
AFFIRMATIVE DUTIES AND JUDGES' DUTIES:
UNITED STATES V. STOCKBERGER

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After twenty-four years of judicial experience, Judge Richard Posner contrasted the “aggressive judge” with the “modest judge” in his 2005 Foreword in the *Harvard Law Review*.¹ When Professor Posner became Judge Posner in 1981, anyone familiar with his ambitious, trailblazing academic achievements would have expected the bold professor to become an aggressive judge. One might have imagined the Seventh Circuit’s slip opinions being transformed into the *Journal of Legal Studies*, as he would bring an economic perspective to every reach of the law. Instead, Judge Posner brought measured judicial restraint to many of his cases. One recent example is *Stockberger v. United States*,² in which Judge Posner had an opportunity to put his academic theories into practice. Instead, he heeded his own call for judicial restraint by not straying far from state precedent. In this brief tribute to Judge Posner, I commend this modesty but suggest that, in similar cases, he might reconcile his desire for restraint with his academic theories by engaging in bolder modesty and more aggressive deference. Specifically, he might establish supermajority voting rules in diversity cases that ask federal judges to predict the direction of state law.

On March 24, 1999, Maurice Stockberger, a diabetic employed at the federal prison in Terre Haute, Indiana, announced to his colleagues that he was not feeling well. A colleague described him as “aggravated and angry, and adamant about going home.”³ His colleagues had witnessed several of his hypoglycemic episodes before and knew that he would become “hostile, suspicious, unresponsive, agitated,” and in denial of his medical problem.⁴ Many of these colleagues were medically trained and recognized that Stockberger was experiencing another of his hypoglycemic episodes that day.⁵

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¹ See Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 54–60 (2005).

² 332 F.3d 479 (7th Cir. 2003).

³ *Stockberger v. United States*, 225 F. Supp. 2d 949, 952 (S.D. Ind. 2002).

⁴ *Stockberger*, 332 F.3d at 480.

⁵ See *id.*

A physician's assistant at the prison, who had observed Stockberger's past episodes and found him on that day "immobile" and "non-responsive," provided him with Ensure, a drink that would correct his blood sugar deficit.⁶ After lunch and the drink, Stockberger said he felt "a lot better," and the physician's assistant and other colleagues allowed him to drive home.⁷ They might have taken strong measures, such as taking his keys, committing him to the infirmary, or otherwise preventing him from leaving the prison. Or they simply might have offered him a ride or called his wife to let her know of the situation. These colleagues had the expertise and experience to understand that the risk in this situation was similar to letting a drunk colleague drive home, and they had a moral duty to prevent it or at least to warn someone. Instead, they did nothing. Stockberger drove home erratically and fatally crashed into a tree.⁸

These facts present a difficult legal case because the common law imposes few affirmative or positive duties, such as the duty to rescue. Tort law penalizes the active creation of risks, but it generally does not make one liable for passively allowing harms to befall others. Such a broad web of duties would be difficult to adjudicate manageably. Furthermore, opponents of affirmative duties argue that human altruism and the reward of social recognition already produce rescues in most cases. Critics of affirmative duties even suggest that legal duties to rescue actually might deter some people from attempting to rescue, or from putting themselves into position for a potential rescue, out of a fear of liability.⁹ Thus, in such cases, tort law privileges individual autonomy and judicial economy above social welfare. Nearly thirty years ago, Posner, then a law professor, offered a solution to the vexing question of affirmative duties:

Suppose that if all of the members of society could somehow be assembled they would agree unanimously that, as a reasonable measure of mutual protection, anyone who can warn or rescue someone in distress at negligible cost to himself (in time, danger, or whatever) should be required to do so. These mutual promises of assistance would create a contract that [Professor Richard] Epstein would presumably enforce since he considers the right to make binding contracts a fundamental one. However, there are

⁶ *Stockberger*, 225 F. Supp. 2d at 952–53.

