accompanying note 327 (same point in context of *Greycas, Inc. v. Proud*).

170. *See supra* text accompanying note 48.

171. *See supra* text accompanying note 49.

172. *See* Englard, *supra* note 6, at 369; Zipursky, *supra* note 6, at 2002. Because Hand rarely used the formula and later abandoned it, perhaps the Hand formula should be renamed the Posner formula. *See* Wright, *supra* note 6, at 150–52.

Cardozo and Posner differ sharply on the tort consequences of statutory violations. For example, in *Davis*, the railroad inspector case discussed above, Posner disposed of defense arguments that the inspector violated the blue flag law by saying he rarely complied with it, that other employees knew this, and that often flags were not handy.¹⁷³ In contrast, Cardozo, in *Martin v. Herzog*,¹⁷⁴ treated statutory violations as negligence per se. *Martin* involved a couple, driving a buggy at night, hit by a car from the opposite direction. The wife, surviving her husband, sued the car's driver for negligent failure to stay on the road's right side. The driver's defense was contributory negligence, arguing the buggy was traveling without lights in violation of state law. The trial judge told a jury driving without lights evidenced negligence but was not negligence itself. The jury found the driver liable and the couple without fault. Cardozo's court affirmed a reversal, saying "the unexcused omission of the statutory [lights] is more than some evidence of negligence. It is negligence in itself."¹⁷⁵

Martin is now the standard approach,¹⁷⁶ especially in motor vehicle cases,¹⁷⁷ but not the only one. Alternative approaches treat unexcused statutory violations as evidence of negligence (as the *Martin* trial court did) or as akin to departures from custom (much as Posner implied in *Davis*).¹⁷⁸ Cardozo defended the per se approach on legalistic grounds. First, he anchored it in duty: "[T]o omit, willfully or heedlessly, the safeguards prescribed by law for the benefit of another . . . is to fall short of the standard of diligence to which those who live in organized society are under a duty to conform."¹⁷⁹ Second, Cardozo denied that juries could excuse the duty: "Jurors have no dispensing power [to] relax the duty that one traveler on the highway owes under the statute to another."¹⁸⁰

Among competing stances on the tort consequences of statutory violations,¹⁸¹ a striking contrast is between Cardozo's per se approach and

173. See *supra* text accompanying notes 166–69.

174. 126 N.E. 814 (N.Y. 1920) (Cardozo, J.).

175. *Id.* at 815.

176. See ABRAHAM, *supra* note 54, at 80–81; EPSTEIN, *supra* note 53, at 147; RESTATEMENT (THIRD) OF TORTS § 14 (2005) (Tentative Draft No. 1 2001).

177. DOBBS, *supra* note 53, § 134, at 318.

178. See DOBBS, *supra* note 53, at 317; EPSTEIN, *supra* note 53, at 147. The evidence and custom approaches may overlap; variations treat statutory violations as a prima facie case for negligence (as *Martin* allows in dicta). See *infra* text accompanying notes 187–189. See generally Caroline Forell, *Statutory Torts, Statutory Duty Actions, and Negligence Per Se: What's the Difference?*, 77 OR. L. REV. 497 (1998) (examining the state of confusion surrounding Oregon's various types of focused negligence statutes).

179. *Martin*, 126 N.E. at 815 (emphasis added).

180. *Id.* This reference to "dispensing power" evokes English monarchical privilege to suspend statutes but may not answer whether a per se approach or evidence/custom approach is better. See DOBBS, *supra* note 53, § 134, at 317–18.

181. Other rationales for the per se approach echo Cardozo's point about law's hierarchical

Posner's treatment of violations as one factor in a Hand formula negligence test in *Davis*.¹⁸² The contrast is significant for two reasons. First, their treatments of statutory violations suggest how their approaches set different boundaries on judicial power. In seeing violations as negligence per se, Cardozo used rhetoric to anchor this statutory source of liability in fundamental duty. People, living "in organized society," are duty-bound to conform to statutory mandates, and neither juries nor judges can dispense with that bond. Cardozo respected how the source of law in legislation imposes limits on the judicial role.

In contrast, economic analysis requires measuring costs of compliance with statutes. Tension between economic principles and positive law can result. In *Davis*, federal regulations required the inspector to take actions (post blue flags) he did not do. That could be negligence per se and provide a defense. Overlooking this, Posner measured competing prevention costs within the Hand formula. Posner's economic and legal analyses are thus mutually antagonistic while Cardozo's rhetoric and legal analysis are mutually reinforcing. Cardozo emphasized law; Posner emphasizes economics. A judicial opinion is more persuasive when accurately reflecting multiple sources of law production, including legislative, rather than disguising them.

Second, the per se rule excludes evidence about whether a statute is good policy, is current or outdated, or provides other information useful to cost-benefit analysis.¹⁸³ This reality reflects how Cardozo was less interested in cost-benefit analysis than, say, judicial-legislative power allocations, or whether community sense is better determined by legislatures or juries.¹⁸⁴ Posner's treatment of the blue flag rule in *Davis* as evidence in the Hand formula, akin to custom, elevates economic analysis

nature, legislation as functionally binding courts. See Ezra Ripley Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317, 331 (1914). But courts taking this position absent clear legislative directive may be reflecting other rationales. DOBBS, *supra* note 53, § 134, at 317–18. For example, the per se approach offers certainty, which must be traded-off against the flexibility offered by the evidence and custom approaches. *Id.*; EPSTEIN, *supra* note 53, at 147. Some say the per se approach enables judicial control over juries. Clarence Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453, 454 (1933). But it is not obvious why control is more important in statutory violation cases than in others or why other judicial tools like directed verdicts and judgments notwithstanding the verdict are inadequate. See DOBBS, *supra* note 53, § 134, at 317–18. Modern explanations, less legalistic or hierarchical than Cardozo's, simply recognize the "awkwardness of juries tolerating what legislatures [have] forbid[den]." EPSTEIN, *supra* note 53, at 147.

182. See *supra* text accompanying notes 166–69; see LANDES & POSNER, *supra* note 3, at 248–49 ("[V]iolation of the statute might not be negligent for a particular [person], given [the person's] costs of compliance relevant to the benefits of violation.").

183. EPSTEIN, *supra* note 53, at 147.

184. Cardozo is known for giving deference to other branches of government. See KAUFMAN, *supra* note 8, at 247–48, 250, 305, 308.

above legal norms.¹⁸⁵ Cardozo recognized many potentially contending values (as traditional legal analysis does); Posner lets one dominate (a tendency in contemporary economic analysis of law).¹⁸⁶ It is axiomatic that such a unitary jurisprudence is more limited than a multi-dimensional one.

A final observation about *Martin* and Cardozo's traditional legal analysis bears mention. After determining the victim's statutory violation was negligence itself, Cardozo noted that to have legal significance, such negligence must be connected to injury.¹⁸⁷ If the widow showed using lights would not have helped avert injury, then violation does not sustain the defense of contributory negligence.¹⁸⁸ The widow could have presented evidence about other light sources to claim that, even if her buggy had lights, the car driver would have hit her anyway. The jury should then have been told omitting lights was negligence but only prima facie evidence of contributory negligence, subject to competing evidence about other light sources severing causation. But the evidence showed nothing of the kind, Cardozo said.¹⁸⁹

Judge John Hogan dissented on this point, criticizing Cardozo's treatment of the causal connection between negligent action and injury. Hogan marshaled trial evidence suggesting there was enough light from other sources to make the buggy visible to the driver. He complained that Cardozo's opinion was "substituting form and phrases for substance, and diverging from the rule of causal connection."¹⁹⁰ Such rebuke to Cardozo's propensity to persuade using rhetoric in legal analysis is familiar.¹⁹¹ But such critique of Cardozo's rhetoric should not obscure the strength of his traditional legal analysis. Echoing *Pokora*,¹⁹² Cardozo, in *Martin*, offered causation as a tool to mitigate otherwise harsh results that a contributory negligence regime posed, though he and Hogan disagreed about whether evidence in *Martin* justified invoking it.¹⁹³

185. Economic analysis is elevated even above custom, for Posner reports as a fact that custom may have dictated the crew blowing the train's whistle before moving it yet ensuing analysis evaluates the point in terms of estimated costs of doing so. *Davis v. Consol. Rail Corp.*, 788 F.2d 1260, 1264–65 (7th Cir. 1986).

186. Posner, *supra* note 79, at 33 ("[T]he dominant function of the fault system is to generate rules of liability that if followed will bring about, at least approximately, the efficient—the cost-justified—level of accidents and safety.").

187. *Martin v. Herzog*, 126 N.E. 814, 816 (N.Y. 1920).

188. *Id.*

189. *Id.*

190. *Id.* at 820 (Hogan, J., dissenting).

191. See William Powers, *Thaumatrope*, 77 TEX. L. REV. 1319, 1320–21 (1999). Posner echoes Hogan's point when citing a characteristic Cardozo flaw as "the substitution of words for thought." POSNER, *supra* note 8, at 118–19.

192. See *supra* text accompanying note 64.

193. To deal with the harsh results contributory negligence regimes posed by barring any recovery, courts found numerous ameliorating doctrines. See, e.g., ABRAHAM, *supra* note 54, at 145.

B. *Foreseeability and Causation*

A more subtle contrast between traditional legal analysis and contemporary economic analysis appears in cases presenting an attenuated nexus between action and injury. As *Palsgraf v. Long Island Railroad Co.*¹⁹⁴ illustrates, traditional legal analysis uses duty, foreseeability and causation principles to establish limitations on liability for such remote injuries. This is difficult terrain for economic analysis, however, because while pragmatic grounds support imposing such limitations, an efficiency rationale for doing so is elusive.¹⁹⁵ Facing this problem in *Stoleson v. United States*,¹⁹⁶ Posner's opinion uses traditional legal analysis to defend the limitations, providing his own testament to its power.

Palsgraf is a canonical exhibit of Cardozo's traditional legal analysis and among the most prominent cases in American law.¹⁹⁷ A passenger stood on a platform awaiting a train while another, carrying a fifteen-inch long package, rushed to catch a departing one. As the rushing passenger jumped aboard, one railroad employee pulled him onto the moving train, while another pushed him on from the platform. In the jostling, his package fell, exploding fireworks inside. The explosion knocked over scales "at the other end of the platform many feet away,"¹⁹⁸ injuring the standing passenger.¹⁹⁹ A jury found the railroad negligent, with liability

These included an exception against bar when the injurer violated a safety statute, removal of bar when the injurer was more than merely negligent (such as grossly negligent), and the last-clear chance limitation (when the injurer, compared to the victim, had a final opportunity to avoid injury). *Id.* To this list, one may add a spin on Cardozo's *Martin* opinion: the victim's statutory violation is negligence per se, and contributory negligence is a defensive bar unless the victim proved causation between the other's violation and her injury. *Cf.* EPSTEIN, *supra* note 53, at 191 (doctrine of causation in contributory negligence can relax harshness of barring recovery). In contrast, in *Davis*, treating the inspector's violation of the blue flag regulation as negligence per se would not have barred recovery but, under prevailing comparative negligence law, reduced damages.

