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STRICT LIABILITY: A COMMENT

RICHARD A. POSNER*

WITHIN the last year there have appeared several major articles¹ that, while otherwise extremely diverse, share a strong preference (in one case implicit) for using the principle of "strict liability" to resolve legal conflicts over resource use.² I shall argue in this comment that the authors of these articles fail to make a convincing case for strict liability, primarily because they do not analyze the economic consequences of the principle correctly.

I

To explicate these consequences I shall use the now familiar example of the railroad engine that emits sparks which damage crops along the railroad's right of way. I shall assume that the costs of transactions between the railroad and the farmers are so high that the liability imposed by the law will not be shifted by negotiations between the parties.

The economic goal of liability rules in such a case is to maximize the joint value of the interfering activities, railroading and farming.³ To identify the value-maximizing solution requires a comparison of the costs to the railroad of taking steps to reduce spark emissions to various levels, including zero, and

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¹ William F. Baxter & Lillian R. Altree, *Legal Aspects of Airport Noise*, 15 J. Law & Econ. 1 (1972); Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 Yale L.J. 1055 (1972); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 Harv. L. Rev. 537 (1972); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. Leg. Studies 151 (1973). My analysis is also an implicit criticism of Marc A. Franklin, *Tort Liability for Hepatitis: An Analysis and Appraisal*, 24 Stan. L. Rev. 439 (1972), especially *id.* at 462-64, and of much judicial writing on the subject; see, e.g., *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 462, 150 P.2d 436, 440-41 (1944) (Traynor, J., concurring).

² The concept of strict liability is a various one, but at its core is the notion that one who injures another should be held liable whether or not the injurer was negligent or otherwise at fault.

³ Or, stated otherwise, to maximize the joint value of the railroad's right of way and the farmer's land.

the costs to farmers of either tolerating or themselves taking steps to reduce the damage to their property from the sparks. The value-maximizing solution may turn out to involve changes by both parties in their present behavior; for example, the railroad may have to install a good but not perfect spark arrester and the farmer may have to leave an unplanted buffer space between the railroad right of way and his tilled fields. Or, the value-maximizing solution may involve changes by the railroad only, by the farmer only, or by neither party.

Let us consider what, if any, different effects negligence and strict liability—competing approaches to the design of liability rules—might have in nudging railroad and farmer toward the value-maximizing (efficient) solution, under various assumptions as to what that solution is.

The railroad will be adjudged negligent if the crop damage exceeds the cost to the railroad of avoiding that damage.⁴ But the farmer will still not prevail if the cost of the measures *he* might have taken to avoid the damage to his crops is less than the crop damage; this is the rule of contributory negligence.

If the efficient solution requires only that the railroad take some measure to reduce the farmer's crop damage, then the negligence approach leads us toward the efficient solution. Since the railroad is liable for the damage and the damage is greater than the cost to the railroad of preventing it,⁵ the railroad will adopt the preventive measure in order to avoid a larger damage judgment. If the efficient solution is either that the railroad do nothing or that both parties do nothing, the negligence standard will again lead to the efficient solution. Not being liable, the railroad will have no incentive to adopt preventive measures; the farmer will have no incentive to take precautions either, since by hypothesis the cost of doing so would exceed the crop damage that he suffers. If the efficient solution requires only the farmer to take precautions, the negligence approach again points in the right direction. The railroad is not liable and does not take precautions. The farmer takes precautions, as we want him to do, because they cost less than the crop damage they prevent.

That leaves only the case where the efficient solution involves avoidance by both parties. Again the negligence standard should lead toward an efficient solution. The farmer will adopt his cost-justified avoidance measure so as

⁴ The meaning of negligence is explored in Richard A. Posner, *A Theory of Negligence*, 1 J. Leg. Studies 29 (1972). The example in text assumes that the probability of the damage occurring is one; the assumption is not essential to the analysis. It also assumes that the only possibilities are no crops or no sparks; this assumption, which is again not essential to the analysis, will be relaxed.

⁵ If the cost of prevention exceeded the damage cost, prevention would not be the efficient solution. The efficient solution would be to permit the damage to take place.

not to be barred by the contributory negligence rule and once he has done so the railroad will adopt its cost-justified avoidance measure to avoid liability for the accidents that the farmer's measure does not prevent.

The foregoing discussion must be qualified in one important respect. If the efficient solution requires only the railroad to take precautions but the farmer could take a precaution that, although more costly than the railroad's (otherwise *it* would be the optimum solution), would be less costly than the crop damage, the farmer's failure to adopt the measure will, nonetheless, be deemed contributory negligence. He will therefore adopt it and the railroad will have no incentive to adopt what is in fact the cheaper method of damage prevention.