⁷ *Id.* at 952.

⁸ See *Stockberger*, 332 F.3d at 480.

⁹ See *id.* at 481. Judge Posner explained this rationale:

[P]eople would be deterred by threat of liability from putting themselves in a position where they might be called upon to attempt a rescue, especially since a failed rescue might under settled common law principles give rise to liability, on the theory that a clumsy rescue attempt may have interfered with a competent rescue by someone else.

Id. (citing *Stiver v. Parker*, 975 F.2d 261, 272 (6th Cir. 1992); *Jackson v. City of Joliet*, 715 F.2d 1200, 1202–03 (7th Cir. 1983); *Farwell v. Keaton*, 240 N.W.2d 217 (Mich. 1976)).

technical obstacles — in this case insurmountable ones — to the formation of an actual contract among so many people. Transaction costs are prohibitive. If, moved by these circumstances, a court were to impose tort liability on a bystander who failed to assist a person in distress, such liability would be a means of carrying out the original desires of the parties just as if it were an express contract that was being enforced.

The point of this example is that tort duties can sometimes . . . be viewed as devices for vindicating the principles that underlie freedom of contract. It may be argued, however, that the contract analogy is inapplicable because the bystander would not be compensated for coming to the rescue of the person in distress. But this argument overlooks the fact that the consideration for the rescue is not payment when the rescue is effected but a commitment to reciprocate should the roles of the parties some day be reversed. Liability would create a mutual protective arrangement under which everyone was obliged to attempt a rescue when circumstances dictated and, in exchange, was entitled to the assistance of anyone who might be able to help him should he ever find himself in a position of peril.¹⁰

Professor Posner claims to be maximizing both autonomy and welfare by overcoming both the inconveniences and the transaction costs that thwart the social contract for mutual duties that individuals would enter into if it were possible (i.e., in the imagined original position).¹¹ His argument draws from social contract theory to answer contractarian objections to affirmative duties,¹² thus improving on earlier moral and doctrinal arguments in favor of affirmative duties.¹³

In *Stockberger*, Judge Posner had an opportunity to put Professor Posner's theory into practice. However, the common law did not give him much room to establish his theory of affirmative duties as a new line of precedent. In his opinion, he set forth the general common law rule against affirmative duties and noted that such broad duties would be difficult to manage.¹⁴ He then outlined three types of "special relationships" that were exceptions to the common law rule as it existed in Indiana.¹⁵ The first exception would apply when the defendant as-

¹⁰ Richard A. Posner, *Epstein's Tort Theory: A Critique*, 8 J. LEGAL STUD. 457, 460 (1979).

¹¹ See JOHN RAWLS, *A THEORY OF JUSTICE* (1971). Professor Posner cites Rawls's *A Theory of Justice* in his article. See Posner, *supra* note 10, at 464.

¹² Professor Posner was attempting to use Professor Epstein's emphasis on the freedom of contract to establish affirmative tort duties and to question Professor Epstein's use of causation as the touchstone of tort liability. This aspect of Professor Posner's critique of Professor Epstein may be criticized itself as talking past Professor Epstein because Professor Posner's imagined or fictional contract is not the same as an actual contract. The parties' actual consent is not the same as a speculation about what all people would prefer in the abstract. See Richard A. Epstein, *Causation and Corrective Justice: A Reply to Two Critics*, 8 J. LEGAL STUD. 477, 490-93 (1979).

¹³ See, e.g., James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 111-13 (1908).

¹⁴ *Stockberger*, 332 F.3d at 480-81.

