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## **Fingerprints: An Impressionistic and Empirical Evaluation of Richard Posner's Impact on Contract Law**

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# Fingerprints: An Impressionistic and Empirical Evaluation of Richard Posner’s Impact on Contract Law

Jeffrey L. Harrison\*

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## I. INTRODUCTION

Richard Posner’s retirement after 36 years on the federal bench presents an ideal opportunity to reflect on his sometimes controversial career as a scholar and a judge. Judge Posner’s principal scholarly work, *Economic Analysis of Law*,<sup>1</sup> has been cited by legal scholars over 7,500 times. Given this, one would expect him to have had a substantial impact on law.<sup>2</sup> This Article considers his impact

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1. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (9th ed. 2014) [hereinafter *ECONOMIC ANALYSIS*]. All citations are to the ninth edition unless otherwise noted.

2. This was determined by a Westlaw search, which considers legal periodicals only, and does not include books or citations to Judge Posner’s many other works. Therefore, the number is a substantial understatement.

on contract law. I conducted two lines of research: one line explores the impact of Judge Posner's scholarly writings on judicial opinions and the other line examines the impact of his opinions on other courts.

This research suggests that Judge Posner's impact on contract law is minimal if "impact" is measured in relation to changes that have occurred in the field. For the most part, there is scant evidence that his scholarly writings in the area have influenced other judges in more than a few cases.<sup>3</sup> Similarly, there is little indication that his judicial opinions have influenced other courts.<sup>4</sup> Perhaps this is explained by the fact that his writing in the field of contracts typically supports the status quo.<sup>5</sup> Indeed, one interpretation of this research is that Judge Posner has supplied insights and rationales in support of the status quo and provided courts with new ways to articulate old ideas. In either case, this Article attempts to establish Judge Posner's importance in the evolution of contract law. Perhaps it also furthers our insight into the disconnect between legal scholarship and the law.<sup>6</sup>

Part II of this Article is a brief and critical examination of Judge Posner's view of contract law. Chapter 4 of his book, *Economic Analysis of Law*, is his most comprehensive treatment of this issue.<sup>7</sup> Part III considers instances in which judicial opinions cite Posner's primary works. It addresses whether Posner's writings have impacted the path of contract law. Part IV presents a detailed look at the impact of his judicial opinions.

Before beginning, it is important to note some qualifications for the results that follow. First, as far as I know, Judge Posner has not claimed that his work has been influential to the development of contract law. As already noted, this should not be surprising since the theme of much of Posner's work is that the common law reflects an intuitive application of economic reasoning.<sup>8</sup> Second, in the wake of his most important work, *Economic Analysis of Law*, many other scholars turned to an economic approach to law. These scholars may have had some, albeit moderate, influence.<sup>9</sup> It is incorrect to view their works as

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3. See *infra* Part III.

4. See *infra* Part IV. Perhaps this should not be surprising. Eric Posner wrote 15 years ago, "economic analysis has failed to produce an 'economic theory' of contract law, and does not seem likely to be able to do so." Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 830 (2003).

5. Although impossible to assess, it may be that the impact will be felt in terms of retarding changes in the law.

6. See generally Jeffrey L. Harrison & Amy R. Mashburn, *Citations, Justifications, and the Troubled State of Legal Scholarship: An Empirical Study*, 3 TEX. A&M L. REV. 45 (2015).

7. ECONOMIC ANALYSIS, *supra* note 1, at 95–158.

8. *Id.* at 297; Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 270–71 (1974).

9. See Jeffrey L. Harrison, *The Influence of Law and Economics Scholarship on Contract Law: Impressions Twenty-Five Years Later*, 68 N.Y.U. ANN. SURV. AM. L. 1 (2012) [hereinafter *Influence of Law and Economics Scholarship*]; Jeffrey L. Harrison, *Trends and Traces: A Preliminary Evaluation of Economic*

derivative, yet the question remains of whether their occasionally influential works would have existed but for the pioneering work of Judge Posner. Third, and most importantly, although this effort is essentially empirical, it reflects certain methodologies and assumptions that are ultimately subjective. Readers are encouraged to question both of these and explore possible alternatives.

## II. POSNER'S VIEW OF CONTRACT LAW

### A. *Basic Positions and Minor Criticisms*

As one would expect, Judge Posner's analysis of contract law is centered around the goal of efficiency. Accordingly, contract law has five functions:

(1) to prevent opportunism, (2) to interpolate efficient terms either on a either a wholesale or retail basis (gap-filling versus ad hoc interpretation), (3) to punish avoidable mistakes in the contracting process, (4) to allocate risk to the superior risk bearer, and (5) to reduce the costs of resolving contractual disputes.<sup>10</sup>

Other than (5)—which seems, in part, to follow from (1) through (4)—this Section considers each of these functions along with some additional observations about Posner's positions on promissory estoppel, duress and related doctrines, and remedies. The following Subsection presents more general criticisms.

Posner notes that, "The basic aim of contract law is to deter people from behaving opportunistically toward their contracting parties, in order to encourage optimal timing of economic activity and . . . obviate costly self-protection measures."<sup>11</sup> Put differently, contract law decreases the risk of opportunistic behavior and, in so doing, lowers transaction costs. Posner expands on the notion of opportunism and notes that guarding against it is really a version of guarding against monopoly (or monopsony) power.<sup>12</sup> This risk arises when performances are sequential as opposed to simultaneous. Thus, a builder of a house who is to be paid only when the house is finished is at the mercy of the person for whom it is built. For example, halfway through construction, the buyer of the house may say that he or she will pay 20% less for the house. At that point the builder, who has invested substantial personal funds, may consider the alternatives of stopping construction or finishing and locating a new buyer. Neither of these options may be more attractive than simply accepting the lower price from the opportunistic buyer. Contract law avoids this by permitting the builder to hold the buyer

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*Analysis in Contract Law*, 1988 N.Y.U. ANN. SURV. AM. L. 73 [hereinafter *Trends and Traces*].

10. ECONOMIC ANALYSIS, *supra* note 1, at 102.

11. *Id.* at 97.

12. Monopsony power involves the possession of leverage on the buying side of the market.

responsible for the full amount to which the parties agreed.

Gap filling, according to Judge Posner, presents opportunities for observing efficiency standards. For example, gap filling by courts relieves the parties of costly “negotiation and drafting.”<sup>13</sup> In effect, contract law contains default rules that courts will apply unless the parties opt out of them. Posner portrays these default rules as a type of form contract. There are really two questions here: Should a court fill the gaps, and if so, how should it fill them? Posner is correct that contract law itself serves a useful function in filling the gaps with a set of default rules. The issue of how one fills the gap, however, is another matter. Here, Posner makes a leap of faith by noting that an efficient term should fill the gap because the parties likely would have agreed to doing that.<sup>14</sup> His logic is that filling the gap with an efficient term means maximizing the surplus created by the contract and that both parties will benefit.

It is interesting to visualize this in the context of an actual case. In *American Land Holdings of Indiana, LLC v. Jobe*,<sup>15</sup> (a Posner opinion) the dispute was between a landowner and a mining company. The issue was whether a grant to the mining company included the right to strip mine the land. The contractual provision in question granted the right to “‘all the coals, clays minerals, and mineral substances underlying’ the defendant’s land, ‘together with the right to mine and remove said coals.’”<sup>16</sup> The court deemed the clause ambiguous, thus creating an opportunity for gap filling. The court filled the gap by holding that the clause did not permit strip mining.

Posner’s approach to the problem was to imagine the parties back at the time of negotiating the contract. Someone stops them in mid negotiation and notes that the clause might be ambiguous and asks “what do you mean?” The problem with this approach is that the parties would not simply have inserted a clause that indicates whether strip mining is allowed. They would have discovered that they disagree. The landowner will claim it does not include strip mining and the mining company will insist that it does. In all likelihood, resolution of the dispute would require revising the contract so that both parties are satisfied. For example, the landowner will certainly demand more if the land is strip mined, and the mining company will ultimately pay more or the contract negotiation will fail.

The logic of Posner’s gap filling argument is not compelling. First, as noted in the example, the parties would have renegotiated had they thought of it, which would mean the terms would change for both sides. Courts, however, do not hold that one side’s definition is the correct one and then adjust the whole bargain.

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13. ECONOMIC ANALYSIS, *supra* note 1, at 99.

14. This point is made more succinctly in the seventh edition of the *Economic Analysis of Law*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 96–97 (7th ed. 2007) [hereinafter ECONOMIC ANALYSIS 7TH ED.], and is made less directly in the ninth edition in which Posner lists as one of the functions of contract law to “interpolate efficient terms.” ECONOMIC ANALYSIS, *supra* note 1, at 102.

15. 604 F.3d 451 (7th Cir. 2010).

16. *Id.* at 454.

Second, if the goal is to replicate what the parties would have done, there is little reason to believe they would have maximized the surplus created by the exchange as opposed to each seeking to maximize their individual returns.<sup>17</sup> In fact, in any contract in which one party has monopoly or monopsony power, it is unlikely that the total surplus will be maximized.<sup>18</sup> Third, the idea of filling the gap with the most efficient term suggests there is one generally accepted concept of efficiency and that judges are equipped to discover it. Both of these assumptions are questionable.

Posner's gap filling approach of asking what the parties would have done extends to allocating the risk to the superior risk-bearer in cases of impracticability<sup>19</sup> and mutual mistake.<sup>20</sup> Here, Posner argues that the party who could have avoided or insured against the unexpected event at the lowest cost would have assumed the risk, had it been considered. The point is that the parties, had they thought about it, would have agreed to the efficient allocation of the risk. Again, Posner falls into the trap of assuming the parties would seek to maximize the total or joint return from the contract as opposed to individual returns. Moreover, had they thought about it, the party assuming the risk would have demanded compensation.

The purpose of "punishing"<sup>21</sup> those who make avoidable mistakes in the formation process raises questions about how to handle the risk of mistake in formation. For example, a seller mismarks the price on a rare coin or baseball card. The buyer notices the bargain and buys the item at a low cost. The default position is that the party who is the lowest cost-avoider of the mistake should bear the burden.<sup>22</sup> The goal is to decrease incidents of miscommunication by imposing the risk on those who could avoid the mistake at the lower cost. While assigning the risk of mistakes to those best able to avoid them is desirable, it is not clear whether it is consistent with overall efficiency. One of the underlying premises of Posner's analysis is that we want contracts to be a method of assuring that goods eventually reach the hands of those who value them the most. Punishing the party who could avoid the mistake may be inconsistent with this goal. The mismarked item may be scooped up by someone who values it at a fraction of its highest value. Although subsequent transactions might result in this eventual allocation, it also means increased transaction costs.