A principle of strict liability, with no defense of contributory negligence, would produce an efficient solution where that solution was either for the railroad alone to take precautions or for neither party to do so,⁶ but not in the other two cases. In the case where the efficient solution is for the farmer alone to take avoidance measures, strict liability would not encourage efficiency, for with the railroad liable for all crop damage the farmer would have no incentive to avoid such damage even if it was cheaper for him to do so; he would be indifferent between the crops and compensation for their destruction. Similarly, in the case where the efficient solution consists of precautions by both railroad and farmer, strict liability would give the farmer no incentive to shoulder his share of the responsibility. But we need only add a defense of contributory negligence in strict liability cases in order to give the farmer an incentive to take precautions where appropriate. There would still be the problem of inefficient solutions where the farmer's precaution, although less costly than his crop damage, was more costly than the railroad's precaution; but this could be remedied by redefining the contributory negligence defense—a step that should be taken in any event.

At least as a first approximation, then, a strict liability standard with a defense of contributory negligence is as efficient as the conventional negligence standard, but not more efficient. This conclusion would appear to hold with even greater force where, as in a products liability case, there is (or can readily be created) a seller-buyer relationship between injurer and victim. Indeed, it can be shown that in that situation an efficient solution is likely to be reached not only under either strict liability (plus contributory negligence) or negligence, but equally with no tort liability at all.

The cost of a possibly dangerous product to the consumer has two elements: the price of the product and an expected accident cost (for a risk-neutral

⁶ In the first case, the railroad would be liable and would have an incentive to adopt the precaution. In the second case, the railroad would still be liable but it would have no incentive to adopt precautions; it would prefer to pay a judgment cost that by hypothesis would be lower than the cost of the precautions.

purchaser, the cost of an accident if it occurs multiplied by the probability of occurrence). Regardless of liability, the seller will have an incentive to adopt any cost-justified precaution, because, by lowering the total cost of the product to the buyer, it will enable the seller to increase his profit.⁷ Where, however, the buyer can prevent the accident at lower cost than the seller, the buyer can be counted on to take the precaution rather than the seller, for by doing so the buyer will minimize the sum of the price of the product (which will include the cost of any precautions taken by the seller) and the expected accident cost.⁸

Although both strict liability and negligence appear to provide efficient solutions to problems of conflicting resource uses, they do not have identical economic effects. The difference comes in cases where the efficient solution is for neither party to the interference to do anything. This is the category of interferences known in negligence law as "unavoidable accidents." They are rarely unavoidable in the literal sense. But frequently the cost either to injurer or to victim of taking measures to prevent an accident exceeds the expected accident cost and in such a case efficiency requires that the accident be permitted to occur. Under a negligence standard, the injurer is not liable; under strict liability, he is. What if any economic difference does this make?

It can be argued that unless an industry is liable for its unavoidable accidents, consumers may be led to substitute the product of the industry for the safer product of another industry. Suppose the only difference between railroads and canals as methods of transportation were that railroads had more unavoidable accidents. If the railroad industry were not liable for those accidents, the price of railroad transportation would be the same as the price of transportation by canal, yet we would want people to use canals rather than railroads because the former were superior in the one respect—safety—in which the two methods differed. In principle, a negligence standard would require the railroad to bear the cost of those accidents. They are not unavoidable. In fact, they could be avoided at zero cost by the substitution of canal for railroad transportation. But perhaps courts are incapable of making inter-

⁷ Suppose the price of a product is \$10 and the expected accident cost 10¢; then the total cost to the (risk-neutral) consumer is \$10.10. If the producer can reduce the expected accident cost to 5¢—say at a cost of 3¢ to himself—then he can increase the price of the product to \$10.05, since the cost to the (risk-neutral) consumer remains the same. Thus his profit per unit is increased by 2¢. (In fact, he will be able to increase his total profits even more by raising price less.) The extra profit will eventually be bid away by competition from producers but that is in the nature of competitive advantages.

⁸ This is actually a more efficient solution than either negligence or strict liability, since it avoids the problem we noted earlier of the law's economically incorrect definition of contributory negligence.

The economics of products liability is debated at length in Symposium, *Products Liability: Economic Analysis and the Law*, 38 U. Chi. L. Rev. 1 (1970). See in particular Roland N. McKean, *Products Liability: Trends and Implications*, *id.* at 3.

industry comparisons in applying the negligence standard. Nonetheless the argument affords no basis for preferring strict liability to negligence, since an identical but opposite distortion is created by strict liability. Compare two different tracts of land that are identical in every respect except that one is immediately adjacent to a railroad line and one is well back from any railroad line. If the railroad is strictly liable for crop damage inflicted by engine sparks there will be no incentive to use the tract near the railroad line for fire-insensitive uses and to shift the growing of flammable crops to the tract that is remote from a railroad line, even though such a rearrangement may eliminate all crop damage at zero cost.