¹⁵ Because *Stockberger's* wife brought a claim under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (2000), Indiana tort law governed the case. See *Stockberger*, 332 F.3d at 480.

sumed an explicit or implicit contractual duty to rescue or created a reasonable expectation of rescue. The second exception would apply when the victim was in the defendant's custody (typically as a prison inmate or mental patient) and lacked access to other potential rescuers. The third exception would create an affirmative duty when the potential rescuer caused the victim's peril, even if nonnegligently.¹⁶ In terms of the facts of *Stockberger*, the prison had never promised to protect Stockberger from the risks of his illness, and although it sometimes transported ill employees home, those past accommodations did not create a reasonable expectation in this case.¹⁷ Stockberger was not in the custody of the prison, and in fact, his peril was the direct result of his exercising his freedom to leave the prison. Moreover, none of the prison employees created the risk. They did not put Stockberger in jeopardy of hypoglycemia by denying him access to insulin or otherwise hindering his treatment.¹⁸ In fact, one colleague offered him help by giving him Ensure. They did not force him to leave the premises or prevent someone else from giving him a ride. Thus, none of the common law exceptions seemed to cover Stockberger's situation.

Judge Posner, however, did not end his inquiry at the traditional common law doctrine. He proceeded to observe that the risks of a serious car accident outweighed the burden of temporarily restraining Stockberger.¹⁹ (As a less intrusive option, a colleague might have called Stockberger's wife or a cab.) Of course, it is not surprising that Judge Posner invoked the Learned Hand test, a great breakthrough of law and economics in tort law. But Judge Posner also returned to the device of the hypothetical contract, first using it to explain the traditional tort law duties of due care and then carrying it over to the more contested arena of affirmative duties. Again, I'll let Judge Posner speak for himself:

Hypothetical-contract analysis is a powerful tool for understanding tort law and determining its scope. It is easy to imagine that if drivers and pedestrians, say, could contract with regard to safety, they would agree that drivers would take cost-justified measures to avoid hitting pedestrians and pedestrians would take cost-justified measures to avoid being hit; for that is the form of contract that would minimize all relevant costs — the costs of accidents and the costs of avoiding accidents. And it is possible that such an analysis would lead to the conclusion that when an invitee suddenly becomes helpless and in peril on the premises of his invitor, the invitor has a duty to take at least minimal steps to save him, since that is the solution that minimizes all the relevant costs. This con-

¹⁶ *Stockberger*, 332 F.3d at 481–82.

¹⁷ *Id.* at 482.

¹⁸ *Id.*

¹⁹ *Id.* at 483.

clusion might make as much sense as the other exceptions to the common law's rejection of good Samaritan liability²⁰

Here Judge Posner scaled back the hypothetical contract from a universal social contract for affirmative duties to a more narrow context of inviters and invitees, a special relationship more consistent with the common law exceptions. By limiting the context of liability, this rule raises fewer problems for judicial manageability.²¹

Nevertheless, Judge Posner did not apply this hypothetical contract to the federal prison in Terre Haute, for the state of Indiana had "not yet taken the step of imposing good Samaritan liability on inviters."²² Thus, he refrained from establishing his theory as the law, and he held that the prison employees were not liable for their failure to intervene.

But did state law actually dictate this result? Indiana law certainly was not the most fertile ground for cultivating affirmative duties. About a century before *Stockberger*, the Indiana Supreme Court established a major precedent against affirmative duties. In *Hurley v. Ed-dingfield*,²³ a violently ill man sent for his family physician. The messenger informed the physician that no other doctors were available and offered fees for his service, which the physician held open to the public. Yet, without giving a reason, the physician refused to help, and the man died. The court described the physician's act as merely a "refusal to enter into a contract of employment."²⁴ The fact that he was licensed by the state did not create any general duty to provide care to the public.²⁵

However, one can find growing exceptions to the common law rule in Indiana prior to *Stockberger*. Indiana courts had signaled that inviters and employers have "special relationships" with invitees and employees, and that these special relationships create special duties.²⁶ For example, the Indiana Supreme Court has stated that inviters and employers may have a "legal obligation to take affirmative steps to affect the rescue of a person who is helpless and in a situation of peril when the defendant is a master or an invitor and when the injury re-

²⁰ *Id.* at 483-84.