Judge Posner offers a weak and likely obsolete defense of promissory

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17. Posner recognizes this, *ECONOMIC ANALYSIS 7TH ED.*, *supra* note 14, at 96–97, but maintains that the best chance to enrich oneself is to increase the size of the surplus.

18. One of the principle objections to the use of monopoly power is that it fails to maximize total surplus. See E. THOMAS SULLIVAN & JEFFREY L. HARRISON, *UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS* 23–25 (5th ed. 2013). There is little reason to think this would be different in the case of individual transactions.

19. *ECONOMIC ANALYSIS*, *supra* note 1, at 112.

20. *Id.* at 108–09.

21. Here, it seems clear that Judge Posner does not equate punishing with imposing punitive damages.

22. *ECONOMIC ANALYSIS*, *supra* note 1, at 108.

estoppel.<sup>23</sup> His example is that of a wealthy person who promises to pay someone's way through college. The promisee then relies on the promise and quits his job. According to Posner, the wealthy person should be required to pay under the reasoning that the promise "induced reliance that cost the promisee heavily when it was broken, and such a cost can be avoided for the future by holding such a promisor liable for the promisee's cost of having relied."<sup>24</sup> The question is whether a rule that one must not rely on gratuitous promises might be more efficient. Specifically, if courts never enforced these promises, the cost of relying on them would almost certainly decline. This would also eliminate the legal costs of determining whether a claimant has satisfied all the elements of a promissory estoppel claim.<sup>25</sup>

Perhaps Judge Posner's more interesting comments deal with duress, related doctrines, and remedies. He notes that subjecting people to duress should be discouraged not because people are unable to exercise their free will, but because we have a more generalized preference not to be subject to extortion.<sup>26</sup> Thus, a contract completed at gun point is not avoidable because you were robbed of your free will, but because we want to discourage, as a general matter, the use of resources to put people in situations in which they have little choice. His reasoning regarding duress seems circular—the reason we dislike extortion is because it eliminates the options we have if we are to exercise free will. Nevertheless, he does find an efficiency justification for not enforcing contracts entered into under duress in that we want to discourage the flow of resources into making threats and guarding against them.<sup>27</sup> Those uses may have only distributive effects but, according to Posner, do not advance overall social welfare.

Posner's concept of duress is narrow.<sup>28</sup> For example, it is not duress if the source of the duress is not the advantage-taker. From the standpoint of discouraging investment in duress-causing efforts, this makes sense. The merchant who charges high prices to people with few choices arguably is not responsible for their plight; allowing avoidance would not lead to a decrease in the source of the duress. However, it does not make sense in terms of decreasing investment in guarding against duress. A vulnerable party wishing to avoid

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23. *Id.* at 101.

24. *Id.*

25. Judge Posner offers a more compelling rationale for promissory estoppel in his article, Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411 (1977) [hereinafter *Gratuitous Promises*]. Suppose you wanted to give someone \$100. In a regime without promissory estoppel, the actual promise would have to be for more because the promisee would discount the value of your promise. So, you might have to promise \$125 to actually create the perception of a \$100 promise. If there is promissory estoppel, the promise could be for \$100 because very little or no discounting would take place.

26. ECONOMIC ANALYSIS, *supra* note 1, at 123.

27. *Id.*

28. *Id.* at 123–27.

advantage-taking likely has little insight into the source of the duress and, to the extent possible, must invest to avoid a more generalized threat. On the related notion of unconscionability, Posner adopts the standard law and economics point of view that widespread use of unconscionability can reduce the available options for less well-off individuals.<sup>29</sup>

On remedies, Posner is a proponent of the notion that expectancy damages are consistent with the so-called efficient breach.<sup>30</sup> He seems less supportive of liquidated damages and specific performance. With respect to liquidated damages clauses, Posner observes, “There are good reasons for not awarding punitive damages for the non-opportunistic breach of contract . . . . But there are not good reasons for refusing to enforce voluntarily negotiated penalty clauses.”<sup>31</sup> He views a penalty clause as a way for a party who may appear risky to his or her counterpart to overcome reluctance to assume that risk. On specific performance he appears to view the current policy of applying it to real property transactions as consistent with efficiency.<sup>32</sup>

Posner’s qualms about liquidated damages and specific performance are related to the impact they may have on the efficient breach. This requires some explanation. Suppose A contracts to sell a car to B for \$2,000. The market value is \$2,200. C comes into the picture and personally values the car at \$2,500 and makes that offer to A. Under the efficient breach theory, A would sell the car to C, pay damages of \$200 to B, and be better off. In fact, all three parties would be better off or no worse off after the breach than they would have been had the contract been performed.

On the other hand, suppose A and B have a clause that says A is to pay \$800 in liquidated damages if the car is not delivered to B. A cannot pay B \$800 and profit from the breach, and it will not occur. There is, however, an alternative to delivering the car or paying liquidated damages. Rather than breach, A could approach B and ask what it would take to relieve A of the obligation under the clause. For example, he could offer B \$400. This would make B better off than delivery of the car, which only nets him a \$200 benefit of the bargain. In fact, there is a range of prices that A could offer B for release from the clause that would allow the “efficient breach” (no longer a breach since it would be with B’s blessing) to occur. Posner’s concern is that the bilateral monopoly relationship of the parties may prevent this exchange from occurring.<sup>33</sup> In the example, there is one potential “buyer” of the right to be released from the clause and one potential seller. Under these conditions, the parties may negotiate, bluff, and ultimately fail to agree.<sup>34</sup>

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29. *Id.* at 127.

30. *Id.* at 129.

31. *Id.* at 140.

32. *Id.* at 145–46.

33. *Id.* at 140.

34. The frequency of parties to agree under conditions of bilateral monopoly is an empirical question.



In the case of specific performance, the argument has similar steps. Suppose now the car is unique and B is likely to be awarded specific performance. Still the car is only worth \$2,200 to B. Specific performance would keep the car from finding its way to C. The parties could bargain around this. A could say, "I will deliver the car and you will be \$200 ahead or I can make you \$400 ahead and I will transfer the car to C." Again, there is one buyer and one seller along with the possibility of a stalemate that would prevent the more efficient outcome from occurring.

### *B. General Observations*

Judge Posner's most extensive treatment of contract law teeters between advocating that the law is efficient as-is and wishful thinking. On the latter point, Posner observes that courts are using the doctrine of unconscionability less frequently<sup>35</sup>—something he sees as consistent with efficiency—while, in fact, the opposite seems to be the case.<sup>36</sup> There are, however, larger issues with the analysis which this Article will briefly address. They deal with the notions of opportunism, efficiency, and remedies.

First, as already noted, Posner views contract law's primary purpose as avoiding opportunism—advantage-taking that does not increase overall welfare. His opportunism seems confined to behavior after the contract is made. In fact, a great deal of contract law is a response to opportunism at the point of contracting. Although not listed by Judge Posner as one of the purposes of contract law, contract law limits means of persuasion.<sup>37</sup> In fact, a leading contracts casebook devotes a substantial chapter to the subject of "policing the bargaining process."<sup>38</sup> Measures that police the bargain can be about efficiency, but they often deal directly with distributive outcomes. To serve basic ideas of fairness, courts have employed notions of capacity, duress, public policy, undue influence, unconscionability, and misrepresentation. Courts have also used standard contract doctrines to address unfairness in exchanges.<sup>39</sup> A single-minded

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35. This statement is found in the seventh edition, *ECONOMIC ANALYSIS* 7TH ED., *supra* note 14, at 117, but is not found in the ninth edition, *ECONOMIC ANALYSIS*, *supra* note 1. It is not clear whether Judge Posner found empirical evidence to refute his initial statement or realized he had no evidence either way.

36. See Jeffrey L. Harrison, *Defects in Consent and Dividing the Benefit of the Bargain: Recent Developments*, 53 U. LOUISVILLE L. REV. 193 (2015).

37. THOMAS F. COTTER & JEFFREY L. HARRISON, *LAW AND ECONOMICS: POSITIVE, NORMATIVE AND BEHAVIORAL PERSPECTIVES* 276–81 (3d ed. 2013).

38. E. ALLAN FARNSWORTH ET AL., *CONTRACTS: CASES AND MATERIALS* 339–404 (8th ed. 2013).

39. This is noted in the comment to § 2-302 of the U.C.C., which addresses unconscionability. The comment reads:

This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract.

emphasis on efficiency, as Posner seems to view it, is an incomplete version of the functions of contract law.

Second, Judge Posner's notions of efficiency are fuzzy. He cites a number of sources of efficiency. For example, without contract law, parties would have to take more expensive measures to avoid opportunistic behavior. Gap filling by courts lowers the costs of negotiation and drafting. In addition, by lowering transaction costs, a system of contract law helps insure that goods go to their most valued users. Courts can use contract rules to assign a variety of risks to the party better able to avoid their consequences or insure against them. In all instances, efficiency means either lowering costs or increasing benefits.

Costs in the context of contracts can have the same three layers as costs in the context of torts, as explained by Guido Calabresi.<sup>40</sup> Primary costs are the costs we observe. Secondary costs concern how parties actually feel the costs.<sup>41</sup> They are "the costs of bearing the costs of accidents."<sup>42</sup> For example, a court could impose a \$20 fine could impose on a homeless person or on Bill Gates. Most would agree that the actual suffering would be greater for the homeless person. Finally, there are costs of administering the system. Posner seems disinclined to recognize secondary costs in particular.<sup>43</sup> All three types of costs are relevant in contract law.

The same analysis is applicable to benefits. Primary benefits are the ones we can monetize. Secondary benefits are determined by the actual impact of the benefit. Thus, finding a \$20 bill on the street is likely to be of greater benefit to the homeless person who is able to buy necessities than to Bill Gates who may actually lose money by spending the time it takes to pick up a \$20 bill.

The importance of these layers of costs and benefits can be understood by focusing on the allocation of risk in the case of impossibility or impracticability. In these instances, the real decision is who will bear the loss. For example, suppose the contract is to build a house in Houston, Texas for \$300,000. After the house is half-way completed at a cost of \$150,000, it is completely destroyed by a hurricane. Under Posner's approach, the decision to excuse the contractor or not would be based on how the risk would have been allocated if the parties had considered it. If it were assigned to the owner, the contractor would be excused. If assigned to the contractor, performance would not be excused. If they had thought about it, they may have both consulted an insurer. Suppose the contractor could buy insurance for \$100 and the homeowner for \$150. With this information at the bargaining table, the contractor would not be excused.<sup>44</sup> It is important to

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U.C.C. § 2-302 cmt. 1 (AM. LAW INST. & UNIF. LAW COMM'N 2010).

40. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 53 (1970).