A related misconception involves the question of the comparative safety level in the long run under strict liability versus negligence liability. The level of safety is unaffected in the short run by which liability rule is chosen. Even if the injurer is strictly liable, he will not try to prevent an accident where the cost of prevention exceeds the accident cost; he will prefer to pay the victim's smaller damages. However, he will have an incentive to invest in research and development efforts designed to develop a cost-justified method of accident prevention, for such a method would lower the cost of complying with a rule of strict liability. It is tempting to conclude that strict liability encourages higher, and in the long run more efficient, levels of safety, but this is incorrect. Rather than creating an incentive to engage in research on safety, a rule of strict liability merely shifts that incentive. Under the negligence standard the cost of unavoidable accidents is borne by the victims of accidents. They can reduce this cost in the long run by financing research into and development of cost-justified measures by which to protect themselves. The victims will not themselves organize for research, but they will provide the market for firms specializing in the development of new safety appliances.⁹

Let us consider some other possible differences, in economic effect, between strict liability and negligence. It might appear that strict liability would reduce the costs of tort litigation, both by simplifying the issues in a trial and thereby reducing its costs and by removing an element of uncertainty and thereby facilitating settlements, which are cheaper than trials. But the matter is more complex than this. By increasing the scope of liability, strict liability enlarges the universe of claims, so even if the fraction of cases that go to trial is smaller the absolute number may be larger. And, by increasing the certainty that the plaintiff will prevail, strict liability encourages him to spend more money on the litigation; conceivably, therefore, the costs of trials might actually increase.¹⁰

⁹ In principle, the costs of research should be included in the basic negligence calculus; in practice, we may assume they are not.

¹⁰ On the determinants of the choice to litigate rather than to settle and of expenditures

Under strict liability, in effect the railroad (in our example) insures the farmer against the loss of his crops; under negligence liability, the farmer must obtain and pay for insurance himself (or self-insure). Thus, although strict liability, under the name "enterprise liability," has long been defended on the ground¹¹ that it permits accident losses to be spread more widely, there is little to this argument: the farmer can avoid a concentrated loss by insuring. However, if we were confident that the cost of insuring was lower for the railroad than for the farmer, we might on this ground prefer strict liability.¹²

Strict liability increases the costs of railroading, in our example, and negligence the costs of farming. But the implications for the overall distribution of income and wealth are uncertain, at least in the example, so intertwined were the economic interests of railroads and farmers during the period when the modern system of negligence liability was taking shape. Any increase in the cost of railroading would be borne in significant part by farmers since they were the railroads' principal customers. The intertwining of economic interests is characteristic of many modern tort contexts as well, such as automobile and product accidents. Most victims of automobile accidents are owners of automobiles; victims of defective products are also consumers.

Additional considerations come into play where there is a buyer-seller relationship between victim and injurer; but they relate primarily to the question whether sellers' liability (either strict liability or negligence) has different consequences from no liability (*i.e.*, buyers' liability). There are two reasons for believing that there might be different safety consequences. First, if the buyers of a product are risk preferring, they may be unwilling to pay for a safety improvement even if the cost is less than the expected accident cost that the improvement would eliminate. Under a rule of no liability, the improvement will not be made; under a rule either of strict liability or of negligence liability, the improvement will be made.¹³ But the higher level of safety

on litigation see Richard A. Posner, *The Behavior of Administrative Agencies*, 1 J. Leg. Studies 305-23 (1972); see also William M. Landes, *An Economic Analysis of the Courts*, 14 J. Law & Econ. 61 (1971).

¹¹ Not an economic ground. See Richard A. Posner, Book Review, 37 U. Chi. L. Rev. 643 (1970).

¹² The farmer may not want to insure; he may be a risk preferrer. A risk preferrer is someone who likes to take chances. He will pay \$1 for a lottery ticket although the prize is \$1000 and his chances of winning only one in 2000. And he may prefer to accept a one one-thousandth chance of a \$1000 loss rather than pay \$1 to insure against the loss. He will be especially hostile to the idea of paying \$1.10 for that insurance, a more realistic example since insurance involves administrative expenses that consume a part of the premium. Hence, if many farmers are risk preferring and do not want insurance, the benefits of strict liability, as perceived by them, may be slight.

¹³ This assumes that the producer cannot disclaim liability; the effect of a disclaimer is to shift liability to the consumer.

is not optimum in the economic sense, since it is higher than consumers want.

Second, consumers may lack knowledge of product safety. Criticisms of market processes based on the consumer's lack of information are often superficial, because they ignore the fact that competition among sellers generates information about the products sold. There is however a special consideration in the case of safety information: the firm that advertises that its product is safer than a competitor's may plant fears in the minds of potential consumers where none existed before. If a product hazard is small, or perhaps great but for some reason not widely known (*e.g.*, cigarettes, for a long time), consumers may not be aware of it. In these circumstances a seller may be reluctant to advertise a safety improvement, because the advertisement will contain an implicit representation that the product is hazardous (otherwise, the improvement would be without value). He must balance the additional sales that he may gain from his rivals by convincing consumers that his product is safer than theirs against the sales that he may lose by disclosing to consumers that the product contains hazards of which they may not have been aware, or may have been only dimly aware. If advertising and marketing a safety improvement are thus discouraged, the incentive to adopt such improvements is reduced. But make the producer liable for the consequences of a hazardous product, and no question of advertising safety improvements to consumers will arise. He will adopt cost-justified precautions not to divert sales from competitors but to minimize liability to injured consumers.