194. 162 N.E. 99 (N.Y. 1928).

195. See Richard W. Wright, *Actual Causation vs. Probabilistic Linkage: The Bane of Economic Analysis*, 14 J. LEGAL STUD. 435, 445–48 (1985) [hereinafter Wright, *Actual Causation*]; Richard W. Wright, *The Efficiency Theory of Causation and Responsibility: Unscientific Formalism and False Semantics*, 63 CHI.-KENT L. REV. 553, 571–73 (1987) [hereinafter Wright, *Efficiency Theory*].

196. 708 F.2d 1217 (7th Cir. 1983) (Posner, J.) (applying Wisconsin law).

197. *E.g.*, ABRAHAM, *supra* note 54, at 132; DIAMOND ET AL., *supra* note 54, at 126; POSNER, *supra* note 8, at 16, 41–42; SHAPO, *supra* note 142, ¶ 55.02, at 302.

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

199. *Id.* As a matter of style, some see Cardozo's statement of facts in *Palsgraf* as a model. See HELENE SHAPO & MARSHALL SHAPO, *LAW SCHOOL WITHOUT FEAR: STRATEGIES FOR SUCCESS* 155–56 (2d ed. 2002); Richard C. Wydick, *Plain English for Lawyers*, 66 CAL. L. REV. 727, 728–29 (1978). As a matter of fidelity to the record, others see grounds for criticism. Posner calls it "elliptical and slanted." POSNER, *supra* note 8, at 38–40. One claim is that Cardozo exaggerated the distance between the passenger, scales, and explosion. The victim sought to reargue the case on similar grounds; in denying the motion, the court per curiam said: "If we assume that the plaintiff was

affirmed by a 3-2 intermediate appellate decision. Cardozo's court reversed, 4-3, deciding the railroad employees' negligence to one passenger did not make it liable for injuries to another.

Negligence, Cardozo said, is not actionable unless it invades a legally protected interest—violation of a right. So a passenger cannot assert breach of duty owed to another. Cardozo put the point concerning duty several ways. First, duty is defined by reasonably perceivable risk, within a range of apprehension, meaning something foreseeable. Second, “the orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty.”²⁰⁰ Third. “[t]he risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension.”²⁰¹ Cardozo thus delineated the nature of duty as a matter of law, and not for the jury.²⁰² It is a distinctively legal, substantive notion, stressing a nexus connecting a wrongdoer's breach of a particular duty to a particular injury.²⁰³

Judge William Andrews' dissent took a broader view of duty: “Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others.”²⁰⁴ Negligence is not defined by duty, but as an unreasonable act affecting rights, not confined to those who might probably be hurt. If one person is justified to complain, anyone injured may assert liability, Andrews reasoned. For Andrews, the only limitation on liability for negligence is absence of proximate cause, based on “practical politics,” not philosophy or logic. Though it must be “something without which the event would not happen,” proximate cause means “that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point.”²⁰⁵ Andrews posed a series of questions to decide whether an action is the proximate cause of injury and found all supported requisite

nearer the scene of the explosion than the prevailing opinion would suggest, she was not so near that injury from a falling package, not known to contain explosives, would be within the range of reasonable prevision.” *Palsgraf v. Long Island R.R.*, 164 N.E. 564, 564 (N.Y. 1928) (per curiam) (denying motion for reargument). Cardozo probably wrote that. KAUFMAN, *supra* note 8, at 655 n.32. Another objection is mischaracterization of the alleged negligence, which Cardozo takes as the employees' jostling of the passenger when the allegation concentrated on how employees did not take precautions to deter passengers from boarding moving trains. See Richard W. Wright, *The Grounds and Extent of Legal Responsibility*, 40 SAN DIEGO L. REV. 1425, 1481–85 (2003).

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

201. *Id.*

202. *Id.* at 101 (“The range of reasonable apprehension is at times a question for the court, and at times, if varying inferences are possible, a question for the jury.”).

203. See John C. P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1813–14 (1998); Benjamin C. Zipursky, *Rights, Wrongs and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 8 (1998); Goldberg, *supra* note 12, at 1468–69.

204. *Palsgraf*, 162 N.E. at 103 (Andrews, J., dissenting).

205. *Id.* at 103–04.

causation in *Palsgraf*.²⁰⁶

Palsgraf stimulates voluminous discussion for many reasons. Cardozo's opinion is valued for its delineation of duty and how he fashioned it into a general liability limiting principle hinging on foreseeability,²⁰⁷ despite Andrews' broader view.²⁰⁸ An important issue is the jury-judge divide:²⁰⁹ Cardozo, akin to Holmes in *Goodman*, thought reasonable people would necessarily agree that the remote passenger's injury was not a foreseeable result of employees jostling another; Andrews, akin to Cardozo in *Pokora*, thought they could disagree. In addition, the duty-causation split between Cardozo and Andrews is a reason to discuss the opinion, especially because the doctrines each judge used could have been applied to reach the opposite result.²¹⁰

Above all, *Palsgraf* is famous because of enduring tensions between the concepts of duty and causation²¹¹ and how courts diverge on whether to follow Cardozo, or Andrews,²¹² or both on different points. For example, *Palsgraf* reflects two disagreements, one attracting a wider following to Andrews and the other Cardozo.²¹³ The first disagreement is, in a negligence case, where the liability limitation principle belongs—at duty or causation; courts generally follow Andrews' view of locating it at causation.²¹⁴ The second disagreement concerns the substance of that limitation, whether it should be based on the test of foreseeability or a broader notion of “practical politics;” courts generally follow Cardozo's foreseeability test.²¹⁵ A related reason for *Palsgraf's* fame is how the doctrinal dexterity Cardozo and Andrews both displayed remains useful to contemporary judges, including Posner, who used both to enrich his opinion in *Stoleson v. United States*.²¹⁶

In *Stoleson*, an employee of a government contractor handled nitroglycerin in a munitions plant. She began to suffer chest pains, but only on weekends. A year after starting work, she developed heart trouble. After years enduring the malady and several doctors denying her theory—

206. *Id.* at 104–05.

207. *See infra* text accompanying notes 260–317.

208. *See* Heidi M. Herd & Michael S. Moore, *Negligence in the Air*, 3 THEORETICAL INQUIRIES IN LAW 333, 349 (2002).

209. *See* ABRAHAM, *supra* note 54, at 132–33.

210. Cardozo could have applied proximate causation to conclude that the victim was outside the chain of jural causes (to use a phrase from Cardozo's *Wagner* opinion), and Andrews could have applied duty analysis to say it was possible for a rational jury to decide the victim was within the range of foreseeable injury from employees jostling another passenger.

211. DIAMOND ET AL., *supra* note 54, at 126.

212. ABRAHAM, *supra* note 54, at 135 (“[C]ourts have never fully reconciled these two points of view. Sometimes courts employ Cardozo's approach, sometimes Andrews' approach.”).

213. *See* DOBBS, *supra* note 53, § 182, at 451.

214. *Id.*

215. *Id.*

216. 708 F.2d 1217 (7th Cir. 1983) (Posner, J.) (applying Wisconsin law).

that pains were caused by handling nitroglycerin—she found one who confirmed it. Daily exposure caused artery expansion; withdrawal on weekends caused constrictions, yielding chest pains. Though the symptoms should have abated after stopping work at the plant, she continued to have them, which were diagnosed as hypochondria. In a bench trial, the judge found the government negligent and awarded damages for related heart disease. But the party's expert witnesses disagreed over whether hypochondria resulted from the employee's heart trouble and treatment or was a pre-existing condition. The judge found the employee failed to prove the government's negligence was the cause and denied associated damages. Posner's court affirmed.

The issue was whether the employee proved causation between the negligence and her hypochondria symptoms, but the trial judge's conclusion posed an interpretive problem: did the employee fail to prove causation as a matter of law or fact?²¹⁷ Posner invoked two traditional legal principles to test the judge's conclusion in terms of legal causation. First, it could not mean liability would follow only if government caused the hypochondria since, under tort law's well-settled thin skull rule, injurers take negligence victims as they are.²¹⁸ It makes no difference that the employee was harmed only because of her vulnerability to that illness. Second, liability is not excused if the employee's hypochondria symptoms were triggered by alarmist treatment of her physician. Tort law is equally well-settled that injurers are liable for aggravations to injury they originally cause.²¹⁹ The government was negligent in exposing the employee to nitroglycerin and causing her heart condition. If a doctor negligently treated her heart illness and caused greater harm, the government would be liable for the original and additional harm.

But after thus suggesting probable reversal, Posner said a more plausible interpretation of the judge's finding is the employee failed to prove causation as a matter of fact. The employee failed to prove her physical symptoms were caused by hypochondria and not some undiagnosed condition. Given that hypochondria is not well understood, the best reading of the trial judge's conclusion is not that the employee failed to prove the government's negligence caused her hypochondria symptoms, but that she failed to prove her physical symptoms were the

217. *Id.* at 1220.

218. Posner cites the classic *Vosburg v. Putney*, where an injurer was liable, not for causing underlying infection in the victim's tibia, but because the injurer's negligent kick exacerbated a pre-existing condition and caused injury. *Id.* at 1221 (citing *Vosburg v. Putney*, 50 N.W. 403, 404 (Wis. 1891)). For criticism that Posner ignores a distinction within the thin skull rule between physical and mental injury, see J. Stanley McQuade, *The Eggshell Skull Rule and Related Problems in Recovery for Mental Harm in the Law of Torts*, 24 CAMPBELL L. REV. 1, 19 n.34 (2001).

219. *Stoleson*, 708 F.2d at 1221 (citing *Butzow v. Wausau Mem'l Hosp.*, 187 N.W.2d 349 (Wis. 1971); *Heims v. Hanke*, 93 N.W.2d 455 (Wis. 1958)).

result of hypochondria rather than some unrelated condition. Posner's exemplary traditional legal analysis could have ended his opinion there. Yet Posner continued.