41. *Id.* at 40–54. Posner apparently discounts this as referring to the "distribution" of costs, but distribution has true efficiency implications in terms of the utility of those who absorb these costs.

42. JULES COLEMAN, *RISKS AND WRONGS* 204 (2002).

43. Richard A. Posner, *Guido Calabresi's The Costs of Accidents: A Reassessment*, 64 MD. L. REV. 12, 15 (2005).

44. The contractor would accept any amount in excess of \$100 to assume the risk and the homeowner

remember that when the issue arises no one has actually insured the house. This means if the contractor bears the risk, the contractor will have to start the project over or be liable for a breach. This, however, focuses only on primary costs. Take it one more step and assume the homeowner is Donald Trump, who is building a cottage for a distant relative. The contractor is a small and new sole proprietorship and this is only his second project. If secondary costs are considered, it may be that the efficient allocation of the risk is to the homeowner. The Posner analysis looks only at one layer of costs.

Before turning to the question of whether Judge Posner has influenced contract law, one additional, albeit minor, criticism is in order. As noted, Judge Posner warns that penalty clauses and specific performance may prevent what is known as the efficient breach. The problem is that in order to overcome the possible inefficiencies of those remedies, the parties must bargain under conditions of bilateral monopoly. In theory, there is no stable outcome under these conditions. The parties are stuck with each other and both parties know the other party has no alternatives. Under these conditions there is a danger of an impasse leaving both parties worse off. How often parties end up in a stalemate under these conditions is an empirical question, and it seems likely that Judge Posner overstates the danger.<sup>45</sup>

### III. THE IMPACT OF POSNER'S SCHOLARSHIP ON JUDICIAL DECISION-MAKING

Of all of Judge Posner's writings, the most important one is *Economic Analysis of Law*. A Westlaw search in late fall 2017 using the terms "Posner" and "Economic Analysis of Law" indicates that the book has been cited in 283 opinions.<sup>46</sup> This includes all cases regardless of the subject matter. When I added the term "contract!" to the search, the number drops to 205. Obviously, the fact that some form of the word "contract" is included in an opinion does not mean the case is concerned with contract law. Nor does the absence of the term mean that a case may not ultimately be about contract law. For example, a case about a lease may not include the word contract. Thus, I searched for cases that cited the book and used the term "lease," but did not use the term "contract!" This yielded three additional cases. To expand the sample, I afforded the same treatment to four additional works. These works were: *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, by Posner and Rosenfield;<sup>47</sup> *The*

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would pay up to \$150 to avoid the risk.

45. Experimental evidence suggest that impasses are not a frequent occurrence. See Elizabeth Hoffman & Matthew L. Spitzer, *The Coase Theorem: Some Experimental Tests*, 25 J. L. ECON. 73 (1982); see also Elizabeth Hoffman & Matthew L. Spitzer, *Entitlements, Rights, and Fairness: An Experimental Examination of Subjects' Concepts of Distributive Justice*, 14 J. LEGAL STUD. 259 (1985).

46. By contrast, the book has been cited over 7,500 times by legal scholars. This raises the issue addressed elsewhere of the relevance of legal scholarship. See Harrison & Mashburn, *supra* note 6, at 45.

47. Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law*:

*Economics of Contract Law*, by Posner and Kronman;<sup>48</sup> *Gratuitous Promises in Economics and Law*, by Posner;<sup>49</sup> and *One-Sided Contracts in Competitive Consumer Markets*, by Bebchuk and Posner.<sup>50</sup> Together these four works were cited 18 times.<sup>51</sup>

I then took two “pruning” steps. First, I examined the headnotes of those cases citing one or more of the works to see if the case concerned a contract law issue. Second, I read the cases addressing a contract law issue to determine if the contract law issue was a significant issue as opposed to a minor one. This narrowed the sample to 68 cases.<sup>52</sup> It was apparent that “citation” did not mean the cited work was relied on in a substantive way. Courts frequently offered gratuitous cites or asides—those that do not seem to inform the opinion or the reasoning of the court.<sup>53</sup> These cites, for want of a better description, leave the reader wondering “so what?” In other words, the issue was not simply whether the author cited *Economic Analysis of Law* or the other works, but whether the citation mattered.

This distinction is important. As an example, take the notion of “efficient breach.” If a person enters the search terms “Posner,” “efficient breach,” and “Economic Analysis of Law” into a Westlaw search, the search will return 17 cases in which all three terms are found.<sup>54</sup> Although it is possible that the citation

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*An Economic Analysis*, 6 J. LEGAL STUD. 83 (1977).

48. ANTHONY T. KRONMAN & RICHARD A. POSNER, *THE ECONOMICS OF CONTRACT LAW* (1979).

49. *Gratuitous Promises*, *supra* note 25, at 411.

50. Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827 (2006).

51. These results can be replicated by using the titles as search terms in WestLaw.

52. This is consistent with a 2011 survey that found that *Economic Analysis of Law* was cited in 68 cases that dealt with contract law, whether or not the actual case itself was related to the contractual issue. See *Influence of Law and Economics Scholarship*, *supra* note 9, at 3.

Other law and economic works with substantial citation include: Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984) (18 citations); Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554 (1977) (22 citations). See *Influence of Law and Economics Scholarship*, *supra* note 9.

53. An example of this type of citation is *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), which includes the following:

The ADA, as we recognized in *Morales*, 504 U.S., at 378, 112 S.Ct., at 2034, was designed to promote “maximum reliance on competitive market forces.” 49 U.S.C.App. § 1302(a)(4). Market efficiency requires effective means to enforce private agreements. See Farber, *Contract Law and Modern Economic Theory*, 78 Nw.U.L.Rev. 303, 315 (1983) (remedy for breach of contract “is necessary in order to ensure economic efficiency”); R. Posner, *Economic Analysis of Law* 90–91 (4th ed. 1992) (legal enforcement of contracts is more efficient than a purely voluntary system). As stated by the United States: “The stability and efficiency of the market depend fundamentally on the enforcement of agreements freely made, based on needs perceived by the contracting parties at the time.” Brief for United States as *Amicus Curiae* 23. That reality is key to sensible construction of the ADA.

*Id.* at 230.

54. *Search Results*, WESTLAW,

[https://1.next.westlaw.com/Search/Results.html?query=%22Posner%22%20%26%20%22efficient%20breach%](https://1.next.westlaw.com/Search/Results.html?query=%22Posner%22%20%26%20%22efficient%20breach%22)

to *Economic Analysis of Law* in these cases may have little to do with the efficient breach, further examination reveals that in all but three cases the two terms were linked. On the other hand, it seems likely that compensatory damages would have been awarded anyway given long standing precedent.<sup>55</sup> It is wrong to attribute the idea of expectancy damages to Judge Posner. Moreover, the fact that the term “efficient breach” has entered into the picture probably has not influenced the law with respect to awarding compensatory damages.<sup>56</sup>

I examined all 68 citations to assess the importance of the influence of Judge Posner's work. “Importance,” however, is a fuzzy standard and I refined the analysis one more step. I examined each citation to see if it was merely gratuitous,<sup>57</sup> provided some useful information about the reasoning of the court,<sup>58</sup> or seemed to directly influence the outcome.<sup>59</sup> These judgements are highly subjective and, hopefully, readers will make their own evaluations.

In the case of the article, “Gratuitous Promises in Economics and Law,” there was one citation and it was classified as gratuitous.<sup>60</sup> The book with Kronman, *The Economics of Contract Law*, was cited nine times.<sup>61</sup> In none of these instances does it appear the authors' observations caused a court to rethink a

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22%20%26%20%22Economic%20Analysis%20of%20Law%22&jurisdiction=ALLCASES&contentType=CASE&querySubmissionGuid=i0ad6ad3b00000165723a95a64fa48fc9&startIndex=1&searchId=i0ad6ad3b00000165723a95a64fa48fc9&originationContext=SearchListView&transitionType=ListViewType&contextData=(search) (last visited Aug. 25, 2018) (on file with *The University of the Pacific Law Review*).

55. O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) (“The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else.”). See generally Jeffrey L. Harrison, *A Nihilistic View of the Efficient Breach*, 2013 MICH. ST. L. REV. 167 [hereinafter *Nihilistic View*].

56. On the other hand, it is possible that Judge Posner has publicized a new way to justify expectancy damages.

57. See *supra* text accompanying note 53; e.g., *SSC Manager, LLC v. Venezia FC 1907 LP*, No. 17-1042, 2017 WL 3225851, at \*11 n.4 (E.D. Pa. July 27, 2017) (quoting RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 175 (8th ed. 2011) [hereinafter *ECONOMIC ANALYSIS 8TH ED.*], who illuminated “the inappropriateness of applying the participation doctrine to contractual claims” when he wrote, “A contract gives one a right only against the other party to the contract. A tort right, like a property right—which tort rights frequently serve to enforce—is a right against the whole world, enabling one to obtain damages from (for example) a trespasser on one's property with whom one had no previous agreement limiting his right to enter the property. It would be infeasible to make a contract with every potential trespasser to protect oneself against trespass.”).

58. An example is *SSC Manager, LLC*, 2017 WL 3225851, at \*11 n.4, which is as follows:

The following excerpt from an article by Richard Posner further illuminates the inappropriateness of applying the participation doctrine to contractual claims: “A contract gives one a right only against the other party to the contract. A tort right, like a property right—which tort rights frequently serve to enforce—is a right against the whole world, enabling one to obtain damages from (for example) a trespasser on one's property with whom one had no previous agreement limiting his right to enter the property. It would be infeasible to make a contract with every potential trespasser to protect oneself against trespass.”

*Id.* (quoting *ECONOMIC ANALYSIS 8TH ED.*, *supra* note 57, at 175).

59. See *infra* text accompanying note 66.

60. *U.S. v. Meadors*, 753 F.2d 590, 596 (7th Cir. 1985).

61. The search terms “Kronman” and “The Economics of Contract Law” were used.

position it was predisposed to take. In effect, the work supported the *status quo*. The article by Posner and Rosenfield was cited eight times.<sup>62</sup> The essence of the article is that, in cases of impossibility and related doctrines, courts should determine excuse by evaluating who is able to bear the risk of the unexpected event.<sup>63</sup> It is difficult to conclude that the article led a court to decide a case differently from how the case would have come out under existing law. On the other hand, a few courts have embraced the article's reasoning.<sup>64</sup>

Focusing on the citations to *Economic Analysis of Law*, there appear to be 13 instances in which Judge Posner's work was cited and seemed to influence the outcome of the case or the opinion of at least one judge.<sup>65</sup> I examined these 13 cases to determine if there were any specific aspects of contract law that Judge Posner influenced or whether they were simply scattered instances of citation. A close reading of these cases suggests that Judge Posner's scholarly work, while influential in individual cases, has had little systematic influence on contract law. For example, Judge Posner's work influenced North Carolina courts in developing the doctrine of implied habitability. The court quoted Posner's economic rationale:

Further, by virtue of superior knowledge, skill, and experience in the construction of houses, a builder-vendor is generally better positioned than the purchaser to know whether a house is suitable for habitation. He also is better positioned to evaluate and guard against the financial risk posed by a defective septic system, and to absorb and spread across the market of home purchasers the loss therefrom. In terms of risk distribution analysis, he is the preferred or "least cost" risk bearer. Finally, he is in a superior position to develop or utilize technology to prevent such defects; and as one commentator has noted, "the major pockets of strict liability in the law" derive from "cases where the potential victims . . . are not in a good position to make adjustments that

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62. The search terms "Posner," "Rosenfield," and "Impossibility and Related Doctrines in Contract Law: An Economic Analysis" were used.