In principle, we need not assume that the only possible sources of information about product safety are the manufacturers of the product. Producers in other industries would stand to gain from exposing an unsafe product, but if their products are not close substitutes for the unsafe product, as is implicit in our designation of them as members of other industries, the gain will be small and the incentive to invest money in investigating the safety of the product and disseminating the results of the investigation slight. Firms could of course try to sell product information directly to consumers; the problem is that because property rights in information are relatively undeveloped, the supplier of information is frequently unable to recover his investment in obtaining and communicating it.

The information problem just discussed provides an arguable basis for rejecting *caveat emptor* in hazardous-products cases, but not for replacing negligence with strict liability in such cases, which is the trend of the law. The traditional pockets of strict liability, such as respondeat superior and the liability of blasters and of keepers of vicious animals, can be viewed as special applications of negligence theory.¹⁴ The question whether a general substitution of strict for negligence liability would improve efficiency seems

¹⁴ See note 23, *infra*; Richard A. Posner, *supra* note 4, at 42-44, 76.

at this stage hopelessly conjectural; the question is at bottom empirical and the empirical work has not been done. Finally, it is interesting to note that in the area of tort law that is in greatest ferment, liability for automobile accidents, the movement appears to be from negligence to no liability!¹⁵

II

A

Now to our authors. I begin with Professor Baxter. His discussion of strict liability is brief and largely implicit, and in focusing upon one small aspect of a long and excellent study I hope I will not be understood as intending a general criticism of his article.

Baxter is concerned with the problem of airport noise. The airlines correspond to the railroad in our example. The owners of residences in the vicinity of the airport who are disturbed or annoyed by airplane noise correspond to the farmer. Baxter seeks a rule of liability that will lead to an efficient level of noise damage. One approach that he considers is the noise easement. Under existing law an airline that flies low enough to create a high noise level is required to obtain from the owner of the subjacent property (by condemnation, if the airline cannot come to terms with him) an easement for the airline to maintain that noise level. The price of the easement in a condemnation proceeding will be equal to the reduction in the market value of the property caused by the noise.

Baxter is troubled by the fact that the easement is perpetual. He points out that should an airplane noise-suppression device one day be developed that enabled a reduction in the noise level at a cost lower than the increase in property values brought about by the device, the airline would have no incentive to install the device¹⁶ and the result would be to perpetuate a solution to the conflicting uses that was no longer optimum. To remedy this he proposes that easements be limited to ten years. If at the end of that period a method for reducing noise at a cost lower than the increase in property value had been developed the airline would install it in order to minimize the cost of acquiring easements for the next period.¹⁷

This solution solves the problem identified by Professor Baxter but in so doing unsolves another, and for all one knows as serious, a problem that per-

¹⁵ Most no-fault auto compensation plans involve (1) compulsory accident insurance and (2) exemption from tort liability.

¹⁶ Since it had already paid for the right to maintain the noise level that the device, not without cost to the airline, would enable it to reduce. It might attempt to sell back a portion of the easement to the property owners, but each owner would have an incentive to decline to enter into the transaction in the hope that others would do so; for once the airline purchased the device all the subjacent property owners, those who had not paid the airline along with those who had, would benefit from the reduced level of noise.

¹⁷ See William F. Baxter & Lillian R. Altree, *supra* note 1, at 17-21, 92-113.

petual easements avoid. Just as one method of maximizing the joint value of railroading and farming may be for the farmer to take certain precautions, so one method of maximizing the joint value of air travel and of land use may be for the landowners in the vicinity of airports to reduce the damage from noise by soundproofing or by shifting to a land use that is relatively insensitive to noise. Assume that sometime after the airline obtains perpetual easements, an improved method of soundproofing residences is developed; its adoption would reduce noise damage by more than it costs. Under existing law the homeowners would have an adequate incentive to adopt the method, because the entire resulting increase in the value of their homes would inure to them. Under Baxter's proposed system of time-limited easements the homeowners' incentive to install such devices would be much smaller. A part of the improvement would inure to the benefit not of the homeowner but of the airline, in the form of a reduced easement price in the next period. The method of time-limited easements, therefore, will discourage efficient cost-reduction measures by noise victims.