Drawing on cases with lineage to *Palsgraf*, Posner found "additional confidence" affirming.²²⁰ These cases say that, even absent doubt about causation in fact, injurers may avoid liability for damages so remote and disproportionate to culpability that public policy justifies denying them. Posner raised this principle, articulated by the Wisconsin Supreme Court in *Howard v. Mt. Sinai Hospital*,²²¹ on his own, the lawyers evidently not briefing it. In doing so, Posner signals *Palsgraf*-like limits on the employee's claim. *Howard* is a descendant of *Palsgraf*, citing an earlier opinion, *Pfeifer v. Standard Gateway Theater*,²²² which states:

[I]n cases so extreme that it would shock the conscience of society to impose liability, the courts may . . . hold as a matter of law that there is no liability. An example of this is *Palsgraf* . . . [where Judge Cardozo] held that as a matter of law the plaintiff could not recover In a dissenting opinion . . . Judge Andrews argued the question of proximate cause [finding] that the proximate cause of plaintiff's injury was the negligence of defendant's employees because their wrongful act had set in motion the sequence of events which produced the harm without any intervening cause. Logic seems to be on the side of the dissenting opinion, yet the majority opinion can be justified from the standpoint that judicial policy warranted the result. The conscience of society might be shocked by imposing liability in such a case.²²³

So Posner, *sua sponte*, drew on Wisconsin precedents with roots in *Palsgraf*, intimating that both duty and causation principles support the result in *Palsgraf* (and *Stoleson*). In writing about *Palsgraf*, Posner suggests it is not an interesting case, but an "esoteric problem," and says Cardozo's "engineered . . . minority solution" is little better than the "unsatisfactory" causation solution.²²⁴ Posner adds modest economic insights. Posner muses that on one hand, not imposing liability may yield insufficient precautions.²²⁵ Yet it was not the railroad, but its employees, who were negligent, and large organizations cannot control their workers;

220. *Id.* at 1224.

221. 217 N.W.2d 383 (Wis. 1974).

222. 55 N.W.2d 29 (Wis. 1952).

223. *Id.* at 34 (internal citation omitted).

224. POSNER, *supra* note 8, at 41. It is not clear that Cardozo's solution is a "minority" one. See *supra* text accompanying notes 211–16. Nor does it seem accurate to characterize the problem as "esoteric." True, case outcomes may not pivot on the issue, but the problem recurs and poses important conceptual challenges.

225. POSNER, *supra* note 8, at 37.

plus, the accident was highly improbable. So Posner concludes that imposing liability would not likely affect the injurer's behavior or reduce the probability or magnitude of loss from this risk type.

Stoleson and these musings imply that Posner would probably concur with Cardozo's *Palsgraf* result denying liability, but be agnostic about resting it on duty or causation.²²⁶ After all, either legal ground can be supported by Posner's economic justifications. And there are few other economic justifications, since efficiency rationales for imposing foreseeability limitations on tort liability are elusive.²²⁷ So it does not seem likely an opinion relying on those economic ideas would become canonical like the one Cardozo wrote,²²⁸ with its emphatic delineation of the traditional legal concept of duty and engagement with foreseeability as a limitation on liability. Thus, Posner's economic insights on *Palsgraf*, and sua sponte invocation of *Palsgraf*-inspired judicial policy, especially in such a doctrinal opinion, reflect the power of traditional legal analysis and comparatively modest utility of contemporary economic analysis.

C. Product Liability and Strict Liability

More textured contrasts between Cardozo's traditional legal analysis and Posner's contemporary legal analysis concern technique. In *MacPherson v. Buick Motor Co.*,²²⁹ Cardozo's most influential opinion, he used doctrine, especially duty and foreseeability, to create negligence liability for consumer product manufacturers at the dawn of the era of merchandizing and consumerism. Cardozo employed classical analogical reasoning and doctrinal classification to render a pragmatic opinion so persuasive and adaptive to socioeconomic change that it was rapidly followed in all other states.²³⁰ The opinion also reflects Cardozo's normative preference for tort liability based on fault (negligence) over strict liability. Posner shares that preference but his attempt to justify it using contemporary economic analysis, in *Indiana Harbor Belt Railroad Co. v. American Cyanamid Co.*²³¹ (one of his most prominent opinions) does not command wide following or assent even among devotees of the

226. Elsewhere Posner embraces Cardozo's *Palsgraf* opinion to focus on duty and foreseeability. See *infra* text accompanying notes 278–90 (discussing *Edwards v. Honeywell*).

227. See Wright, *Actual Causation*, *supra* note 195; Wright, *Efficiency Theory*, *supra* note 195.

228. ABRAHAM, *supra* note 54, at 132; DIAMOND ET AL., *supra* note 54, at 141; POSNER, *supra* note 8, at 16, 41–42; SHAPO, *supra* note 142, ¶ 55.02, at 302; Paul Brickner, Kaufman's *Cardozo: Judicial Biography as Legal History*, 88 GEO. L.J. 1895, 1912 (2000) (reviewing KAUFMAN, *supra* note 8).

229. 111 N.E. 1050 (N.Y. 1916).

230. See, e.g., ABRAHAM, *supra* note 54, at 197; DIAMOND ET AL., *supra* note 54, at 170; DOBBS, *supra* note 53, § 353, at 973; EPSTEIN, *supra* note 53, at 389–92; POSNER, *supra* note 8, at 33 n.1; SHAPO, *supra* note 142, ¶ 38.01, at 205.

231. 916 F.2d 1174 (7th Cir. 1990) (Posner, J.) (applying Indiana law).

economic approach. Posner's opinion is also non-parsimonious compared to traditional legal analysis, which could have readily defended applying negligence rather than strict liability.

In *MacPherson*, the buyer of a car from a retail dealer sued the manufacturer for personal injuries, alleging negligence.²³² The manufacturer defended by citing absence of a contractual relationship with the buyer—the formidable privity defense that precluded like suits before.²³³ Cardozo's court affirmed a judgment that the manufacturer owed a *duty* to all buyers, despite the privity rule, because cars can be “thing[s] of danger.”²³⁴ To quote:

If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger: Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by [a person] other than the purchaser, and used without new tests [to discover danger], then, *irrespective of contract*, the manufacturer of this thing of danger is under a *duty* to make it carefully.²³⁵

If such things are not made carefully, manufacturers are liable for injury to parties even absent privity. Cardozo restated prevailing settled law that manufacturers are liable only to direct buyers of their products. He then restated the equally established exception to this limitation for inherently destructive items, like poisons, explosives, and weapons—things whose normal function endangers life. Related risks are foreseeable and that creates a duty to avoid injury, irrespective of duty delimited by contract.

To counter the exception, the manufacturer urged that a car, unlike poison, is not an inherently destructive instrument. This would put it outside the “imminent danger” category and limit liability in accordance with contract. Cardozo responded that if a product, when negligently made, and used in its customary way, poses risk of personal injury, the product is dangerous because injury is a foreseeable consequence of use. Toiling with contending precedents in traditional legalistic ways to justify the analogical reach, Cardozo claimed to find this principle in several

232. *MacPherson v. Buick Motor Co.*, 138 N.Y.S. 224, 225 (N.Y. App. Div. 1912).

233. *Id.* It also defended by noting the wheels were manufactured by another company, with a reliable reputation. *Id.*

234. *MacPherson*, 111 N.E. at 1053.

235. *MacPherson*, 111 N.E. at 1053 (emphasis added). Cardozo limited manufacturer's duty outside contractual relationships. First, a manufacturer must know of danger that is probable, not merely possible. Second, it must know that it is likely that others besides a direct buyer will use the product. Third, the manufacturer's knowledge of danger and use must survive a proximate cause analysis. In *MacPherson*, all these limitations were met. *Id.*

cases holding manufacturers liable to people not in privity with them.²³⁶

Cardozo summed up the essence of *MacPherson*:

We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.²³⁷

Cardozo was eviscerating privity by incrementally expanding the scope of legal duty, using traditional forms of analogical reasoning²³⁸ and the legal principle of foreseeability. This opinion highlights Cardozo's pragmatic jurisprudence, evolving law by traditional means to address socioeconomic change.²³⁹

As a matter of technique, Posner's *Indiana Harbor* offers a good contrast. Posner tries to translate into economic terms traditional legal statements on whether strict liability or negligence applied when a switching line sued a chemical manufacturer to recover decontamination costs after a railcar containing hazardous chemicals leaked in its yard. Despite valiant effort, Posner's economic analysis has attracted considerable criticism and dissent, even among devotees of the approach. Moreover, traditional legal analysis would have worked more parsimoniously.²⁴⁰

236. *Id.* at 1052, 1054 (citing *Torgeson v. Schultz*, 192 N.Y. 156 (1908) (classifying aerated water bottles that explode as inherently dangerous)); *Devlin v. Smith*, 89 N.Y. 470 (1882) (classifying scaffolding as inherently dangerous when finding a scaffold's builder liable to an injured workman though the builder lacked any contract with him); *Winterbottom v. Wright*, (1842) 152 Eng. Rep. 402 (finding a contractor not liable to a stagecoach driver for injuries suffered due to coach defects). Cardozo distinguished *Winterbottom* in part because the defendant was not the manufacturer and in part because the complaint in the case was technically deficient. *Id.* at 1054.

237. *Id.* at 1053.

238. See EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1–19 (1949).

239. Chief Judge Willard Bartlett, the lone dissenter, agreed with Cardozo's statement of the privity rule and its inherently dangerous product exception. *MacPherson*, 111 N.E. at 1055 (Bartlett, C.J., dissenting). He disagreed about the sort of products in the previous line of cases. *Id.* Courts treated scaffolding and aerated water bottles as inherently dangerous products period, having nothing to do with negligent manufacture. *Id.* at 1056. Cardozo's rationale for finding a car inherently dangerous is an unwarranted expansion of case law. Nor could Bartlett accept Cardozo's attempt to distinguish *Winterbottom*; he found them analogous. *Id.* Any extension of liability beyond contract is for legislative branches, Bartlett said, which turned out an incorrect prophesy when dozens of courts followed New York's lead. *Id.* at 1057.

240. *Indiana Harbor* can be criticized for applying tort law at all, whether strict liability or negligence, because the issues involved would better have been handled by contract law. See David Rosenberg, *The Judicial Posner on Negligence Versus Strict Liability: Indiana Harbor Belt Railroad Co. v. American Cyanamid Co.*, 120 HARV. L. REV. 1210, 1219–20 (2007). Notably, Posner criticizes Cardozo's *MacPherson* opinion on precisely the same ground. POSNER, *supra* note

The opinion interprets the *Restatement (Second)*'s factors delineating whether an activity is ultra-hazardous so that strict liability applies: (1) great probability of harm, (2) great magnitude of harm, (3) due care cannot eliminate risk; (4) the activity is not common; (5) the activity is inappropriate to a certain place, and (6) the relation between the activity's community value to unavoidable risk. Posner reorganized these to show that analysis is and should be based on negligence principles. The first issue is whether due care can eliminate a risk, item (3), which reflects negligence as common law's baseline.²⁴¹ If activity can be reduced by due care and was not so reduced, negligence points to liability and there is no need for strict liability. If the activity cannot be reduced by due care, the issue is whether the activity can more safely be conducted elsewhere or on a lesser scale (items (5) and (6)). Strict liability creates such incentives, which are most appealing when the probability and/or magnitude of harm increases to great levels (items (1) and (2)). If the activity is common, the case for strict liability weakens (item (4)).