63. See Posner & Rosenfield, *supra* note 47.

64. See, e.g., *Assoc'd Gas Distribs. v. F.E.R.C.*, 824 F.2d 981, 1016–17 (D.C. Cir. 1987); *Franconia Two, LP v. Omniguru Sys., Inc.*, 82 Va. Cir. 256, \*4 (2011).

65. *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 612 (7th Cir. 1993); *Jordan v. Duff & Phelps, Inc.*, 815 F.2d 429, 438 (7th Cir. 1987); *A&S Transp. Co. v. Tug Fajardo*, 688 F.2d 1, 3 (1st Cir. 1982); *Dynamic Mach. Works, Inc. v. Mach. & Elec. Consultants, Inc.*, 352 F. Supp. 2d 83, 89 (D. Mass. 2005); *Freeman & Mills, Inc., v. Belcher Oil Co.*, 900 P.2d 669, 682 (Cal. 1995); *Tusch Enters. v. Coffin*, 740 P.2d 1022, 1032–33 (Idaho 1987); *Campbell v. Leaseway Customized Transp., Inc.*, 484 N.W.2d 41, 45 (Minn. Ct. App. 1992); *S. Real Est. & Fin. Co. v. City of St. Louis*, 758 S.W.2d 75, 93 (Mo. Ct. App. 1988); *Kutzin v. Pirnie*, 591 A.2d 932, 941 (N.J. 1991); *St. Barnabas Med. Ctr. v. Cty. of Essex*, 543 A.2d 34, 44–45 (N.J. 1988); *City of Cape May v. St. Paul Fire & Marine Ins. Co.*, 524 A.2d 882, 886 (N.J. Super. Ct. App. Div. 1987); *Gaito v. Auman*, 318 S.E.2d 555, 559 (N.C. Ct. App. 1984); *George v. Veach*, 313 S.E.2d 920, 924 (N.C. Ct. App. 1984); *Chepkevich v. Hidden Valley Resort, L.P.*, 2 A.3d 1174, 1197 (Pa. 2010); *Hill v. Mobile Auto Trim, Inc.*, 725 S.W.2d 168, 176 (Tex. 1987) (Gonzalez, J., dissenting).

might in the long run reduce or eliminate the risk.”<sup>66</sup>

Similarly, a 1987 Idaho decision described the extent of the implied warranty of habitability.<sup>67</sup>

In *City of Cape May v. St. Paul Fire & Marine Insurance Co.*,<sup>68</sup> Judge Posner’s “superior risk bearer” analysis also seemed to influence the breadth of insurance coverage.<sup>69</sup> In this case, the court interpreted ambiguities in the policy against the insurer.<sup>70</sup> There was a clear influence in *Dynamic Machine Works, Inc. v. Machine & Electric Consultants, Inc.*,<sup>71</sup> which dealt with Article 2 of the Uniform Commercial Code. Specifically, the court relied on Posner’s discussion of the functions of contract law with respect to discouraging opportunism and encouraging the “optimal timing of economic activity.”<sup>72</sup> Posner’s analysis of opportunism also played a role in *Jordan v. Duff & Phelps, Inc.*<sup>73</sup> In *Pyles v. Goller*,<sup>74</sup> the court relied on Judge Posner to support a holding that a co-owner of property to be sold at auction may not bid on the property.<sup>75</sup> The importance of a contract as a risk-allocating instrument was also discussed in *Royal Indemnity Co. v. Baker Protective Services, Inc.*<sup>76</sup>

In a 1993 case, *Bidlack v. Wheelabrator Corp.*,<sup>77</sup> the dispute was between a union and former workers. The case involved gap filling and interpretation. Judge Posner’s approach of filling the gap with what the parties were likely to have agreed upon, if they had thought about it, appeared to influence Judge Cudahy’s concurring opinion.<sup>78</sup> Similarly, Judge Posner was influential in a losing cause. In *Southern Real Estate & Financial Co. v. City of St. Louis*,<sup>79</sup> the issue was whether the city possessed the right to destroy a parking garage. A dissenting judge relied rather heavily on Judge Posner by arguing that the city did not possess the right.<sup>80</sup> In another dissenting opinion, the judge relied upon Judge

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66. *George v. Veach*, 313 S.E.2d 920, 923–24 (N.C. Ct. App. 1984) (quoting RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 140–41 (2d ed. 1977)); see also *Gaito v. Auman*, 318 S.E.2d 555, 559 (N.C. Ct. App. 1984).

67. *Tusch Enters.*, 740 P.2d at 1032.

68. 524 A.2d 882 (N.J. Super. Ct. App. Div. 1987).

69. *Id.* at 886.

70. *Id.*

71. 352 F. Supp. 2d 83 (D. Mass. 2005).

72. *Dynamic Mach. Works, Inc. v. Mach. & Elec. Consultants, Inc.*, 352 F. Supp. 2d 83, 89 (D. Mass. 2005).

73. 815 F.2d 429, 438 (7th Cir. 1987).

74. 674 A.2d 35 (Md. Ct. Spec. App. 1996).

75. *Id.* at 42–43 n.9.

76. 515 N.E.2d 5, 7 (Ohio Ct. App. 1986).

77. 993 F.2d 603, 612 (7th Cir. 1992).

78. *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 612 (7th Cir. 1992).

79. 758 S.W.2d 75 (Mo. Ct. App. 1988).

80. 758 S.W.2d 75, 93 (Mo. Ct. App. 1988). This was only picked up in this survey as a contracts case because it dealt with the interpretation of a lease.

Posner's work to support the argument that a covenant not to compete was enforceable.<sup>81</sup>

As a general matter, these results seem surprising when the subject of the study is someone as prolific as Judge Posner. The fact that legal scholars cited *Economic Analysis of Law* over 7,500 times may make a person wonder whether a connection exists between legal scholarship and law.<sup>82</sup> Keep in mind this study focused entirely on contract law. Also, it does not account for scholars, influenced by Judge Posner, whose works the courts cited. Perhaps most importantly and as already noted, Judge Posner's scholarship in the area of contracts largely supports the status quo. Given this, maybe it is surprising that he has had any additional influence at all.

#### IV. THE IMPACT OF JUDGE POSNER'S JUDICIAL OPINIONS ON OTHER COURTS

I attempted to read all of Judge Posner's opinions that dealt with contract law issues. Westlaw returned 2,785 results for the search terms "The Court of Appeals, Posner, Circuit Judge, held" or "The Court of Appeals, Posner, Chief Judge, held."<sup>83</sup> When the word "contract!" was added to the search, the number fell to 1,112.<sup>84</sup> Repeating the same search but substituting "promissory estoppel" for "contract!" captures additional cases addressing promissory estoppel.<sup>85</sup> I then took two additional, highly subjective pruning steps. First, I read the "headnotes" to these cases to determine whether the case addressed contract law issues. Initially, I identified approximately 150 cases that fit this description. In many instances, there was nothing remarkable about the opinion. Either the rule was obvious, Judge Posner adhered to identifiable state law, or the contract law issue was minor. I then excluded cases with little analysis. I grouped the remaining cases depending on whether they dealt with issues of interpretation (including good faith, promissory estoppel, duress and related doctrines), remedies, or other topics.<sup>86</sup> Aside from remedies, I chose these categories because the standards within each one are malleable and allow the application of

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81. *Hill v. Mobile Auto Trim, Inc.*, 725 S.W.2d 168, 176 (Tex. 1987) (Gonzales, J., dissenting); *see also* *A&S Transp. Co. v. Tug Fajardo*, 688 F.2d 1, 3 (1st Cir. 1982) (consequential damages); *Chepkevich v. Hidden Valley Resort*, 2 A.3d 1174, 1197 (Pa. 2010) (adhesion contract); *Freeman & Mills, Inc. v. Belcher Oil Co.*, 900 P.2d 699, 682 (Cal. 1995) (contract or tort theory); *Campbell v. Leaseway Customized Transport, Inc.*, 484 N.W.2d 41, 45 (Minn. Ct. App. 1992) (efficient breach).

82. *See* *Harrison & Mashburn*, *supra* note 6, at 50.

83. Results as of August 2018.

84. *Search Results*, WESTLAW, [https://1.next.westlaw.com/Search/Results.html?query=%22The%20Court%20of%20Appeals%2C%20Posner%2C%20Circuit%20Judge%2C%20held%22%20%26%20%22The%20Court%20of%20Appeals%2C%20Posner%2C%20Circuit%20Judge%2C%20held%22&jurisdiction=ALLCASES&contentType=CASE&querySubmissionGuid=i0ad6ad3b000001657242a1f3536ce38d&searchId=i0ad6ad3b000001657241af1e4fa4922a&transitionType=ListViewType&contextData=\(sc.Search\)](https://1.next.westlaw.com/Search/Results.html?query=%22The%20Court%20of%20Appeals%2C%20Posner%2C%20Circuit%20Judge%2C%20held%22%20%26%20%22The%20Court%20of%20Appeals%2C%20Posner%2C%20Circuit%20Judge%2C%20held%22&jurisdiction=ALLCASES&contentType=CASE&querySubmissionGuid=i0ad6ad3b000001657242a1f3536ce38d&searchId=i0ad6ad3b000001657241af1e4fa4922a&transitionType=ListViewType&contextData=(sc.Search)) (last visited Aug. 25, 2018) (on file with *The University of the Pacific Law Review*).

85. This yielded a single case, *Bash v. Firstmark Standard Life Ins. Co.*, 861 F.2d 159 (7th Cir. 1988).

86. The "other topics" cases were not further analyzed because they addressed isolated issues.



a judge's personal points of view.