To demonstrate the fundamental difficulty with Baxter's proposal, let us imagine that the periods are made shorter and shorter (a process Baxter would object to, I take it, only on the basis of administrative costs, which let us assume are zero). In the limit, the system of time-limited easements becomes a system of strict liability: the airline pays for noise damage as it occurs. But we saw earlier that a rule of strict liability, unless modified by a defense of contributory negligence, will not produce an efficient solution (assuming, as Baxter does, heavy transaction costs) if the solution requires a change in the victims' behavior.¹⁸

B

Professor Calabresi proposes that liability be placed on the party to an interaction who is in the better position to "make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made."¹⁹ The application of this rule would lead in many, although not in all, cases to strict liability without any defense of contributory negligence. For example, suppose that people are frequently injured because the blade of their rotary mower strikes a stone and that these accidents could be prevented at least cost by the operator of the mower, who need only remove the stones in his path. Calabresi suggests that the manufacturer of the mower might nonetheless be liable under his approach. The injury is an expectable

¹⁸ It is noteworthy that in an earlier article, Professor Baxter recognized the importance of a defense of contributory negligence to strict liability. See William F. Baxter, *The SST: From Watts to Harlem in Two Hours*, 21 *Stan. L. Rev.* 1, 53 (1968).

¹⁹ Guido Calabresi & Jon T. Hirschoff, *supra* note 1, at 1060.

one and the manufacturer is in a better position than the user to figure out how to minimize the relevant costs.

To impose liability on the manufacturer in this case, however, is inefficient: it eliminates the incentive of the operator to adopt a more economical method of preventing the injury. One could argue, perhaps, that the incentive created by fear of physical injury is already so great that adding or subtracting a pecuniary cost will not affect behavior. But Calabresi does not take this position.

He allows himself an escape hatch. The mower case might be one where, in his terminology, although the producer is in the better position to determine the efficient solution he is not in the better position to implement it, since implementation requires a change in behavior by the user. But this circumstance, while relevant, is not, for Calabresi, decisive: where the party in the better position to determine the efficient solution is not the one in the better position to implement it, "the decision requires weighing comparative advantages."²⁰

I am mystified by his approach. The only reason that Calabresi offers for not placing liability in every case on the party whose behavior we want to influence in order to produce the efficient solution is that identification of that party is often very difficult; but his approach requires such identification in every case, since it is always relevant, although never decisive, to inquire whether the party best able to judge the costs and benefits of alternative courses of action is also the party whom we want to act upon that judgment.

I can only speculate on the reasons that have led Calabresi into such an odd corner. He is, of course, strongly committed to the proposition that the negligence system is incapable of producing efficient solutions to problems of conflicting resource use.²¹ And he must now believe, perhaps for reasons similar to those presented in part I of this comment, that strict liability is not sharply distinguishable from negligence so far as the production of efficient solutions to problems of conflicting resource use is concerned. He has therefore shifted discussion to a new level, where the inability of either principle to optimize accident costs is admitted and strict liability defended on another ground altogether: that it is the appropriate method of compelling the party better able to determine the efficient solution to make that determination. Where, however, that party is incapable of acting on the determination—because the solution turns out to require a change in behavior by the other party and transaction costs preclude him from paying that party to make the change—it is very difficult to see what has been accomplished. That is pre-

²⁰ *Id.* at 1060, n.19.

²¹ See Guido Calabresi, *The Costs of Accidents, A Legal and Economic Analysis*, pt. IV (1970); Guido Calabresi & Jon T. Hirschoff, *supra* note 1, at 1075 and n.74.

sumably why Calabresi added a second prong to his test, requiring that the party best able to make the cost-benefit analysis also be able to act upon it. But to use the second prong the court (or legislature) must make precisely the determination about which Calabresi is so skeptical when it is made in a negligence case: the determination of which party is in the better position to optimize the costly interaction.

C

Let us turn now to the moralists, Professors Fletcher and Epstein. Fletcher discusses two competing paradigms, or theories, of tort liability. One is the entirely novel "paradigm of reciprocity," under which the injurer is strictly liable if he created a risk to the victim that was disproportionate to the risk the victim created to him. He sets out "to demonstrate the pervasive reliance of the common law on the paradigm of reciprocity,"²² but many of the examples he uses in the demonstration are odd.²³ His reasons for promoting the paradigm of reciprocity emerge from his criticism of the competing theory, which he terms the "paradigm of reasonableness" and which corresponds roughly to the negligence standard interpreted in economic terms. Fletcher dislikes this paradigm because it is instrumentalist: that is, it involves a comparison of the utility of the victim's conduct with the utility of the injurer's. In cases where the negligence principle results in the denial of compensation to someone injured by one of Fletcher's nonreciprocal (disproportionate) risks, an innocent victim is sacrificed on the altar of community needs.²⁴ He believes that the refusal to compensate in these circumstances is the moral equivalent of punishing for bigamy a woman who honestly believed that her first husband was dead.