Posner accepted that explosive chemicals are a common context warranting strict liability as they are dangerous even when handled carefully and liability threats may promote precautions. But that does not automatically support strict liability over negligence. Exposing manufacturers to strict liability for moving products in the stream of commerce may be too sweeping, foreclose inquiry into relevant factors and not deter leakage accidents. After all, no one suggested "the leak in this case was caused by the *inherent* properties of acrylonitrile."²⁴² Carelessness was the cause. The issue was whose carelessness and this was unclear.²⁴³ Posner also rejected the argument that the activity was ultra-hazardous because of the yard's proximity to Chicago. One must apply the liability regime most likely to control targeted actions, Posner explained. Imposing strict liability on a chemical manufacturer for transport spills does not create incentives for manufacturers to prevent recurrence. The only choices are relocating or reducing the activity, and it is not obvious how manufacturers can do that for shipping means or routes.

Posner thus struggles to breathe analytical economic content into the *Restatement*'s black letter law, a difficult task given that the *Restatement*

8, at 108–09 (stating otherwise a "tour de force of judicial casuistry," Cardozo missed the principal pragmatic issue of whether manufacturer responsibility to injured consumers is better addressed using tort law principles as Cardozo did or contract law).

241. *Indian Harbor*, 916 F.2d at 1177.

242. *Id.* at 1179.

243. *Id.* Candidates included: the car's owner (for related maintenance and inspection); the car's manufacturer (for possible failure to inspect it); the railroad (for maintenance of cars it possessed); or even the switching line company itself. *Id.* Posner also uses this technique of listing all other potential defendants to justify denying liability in *Edwards v. Honeywell*. See *infra* text accompanying notes 278–290.

was not born of economic insight.²⁴⁴ He says the rationale of strict liability is to reduce frequency of highly dangerous activities, and opines that negligence is more likely to produce that result. If negligence is enough to achieve desired reduction, it is preferable to strict liability, he reasons. But economic models do not make it clear that negligence is more likely than strict liability to reduce frequency of highly dangerous activities. The issue is whether negligence or strict liability will induce the optimal level of care. In economic models, optimal means minimizing total costs of accidents plus prevention. The standard theoretical model suggests that negligence and strict liability yield the same optimal outcome, the difference being who bears residual loss.²⁴⁵ In strict liability the injurer does; in negligence the victim does.

Professor Epstein notes that the result may change by adding all other costs to the equation, like administrative costs and the costs of error.²⁴⁶ For example, negligence means fewer, but more complex, lawsuits.²⁴⁷ Strict liability means all incentives are on those pursuing the activity to determine *ex ante* optimal ways and locations—probably a more efficient way than courts making those decisions in hindsight. Error costs may likewise be lower under strict liability than negligence.²⁴⁸ The upshot is strict liability may have an edge over negligence, raising doubt about Posner's *Indiana Harbor* opinion in economic terms.

On the other hand, Professor Abraham suggests the case may be correct on its facts, but is uncertain whether it can be generalized.²⁴⁹ He emphasizes the difference between activity effects and safety effects.²⁵⁰ Negligence liability creates incentives to provide optimal safety and shifting to strict liability adds no new ones. Strict liability adds incentives to avoid dangerous activities and pursue safer ones. It can create incentives that negligence cannot.²⁵¹ This is because negligence liability does not force actors to internalize all activity costs fully whereas strict liability does. But to achieve those gains requires good substitutes for the subject activities, not always possible—probably not on *Indiana Harbor*'s facts concerning transport, as Posner suggested.²⁵²

244. See Alan O. Sykes, *Strict Liability versus Negligence in Indiana Harbor*, 74 U. CHI. L. REV. 1911, 1922 (2007).

245. See generally Brown, *supra* note 3 (analyzing from an economic perspective the legal standards for negligence).

246. EPSTEIN, *supra* note 53, at 95–96.

247. See Keith N. Hylton, *Costly Litigation and Legal Error under Negligence*, 6 J.L. ECON. & ORG. 433, 435 (1990).

248. See *id.*

249. ABRAHAM, *supra* note 54, at 179.

250. *Id.* The pioneering work examining activity levels is Steven Shavell, *Strict Liability versus Negligence*, 9 J. LEGAL STUD. 1 (1980).

251. *Id.* at 172.

252. 916 F.2d 1174, 1180 (7th Cir. 1990) (Posner, J.). Similarly, though strict liability deters

On *Indiana Harbor's* facts, Cardozo would not have recast the *Restatement's* factors into economic terms or concentrate on efficient deterrence incentives, as Posner did. He would have analyzed doctrinally, probing duty, foreseeability, and fault. But his method would still likely reach Posner's result. In *Palsgraf*, Cardozo put ultra-hazardous activities to one side, yet his emphasis on duty (and foreseeability) reflected his agreement with prevailing law preferring liability based on fault over strict liability.²⁵³ Cardozo's traditionalism could justify that result by stressing the flexibility of negligence compared to the rigidity of strict liability,²⁵⁴ and enabling probing fault and just compensation, in addition to efficient deterrence.²⁵⁵ Although Posner's analysis hints at the flexibility point, noting how strict liability forecloses inquiry into relevant factors, Posner's economic preoccupation obscures flexibility's significance.

It seems ironic that Posner exerts such energy in *Indiana Harbor* to justify negligence over strict liability in economic terms when traditional legal analysis so readily defends applying negligence. Flexibility animates Cardozo's traditional legal analysis, ranging from *Palsgraf's* denial of liability, addressing a vigorous and influential dissent, to *MacPherson's* influential expansion of liability, overcoming formidable doctrinal hurdles. Posner's application of traditional tools in *Stoleson*, like causation, reflects that kind of flexibility too. Cardozo's *Martin* rule of negligence per se for statutory violations limits judicial flexibility, but respects other sources of legal duty that enlarge law's capacity to contribute to social organization. Indeed, legislatures generally are better positioned to determine what hazardous activities should be reduced, and judges using traditional legal analysis can hold actors who violate resulting law negligent per se. *Davis* and *Indiana Harbor* show how Posner's contemporary economic analysis lacks that capacity.

by creating incentives to find safer ways or locations, it may not reduce risk and may over-deter. See Mark Geistfeld, *Should Enterprise Liability Replace the Rule of Strict Liability for Abnormally Dangerous Activities?*, 45 UCLA L. REV. 611, 634 (1998); Joseph H. King, Jr., *A Goals-Oriented Approach to Strict Tort Liability for Abnormally Dangerous Activities*, 48 BAYLOR L. REV. 341, 354 (1996). As Professor Dobbs notes, even the oft-repeated idea that people will move to safer places under strict liability compared to negligence is not incontestable. DOBBS, *supra* note 53, § 351, at 965. One can move recreational blasting but it is not always feasible to move blasting for subways, tunnels or highways. Similar limitations apply to transportation of dangerous goods.

253. See *Palsgraf v Long Island R.R.*, 162 N.E. 99, 99 (1928) (noting cases involving liability without fault are "rare exceptions, survivals for the most part of ancient forms of liability, where conduct is held to be at the peril of the actor"); KAUFMAN, *supra* note 8, at 253 (Cardozo "regarded strict liability not as a reform but as an archaic survival . . . [reflecting his] general sense of the moral element in law. He did not wish to impose liability without irresponsible behavior.").

254. See Vernon Palmer, *A General Theory of the Inner Structure of Strict Liability*, 62 TULANE L. REV. 1303, 1354 (1988); *supra* text accompanying notes 35–61.

255. See Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266 (1997).

IV. DUTY

This Part addresses tort cases involving third party claims against contracting parties in contract, tort, or both. These claims raise advanced problems underscoring the need for the broad framework of justification that traditional legal analysis provides and that contemporary economic analysis can support but not supplant. A primary traditional legal tool to evaluate such claims is duty, which tended to replace privity in determining whether to recognize third-party rights. This discussion reveals Cardozo's felicity in developing duty as a way both to limit and to recognize liability and Posner's debt to Cardozo. It shows not only the value, but the necessity, of traditional legal analysis, and how economic insight plays a subordinate role.

A. Third Party Remoteness

Cardozo used the legal concept of duty to establish limitations on liability to third parties in two seminal cases—*H.R. Moch Co. v. Rensselaer Water Co.*²⁵⁶ and *Ultramares v. Touche, Niven*.²⁵⁷ *Moch* proved pivotal to Posner when addressing similar problems in *Edwards v. Honeywell*.²⁵⁸ In all three cases, a service provider breached a contract to its counterparty, and a third party, who would have benefited from performance, sued. All three opinions deny liability, primarily on the grounds established in *Moch*—absence of duty, based on the remote nexus between the claimant and the contract. Posner amplifies *Moch's* legal rationale with economic ones that, while supportive, are not more persuasive.

In *Moch*, a warehouse owner whose property was damaged by fire sued a company under contract to supply a city with water. While the contract was in effect, a fire spread to the warehouse, yet the company failed to supply water to hydrants to contain it. Cardozo rejected the owner's claims in both contract and tort. The contract claim portrayed the owner as a third-party beneficiary of the city-company contract. Third parties enjoyed such status but only if the contracting parties manifestly intended that. Cases allowing third-party enforcement were classified as creditor—²⁵⁹ when the promisee owed the third party a debt—or donee—when the promisee-third party relation justified inferring that the promisee bargained to get the promisor to make a gift to the third party (as when aunts get uncles to promise to transfer property to nieces).²⁶⁰ *Moch* did not fit either category. To allow liability of city contractors to citizens would stretch the

256. 159 N.E. 896 (N.Y. 1928) (Cardozo, C.J.).

257. 174 N.E. 441 (N.Y. 1931) (Cardozo, C.J.).

258. 50 F.3d 484 (7th Cir. 1995) (Posner, J.) (applying Wisconsin law).

259. *Lawrence v. Fox*, 20 N.Y. 268, 270 (1859).

260. *Seaver v. Ransom*, 120 N.E. 639 (N.Y. 1918).

idea of third-party beneficiaries too far. It is not reasonable to infer that cities and their contractors form service contracts intending that citizens could recover damages from the contractor for breach, Cardozo explained.