### A. Interpretation, Gap Filling, and Good Faith

Courts are often responsible for completing the contract that the parties have made. I examined approximately 40 of Judge Posner's opinions involving contract interpretation issues, including good faith.<sup>87</sup> A number of strands of Judge Posner's decisions converge in the context of interpretation. For example, in *Beanstalk Group, Inc. v. AM General Corp.*, he wrote, "a contract will not be interpreted literally if doing so would produce absurd results, in the sense of results that the parties, presumed to be rational persons pursuing rational ends, are very unlikely to have agreed to seek."<sup>88</sup> Similarly, in *Dispatch Automation, Inc. v. Richards*,<sup>89</sup> he observed that "when a contractual interpretation makes no economic sense, that's . . . a compelling reason for rejecting it."<sup>90</sup> Then, in *Morin Building Products*, Judge Posner noted that "[t]he requirement of reasonableness is read into a contract not to protect the weaker party but to approximate what the parties would have expressly provided with respect to a contingency they did not foresee, if they had foreseen it."<sup>91</sup> More generally, "Judicial interpolation of missing contractual terms . . . performs an important economic function. . . .

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87. *Cincinnati Ins. v. Vita Food Prods., Inc.*, 808 F.3d 702 (7th Cir. 2015); *Tilstra v. BouMatic LLC*, 791 F.3d 749 (7th Cir. 2015); *Visteon Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 777 F.3d 415 (7th Cir. 2015); *Goldberg v. 401 N. Wabash Venture LLC*, 755 F.3d 456 (7th Cir. 2014); *Atl. Cas. Ins. v. Paszko Masonry, Inc.*, 718 F.3d 721 (7th Cir. 2013); *R.C. Wegman Constr. Co. v. Admiral Ins.*, 629 F.3d 724 (7th Cir. 2011); *Am. Land Holdings of Ind., LLC v. Jobe*, 604 F.3d 451 (7th Cir. 2010); *Est. of Luster v. Allstate Ins.*, 598 F.3d 903 (7th Cir. 2010); *Vendetti v. Compass Envtl., Inc.*, 559 F.3d 731 (7th Cir. 2009); *Wis. Elec. Power Co. v. Union Pac. R.R.*, 557 F.3d 504 (7th Cir. 2009); *Extra Equipamentos E Esportação Ltda. v. Case Corp.*, 541 F.3d 719 (7th Cir. 2008); *Knutson v. UGS Corp.*, 526 F.3d 339 (7th Cir. 2008); *Krueger Int'l Inc. v. Royal Indem. Co.*, 481 F.3d 993 (7th Cir. 2007); *In re Comdisco, Inc.*, 434 F.3d 963 (7th Cir. 2006); *ConFold Pac., Inc. v. Polaris Indus., Inc.*, 433 F.3d 952 (7th Cir. 2006); *Phelps Dodge Corp. v. Schumacher Elec. Corp.*, 415 F.3d 665 (7th Cir. 2005); *Joy v. Hay Grp., Inc.*, 403 F.3d 875 (7th Cir. 2005); *A.M.I. Diamonds Co. v. Hanover Ins.*, 397 F.3d 528 (7th Cir. 2005); *Sutter Ins. v. Applied Sys., Inc.*, 393 F.3d 722 (7th Cir. 2004); *Utica Mut. Ins. v. Vigo Coal Co.*, 393 F.3d 707 (7th Cir. 2004); *Haslund v. Simon Prop. Grp., Inc.*, 378 F.3d 653 (7th Cir. 2004); *Foufas v. Dru*, 319 F.3d 284 (7th Cir. 2003); *Brines v. XTRA Corp.*, 304 F.3d 699 (7th Cir. 2002); *Dispatch Automation, Inc. v. Richards*, 280 F.3d 1116 (7th Cir. 2002); *Hartford Fire Ins. v. St. Paul Surplus Lines Ins.*, 280 F.3d 744 (7th Cir. 2002); *Sutton v. A.O. Smith Co.*, 165 F.3d 561 (7th Cir. 1999); *Brazell v. First Nat'l Bank & Tr. Co. of Rockford*, 982 F.2d 206 (7th Cir. 1992); *First Nat'l Bank of Chi. v. Atl. Tele- Network Co.*, 946 F.2d 516 (7th Cir. 1991); *Mkt. St. Assocs. Ltd. P'ship v. Frey*, 941 F.2d 588 (7th Cir. 1991); *Residential Mktg. Grp., Inc. v. Granite Inv. Grp.*, 933 F.2d 546 (7th Cir. 1991); *Cont'l Cas. Co. v. Pittsburgh Corning Corp.*, 917 F.2d 297 (7th Cir. 1990); *Patton v. Mid-Continent Sys., Inc.*, 841 F.2d 742 (7th Cir. 1988); *Empire Gas Corp. v. Am. Bakeries Co.*, 840 F.2d 1333 (7th Cir. 1988); *City of Clinton, Ill. v. Moffitt*, 812 F.2d 341 (7th Cir. 1987); *Matterhorn, Inc. v. NCR Corp.*, 763 F.2d 866 (7th Cir. 1985); *Morin Bldg. Prods. Co. v. Baystone Constr., Inc.*, 717 F.2d 413 (7th Cir. 1983); *Fidelity & Deposit Co. of Md. v. City of Sheboygan Falls*, 713 F.2d 1261 (7th Cir. 1983).

88. 283 F.3d 856, 860 (7th Cir. 2002).

89. 280 F.3d 1116 (7th Cir. 2002).

90. *Id.* at 1119.

91. *Morin Bldg. Prods. Co. v. Baystone Constr., Inc.*, 717 F.2d 413, 415 (7th Cir. 1983).

Contracts would be thousands of pages long if the parties had to anticipate and provide for every contingency.”<sup>92</sup> Finally, Judge Posner has made it clear that he believes the reasonable term is the most efficient one.<sup>93</sup>

It makes sense to distinguish pure gap filling where a term is missing or exceedingly vague from attributing meaning to a term actually in the contract. In the case of the latter, Judge Posner’s view is to interpret the term in an economically sensible way but not necessarily to substitute an efficient term.<sup>94</sup> This is consistent with his view that a court should observe the intentions of the parties, even if the term is not efficient. With regard to the intentions of the parties, he wrote:

Interpreting contracts to make economic sense is a method of contract interpretation that we have commended in other cases. . . . It rests on the commonsensical observation that people usually don’t pay a price for a good or service that is wildly in excess of its market value, or sell a good or service (here insurance) for a price hugely less than its market value . . . .<sup>95</sup>

The key notion here is common sense, and this view hardly deviates from what a person would expect from even a non-economically oriented judge.

In cases where a gap existed, I was unable to locate an instance in which Judge Posner expressly filled the gap with a term that the parties would have agreed to and which he deemed efficient. Nevertheless, he was able to adhere to this goal and to his scholarship by characterizing the contract, once made, as a type of partnership. This is most evident in *Market Street Associates Ltd. Partnership v. Frey*,<sup>96</sup> a 1991 case dealing the requirements of good faith. In that case, a clause in a lease agreement allowed the lessee to buy the property for what turned out to be a below market value price if the lessor and lessee were unable to agree on the financing of improvements.<sup>97</sup> The lessor did not appear to know of the provision, and the lessee did not point it out.<sup>98</sup> The question was whether good faith required the lessee to point out the clause that permitted them to buy at a lower than market price if the financing arrangement were not agreed to.<sup>99</sup> Judge Posner explained that the “concept of the duty of good faith like the

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92. Phelps Dodge Corp. v. Schumacher Elec. Corp., 415 F.3d 665, 670 (7th Cir. 2005) (citations omitted).

93. See *supra* text accompanying notes 13–20.

94. ECONOMIC ANALYSIS, *supra* note 1, at 100.

95. Hartford Fire Ins. v. St. Paul Surplus Lines Ins. Co., 280 F.3d 744, 747 (7th Cir. 2002) (citations omitted).

96. 941 F.2d 588, 589 (7th Cir. 1991).

97. *Id.*

98. *Id.* at 598.

99. The case was remanded for a determination of whether the lessee had reason to know of the ignorance of the lessor. On remand the lower court denied the lessee/plaintiff’s request for specific performance. *Mkt. St. Assocs. Ltd. P’ship v. Frey*, 817 F. Supp. 784, 788 (E.D. Wis. 1993). On appeal the

concept of fiduciary duty is a stab at approximating the terms the parties would have negotiated had they foreseen the circumstances that gave rise to their dispute.”<sup>100</sup>

He goes on to reason that, having made a contract, the parties have entered into a cooperative arrangement.<sup>101</sup> In that context, the parties are not adversaries, and there is no socially beneficial reason to allow one partner to take advantage of an oversight by the other contractual partner.<sup>102</sup> Consequently, “The office of the doctrine of good faith is to forbid the kinds of opportunistic behavior that a mutually dependent, cooperative relationship might enable in the absence of rule.”<sup>103</sup> The parties, like shareholders in a corporation, are expected to perform in a manner that advances the ends of the contract. The gap filling that took place in this case was an implied term that mistakes of one party could not be deliberately taken advantage of by the other party to the contract. Under the Posner approach, the parties would have agreed to this term had they thought about it.<sup>104</sup>

Judge Posner’s reasoning seems forced and is actually more consistent with a prior opinion in which he characterized good faith as a chameleon.<sup>105</sup> It is fine to view the parties as having a partnership-like relationship once they form a contract. This idea is not new.<sup>106</sup> The problem is that the gap-filling process is one that asks what they would have included in the contract when they were in a bargaining posture. That envisions a situation in which they are hardly partners wishing to maximize the profits of their joint venture. Instead, the term the parties would have adopted is one that reflects a give and take with each party attempting to maximize individual profit. In effect, Judge Posner might have adopted the view that the parties have agreed to cooperate, but this is not the same as filling the gap with what they would have done at the outset.

Judge Posner’s opinion in *Market Street Associates*, and his articulation of a good faith standard, has been widely cited,<sup>107</sup> and appears to be consistent with

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Seventh Circuit affirmed, holding that the lessee had not acted in good faith. *Mkt. St. Assocs. Ltd. P’ship v. Frey*, 21 F.3d 782, 784 (7th Cir. 1994).

100. *Mkt. St. Assocs. Ltd. P’ship*, 941 F.2d at 595.

101. *Id.* at 594.

102. *Id.*

103. *Id.* at 595.

104. Judge Posner’s position seems to be influenced by the work of Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 371 (1980).

105. *Empire Gas Corp. v. Am. Bakeries Co.*, 840 F.2d 1333, 1339 (7th Cir. 1988).