²¹ However, because all of us are inviters or invitees on a regular basis, it does not significantly narrow the scope of liability. But an advantage is that, because we all are sometimes inviters and sometimes invitees, it is easy to imagine that we would view such a hypothetical contract as mutually beneficial.

²² *Stockberger*, 332 F.3d at 484.

²³ 59 N.E. 1058 (Ind. 1901).

²⁴ *Id.* at 1058.

²⁵ *See id.*

²⁶ *See, e.g.,* L.S. Ayres & Co. v. Hicks, 40 N.E.2d 334, 337-38 (Ind. 1942) (noting the invitor's "special relationship" to invitees in dicta, but not going so far as to recognize a duty of rescue); J.A.W. v. Roberts, 627 N.E.2d 802, 809 (Ind. App. 1994) (same); Tippecanoe Loan & Trust Co. v. Cleveland, Cincinnati, Chi. & St. Louis Ry. Co., 104 N.E. 866, 868 (Ind. App. 1914) (holding that railroading company had an affirmative duty to help employee in certain situations).

sulted from the use of an instrumentality under the control of the defendant."²⁷ This rule defines the special relationship by focusing on causation, while expanding the inquiry beyond custody (the second exception Judge Posner identified) to the victim's helplessness.

Stockberger's "helplessness" is debatable, but one could argue that being in a hypoglycemic state prevented him from perceiving and guarding against risks. The prison employees did not cause his hypoglycemia, but perhaps the physician's assistant "caused" Stockberger's fatal decision to drive home (in a necessary-condition causal sense, although not necessarily in terms of proximate cause or "proximate negligence"²⁸) by giving him just enough Ensure to start the drive, but not enough medical attention to make him well enough to drive safely. Indeed, this small act of assistance may have actually increased the risk of harm by creating enough of a false sense of security for Stockberger to attempt a drive home, and a medically trained person should have recognized it was insufficient help.²⁹ These interpretations would expand two of the three categories Judge Posner identified: custody and causation. One might also argue that the first exception, reliance, should apply to this case. The prison had provided transportation from time to time for sick employees, and thus Stockberger might have reasonably expected the prison to offer him such assistance. Furthermore, he might have relied on his medically trained colleagues to look out for him during his delusional hypoglycemic episodes when he could not care for himself.

Moreover, the Indiana Supreme Court had announced that morality sometimes demands a broad recognition of social duties:

There may be principles of social conduct so universally recognized as to be demanded that they be observed as a legal duty, and the relationship of the parties may impose obligations that would not otherwise exist. Thus, it has been said that, under some circumstances, moral and humanitarian considerations may require one to render assistance to another who has been injured, even though the injury was not due to negligence on his part and may have been caused by the negligence of the injured person.³⁰

Some judges might have combined this open-ended appeal to morality and justice with a loose interpretation of Indiana precedents on reliance and risk causation to establish such a duty to rescue in *Stockberger*. Given his prior commitment to promoting affirmative duties in tort law, Judge Posner may have been tempted to do so. However, he

²⁷ *Palace Bar, Inc. v. Fearnot*, 381 N.E.2d 858, 865 (Ind. 1978).

²⁸ The term "proximate negligence" is more apt than the term "proximate cause" in such cases.

²⁹ Another Indiana decision established that if the government began to assist gratuitously, it assumed a duty to rescue only if its initial undertaking increased the risk of harm. *See Great-house v. Armstrong*, 616 N.E.2d 364, 369 (Ind. 1993).