The relationship of the paradigm of reciprocity to strict liability is not one to one. But railroads vis-à-vis farmers, drivers vis-à-vis pedestrians, and many other interactions traditionally governed by the negligence principle would become, under his approach, areas of strict liability. Fletcher's analysis, however, is unsound. Reciprocity in his sense is a function purely of the rule of liability that happens to be adopted, and not of any underlying physical or

²² George P. Fletcher, *supra* note 1, at 543.

²³ For example, assault and battery. How would Professor Fletcher deal with the rule that permits both parties to an illegal combat to obtain damages from the other if he is injured (see Clarence Morris, *Morris on Torts* 30-31 (1953))? It is a rule of strict liability, but under his view should not be; so far as the reciprocity of the risk (in his terms) is concerned, an illegal combat is just like a mid-air collision. Another of his odd examples is the strict liability of owners of vicious dogs. The common law rule (see *id.* at 239) is that the dog's owner must have reason to believe that the dog is vicious (the "one-bite" rule), and so understood represents an application of the negligence principle rather than of strict liability.

²⁴ See, e.g., George P. Fletcher, *supra* note 1, at 564.

economic relationships. Were the railroad strictly liable for crop damage caused by engine sparks it could not injure the farmer; he would be indifferent as between having crops and being fully compensated for their destruction. But he could injure the railroad—by planting additional crops (perhaps closer to the railroad right of way), by planting more flammable or more valuable crops, by stacking hay ricks near the tracks, by erecting wooden buildings near the tracks, and so on. Any of these actions would increase the railroad's damage bill and might ultimately force the railroad to discontinue its line, with resulting losses to the railroad's shareholders, employees, and customers (perhaps most of whom are farmers). One can make the element of victimization even clearer by assuming that the railroad line was built before the adjacent lands were used for farming. This is plausible since the construction of a railroad line typically increased the agricultural value of land proximate to it. In such a case are the farmers so morally innocent as to be entitled to compensation regardless of the costs to the railroad? Would denying them compensation really be just like imposing a criminal penalty on a woman who honestly and reasonably believed her husband was dead?

Most torts arise out of a conflict between two morally innocent activities, such as railroad transportation and farming. What ethical principle compels society to put a crimp in the former because of the proximity of the latter, rather than a crimp in the latter because of the proximity of the former? The farmer crowds the railroad, and the railroad the farmer. A rule of strict liability taxes the railroad for the benefit of the farmer; a rule of no liability would tax the farmer for the benefit of the railroad. Under a rule of strict liability, the railroad pays for the crop damage even if the cheapest way of minimizing that damage is for the farmer to modify his behavior; the result is a reduction in the value of the railroad that is greater than the farmer's gain. Under a rule of no liability the farmer pays for all crop damage even when the cheapest way of minimizing the damage is for the railroad to modify its behavior; the result is a reduction in the value of farmland greater than the railroad's gain. Why is not the railroad morally innocent when it must pay for damage that the farmer could have avoided at lower cost and the farmer morally innocent when he is forced to absorb damage costs that the railroad could have avoided at lower cost?

The situation is not clarified by restating the issue in terms of individual interests versus community needs.²⁵ The rule of strict liability, imposed in the case where the farmer is the cheaper cost avoider, harms both individual interests—those of the customers (many of them farmers), employees, suppliers, and shareholders of the railroad—and the community interest in efficiency. It benefits other individuals—farmers, consumers of food products (except their gains may be offset by higher railroad costs), etc.

²⁵ See *id.* at 573.

Fletcher would in effect apply a rule of strict liability, without a defense of contributory negligence,²⁶ to a number of areas now governed by the negligence standard. Such an approach, as explained in part I of this comment, is inefficient. Apparently he considers this irrelevant.²⁷ Yet it cannot be an ethical imperative that society dissipate an indefinite amount of its members' resources in order to operate a scheme for the compensation of accident victims, who, after all, can insure against the consequences of an accident. Fletcher seems at least troubled by the point. He says, for example, that he desires only to tax and not to prohibit socially useful activity. But this is not responsive to the problem. A tax, if high enough, becomes prohibitory. Even a moderate tax will have some resource effects. A compensation system that fails to give farmers an incentive to economize on their activities will result in the waste of valuable resources. In another place he states: "If imposing a private duty of compensation for injuries resulting from nonreciprocal risk-taking has an undesirable economic impact on the defendant, the just solution would not be to deny compensation, but either to subsidize the defendant or institute a public compensation scheme."²⁸ But this is not responsive to the problem either. Subsidizing the railroad, in our example, will not give the farmer an incentive to take cost-justified methods of damage avoidance, and it is the failure to create such incentives that is the source of inefficiency under Fletcher's approach.