Allowing the tort claim would likewise mean liability for city contractors “unduly and . . . indefinitely extended,” Cardozo said.²⁶¹ Under the owner’s theory, the company’s contract created a duty of non-negligence and supply guarantee enforceable by anyone who would benefit from the bargain. True, tort law’s duty of care exposes the duty-bound to liability for breach. But the liability issue requires examining how “the relation and its attendant duty are established.”²⁶² One must assess “the conduct that engenders the relation.”²⁶³ This relation was too indirect. Cardozo supported this reckoning by invoking the hoary distinction between nonfeasance and misfeasance, observing that the company may have “[withheld] a benefit” but did not create an injury.²⁶⁴ Absence of a direct relationship and mere failure to confer the benefit doomed the owner’s tort claim.²⁶⁵

Duty is often taken for granted in tort cases.²⁶⁶ It may appear only in the shadow of other analytical tools, like when duty is owed to foreseeable victims for foreseeable injuries (as in *MacPherson*) but not for unforeseeable ones (as in *Palsgraf*).²⁶⁷ Yet absence of duty can be central. This is illustrated by the subtle distinction between nonfeasance (where duty may not exist) and misfeasance (where undertaking action may carry with it a duty to act non-negligently). *Moch* is often criticized for Cardozo’s use of this distinction.²⁶⁸ After all, a car driver cannot escape liability by saying he opted not to apply the brakes.²⁶⁹ Clear criteria are elusive for distinguishing innocent from culpable inaction; a reliable approach may characterize the context and behavior at issue.²⁷⁰ If so, in *Moch*, why the water company breached—reasons for inaction not the fact of inaction—may be important, though Cardozo did not consider this.²⁷¹

261. *Moch*, 159 N.E. at 899.

262. *Id.* at 898.

263. *Id.*

264. *Id.*

265. *Id.* Cardozo also dismissed the owner’s assertion of breach of statutory duty. *Id.* at 899.

266. See W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671, 698–99 (2008); Dilan A. Esper & Gregory C. Keating, *Abusing “Duty”*, 79 S. CAL. L. REV. 265, 266 (2006).

267. DIAMOND ET AL., *supra* note 54, at 125.

268. See Warren A. Seavey, *Reliance upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913, 920–21 (1951) (calling *Moch* Cardozo’s “most unsatisfactory” torts opinion, focusing on the misfeasance-nonfeasance distinction without probing the role of the contract).

269. DOBBS, *supra* note 53, § 315, at 856.

270. DOBBS, *supra* note 53, § 315, at 856.

271. DIAMOND ET AL., *supra* note 54, at 125. Professor Epstein says Cardozo “mysteriously” said beginning to act, so that stopping would cause affirmative harm, not just withholds a benefit; it creates a duty. EPSTEIN, *supra* note 53, at 272. He says such talk is “oft-repeated” but may be

These criticisms are valid, yet there is a place for duty in the *Moch* analysis. One difficulty in *Moch* is the contractual relationship. The warehouse owner is a stranger to the contract. That status implicates the limits of liability set by privity then in force or, today, limits in third-party beneficiary doctrine. At the time of *Moch*, the old privity rule had weakened and third-party beneficiary doctrine was expanding. In *Moch*, Cardozo set outer limits in an opinion representing the “leading discussion” of the doctrine and its scope.²⁷²

Cardozo is also routinely criticized for failing to emphasize in *Moch* the terms of the city-supplier contract. It was a fixed price contract for water, not a pricing structure that would compensate the supplier for risks of extensive structural damage for breach.²⁷³ Readers have to work hard to uncover this notion in Cardozo’s opinion. They also must toil to see another doctrinal limitation on contract damages: even if the citizen could recover something, costs of structural damage would be consequential damages and probably not recoverable.²⁷⁴ On this branch, again, it is doctrinally responsible to say this means the supplier owed the warehouse owner no *duty*.²⁷⁵

Despite criticism, New York continues to follow *Moch*²⁷⁶ and other courts facing similar facts tend to agree.²⁷⁷ Posner found *Moch* vital in *Edwards v. Honeywell, Inc.*²⁷⁸ in using duty as a limitation on liability in a negligence case. The opinion addressed a widow’s claim against a fire alarm provider alleging that her fireman husband died because the provider negligently delayed calling the fire department. The result was a weaker floor in a burning house through which the fireman fell. Posner’s court affirmed summary judgment for the provider, saying it owed no duty of care to the fireman.

Posner assumed the provider breached a duty of non-negligence (not contractual duty) to the homeowner–subscriber by failing to keep current information and that the fireman’s death was a consequence. He emphasized this is a tort, not a contractual, duty because the widow was not asserting the fireman was a third-party beneficiary of the owner-provider contract. The issue was whether the tort duty extended to the fireman. Posner completed this framing of the opinion with wonderment about “the elusive concept of ‘duty,’” saying “[w]hy duty should be an

“verbal hocus-pocus” and explains why modern courts instead say providers are liable if services are not rendered with reasonable care. *Id.*

272. DOBBS, *supra* note 53, at 870.

273. DOBBS, *supra* note 53, § 321, at 871; EPSTEIN, *supra* note 53, at 272.

274. *See* Hadley v. Baxendale, 9 Exch. 341, 341 (1854).

275. Posner joins the two common criticisms of *Moch*. *See* POSNER, *supra* note 8, at 110.

276. *See* Strauss v. Belle Realty, 482 N.E.2d 34, 35–36 (N.Y. 1985).

277. DOBBS, *supra* note 53, § 321, at 870–71 & n.4 (citing cases presenting different facts or disagreeing with *Moch*).

278. 50 F.3d 484 (7th Cir. 1995) (Posner, J.) (applying Wisconsin law).

issue in a negligence case is not altogether clear . . . and the quest for an answer may guide us to a decision.”²⁷⁹

For guidance, Posner turned to Cardozo, especially *Moch* and *Palsgraf*. Posner noted that modern thought equates negligence with carelessness but this is ahistorical.²⁸⁰ Negligence originally was limited to carelessness in performing a duty, whether undertaken freely or by law. The duty limitation eroded during the nineteenth century but, as negligence liability expanded, courts sought limitations and found them in duty.²⁸¹ A threshold issue became whether a duty existed. For example, bystanders have no duty to warn strangers of peril. This duty limitation appears in the separate lines of cases following *Palsgraf* (limitation on duty owed to unforeseeable victims) and *Moch* (limitation on duty owed by water companies and other utilities to citizens). These lines intersect on the *Edwards* facts.

Posner assessed arguments for and against duty limitation cases. He introduced Judge Henry Friendly as opposing the duty limitation.²⁸² The only time to talk about duty, Friendly thought, is when someone was careless. Why should carelessness be excused because a victim or harm was unforeseeable?²⁸³ If the rail workers in *Palsgraf* did not enable getting the package-toting passenger onto the train, the bystander would not have been hurt. If the water company in *Moch* performed its contract by supplying water, the warehouse would not have burned. And if this alarm company had kept its files current, this fireman would not have perished.

In contrast, two economic arguments support the duty limitation, in addition to grounds Cardozo provided. First, enterprises, whose liability is usually in question, cannot control employees, yet are liable under respondeat superior for consequences of employee negligence within the scope of employment. Enterprise carefulness does not eliminate liability risk. This suggests a rationale for excusing liability of unforeseeable sorts. It will not reduce the risk of accidents. A railroad cannot know its passengers pose explosive risks and a water company does not know the probability of fires.

Second, more relevant to *Moch* cases than *Palsgraf* cases, is determining who is in the best position to prevent particular accident types. Liability should be placed on them to minimize costs. To illustrate, Posner used the notion of lines of defense. The first line of defense against injury from fires is preventing fires from starting. The second is the water

279. *Id.* at 485–87.

280. For discussion of this history, see generally Cardi & Green, *supra* note 266 (chronicling “[t]he concept of duty in tort law”); Esper & Keating, *supra* note 266 (analyzing duty in tort law).

281. *Edwards*, 50 F.3d at 488..

282. *Id.* at 490 (discussing Petition of Kinsman Transit, Co., 338 F.2d 708, 721–26 (2d Cir. 1964) (Friendly, J.).

283. *Id.*

company to supply water to fight them.²⁸⁴ But it cannot control those responsible for the first line of defense. So it may make sense to excuse them from liability, putting the burden on potential victims.

In *Edwards*, Posner deemed arguments favoring duty limitations stronger than those, like Judge Friendly's, challenging them. First, *pace* Cardozo, this accident was unforeseeable, if that word "is given the practical meaning of too unusual, too uncertain, too unreckonable to make it feasible or worthwhile to take precautions against."²⁸⁵ It would be hard for the provider to know what would be necessary to meet its legal obligations in a regime without duty limitations. Second, the provider had no way to control fire risk at subscribers' homes. It lacked ability to reduce the risk or cost of accidents or to control the risk firemen take fighting fires.²⁸⁶ Third, the alarm service was at best a third line of defense, after the homeowner and fire department certainly, and maybe after many other potential defendants—the maker of the furnace where the fire started, furnace service companies, suppliers of the wood that built the floor that weakened so rapidly, and even the house's architect or builder.²⁸⁷

So Posner restates duty and foreseeability principles Cardozo's cases developed and defends them with economic insight focusing on least cost avoidance and imaginary lines of defense. The economic insight may make *Edwards* more persuasive than relying solely on Cardozo's traditional legal analysis that examines the nexus among parties to define the scope of duty and orbit of liability. On the other hand, the economic models dubiously assume parties have knowledge of least cost avoidance at the time accidents occur, weakening its justification.²⁸⁸ The full burden of justification can be discharged by delineating duty, as Cardozo did, according to reasonably perceivable risk, within a range of apprehension, and setting the orbit of liability accordingly.²⁸⁹ It cannot be fully discharged by citing least cost avoidance and lines of defense, whatever persuasive support they add.²⁹⁰

284. *Id.*

285. *Id.* at 491.

286. *Id.* at 490–91.

287. *Id.* at 491. Posner also used this "list potential defendants" technique in *Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, 916 F.2d 1174, 1178 (7th Cir. 1990).

288. See Giuseppe Dari-Mattiacci & Nuno Garoupa, *Least-Cost Avoidance: The Tragedy of Common Safety*, 25 J.L. ECON. & ORG. 235, 245 (2009); Stephen G. Gilles, *Negligence, Strict Liability, and the Cheapest Cost-Avoider*, 78 VA. L. REV. 1291, 1292 (1992).