³⁰ *L.S. Ayres*, 40 N.E.2d at 337.

chose not to stretch Indiana law to fit his theory. Indiana law recognized the general rule against affirmative duties, and the precedent did not establish much support for expanding the limited duty to rescue to cases like *Stockberger*. The claim of reliance was weak, especially because Indiana courts had already rejected the argument that past services could establish reasonable reliance.³¹ Far from being in custody, Stockberger was, as noted before, free to leave — and that freedom was actually his peril. It seems unfair to rule that a colleague's attempt to help Stockberger by providing him with Ensure was a cause of the accident or increased the risk of harm. It may have been a "necessary condition" in the chain of events, but it was an act intended to decrease the risk of harm, even if more could have been done, and even if the colleague overlooked other dangers. Making the public liable for offering assistance that turned out to be insufficient would create a rather slippery slope.³²

Although Judge Posner ruled that Indiana courts had not yet recognized a duty to rescue, he acknowledged a second line of argument: the federal court should establish an affirmative duty in this case because Indiana courts are likely to do so in the future. However, Judge Posner noted that the plaintiff had focused only on the unsuccessful argument that the case fit into established Indiana law and had not attempted to argue that Indiana courts were moving toward such an expanded scope of affirmative duties.³³ Out of fairness to the parties and to the court, the parties are responsible for making their own arguments. Moreover, according to Judge Posner, even if the court accepted that Indiana would recognize a duty to rescue in the future, it was not entirely clear that such a duty would have applied in a situation like Stockberger's, in which "due care" would have required "restraining a person's freedom of movement."³⁴ Judge Posner might have considered other potential "rescues" that would not have restrained Stockberger's freedom, but those scenarios would not have fit the facts of the case as realistically. Presented with an opportunity to turn his theory into law, Judge Posner also might have added his own legal arguments or a more creative reading of the facts, but he decided

³¹ See, e.g., *Bd. of Comm'rs v. Hatton*, 427 N.E.2d 696, 700 (Ind. App. 1981).

³² Furthermore, an Indiana statute immunizes those individuals who provide emergency care from "any act or omission by the person in rendering the emergency care." IND. CODE § 34-30-12-1(b)(1) (1998). Although the aid to Stockberger was not provided in an emergency, the statute suggests that Indiana law would not impose liability for insufficient assistance.

³³ See *Stockberger*, 332 F.3d at 484.

³⁴ *Id.* Judge Posner recognized that an affirmative duty would create a rescuer's dilemma: "It would not be sensible . . . to place employers or other inviters on a razor's edge where they face a suit for false imprisonment if they don't let the ill person leave or a suit for negligence if they do . . ." *Id.*

not to. In other words, Judge Posner did not permit Professor Posner to intervene on Stockberger's behalf.

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Here was a case that presented Judge Posner with an opportunity to turn his theory into law, and a rough sense of justice seemed to be on the side of his theory. However, he had enough wisdom to recognize that this case did not involve the right state precedents or the right arguments by the lawyers. Judge Posner's judicial restraint echoed a passage in a book review he had published just a few months before authoring *Stockberger*:

The Supreme Court is a political court. The discretion that the justices exercise can fairly be described as legislative in character, but the conditions under which this "legislature" operates are different from those of Congress. Lacking electoral legitimacy, yet wielding Zeus's thunderbolt in the form of the power to invalidate actions of the other branches of government as unconstitutional, the justices, to be effective, have to accept certain limitations on their legislative discretion. They are confined, in Holmes's words, from molar to molecular motions. And even at the molecular level the justices have to be able to offer reasoned justifications for departing from their previous decisions, and to accord a decent respect to public opinion, and to allow room for social experimentation, and to formulate doctrines that will provide guidance to lower courts, and to comply with the expectations of the legal profession concerning the judicial craft. They have to be seen to be doing law rather than doing politics.³⁵

Reasonable philosopher kings might disagree about the ordering of duties in *Stockberger*, but Judge Posner knew the difference between law and political theory. Of course, judges must be more than formalist functionaries, and in some cases, a moral imperative or a beneficial outcome trumps precedent. Judge Posner was wise to recognize that the plaintiff's case, although sympathetic, did not overcome some significant legal hurdles. While his academic work reflects his boldly creative mind, his judicial craft in this case demonstrates his modesty and deference on the bench.³⁶

³⁵ Richard A. Posner, *The Anti-Hero*, NEW REPUBLIC, Feb. 24, 2003, at 30 (book review), available at <http://www.tnr.com/doc.mhtml?i=20030224&s=posnero22403>.