106. Jeffrey L. Harrison, *A Case for Loss Sharing*, 56 S. CAL. L. REV. 573, 595 (1983).

107. By the late fall of 2017, the case had been cited 204 times, mostly for the good faith interpretation.

Search Results, WESTLAW, <https://1.next.westlaw.com/RelatedInformation/I596da59494c011d993e6d35cc61aab4a/kcCitingReferences.html?sortType=depthdesc&facetGuid=h562dbc1f9a5f4b0c9e54031a19076b9c&midlineIndex=39&originationContext=citingreferences&transitionType=CitingReferences&contextData=%28sc.Keycite%29> (last visited Aug. 25, 2018) (on file with *The University of the Pacific Law Review*).

his personal views as expressed in *Economic Analysis of Law*. Although this appears to be Judge Posner's most important offering (as far as the definitions of good faith and gap filling), two factors cut against the view that Judge Posner has influenced contract law. First is the distinct possibility that the common law had, through an evolutionary process, already adopted the what-they-would-have-done-had-they-thought-about-it approach. In 1980, Steven J. Burton published an extensive study of the common law duty of good faith,<sup>108</sup> which Judge Posner cites to in *Market Street Associates*.<sup>109</sup> Professor Burton wrote, "Discretion in performance may be exercised legitimately for the purposes reasonably contemplated by the parties, including ordinary business reasons. It cannot be exercised for the purpose of recapturing forgone opportunities, for such conduct harms the expectation interest of the dependent party."<sup>110</sup> Good faith, as interpreted by Professor Burton, is consistent with Judge Posner's description. Interestingly, courts have cited Professor Burton's article 98 times.<sup>111</sup> Only eight of those citations preceded Judge Posner's *Market Street Associates* citation to his article.

The possibility that Judge Posner's role provided an accessible articulation of pre-existing law is further supported by his *Market Street Associates* opinion's reliance on Judge Easterbrook's opinion in *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*.<sup>112</sup> In that case, Judge Easterbrook wrote, "'Good faith' is a compact reference to an implied undertaking not to take opportunistic advantage in a way that could not have been contemplated at the time of drafting . . . ."<sup>113</sup> Nevertheless, Posner's articulation has obviously been influential. In sum, it appears that Judge Posner did not change the common law with respect to good faith, but he did provide an expression that other courts have followed. In addition, although it is conjecture, he may have exposed Professor Burton's work to other judges. What is generally absent, however, in those other judge's opinions is the sense that the parties, had they thought about it, would have selected an efficient term.

### *B. Promissory Estoppel*

Promissory estoppel is related to good faith in the sense that it concerns basic honesty. A promise-breaker engages in opportunistic behavior by changing his or

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108. Burton, *supra* note 104, at 373.

109. *Mkt. St. Assocs. Ltd. P'ship v. Frey*, 941 F.2d 588, 594 (7th Cir. 1991).

110. Burton, *supra* note 104, at 403.

111. *Citing References*, WESTLAW, [https://1.next.westlaw.com/RelatedInformation/I0e0190714a0f11db99a18fc28eb0d9ae/kcCitingReferences.html?docSource=0411ad09ce3048799b4b851ea7e9a2aa&rank=1&pageNumber=1&sortType=dateasc&sortOrder=dateasc&facetGuid=h562dbc1f9a5f4b0c9e54031a19076b9c&transitionType=ListViewType&contextData=\(sc.Search\)](https://1.next.westlaw.com/RelatedInformation/I0e0190714a0f11db99a18fc28eb0d9ae/kcCitingReferences.html?docSource=0411ad09ce3048799b4b851ea7e9a2aa&rank=1&pageNumber=1&sortType=dateasc&sortOrder=dateasc&facetGuid=h562dbc1f9a5f4b0c9e54031a19076b9c&transitionType=ListViewType&contextData=(sc.Search)) (last visited Aug. 25, 2018) (on file with *The University of the Pacific Law Review*).

112. 908 F.2d 1351, 1357 (7th Cir. 1990).

113. *Id.* This excerpt is quoted by Judge Posner, *Mkt. St. Assocs. Ltd. P'ship*, 941 F.2d at 595.

her mind to the detriment of others. The establishment of promissory estoppel as a theory for recovery may be one of the most important, if not the most important, advancements in twentieth-century contract law. Although there are economic justifications for promissory estoppel, the timing of its development rules out the possibility that Judge Posner played a role. Nevertheless, it is useful to examine his treatment of the doctrine to determine if he employed an economic rationale when applying the doctrine and the extent to which other courts responded to his approach.

Remember that Judge Posner has offered two economic rationales for promissory estoppel.<sup>114</sup> Similar to a tort action, the promise-maker causes the loss, in the form of reliance, and liability is designed to deter either promising or promise-breaking.<sup>115</sup> Another theory is that we actually lower the cost of sincere promises by enforcing promises.<sup>116</sup> Interestingly, there is little in Judge Posner's promissory estoppel opinions that reveals an effort to promote an economic approach to the subject.<sup>117</sup> One exception is that Judge Posner makes the point that the reliance requirement, like the consideration requirement in a standard contract, is evidence that a promise was actually made. In effect, the reliance requirement lowers administrative costs.<sup>118</sup> This would seem to favor a narrow application of promissory estoppel.<sup>119</sup> As Judge Posner argued, the statute of frauds applies with equal force to promissory estoppel if a promise is substituted for consideration.<sup>120</sup>

This is not to say Judge Posner's opinions on promissory estoppel have not been helpful to other courts, including those outside the Seventh Circuit.<sup>121</sup> For example, a federal court in Pennsylvania relied on Judge Posner's statements in

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114. See *supra* text accompanying notes 23–25.

115. See *Goldstick v. ICM Realty*, 788 F.2d 456, 463 (7th Cir. 1986) (analogizing promissory estoppel to contributory negligence in torts because one party unreasonably relied on the promise of another and suffered loss). If one carries out the tort analogy, the idea that someone has relied unreasonably can be analogized to contributory negligence.

116. See generally Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261 (1980).

117. See generally *ATA Airlines, Inc. v. Fed. Express Corp.*, 665 F.3d 882 (7th Cir. 2011); *Garwood Packaging, Inc. v. Allen & Co.*, 378 F.3d 698 (7th Cir. 2004); *Workman v. United Parcel Serv., Inc.*, 234 F.3d 998 (7th Cir. 2000); *Consolidation Servs., Inc. v. KeyBank Nat'l Ass'n*, 185 F.3d 817 (7th Cir. 1999); *Cosgrove v. Bartolotta*, 150 F.3d 729 (7th Cir. 1998); *Milwaukee Auction Galleries Ltd. v. Chalk*, 13 F.3d 1107 (7th Cir. 1994); *Wood v. Mid-Valley Inc.*, 942 F.2d 425 (7th Cir. 1991); *LaSalle Nat'l Bank v. General Mills Rest. Grp., Inc.*, 854 F.2d 1050 (7th Cir. 1988). Cf. *Goldstick*, 788 F.2d at 468.

118. *Garwood Packaging, Inc.*, 378 F.3d at 702.

119. *Id.* at 705 (narrowing the application of promissory estoppel is the view the promise be more than a statement of future intent).

120. *Consolidation Servs., Inc.*, 185 F.3d at 822; *Monetti, S.P.A. v. Anchor Hocking Corp.*, 931 F.2d 1178, 1186 (7th Cir. 1991); see also *Goldstick*, 788 F.2d at 465 (interpreting Illinois law).

121. See generally *Berg v. Obama*, 574 F. Supp. 2d 509, 528–29 (E.D. Pa. 2008); *Weitz C. v. Hands, Inc.*, 882 N.W.2d 659, 672 n. 35 (Neb. 2016); *Jackson v. Morse*, 871 A.2d 47, 53 (N.H. 2005); *B&W Glass, Inc. v. Weather Shield Mfg., Inc.*, 829 P.2d 809, 813 (Wy. 1992); *LAHR Constr. Corp. v. J. Kozel & Son, Inc.*, 640 N.Y.S.2d 957, 959 (N.Y. Sup. Ct. 1996).

*Garwood Packing, Inc. v. Allen & Co.* that a promise must be more than a statement of intent.<sup>122</sup> Similarly, a New Hampshire court found his decisions useful in fashioning the proper remedy in promissory estoppel cases.<sup>123</sup> Although, on balance, the effect may be to narrow the application of promissory estoppel, there is nothing to suggest he advanced or retarded the growth of promissory estoppel by virtue of applying his *economic* theories to the doctrine.

### C. Duress & Unconscionability

Duress and unconscionability, like good faith and interpretation, are malleable concepts. Thus, it would seem to be an area in which a judge's personal beliefs would be revealed. The problem of fitting these doctrines into a systematic analysis of Judge Posner's opinions is the lack of clear demarcation between when it is economically efficient to ignore consent if it is given under duress or unconscionable conditions, and when the contract should be enforced despite these claims.

In the case of duress,<sup>124</sup> it is more productive to think in terms of the type of threat leading to duress rather than the level of duress. This is consistent with the *Restatement (Second) of Contracts*, which states "[i]f a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim."<sup>125</sup> If "by the other party" is viewed as the key language here, the *Restatement* and Judge Posner's economic theory seem to be in sync. Remember that the economic objective, under Posner's view, of applying duress to allow parties to avoid contracts is to discourage investments in illegitimate threats and to lessen the need to engage in preventive measures. In short, we deny benefits to those who

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122. See *Berg*, 574 F. Supp. 2d at 529.

123. *Jackson*, 871 A.2d at 53.

124. Twenty-seven cases were found that were authored by Judge Posner and included some form of the words "contract" and "duress."

125. RESTATEMENT (SECOND) OF CONTRACTS § 175 (AM. LAW INST. 1981). Section 176 also lists types of illegitimate threats:

- (1) A threat is improper if
  - (a) what is threatened is a crime or a tort, or the threat itself would be a crime or a tort if it resulted in obtaining property,
  - (b) what is threatened is a criminal prosecution,
  - (c) what is threatened is the use of civil process and the threat is made in bad faith, or
  - (d) the threat is a breach of the duty of good faith and fair dealing under a contract with the recipient.
- (2) A threat is improper if the resulting exchange is not on fair terms, and
  - (a) the threatened act would harm the recipient and would not significantly benefit the party making the threat,
  - (b) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat, or
  - (c) what is threatened is otherwise a use of power for illegitimate ends.