289. See *supra* text accompanying notes 190–202 (quoting Cardozo's delineation of legal duty in *Palsgraf*).

290. Posner's wonderment about what duty is doing in a negligence case may itself be a cause of wonderment. To quote Professor Epstein's treatise: "The basic tort of negligence contains the following elements: duty; standard of care; breach of duty; causation; and damages." EPSTEIN, *supra* note 53, at 189; see also DIAMOND ET AL., *supra* note 54, at 270. On the other hand, torts scholars have long struggled with the concept of duty in negligence law and theory, and until recently it may have been underappreciated. See, e.g., Cardi, *supra* note 266, at 698–99; Esper &

The capacity and persuasiveness of this use of traditional legal analysis also appears in Cardozo's *Ultramares Corp. v. Touche*,²⁹¹ applauded for its aversion to imposing indeterminate liability to indefinite numbers of third parties, though now a minority position on denying third-party claims for negligent misrepresentation. A lender sued accountants claiming negligence and fraud in the certification of a company's financial reports on which the lender relied. The firm knew an "indefinite and wide" number of third parties might rely on the certified reports to supply funds, though the firm did not know identities. The reports showed a solvent company when the company was insolvent. Cardozo said the evidence supported a finding of auditor negligence.

But Cardozo said a jury could find the firm liable to the lender only if the firm owed the lender a duty to act with the same care the firm owed the company that hired it. Cardozo concluded that the firm did not owe the lender such a duty. The firm owed the company two duties, one "imposed by law to make their certificate without fraud, and [one] growing out of contract to make it with the care and caution proper to their calling."²⁹² The firm owed lenders "a like duty to make it without fraud" but no duty "to make it without negligence."²⁹³ To hold otherwise "may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class," Cardozo wrote, reversing all aspects of lower court rulings.²⁹⁴

Cardozo observed that "[t]he assault upon the citadel of privity is proceeding in these days apace."²⁹⁵ But the assault was not unlimited, particularly when "beneficiaries of the promise are indeterminate or general."²⁹⁶ Quoting *Moch*, the promise must "bespeak the assumption of a duty to make reparation directly to the individual members of the public if the benefit is lost."²⁹⁷ Citing *MacPherson*, Cardozo acknowledged tort law may make negligent manufacturers liable for "unreasonable risk of serious bodily harm" even absent privity.²⁹⁸ That did not mean liability extends to

Keating, *supra* note 266, at 266; John C. P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) of Torts: General Principles and the John W. Wade Conference*, 54 VAND. L. REV. 639, 642 (2001); Goldberg & Zipursky, *supra* note 203, at 1738–39. While Posner grounds *Edwards* in absence of any provider duty to the firefighter, scholars synthesizing the case reclassify the holding subtly. For example, Professor Dobbs reports the case in terms of absence of duty and explains that absence on the ground that the harm was unforeseeable because the provider would find it difficult to determine appropriate product pricing or care to cover liability exposure. DOBBS, *supra* note 53, § 287, at 779.

291. 174 N.E. 441 (N.Y. 1931) (Cardozo, C.J.).

292. *Id.* at 444.

293. *Id.*

294. *Id.* at 444, 450.

295. *Id.* at 445.

296. *Id.*

297. *Id.* (citing *Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896, 897 (N.Y. 1928)).

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

economic harms absent a closer nexus than exists between a lender and an auditor-company contract. Bodily harms differ from economic harms.²⁹⁹ So negligence liability is bounded by contract. In contrast, fraud liability is a matter of law and the evidence, including about negligence, supported concluding that a reasonable jury could have found fraud.³⁰⁰

Ultramares remains the law in New York, modified to address factual variations that still concentrate on Cardozo's indeterminacy point.³⁰¹ Other states take different approaches concerning the scope of third-party recovery for negligent misrepresentation. At the opposite end, a few states allow recovery by those who foreseeably and reasonably rely upon an expert's opinion.³⁰² A middle position, taken by the *Restatement*, allows recovery to a limited group of third parties if the provider intended to supply its opinion to persons in that limited group or knew its client would.³⁰³ Even so, *Ultramares* is a "paradigm case" and Cardozo's concern about indeterminate liability is "often-repeated."³⁰⁴ Legal concepts of foreseeability, reasonableness, intention and knowledge remain the flexible factors courts use to assess the issue in terms of duty, as Cardozo did. Posner is more critical of *Ultramares*, as the following section discusses.

B. Reliance on Misrepresentation

A final cluster of Cardozo-Posner opinions illustrates how duty provides a basis to recognize liability to third parties for misrepresentation, justifiable entirely on doctrinal grounds, with a supporting role for economic theory. The cases echoing *Ultramares*, pose an analytically

299. This distinction is embedded in tort law's traditional economic loss doctrine. *See generally* All-Tech Telecom, Inc. v. Amway Corp., 174 F.3d 862 (7th Cir. 1999) (applying Wisconsin law and discussing the utility of tort law's economic loss doctrine).

300. This branch of the case holds that opinions offered based on knowledge by a maker who lacks requisite knowledge may constitute fraud. *DIAMOND ET AL.*, *supra* note 54, at 347. This was not novel, as liability for fraud to third parties despite lack of privity was recognized as early as the 1700s—and still is. *DOBBS*, *supra* note 53, § 480, at 1370; *EPSTEIN*, *supra* note 53, at 570. What was notable is its point that evidence of negligence may be a basis to support inferring fraud. *DOBBS*, *supra* note 53, § 480, at 1370. *Ultramares* also is an exception to a general rule that misrepresentations of opinion, as opposed to fact, are not actionable. *DIAMOND ET AL.*, *supra* note 54, at 347.

301. *See, e.g.*, *Sec. Pac. Bus. Credit, Inc. v. Peat Marwick Main & Co.*, 597 N.E.2d 1080, 1084 (N.Y. 1992); *Credit Alliance Corp. v. Arthur Andersen & Co.*, 483 N.E.2d 110, 116–18 (N.Y. 1985); *White v. Guarente*, 372 N.E.2d 315, 318 (N.Y. 1977).

302. *DOBBS*, *supra* note 53, § 480, at 1373 (noting Mississippi and Wisconsin). The New Jersey Supreme Court adopted this approach, but in 1995 New Jersey's legislature essentially reversed it. *See H. Rosenblum, Inc. v. Adler*, 461 A.2d 138, 143 (N.J. 1983); *Carl Pacini et. al., At the Interface of Law and Accounting: An Examination of a Trend Toward a Reduction in the Scope of Auditor Liability to Third Parties in the Common Law Countries*, 37 AM. BUS. L.J. 171, 182 (2000).

303. *See Bily v. Arthur Young & Co.*, 834 P.2d 745, 752 (Cal. 1992).

304. *ABRAHAM*, *supra* note 54, at 286; *see also DOBBS*, *supra* note 53, § 480, at 1372.

identical issue: when can a third party hold a professional liable for breach of duty it formally undertook to another. Cardozo explored several doctrinal avenues to reach his result; Posner ultimately follows similar routes, adding economics to the inquiry, attesting not only to the power, but to the necessity, of traditional legal analysis.

In *Glanzer v. Shephard*,³⁰⁵ a contract to buy and sell beans set price according to weight sheets to be certified by an expert. The seller paid the certifier, the receipt saying payment was made “by order of” seller “for G. Bros,” a reference to the buyer. After certification and delivery, the buyer determined the beans weighed less than certified and sued the certifier for damages. Cardozo’s court upheld a directed verdict for the buyer by reversing an intermediate appellate court which thought the buyer’s only remedy was against the seller given buyer-certifier non-privity.

Cardozo said the basis for imposing liability is duty. The duty is imposed by law, from certifier to both seller and buyer, though the buyer did not contract with the certifier. Neither the certification nor the buyer’s use of it was indirect but were “the end and aim of the transaction” between the seller and certifier.³⁰⁶ True, the seller ordered it, but everyone knew the buyer would use it. Further, the certifier held itself out “to the public as skilled and careful in [its common] calling.” The task of certifying carried a duty to do so “carefully for the benefit of all whose conduct was to be governed.”³⁰⁷ The duty arises from a contractual relation but need not be bounded by contract principles.³⁰⁸

Cardozo also explored other grounds for the result. He repeated the notion about common callings and said regarding a hoary distinction used in *Moch*: “It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all.”³⁰⁹ He culled and distinguished other lines of cases involving economic loss, emphasizing: “The controlling circumstance is not the character of the consequence, but its proximity or remoteness in the thought and purpose of the actor.”³¹⁰ He noted cases saying lawyers certifying title are not liable to third parties like lenders but only when unaware of the certificate’s intended use—a lawyer knowing his opinion will be used to induce another to act is liable.³¹¹ Cardozo said it is also possible to put the case in terms of third-party beneficiary law or principal-

305. 135 N.E. 275 (N.Y. 1922) (Cardozo, J.).

306. *Id.* at 276.

307. *Id.* at 276.

308. *Id.* (citing *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916)).

309. *Id.*

310. *Id.* The case is thus easy to square with *Palsgraf*. The scope of duty in *Glanzer* is expressed in a contract to encompass all “whose conduct was to be governed,” a delimited population. *Id.* The asserted but rejected duty in *Palsgraf* would have extended, not by contract, to an unlimited population. *Palsgraf* is thus akin to *Moch*.

311. *Id.* (citing cases from six states).

agent. Regardless, they all give the same result. The basic idea of duty is simplest.

Posner says *Glanzer* illustrates Cardozo's "moralizing tendency."³¹² This is based on how Cardozo stressed the buyer's reliance, which was readily foreseeable, so that, in Posner's words, "the moral sense of the commercial community imposes a duty of care."³¹³ Posner translates this emphasis and sensibility into economic terms to mean the buyer lacked ability to protect itself.³¹⁴ Imposing the duty is justified to promote flexibility and efficiency in commercial exchange because without liability buyers must hire their own certifier. To Posner, this shows that "[c]ommercial morality is perhaps the same thing as efficiency, and *Glanzer* is an even more persuasive decision when the link is made clear."³¹⁵

Posner's critique of *Glanzer* is thus substantially identical to his critique of *Wagner* and invites corresponding rejoinders.³¹⁶ Cardozo's opinion is persuasive and thick, offering numerous doctrinal grounds using reliance, foreseeability, duty, and emphasis on the nexus of the relationship; it is not obvious how equating commercial morality with economic efficiency or invoking incapacity for self-protection would strengthen it.³¹⁷

Certainly those two economic propositions could not justify the *Glanzer* conclusion absent the legal analysis, as discussion of Posner's *Greycas, Inc. v. Proud*³¹⁸ confirms. It raised an issue substantially identical to *Glanzer*, which Posner could have cited and followed, though he instead cited and distinguished *Ultramares*. The opinion addressed a lender's suit against a borrower's lawyer for malpractice and negligent misrepresentation. The borrower needed financing for a farm but all the borrower's assets were encumbered. The borrower got a loan purporting to be secured by those assets, the lender relying on a borrower's lawyer letter, addressed to the lender, falsely reciting that he conducted lien searches and that the assets were unencumbered. Posner's court affirmed a district court damages award, rejecting the lawyer's assertion that he owed the lender no

312. POSNER, *supra* note 8, at 99.

313. *Id.* at 101.