³⁶ Another example of Judge Posner deferring and opting not to apply his own theories to his decisions is found in the area of "efficient breach." Judge Posner was an influential proponent of efficient breach in RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 117-26 (4th ed. 1992). However, Judge Posner has often declined to apply this theory from the bench. Instead, he has either defined the case as an opportunistic breach, to which efficient breach theory does not apply, or he has deferred to local precedents or standards of review. See, e.g., *Walgreen Co. v. Sara Creek Prop. Co.*, 966 F.2d 273, 275 (7th Cir. 1992); *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284, 1289 (7th Cir. 1985) (noting that efficient breach could apply to the case but observing that judges "must be on guard to avoid importing our own ideas of sound public policy into an area where our proper judicial role is more than usually deferential"). Judge Posner has, however,

Judge Posner further develops these themes in his *Harvard Law Review* Foreword.³⁷ He criticizes the “aggressive” judge who exploits ambiguous constitutional texts to advance a social agenda.³⁸ In constitutional cases, he believes that the Supreme Court has too often become a political body.³⁹ He saves his sharpest commentary for Justice Anthony Kennedy’s “moral vanguardist”⁴⁰ approach in *Lawrence v. Texas*,⁴¹ which struck down sodomy laws on privacy grounds,⁴² and *Roper v. Simmons*,⁴³ which held that the execution of minors was cruel and unusual punishment.⁴⁴ Judge Posner suggests that both cases were decided on moral/political grounds, rather than on legal grounds.⁴⁵ In particular, he rebukes Justice Kennedy and the *Roper* majority for relying on foreign legal sources.⁴⁶ Judge Posner’s core objection to these judicial approaches is that they create “promiscuous opportunities” for the whim of the political judge to depart from legal constraints and to practice politics, not law.⁴⁷ Although the Court’s business is the law, it is itself “lawless.”⁴⁸ Judicial supremacy and finality leave the Court above the other branches and sometimes above the law. Judge Posner is troubled specifically by Justice Kennedy’s “Army of One,” and he worries more generally about the power of swing-vote Justices to legislate their politics.⁴⁹

actively resisted local precedent when it has conflicted with other doctrinal commitments. *See, e.g.,* *Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, 916 F.2d 1174, 1176 (7th Cir. 1990) (distinguishing two Illinois decisions in order to reverse a strict liability judgment). In *Indiana Harbor*, he had good reason to distinguish previous state decisions, but his approach to state precedent struck a much less deferential tone than it did in *Stockberger*.

³⁷ *See* Posner, *supra* note 1.

³⁸ *See id.* at 54–60.

³⁹ *See id.* at 39–54.

⁴⁰ *Id.* at 84.

⁴¹ 539 U.S. 558 (2002).

⁴² *See id.* at 578.

⁴³ 125 S. Ct. 1183 (2005).

⁴⁴ *See id.* at 1200.

⁴⁵ *See* Posner, *supra* note 1, at 84 (“[These cases] are startlingly frank appeals to moral principles that a great many Americans either disagree with or think inapplicable to gay rights and juvenile murderers.”).

⁴⁶ *See id.* at 88. He objects that such sources are not legitimate in American law because they are the product of foreign votes and foreign judicial politics and are “not events in our democracy.” *Id.* at 88–89. On the other hand, he argues, federal judges have at least “attenuated democratic legitimacy” based on their selection by elected officials, and therefore it is appropriate to rely on them. *Id.* at 88. But much of his argument against foreign legal sources might be made of legal academic writing. At least foreign judges in many nations are empowered by some form of democratic legitimacy, whereas academics have no claim to such legitimacy. Would Judge Posner prohibit references to academic writing and reliance upon academic insights?