*Id.* § 176.

create and profit from duress that they have caused. This is different than taking advantage of duress the contracting party did not cause. Under Posner's view, a weaker party may be under duress, but if the party with whom he or she is contracting does not cause that duress, there is no basis for allowing avoidance. For example, in *Selmer Co. v. Blakeslee-Midwest Co.*, a subcontractor (Selmer) agreed to complete a project for a general contractor.<sup>126</sup> Because of the breach by the general contractor, Selmer could have stopped performance but agreed to continue with the understanding that the general contractor would pay the extra costs incurred because of the breach.<sup>127</sup> At the end of the project, Selmer demanded \$120,000 and the general contractor offered \$67,000, which Selmer accepted because of his dire financial condition.<sup>128</sup> Later, Selmer sued for the balance arguing that he had been under duress.<sup>129</sup> Judge Posner held that duress was not present because the defendant was not responsible for the plaintiff's weakened position.<sup>130</sup> He distinguished this case from another where the stronger party conceded that it owed the higher amount and settled the debt for pennies on the dollar.<sup>131</sup>

It is inaccurate to say that Judge Posner influenced the law of duress. His positions generally reflect the *Restatement (Second) of Contracts*. On the other hand, if courts regard the *Restatement's* position on duress as flexible and, thus, ranging from interpretations that result in the rare use of duress to interpretations that employ a more liberal use of duress, then Posner falls within the group that rarely uses duress. His writings justify this position in two ways. First, he notes that consistent advantage-taking may result in reputational harm and, thus, is discouraged without judicial action. In addition, some of what we regard as unfair may actually, as in form contracts, result in cost savings.<sup>132</sup> In any event, an examination of citations to Judge Posner's views on duress reveal little reliance by other courts generally and no specific mention of his economic theories.<sup>133</sup>

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126. 704 F.2d 924, 926 (7th Cir. 1983).

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 928.

131. *Selmer Co.*, 704 F.2d at 926; *see generally* Resolution Tr. Corp. v. Ruggiero, 977 F.2d 309, 314 (7th Cir. 1992); Amoco Oil Co. v. Ashcraft, 791 F.2d 519, 523 (7th Cir. 1986); Am. Hosp. Supply Corp. v. Hosp. Prods. Ltd., 780 F.2d 589, 599 (7th Cir. 1986).

132. ECONOMIC ANALYSIS, *supra* note 1, at 124.

133. An examination of three cases—Amoco Oil Co. v. Ashcraft, 791 F.2d 519 (7th Cir. 1986); Selmer Co. v. Blakeslee-Midwest Co., 704 F.2d 924, 926 (7th Cir. 1983); *Oxford Clothes XX, Inc. v. Expeditors International of Washington, Inc.*, 127 F.3d 574 (7th Cir. 1997)—in which Judge Posner discussed duress revealed that they have been cited four times for the discussion of duress. In none of those instances is the Judge's economic rationale mentioned. *See* Progressive Bros. Constr. Co. v. United States, 16 Cl. Ct. 549, 553 (1989); Laidman v. Clark, No. 2:11-CV-00704-LRH-PAL, 2013 WL 508169, at \*4–5 (D. Nev. Feb. 8, 2013); Corp. Aviation Concepts, Inc. v. Multi-Serv. Aviation Corp., No. Civ.A.03-3020, 2005 WL 1693931, at \*5 (E.D. Pa. July 19, 2005); Nev. Ass'n Servs., Inc. v. Eighth Jud. Dist. Ct., 338 P.3d 1250, 1256–57 (Nev. 2014).

Posner's approach to unconscionability is narrow.<sup>134</sup> Remember that Posner takes the position that it is dangerous to allow those who must sign form contracts or those who would claim unconscionability to avoid their contracts.<sup>135</sup> Generally, form contracts may lower the costs to consumers. Excessively liberal use of conscionability may deter practices that are ultimately beneficial to consumers. He writes:

Suppose that for reasons unrelated to any conduct by the promisee the promisor has very restricted opportunities. Maybe he is so poor that he can be induced to sell the clothes off his back for a pittance, or is such a poor credit risk that he can be made . . . to pay an extraordinarily high interest rate to borrow money that he wants desperately. Does he have a "meaningful choice" in such circumstances? If not he may actually be made worse off by a rule of nonenforcement of hard bargains; for, knowing that a contract with him will not be enforced, merchants may be unwilling to buy his clothes or lend him money.<sup>136</sup>

Similarly, "there must be a showing of deception, lack of agreement, compulsion, or some other element of real oppression."<sup>137</sup> Also, Judge Posner is emphatic that unconscionability does not protect sophisticated parties.<sup>138</sup>

A total of 156 cases include the terms "Judge Posner" and "unconscionab!" None of these cases—regardless of their ruling on unconscionability—cite Judge Posner for the general proposition that a finding of unconscionability may make those who otherwise qualify worse off. The *Ashcraft* decision, quoted above, appears to be Judge Posner's most precise explanation in a judicial opinion for being wary of applying unconscionability and, notably, occurred early in his tenure. In *Ashcraft*, Posner interpreted Indiana law. The opinion has been cited 29 times. Only three of those citations are from outside the Seventh Circuit. One case cites the *Ashcraft* opinion for Posner's assertion that Indiana law is "unfriendly" to unconscionability.<sup>139</sup> A second cite seems to rely marginally on the substance of Judge Posner's reasoning.<sup>140</sup> In sum, courts may or may not be increasingly receptive to unconscionability, but there is little evidence that Judge

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134. Thirty-nine cases were found in which Judge Posner wrote an opinion that included some form of the words contract and unconscionability. Many of these did not involve unconscionability as a basis for avoidance.

135. ECONOMIC ANALYSIS, *supra* note 1, at 125–26.

136. *Amoco Oil Co. v. Ashcraft*, 791 F.2d 519, 522 (7th Cir. 1986).

137. *Sarnoff v. Am. Home Prods. Corp.*, 798 F.2d 1075, 1082 (7th Cir. 1986) (interpreting Illinois law).

138. *Stephan v. Goldinger*, 325 F.3d 874, 877 (7th Cir. 2003); *Northrop Corp. v. Litronic Indus.*, 29 F.3d 1173, 1180 (7th Cir. 1994); *Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies Ltd.*, 970 F.2d 273, 281 (7th Cir. 1992).

139. *Smith v. Xlibris Publ'g*, No. 15-cv-5334 (DLI)(RER), 2016 WL 5678566, at \*4 (E.D.N.Y. Sept. 30, 2016).

140. *Travel Servs. Network, Inc. v. Presidential Fin. Corp. of Mass.*, 959 F. Supp. 135, 142 (D. Conn. 1997).



Posner's opinions (or writings for that matter) played a role.

#### D. Remedies

In both his scholarly writings and his opinions, Judge Posner is clearly a proponent of the view that damages equal to expectancy encourage the “efficient breach.”<sup>141</sup> As far as judicial opinions, he first mentions “efficient breach” in a 1986 opinion, *Northern Indiana Public Service Co. v. Carbon County Coal Co.*,<sup>142</sup> but he discussed it in even the earliest edition of *Economic Analysis of Law* in 1972.<sup>143</sup> He discusses it again in *Patton v. Mid-Continent Systems, Inc.*, a 1988 decision,<sup>144</sup> and in a 1997 case, *Lawyers Title Insurance Corp. v. Dearborn Title Corp.*<sup>145</sup>

I conducted searches that combined each of these cases individually with the term “efficient breach.”<sup>146</sup> I discovered one case that cited *Northern Indiana Public Service*.<sup>147</sup> This one case was from outside the Seventh Circuit.<sup>148</sup> *Patton*

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141. See *supra* text accompanying notes 30–35.

142. 799 F.2d 265, 279 (7th Cir. 1986).

143. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 55–59 (1st ed. 1972). The possibility seems to have been first noted by Robert Birmingham. See generally Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273 (1970).

The theory of efficient breach has received considerable criticism. See Daniel A. Farber, *Reassessing the Economic Efficiency of Compensatory Damages for Breach of Contract*, 66 VA. L. REV. 1443 (1980); Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947 (1982); Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1 (1989); *Nihilistic View*, *supra* note 55.

144. 841 F.2d 742, 750–51 (7th Cir. 1988).

145. 118 F.3d 1157, 1161 (7th Cir. 1997).

146. The actual search term was the citation to each case and “efficient breach.”

147. *Search Results*, WESTLAW, [\(https://1.next.westlaw.com/Search/Results.html?query=advanced%3A%20\(%22efficient%20breach%22%20%26%20%22799%20f2d%20265%22\)&jurisdiction=ALLCASES&contentType=CASE&querySubmissionGuid=i0ad62af00000164c02289d220e524cb&startIndex=1&searchId=i0ad62af00000164c02289d220e524cb&originationContext=SearchListView&transitionType=ListViewType&contextData=\(sc.Search\)](https://1.next.westlaw.com/Search/Results.html?query=advanced%3A%20(%22efficient%20breach%22%20%26%20%22799%20f2d%20265%22)&jurisdiction=ALLCASES&contentType=CASE&querySubmissionGuid=i0ad62af00000164c02289d220e524cb&startIndex=1&searchId=i0ad62af00000164c02289d220e524cb&originationContext=SearchListView&transitionType=ListViewType&contextData=(sc.Search)) (last visited July 14, 2018) (on file with *The University of the Pacific Law Review*).

The term “efficient breach” is found in 200 opinions, and in 32 instances it is found along with the term “Posner.”

*Search Results*, WESTLAW, [\(https://1.next.westlaw.com/Search/Results.html?query=adv%3A%20%22efficient%20breach%22&jurisdiction=ALLCASES&contentType=CASE&querySubmissionGuid=i0ad62af00000164c301d0c378a78650&startIndex=1&searchId=i0ad62af00000164c301d0c378a78650&originationContext=SearchListView&transitionType=ListViewType&contextData=\(sc.Search\)](https://1.next.westlaw.com/Search/Results.html?query=adv%3A%20%22efficient%20breach%22&jurisdiction=ALLCASES&contentType=CASE&querySubmissionGuid=i0ad62af00000164c301d0c378a78650&startIndex=1&searchId=i0ad62af00000164c301d0c378a78650&originationContext=SearchListView&transitionType=ListViewType&contextData=(sc.Search)) (last visited July 22, 2018) (on file with *The University of the Pacific Law Review*); *Search Results*, WESTLAW, [\(https://1.next.westlaw.com/Search/Results.html?query=advanced%3A%20\(%22efficient%20breach%22%20%26%20Posner\)&jurisdiction=ALLCASES&contentType=CASE&querySubmissionGuid=i0ad62af00000164c30b851478a787f2&startIndex=1&searchId=i0ad62af00000164c30b851478a787f2&originationContext=SearchListView&transitionType=ListViewType&contextData=\(sc.Search\)](https://1.next.westlaw.com/Search/Results.html?query=advanced%3A%20(%22efficient%20breach%22%20%26%20Posner)&jurisdiction=ALLCASES&contentType=CASE&querySubmissionGuid=i0ad62af00000164c30b851478a787f2&startIndex=1&searchId=i0ad62af00000164c30b851478a787f2&originationContext=SearchListView&transitionType=ListViewType&contextData=(sc.Search)) (last visited July 22, 2018) (on file with *The University of the Pacific Law Review*).