314. *Id.*

315. *Id.*

316. *See supra* text accompanying notes 138–39.

317. Posner may overstate criticism of Cardozo when saying he failed to mention that the seller's retention of the certifier was merely formal given that its service was substantively rendered to and for the buyer. POSNER, *supra* note 8, at 100. The seller was not harmed by the certifier's breach and would not sue. There would be no effective legal remedy against the certifier for breach unless the buyer could claim one. That is the thrust of Cardozo's opinion, when stressing the buyer's reliance and the nexus of the certifier to the buyer-seller exchange. Cardozo's opinion could have been improved by noting this point, which is a legal, not an economic, one.

318. 826 F.2d 1560 (7th Cir. 1987) (Posner, J.) (applying Illinois law).

duty.³¹⁹

Posner explained that malpractice protects clients and that lawyers owe no duty of care to a client's adversaries. If malpractice is limited to breaches to one's client, the lawyer is not liable to the lender. But Illinois discarded the privity requirement for malpractice so non-clients have claims too, though this requires proof that the attorney-client relationship's "primary purpose and intent" was to benefit the claimant.³²⁰ That law "describes this case exactly" (or is even stronger because the borrower retained the lawyer solely to get this loan).³²¹ Negligent misrepresentation required only slightly different analysis, Posner noted. The claim can seem straightforward: the lawyer intended the letter to induce lender reliance, making him liable for all material misrepresentations in it. But concern about indeterminate liability requires attention. Courts limit it in ways akin to those applicable to malpractice claims.

Posner introduced *Ultramares*, noting how modern malpractice cases have analytically similar facts, and *Ultramares* was a negligent misrepresentation case. Posner called *Ultramares* "a famous opinion by Judge Cardozo" but asked why "privity of contract [was] required for liability just because the negligence lay in disseminating information rather than in designing or manufacturing a product?"³²² He noted the "privity limitation in products cases had been rejected, in another famous Cardozo opinion, years earlier."³²³ Posner volunteered an economic account for the difference, shunning Cardozo's distinction between bodily and economic harms.³²⁴ He said privity reflected judicial concern that excessive liabilities on information producers could reduce production of socially valuable information.³²⁵ Information producers cannot always recover returns on investment because law's property rights system in

319. *Id.* at 1568. The lawyer admitted misrepresentation but denied liability because he had no duty to the lender. Posner said this argument treats the lender's claim as malpractice not negligent misrepresentation, despite the lawyer insisting the lender's sole claim was negligent misrepresentation. The lender insisted it was asserting both. Posner could not understand why the parties were so insistent. "Legal malpractice based on a false representation, and negligent misrepresentation by a lawyer, are such similar legal concepts . . . we have great difficulty in holding . . . them apart in our minds . . ." *Id.* at 1563. Still, the inter-party wrangling induced Posner to discuss each claim. Posner also wondered why the lender did not assert fraud. The choice was curious because negligent misrepresentation invites the defense of comparative negligence, which the lawyer asserted, but that is no defense to fraud. Posner speculated that the lender was concerned that the lawyer's insurance policy excluded coverage for fraud or wished to avoid heightened pleading standards applicable to fraud claims. *Id.* at 1562.

320. *Id.* at 1563 (quoting *Pelham v. Griesheimer*, 440 N.E.2d 96, 100 (Ill. 1982)).

321. *Id.*

322. *Id.* at 1564.

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

324. *See supra* text accompanying note 298-99.

325. *Greycas, Inc. v. Proud*, 826 F.2d 1560, 1564 (7th Cir. 1987) (citing William Bishop, *Negligent Misrepresentation Through Economists' Eyes*, 96 L.Q. REV. 360 (1980)).

information is incomplete. They contribute social value without capturing all of it. The result may be under-production of socially valuable information.

Yet many states, including Illinois, reject *Ultramares*, perhaps because, as Posner speculated, information markets are more robust now than earlier or producers can capture full value of information they contribute. Still, courts discarding *Ultramares*'s privity requirement to allow third party negligent misrepresentation claims do so cautiously, heeding Cardozo's admonitions about indeterminate liability. Some courts emphasize particular justifying facts, as where a surveyor offers an "absolute guarantee for accuracy."³²⁶ Illinois cases, decided under *Restatement* § 552, limit third party negligent misrepresentation claims to discrete classes of persons induced to rely.

Under both lines, the *Greycas* lawyer was liable: in practicing his profession, he gave a letter intending to guide the lender's decision so the lawyer had to use due care but did not. Posner added an economic justification to impose liability even under the "absolute guaranty" approach to avoiding indeterminate liability. Information about property liens is of limited social value compared to its private value. It need not be distributed widely. So law need neither provide incentives to produce it nor protect those who produce it carelessly. Professionals negligently misrepresenting such information to non-clients breach a duty of care to them.³²⁷

326. *Id.* at 1564–65 (citing *Rozny v. Marnul*, 250 N.E.2d 656 (Ill. 1969)).

327. Posner rejected the lawyer's defense of comparative negligence, saying the lawyer did not show the lender failed to exercise due care. *Id.* at 1566. This produced a definition of due care Posner developed in *McCarty* and *Davis*: "Due care is the care that is optimal given that the other party is exercising due care." *Id.* at 1566 (citing *McCarty v. Pheasant Run, Inc.*, 826 F.2d 1554, 1557 (7th Cir. 1987); *Davis v. Consol. Rail Corp.*, 788 F.2d 1260, 1265 (7th Cir. 1986)). Posner added: "It is not the higher level of care that would be optimal if potential tort victims were required to assume that the rest of the world was negligent." *Id.* at 1566. So the issue was whether the lender was careless in not conducting its own lien searches and Posner concludes, as a matter of law, it was not. Law does not require duplicative precautions in such quotidian settings and the lender was reasonable when relying on the lawyer. *Id.*

This determination as a matter of law is unusual, for contributory negligence is usually an issue for juries. SHAPO, *supra* note 142, ¶ 31.02, at 160–61. It is also oddly focused on the economic rationale of duplicative efforts that are wasteful, when the point can be reached readily on traditional legal grounds. An injurer's actions may be non-negligent, as a matter of law, if not so risky because it could reasonably assume others would minimize the risk. DOBBS, *supra* note 53, § 162, at 391. That is what Posner means when saying due care standards assume other people are careful, non-negligent. But this does not depend on opposing costly duplication of work and may overstate one's right to assume others are non-negligent. *See supra* notes 151, 169. The conclusion can be justified on traditional legal grounds, including that the risk is within socially tolerable limits as a basic principle of negligence law. DOBBS, *supra* note 53, § 162, at 391. More simply, as Posner noted, the bank was reasonable when relying on the lawyer and that alone justifies excusing it from any obligation to duplicate his work.

Posner's *Greycas* opinion is elaborate and long (5,073 words).³²⁸ Its traditional legal analyses of malpractice and negligent misrepresentation are strong. Its discussion of the economics of information offers plausible explanations for both doctrines and for *Ultramares* and its legacy. *Greycas* aids understanding and supports the legal decision that the lawyer owed the lender a duty. The result is a thorough opinion, providing economic accounts of old and prevailing law alike.

Yet consider two alternatives to identical or nearly identical facts justifying the result using traditional legal analysis. Chief Judge Bauer concurred in *Greycas*, in a 94-word opinion collapsible into two dozen words: the lawyer intentionally misrepresented facts to induce the lender to make the loan and the lender justifiably relied on those misrepresentations to its detriment.³²⁹ Or consider Cardozo's opinion in *Glanzer*, nearly spot on,³³⁰ though Posner does not cite or discuss it. *Glanzer* took 1,691 words when the privity doctrine had some force, exploring the contours of legal duty; Posner uses three times that many words in *Greycas* when the privity doctrine was long dead, working through economic accounts of traditional legal principles.

True, *Glanzer* offers no economic analysis. But it reaches the same result, persuasively and more briefly. Traditional legal analysis played the decisive role, as it invariably did in Cardozo's opinions, including *Moch* and *Ultramares*. Even in Posner's *Greycas* opinion, as in *Edwards*, legal concepts of duty, foreseeability, reliance, and reasonableness played starring roles. Economic insights (lines of defense, least-cost avoidance, the economics of information) played supporting ones. The supporting roles are unnecessary. Though perhaps harmless and sometimes persuasive, economic analysis can be less parsimonious, as *Greycas* and Part III's discussion of *Indiana Harbor* suggest.³³¹ Worse, too much emphasis on economic analysis can impoverish, as Part II's discussion of rigid application of the Hand formula highlights.³³²

V. CONCLUSION

328. *Greycas* is long whether compared to Posner's average during the period of 3,100 words; to those of other federal judges then; or to those of federal judges in Cardozo's era. See WILLIAM DOMNARSKI, IN THE OPINION OF THE COURT 143–44 (1996) (noting that a random sample of Posner's first decade of opinions showed an average length of about 3,100 words); RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 153 (1999) (estimating average opinion length in federal courts in Cardozo's era as about 2,500 words and in Posner's era about 4,050 words). *Greycas* is also long compared to other opinions this Article surveys: Cardozo's average is 2,771 words and Posner's average is 4,779 words.

329. *Greycas*, 826 F.2d at 1568 (Bauer, C.J., concurring).

330. See *supra* note 310 and accompanying text.

331. See *supra* text accompanying notes 236–52.

332. For a discussion of *Wassell v. Adams*, *McCarty v. Pheasant Run, Inc.*, and *Davis v. Consolidated Rail Corp.*, see *supra* text accompanying notes 65–103, 147–72.

Comparative evaluation of Cardozo and Posner torts opinions evidences the strength of traditional legal analysis over contemporary economic analysis. Law's reluctance to provide clear negligence rules and to give juries discretion is based on traditional legal reasoning Cardozo elaborated and which Posner defends by repeating him.³³³ Posner's rigid version of the Hand formula is an innovative economic approach to negligence, but pales in capacity to Cardozo's approach that enables contextual evaluation of relevant factors. Practical notions such as the nexus of exchange relationships and associated legal principles, like reliance, duty, and foreseeability, are central to legal justification, while economic notions, such as efficient deterrence, least-cost avoidance, and lines of defense are not. Posner's own traditional techniques add evidence that this approach to law is more capacious and persuasive compared to economic analysis.