⁴⁷ *Id.* at 85.

⁴⁸ *Id.* at 78 (internal quotation marks omitted).

⁴⁹ *Id.* at 84.

Judge Posner calls for judges to police themselves and to follow general doctrines of deference.⁵⁰ Given Judge Posner's famous calls for pragmatism,⁵¹ which he returns to in his Foreword in his call for judicial modesty,⁵² I would offer a more practical solution: mechanical voting rules in areas of law requiring judicial deference. One example is a supermajority voting rule for overturning legislation.⁵³ Another is a proposed supermajority rule for *Chevron* deference, under which courts defer to agency interpretations of ambiguous statutes.⁵⁴

Stockberger offers another situation in which a supermajority rule might be helpful. In diversity cases, a federal appellate panel might find that a state's precedents have established one rule, but it might also believe that the state courts are on a trajectory toward another rule — a question that Judge Posner entertained in *Stockberger* but properly declined.⁵⁵ When judges engage in such a predictive mode of interpretation, they are on less certain legal grounds and have wide discretion. This predictive role is similar to that of the prophetic-heroic judge that Professor Alexander Bickel hailed in his own *Harvard Law Review* Foreword.⁵⁶ As a "moral vanguard," judges should foresee the progressive direction of society and engage the public in Socratic dialogue to advance that progress through their decisions.⁵⁷ As Judge Posner describes this theory, Professor Bickel "cast the Court in the role of a secular Moses that would lead the American people out of their moral wilderness."⁵⁸ Judge Posner condemns this approach as "transparently political," condescending, and "coercive,"⁵⁹ and by labeling Justice Kennedy's approach as "moral vanguardist," he implies the same of *Roper* and *Lawrence*. I do not agree with Judge Posner's critique of those decisions, but his concerns apply forcefully to the "trajectory of state law" question in diversity cases. Judges should exercise this predictive power to trump the current position of state law only

⁵⁰ See, e.g., *id.* at 102 ("If the Supreme Court is inescapably a political court when it is deciding constitutional cases, let it at least be restrained in the exercise of its power, recognizing the subjective character, the insecure foundations, of its constitutional jurisprudence.")

⁵¹ See, e.g., RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003).

⁵² See, e.g., Posner, *supra* note 1, at 91.

⁵³ See, e.g., Evan H. Caminker, *Thayerian Deference to Congress and the Supreme Court Supermajority Rule*, 78 IND. L.J. 73 (2003); Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893 (2003).

⁵⁴ See Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 YALE L.J. 676 (2007).

⁵⁵ See *Stockberger*, 332 F.3d at 484 (noting that it is a "difficult challenge of predicting whether Indiana will join the bandwagon when a suitable case presents itself," but that *Stockberger's* counsel did not present the argument).

⁵⁶ See Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 77 (1961).

⁵⁷ *Id.* at 79.

⁵⁸ Posner, *supra* note 1, at 81.

⁵⁹ *Id.* at 82.

when they reach a certain level of consensus about the state's future direction. Such consensus might be a unanimous three-judge panel on the Court of Appeals or two-thirds of an en banc panel or of the U.S. Supreme Court. This rule would not have to be mechanical or external; instead, judges could enforce it themselves, perhaps as a norm more than a formal rule. Such norms or rules have the advantage of making the courts' exercise of discretion less "lawless," in Judge Posner's terms, and more practical than general hortatory calls for deference.

Professor Posner's boldness and Judge Posner's modesty both are admirable. In his next twenty-five years on the bench, he should boldly seek an opportunity to expand affirmative duties in tort law, but he should continue to wait modestly for the right case. And with bolder deference, more aggressive modesty, and more pragmatic idealism, he might consider establishing concrete rules to guide other judges toward his goal of judicial restraint.