D

Professor Epstein adopts still a different approach. His position is that a person should be *prima facie* liable for any injury that he causes, "cause" to be defined with reference to the structure of ordinary language rather than in the strained ways in which it has frequently been used by judges and legal commentators. This view naturally leads him to prefer strict liability to negligence as the standard of tort liability, although by emphasizing that people should only be *prima facie* liable for the injuries they cause he leaves open the possibility of various defenses.

It might appear that Epstein has committed the same error as Fletcher, that of failing to understand the reciprocal nature of an accident or other tort injury. He reinforces the impression of error by quoting and then criticizing the passage from Professor Coase's article on social cost in which Coase,

²⁶ See *id.* at 549, n.44. The article is not entirely clear on this point. Fletcher points out that sometimes contributory negligence results in the imposition of excessive risks on the defendant (see *id.* at 549), and therefore creates a situation of reciprocity in his sense of that term. Where, as in many cases, the plaintiff's contributory negligence does not create any risk to the defendant's safety or property, presumably it would not be a defense under his view (see *id.* at 549, n.44).

²⁷ See *id.* at 540-41, 573. His position on this point is not entirely clear due to the obscurity of his discussion of excuses. See, *e.g.*, *id.* at 553.

²⁸ *Id.* at 551, n.51.

in explaining the reciprocal relationship, says that the crop is as much the cause of the spark damage as the engine.²⁹ But Epstein has not in fact committed this error. He is prepared to concede that from an economic standpoint an inquiry into causation is vacuous; but he insists that in an ordinary-language sense it is proper to view the engine as the cause of the crop damage and improper to view the crop as a cause.

Epstein's achievement is in demonstrating, contrary to the dominant view of several generations of tort scholars, that a principle of liability based on causation is not incapable of being reduced to a set of operational rules that conform to an acceptable notion of cause. But this reader is perplexed *why* a society should decide to allocate accident costs in accordance with Epstein's admittedly plausible notions of causation. What social or ethical end is advanced?

Part of Epstein's answer emerges from his discussion of negligence as an alternative to strict liability. He makes two major criticisms of negligence. The first, expressed in various ways, is that we rarely have enough information to know what the optimum solution to a problem of conflicting resource uses is. This is true, and it follows that the negligence system produces, at best, crude approximations of the result one could expect if market rather than legal processes were operative. But why despise crude approximations? In any event, Epstein cannot, merely by embracing strict liability, escape the necessity of making such approximations unless he is prepared not to recognize any defenses that require a comparison of the costs of alternative methods of resolving the conflict. Whether he is prepared to do so is uncertain; he has adopted the risky tactic of postponing consideration of the issue to a subsequent article. We shall return to this point.

His second major criticism of the negligence system brings us to the heart of his reasons for preferring to base liability on causation: it is that the negligence system, if administered in accordance with its basic logic, would give too much power to judges to impose restrictions on human liberty. He illustrates this point with the "good Samaritan" rule of tort law. If I see another person in danger and at trivial cost to myself could save him but fail to do so, I am not liable to him; the law does not require me to be a good Samaritan. But this result, Epstein (who approves of it) argues, is inconsistent with the basic logic of the negligence system and shows that logic to be wrong. If the cost to me of taking a measure that will avert an accident to another is lower than the expected accident cost, the law should shift the accident cost from the victim to me if I fail to take the measure, for this will give me an incentive to incur the lesser cost to avoid the greater, and thereby increase effi-

²⁹ Richard A. Epstein, *supra* note 1, at 164-65, quoting Ronald H. Coase, *The Problem of Social Cost*, 3 J. Law & Econ. 1, 2 (1962).

ciency. No less an authority on utility maximizing than Jeremy Bentham would agree with Epstein's point.³⁰

Nor, says Epstein, can the economic optimizer limit liability to the case where the cost to the rescuer is trivial. Even where there is a substantial risk of bodily harm to the rescuer he should be liable for failure to rescue, so long as the cost to the victim of not being rescued is greater than the expected harm to him. From here it is but a step to situations in which judges might conscript people for all sorts of activity upon a finding that the benefit of the activity exceeded the cost to them.

But Epstein is incorrect that there is no logical stopping point under an economic analysis in imposing liability on people in order to induce them to perform socially productive activity. The rescue case is a plausible one for liability because transaction costs are so high: when I see a flower pot about to fall on someone's head I cannot pause to negotiate with him over an appropriate fee for warning him of the impending danger. There is no occasion for compelling transactions where negotiations are feasible. Indeed, because market transactions are preferable to legal transactions except where market transaction costs are prohibitive,³¹ a system of liability that coerced people into performing services in circumstances where negotiations between them and the beneficiaries of the services were possible would be economically unsound.