So it may be unsurprising that there are reasons to believe the economic approach to tort law is declining and traditional legal analysis absorbing it.³³⁴ First, judges do not widely use economic analysis in tort cases, especially not in negligence law.³³⁵ Even Posner's most famous torts opinions, such as *Indiana Harbor*, are not widely cited by courts.³³⁶ In contrast, Cardozo's opinions, in *MacPherson*, *Palsgraf*, and other cases, gained canonical status quickly³³⁷ and enduringly.³³⁸ Second, within the academy, despite impressive scholarship illuminating economic analysis of

333. See *supra* note 64 and accompanying text.

334. See Kenneth W. Simons, *Tort Negligence, Cost-Benefit Analysis, and Tradeoffs: A Closer Look at the Controversy*, 41 LOY. L.A. L. REV. 1171, 1188–89 (2008). See generally Bernstein, *supra* note 1 (observing the broadening of law and economics in recent decades and its functional absorption into mainstream legal thought).

335. See *supra* note 172 and sources cited therein.

336. See Rosenberg, *supra* note 240, at 1222.

337. See, e.g., CHARLES A. KEIGWIN, CASES ON TORTS (3d ed. 1929) (reprinting three Cardozo opinions, including *MacPherson* and *Palsgraf*); HARRY SHULMAN & FLEMING JAMES, JR., CASES AND MATERIALS ON THE LAW OF TORTS (1942) (reprinting ten Cardozo opinions, including seven of those featured in this Article, see *supra* note 34); LYMAN P. WILSON, CASES AND MATERIALS ON THE LAW OF TORTS (2d ed. 1939) (reprinting nine Cardozo opinions, including seven of the ten still reprinted in current casebooks, see *supra* note 34); Bernard L. Shientag, *The Opinions and Writings of Judge Benjamin N. Cardozo*, 30 COLUM. L. REV. 597 (1930) (reviewing the style and content of several Cardozo opinions).

338. A Westlaw citation review conducted August 6, 2009 shows courts favorably reference Cardozo opinions discussed in this Article far more often than Posner opinions discussed, even adjusted for opinion age. In order, the average annual number of positive case citations to those opinions since issuance dates follows (noting which Posner wrote): *Palsgraf* (19.4), *MacPherson* (11.8), *Ultrameres* (9.7), *Glanzer* (6.5), *Moch* (5.6), *Greycas* (Posner) (3.2), *Martin* (3.0), *Wagner* (2.9), *Indiana Harbor* (Posner) (2.8) and *Pokora* (2.6), followed by the five other Posner opinions and trailed by *Adams*. Compilations of this data, and delineations according to total citations and citations in secondary authorities, which do not vary significantly from these, are available on request.

tort law,³³⁹ a growing literature challenges its descriptive accuracy and normative appeal.³⁴⁰ The method's earlier successes may be due less to capacity or persuasiveness than to alluring theoretical novelty, offering a simpler way to view old, vexing problems.

True, traditional legal analysis can obfuscate as much as it clarifies.³⁴¹ One appeal of contemporary economic analysis may be to clarify and avoid obfuscation,³⁴² a longstanding quest for something akin to scientific method in law,³⁴³ particularly for Posner's approach to tort law.³⁴⁴ Yet it does not always clarify, at best doing so for things it can measure and model.³⁴⁵ It oversimplifies.³⁴⁶ One appeal of traditional legal analysis, even when it obfuscates, is how it can capture complex human reality by offering flexibility in application.³⁴⁷ And at least since Cardozo's time,³⁴⁸ lawyers know, accept, and deal with its limits, appreciating that all is not reducible to bottom line expressions.³⁴⁹

339. See, e.g., BARNES & STOUT, *supra* note 3, at 39; LANDES & POSNER, *supra* note 3, at 312–13; Brown, *supra* note 3, at 323; Coase, *supra* note 3, at 1–2; Hylton, *supra* note 3, at 1501–02.

340. See, e.g., COLEMAN, *supra* note 6, at 10–25; Geistfeld, *supra* note 6, at 234–36; Bayern, *supra* note 6; England, *supra* note 6, at 359; Grady, *supra* note 6, at 397; Green, *supra* note 6, at 1605–06; Moorhouse et al., *supra* note 6, at 667–68; Perry, *supra* note 6, at 988; Wright, *supra* note 6, at 146–53; Zipursky, *supra* note 6, at 2001–02.

341. See, e.g., LLOYD L. WEINREB, LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT (2005) (presenting and challenging this criticism); Larry Alexander, *The Banality of Legal Reasoning*, 73 NOTRE DAME L. REV. 517 (1998) (arguing that there is no special type of reasoning which is unique to lawyers); Scott Brewer, *Exemplary Reasoning, Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 925 (1996) (presenting a detailed model of reasoning by analogy); Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity and Authority*, 142 U. PA. L. REV. 549 (1993) (discussing the Critical Legal Studies movement against traditional analytic jurisprudence); Richard A. Posner, *Reasoning by Analogy*, 91 CORNELL L. REV. 761, 765 (2006) (book review).

342. See generally Jody S. Kraus, *Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis*, 93 VA. L. REV. 287 (2007) (defending the usefulness of economic analysis in law).

343. See JAMES R. HACKNEY, JR., UNDER COVER OF SCIENCE: AMERICAN LEGAL-ECONOMIC THOUGHT AND THE QUEST FOR OBJECTIVITY 157–73 (2007); Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 51–53 (1983); Michael Wells, *Scientific Policymaking and the Torts Revolution: The Revenge of the Ordinary Observer*, 26 GA. L. REV. 725, 734–37 (1992).

344. See G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 219–23 (1980) (discussing Posner's contributions to economic tort theory and their flaws); James R. Hackney, Jr., *Law and Neoclassical Economics: Science, Politics and the Reconfiguration of American Tort Law Theory*, 15 LAW & HIST. REV. 275, 316–21 (1997) (noting Posner's economic approach to tort law as resembling scientific quest).

345. See Cass R. Sunstein, *Cost-Benefit Analysis without Analyzing Costs or Benefits: Reasonable Accommodation, Balancing, and Stigmatic Harms*, 74 U. CHI. L. REV. 1895, 1901–09 (2007).

346. See, e.g., RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 110–11 (1995).

347. See Singer, *supra* note 1, at 939–40.

348. See JEROME FRANK, LAW AND THE MODERN MIND (1930).

349. See Jason Brennan, *Beyond the Bottom Line: The Theoretical Aims of Moral Theorizing*, 28 OXFORD J. LEGAL STUD. 277, 287–90 (2008).

Although some argue that economic analysis, focused on welfare, accommodates all imaginable factors,³⁵⁰ more plausible accounts point out numerous factors it disregards.³⁵¹ The vocabulary and tools of economics may be too blunt to capture all the human experience that would comprise an assessment of social welfare, wealth, or utility. Issues and cases this Article evaluated illustrate some of these limitations when compared to traditional legal analysis.

Many things cannot be measured at all, such as the costs to a tired person of schooling herself to greater vigilance,³⁵² and others can be measured only in rough extremes, such as the prohibitive costs of putting a trolley wiring system underground³⁵³ or the “vanishingly small” costs of sounding a train’s horn before moving it.³⁵⁴ Law does not require motorists at rail crossings to get out of their vehicles because of a practical sense that flexible standards work better than rigid rules and not based on comparative costs of that to other steps.³⁵⁵ Nor does law require rescuers to compute unfathomable costs and gains of rescue, but protects them so long as their efforts are not rash or wanton.³⁵⁶ Ordinarily, a hotel’s safety history, difficult to measure, is vital to evaluating its conduct towards guests, though it is easier to estimate the costs of changing locks or giving notice.³⁵⁷

Compliance with laws, like using lights for nighttime driving³⁵⁸ or posting blue flags when inspecting railcars,³⁵⁹ is not inevitably a pure matter of cost but has independent value and offers useful bright lines. No cost-benefit calculus can determine when injury is so remote from action to excuse liability, whether jostling explosives-toting rail passengers³⁶⁰ or exposing hypochondriac workers to nitroglycerin at a munitions plant.³⁶¹ Factors other than costs and benefits bear on responsibility for safety of manufactured products³⁶² and shipping hazardous chemicals.³⁶³ Nor can economic calculus, better than law, distinguish when service providers

350. Louis Kaplow & Steven Shavell, *Fairness versus Welfare*, 114 HARV. L. REV. 961, 968, 977–78, 980 (2001).

351. See, e.g., Coleman, *supra* note 1, at 1538; David Dolinko, *The Perils of Welfare Economics*, 97 NW. U. L. REV. 351, 363–84 (2002) (book review); Michael B. Dorff, *Why Welfare Depends on Fairness: A Reply to Kaplow and Shavell*, 75 S. CAL. L. REV. 847, 862–88 (2002).

352. See *supra* text accompanying notes 65–103 (discussing *Wassell*).

353. See *supra* text accompanying notes 104–25 (discussing *Adams*).

354. See *supra* text accompanying notes 154–72 (discussing *Davis*).

355. See *supra* text accompanying notes 35–64 (discussing *Pokora*).

356. See *supra* text accompanying notes 126–46 (discussing *Wagner*).

357. See *supra* text accompanying notes 147–53 (discussing *McCarty*).

358. See *supra* text accompanying notes 174–93 (discussing *Martin*).

359. See *supra* text accompanying notes 154–72 (discussing *Davis*).

360. See *supra* text accompanying notes 194–215 (discussing *Palsgraf*).

361. See *supra* text accompanying notes 216–228 (discussing *Stoleson*).

362. See *supra* text accompanying notes 229–239 (discussing *MacPherson*).

363. See *supra* text accompanying notes 240–55 (discussing *Indiana Harbor*).

under contract with one party should be excused³⁶⁴ or held responsible for third party losses.³⁶⁵

Cardozo understood such points and made related intuitions motifs of his opinions. He appreciated that people are heterogeneous, that reasonable expectations vary, and that law should reflect these realities not force them to change. He was practical and flexible, using a multi-dimensional jurisprudence to shape law and its processes. He applied traditional tools to render persuasive opinions that continue to influence law today. Posner holds different views on many of these points, reflected as motifs of his opinions. While deferential to juries, Posner does not show much confidence in them, calling them unsophisticated and non-abiding of instructions, though perhaps not “muddle-headed.”³⁶⁶ He strains to apply economic analysis to facts not persuasively susceptible to them, which leads to overlooking important factors while overweighting others. These contrasts make it unsurprising that tools available to a judicial fox like Cardozo would yield a more capacious and persuasive basis of justification than the tools applied by a judicial hedgehog like Posner.³⁶⁷

364. See *supra* text accompanying notes 256–304 (discussing *Moch*, *Edwards*, and *Ultramares*).

365. See *supra* text accompanying notes 305–332 (discussing *Glanzer* and *Greycas*).

366. *Wassell v. Adams*, 865 F.2d 849, 856 (7th Cir. 1989).

367. See Lawrence A. Cunningham, *Cardozo and Posner: A Study in Contracts*, 36 WM. & MARY L. REV. 1379, 1380 (1995).