Nor is the law's handling of the good Samaritan case quite so inconsistent with the basic logic of economic analysis as Epstein implies. Affirmative duties to avert harm to strangers are frequently imposed, the doctrines of attractive nuisance and of last clear chance being examples. The principal exception is the pure bystander case. Even here, the law will sometimes create an incentive to help a stranger by recognizing a good Samaritan's legal right to be compensated for the assistance rendered; indeed, Fletcher and Epstein's favorite case, *Vincent v. Lake Erie Transp. Co.*,³² may be viewed as a case in which a suit for such compensation was vindicated.³³

³⁰ Jeremy Bentham, *Theory of Legislation* 189-90 (R. Hildreth ed. 1864).

³¹ See Richard A. Posner, *supra* note 4, at 74-77. The point is further developed in Richard A. Posner, *Economic Analysis of Law*, chs. 6, 27 (forthcoming).

³² 109 Minn. 456, 124 N.W. 221 (1910).

³³ The common law and especially Continental rules governing the legal rights and liabilities of rescuers are discussed in John P. Dawson, *Negotiorum Gestio: The Altruistic Intermeddler*, 74 Harv. L. Rev. 1073 (1961). As he points out, the principal examples in common law of the rescuer's being entitled to compensation from the rescued (in the absence of any contractual or other preexisting relationship between the two) are maritime salvage and the right of physicians to recover fees from people whom they treat under emergency conditions. See *id.* at 1096-98, 1119 and n.107; *Cotnam v. Wisdom*, 83 Ark. 601, 104 S.W. 164 (1907). Both liability for failure to rescue and the right to compensation for rescuing are much greater in Continental jurisprudence. See, e.g., sec-

But I am quite prepared to assume that the law is out of phase with economic analysis in the matter of warnings and rescues; it is hardly a point in favor of Epstein's argument. His theory of strict liability is normative rather than positive. His own proposal for dealing with the good Samaritan problem is contrary, he admits, to the common law solution.

The final question that must be asked of Professor Epstein is how high a price he is willing to pay to vindicate the interest in preventing judges from imposing affirmative duties. It may be quite high. He hedges, as I have remarked, on defenses, but there is a strong implication that no version of contributory negligence will be permitted.³⁴ Moreover, the logic of his argument would appear to compel him to tolerate—paradoxically in view of his sensitivity to judicial overreaching—a substantial and potentially quite costly expansion in the degree to which people's freedom of action may be limited by common law liabilities. Suppose I make a completely innocent gesture, such as removing my hand from my pocket, and a highly nervous bystander, mistaking the purpose of the gesture, faints with fright. Under Epstein's theory of liability I may well be liable to the bystander because my gesture caused him to faint.³⁵ Now the fact that I am liable in such situations does not mean that I will never take my hand out of my pocket. But I may hesitate before making any gestures and the aggregate costs of such hesitations will be substantial. The cheaper way of avoiding the accident would have been for the victim to obtain treatment for his nervous ailment or to avoid situations in which an innocent gesture would be likely to frighten him. But this efficient solution is not possible under Epstein's approach. He would say that the driver who without fault injures a blind pedestrian is liable, while the present law would inquire whether the pedestrian was carrying a blind man's stick (to alert drivers) and otherwise taking inexpensive but effective measures to protect himself from injury.

III

The analysis of the comparative economic properties of strict liability and negligence, in part I of this paper, yielded conclusions that may be summarized as follows:

tion 330c of the German Penal Code, which makes it a crime to fail to render aid to someone in danger, even at risk of bodily harm to the rescuer.

³⁴ See, e.g., Richard A. Epstein, *supra* note 1, at 181, 197 and n.108.

³⁵ Professor Epstein remarks that so vulnerable an individual would in all probability not survive long enough to be done in by the defendant's gesture. But this is not a convincing point. He must be done in by someone or something, even if it is only a nurse in the hospital where he is born, who would presumably be liable under Epstein's view. Moreover, susceptibility to injury from fright might be the result of an illness or accident at any age. I am also unpersuaded by his suggestion that there might be a defense, consistent with his general approach, in such a case. *Id.* at 172-73, n. 65. The general impression that Epstein creates in the mind of this reader is that, while he will not admit explicit considerations of cost in his analysis, he is hopeful that his noneconomic approach will not do serious economic damage.

1. Economic theory provides no basis, in general, for preferring strict liability to negligence, or negligence to strict liability, provided that some version of a contributory negligence defense is recognized. Empirical data might enable us to move beyond agnosticism but we do not have any.

2. A strict liability standard without a contributory negligence defense is, in principle, less efficient than the negligence-contributory negligence standard. Empirical data could of course rebut the presumption derived from theory.

The relevance of these findings to the articles discussed in part II is that each author argues for strict liability without any version of a contributory negligence defense. Each thus prefers a standard that, on the basis of existing (and inadequate) knowledge, must be regarded as presumptively less efficient than alternative standards. Since the efficient use of resources is an important although not always paramount social value, the burden, I suggest, is on the authors to present reasons why a standard that appears to impose avoidable costs on society should nonetheless be adopted. They have not carried this burden.