Of these 30, only one appears to have been influenced by Judge Posner's judicial writings. *Freeman & Mills, Inc. v. Belcher Oil Co.*, 900 P.2d 669, 682 (Cal. 1995). Several others cited Judge Posner's scholarship. See *supra* Part III.

148. *Search Results*, WESTLAW, [\(https://1.next.westlaw.com/Search/Results.html?query=advanced%3A%20\(%22efficient%20breach%22%20%26%20%22799%20f2d%20265%22\)&jurisdiction=ALLCASES&contentType=CASE&querySubmissionGuid=i0ad62af00000164c301d0c378a78650&startIndex=1&searchId=i0ad62af00000164c301d0c378a78650&originationContext=SearchListView&transitionType=ListViewType&contextData=\(sc.Search\)](https://1.next.westlaw.com/Search/Results.html?query=advanced%3A%20(%22efficient%20breach%22%20%26%20%22799%20f2d%20265%22)&jurisdiction=ALLCASES&contentType=CASE&querySubmissionGuid=i0ad62af00000164c301d0c378a78650&startIndex=1&searchId=i0ad62af00000164c301d0c378a78650&originationContext=SearchListView&transitionType=ListViewType&contextData=(sc.Search))

and “efficient breach” were found together in 15 cases, ten of which were from courts outside the Seventh Circuit.<sup>149</sup> With respect to the most recent case—*Lawyers Title*—there were no cites from outside the Seventh Circuit.<sup>150</sup>

I examined the cases from outside the Seventh Circuit citing one or more of the Posner authored opinions and the term “efficient breach.” It is unlikely that Judge Posner or anyone else discussing the law on this matter has been responsible for a shift in the law. The efficient breach requires that damages be no more or less than compensatory as measured by expectancy. Since this has been the rule since well before the term efficient breach saw wide usage, Judge Posner (and others) have mainly helped rebrand expectancy. There is no indication that Judge Posner’s opinions have influenced a court to adopt the expectancy measure of damages. Instead, his writings support what already exists. For example, in one case citing the Judge’s opinion in *Patton*, a New York court notes:

Underlying the compensatory damages rationale is a recognition that even deliberate breaches of contract are not necessarily blameworthy. *Patton v. Mid-Continent Systems, Inc.*, 841 F.2d 742, 750-51 (7th Cir.1988) (Posner, J.). In fact, the law presumes that parties to contracts are rational: they chose to breach contracts because it is more efficient to breach and pay compensatory damages than to perform. If so, efficiency is promoted by allowing parties to break their promise, provided that they compensate the non-breaching party for actual losses.<sup>151</sup>

Judge Posner seems to have mixed feelings about liquidated damages and penalty clauses. In 1985 he wrote:

[S]ince compensatory damages should be sufficient to deter inefficient breaches . . . , penal damages could have no effect other than to deter some efficient breaches. But this overlooks the earlier point that the willingness to agree to a penalty clause is a way of making the promisor and his promise credible and may therefore be essential to inducing some

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149. *Search Results*, WESTLAW, [150. \*Search Results\*, WESTLAW, \[151. \\*Topps Co. v. Cadbury Stani S.A.I.C.\\*, 380 F. Supp. 2d 250, 261 n.12 \\(S.D.N.Y. 2005\\).\]\(https://1.next.westlaw.com/Search/Results.html?query=advanced%3A%20\(%22efficient%20breach%22%20%26%20%22118%20F.3d%201157%22\)&jurisdiction=ALLCASES&contentType=CASE&querySubmissionGuid=i0ad62af000000164c01a10cc20e523cb&startIndex=1&searchId=i0ad62af000000164c01a10cc20e523cb&originationContext=SearchListView&transitionType=ListViewType&contextData=\(sc.Search\) \(last visited July 21, 2018\) \(on file with <i>The University of the Pacific Law Review</i>\).</p></div><div data-bbox=\)](https://1.next.westlaw.com/Search/Results.html?query=advanced%3A%20(%22efficient%20breach%22%20%26%20%22841%20F.2d%20742%22)&jurisdiction=ALLCASES&contentType=CASE&querySubmissionGuid=i0ad74014000001649b390710bc9b16be&startIndex=1&searchId=i0ad74014000001649b390710bc9b16be&originationContext=SearchListView&transitionType=ListViewType&contextData=(sc.Search) (last visited July 14, 2018) (on file with <i>The University of the Pacific Law Review</i>).</p></div><div data-bbox=)

value-maximizing contracts to be made. It also overlooks the more important point that the parties (always assuming they are fully competent) will, in deciding whether to include a penalty clause in their contract, weigh the gains against the costs—costs that include the possibility of discouraging an efficient breach somewhere down the road—and will include the clause only if the benefits exceed those costs as well as all other costs.<sup>152</sup>

In effect, he appears to favor liquidated and even penalty clauses if the parties are relatively sophisticated.<sup>153</sup> Moreover, Judge Posner claims there is an “emerging presumption against interpreting liquidated damages clauses as penalty clauses.”<sup>154</sup> The question is whether Judge Posner’s views, as expressed in his opinions, have convinced other courts to be wary of finding that liquidated damage clauses are actually penalty clauses. This question is made more complex because in the latter part of the last century, both the *Restatement (Second) of Contracts*<sup>155</sup> and the *Uniform Commercial Code*<sup>156</sup> took positions that likely lead to greater enforcement of liquidated damages clauses.

Judge Posner’s earliest and most detailed discussion of liquidated damages and penalty clauses is found in *Lake River Corp. v. Carborundum Co.*<sup>157</sup> I entered the citation for this case and the term “liquidated damage!” into a Westlaw search<sup>158</sup> and yielded 91 cases.<sup>159</sup> Courts outside the Seventh Circuit decided 29

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152. *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284, 1289 (7th Cir. 1985).

153. See *XCO Int’l Inc. v. Pac. Sci. Co.*, 369 F.3d 998, 1002 (7th Cir. 2004). On the other hand, since he is typically interpreting state law, there is no indication that he tends to enforce liquidated damages clauses more often than if one adheres to the established standards. *Lake River Corp.*, 769 F.2d at 1291.

154. *XCO Int’l Inc.*, 369 F.3d at 1003.

155. Section 356 of the *Restatement (Second) of Contracts* is as follows:

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.

RESTATEMENT (SECOND) OF CONTRACTS § 356 (AM. LAW INST. 1981).

156. Section 2-718 of the U.C.C. reads as follows:

Liquidation or Limitation of Damages; Deposits.

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

U.C.C. § 2-718 (AM. LAW INST. & UNIF. LAW COMM’N 2010).

157. 769 F.2d 1284, 1289 (7th Cir. 1985).

158. The search term was: “769 F.2d 1284” & “liquidated damages.”

159. *Search Results*, WESTLAW, [https://1.next.westlaw.com/Search/Results.html?query=advanced%3A%20\(%22liquidated%20damage!%22%20%26%20%22769%20F.2d%201284%22\)&jurisdiction=ALLCASES&contentType=CASE&querySubmissionGuid=i0ad62af000000164c05180c320e528a2&startIndex=1&searchId=i0ad62af000000164c05180c320e528a2&originationContext=SearchListView&transitionType=ListViewType&contextData=\(sc.Search\)](https://1.next.westlaw.com/Search/Results.html?query=advanced%3A%20(%22liquidated%20damage!%22%20%26%20%22769%20F.2d%201284%22)&jurisdiction=ALLCASES&contentType=CASE&querySubmissionGuid=i0ad62af000000164c05180c320e528a2&startIndex=1&searchId=i0ad62af000000164c05180c320e528a2&originationContext=SearchListView&transitionType=ListViewType&contextData=(sc.Search)) (last visited July 21, 2018) (on file with *The University of the Pacific Law Review*).

of these cases.<sup>160</sup> The most common citation to Judge Posner's opinion concerns a statement about Illinois law.<sup>161</sup> There is some use of Judge Posner's opinion to support more liberal enforcement of liquidated damages.<sup>162</sup> Generally, though, it would probably be a stretch to link any greater receptivity to liquidated damages to Judge Posner's dicta.

Judge Posner also wrote extensively in his judicial opinions about the costs and benefit of specific performance and injunctive relief.<sup>163</sup> His most complete statement in a judicial opinion is found in *Walgreen Co. v. Sarah Creek Property Co., B.V.*,<sup>164</sup> in which the plaintiff-drugstore (Walgreen) sought to enjoin the shopping store owner from leasing to a competing drugstore (Phar-Mor). The terms of the lease prevented this.<sup>165</sup> In his analysis, Judge Posner applied a Coasian analysis and observed:

Suppose the cost to Walgreen of facing the competition of Phar–Mor at the Southgate Mall would be \$1 million, and the benefit to Sara Creek of leasing to Phar–Mor would be \$2 million. Then at any price between those figures for a waiver of Walgreen's injunctive right both parties would be better off, and we expect parties to bargain around a judicial assignment of legal rights if the assignment is inefficient.<sup>166</sup>

Judge Posner's statement means that courts should be more willing to grant specific relief. On the other hand, Judge Posner is quick to note that conditions of bilateral monopoly may prevent the exchanges from taking place.<sup>167</sup> Thus, it cannot be said that his economic analysis cuts one way or the other with respect to the availability of specific relief. Judge Posner's discussion does provide an innovative way to think about the issue.

The opinion has been cited 85 times in total and 23 times by courts outside the Seventh Circuit Court of Appeals.<sup>168</sup> In most instances the citations are to

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160. The search term used was "966 F.2d 273" and either "specific performance" or "injunct!" *Search Results*, WESTLAW, [https://1.next.westlaw.com/Search/Results.html?query=advanced%3A%20\(%22liquidated%20damage!%22%20%26%20%22769%20F.2d%201284%22\)&jurisdiction=ALLCASES&contentType=CASE&querySubmissionGuid=i0ad62af00000164c05180c320e528a2&startIndex=1&searchId=i0ad62af00000164c05180c320e528a2&originationContext=SearchListView&transitionType=ListViewType&contextData=\(sc.Search\)](https://1.next.westlaw.com/Search/Results.html?query=advanced%3A%20(%22liquidated%20damage!%22%20%26%20%22769%20F.2d%201284%22)&jurisdiction=ALLCASES&contentType=CASE&querySubmissionGuid=i0ad62af00000164c05180c320e528a2&startIndex=1&searchId=i0ad62af00000164c05180c320e528a2&originationContext=SearchListView&transitionType=ListViewType&contextData=(sc.Search)) (last visited July 21, 2018) (on file with *The University of the Pacific Law Review*).

161. See, e.g., *John Hancock Life Ins. v. Abbott Lab.*, 863 F.3d 23, 42–43 (1st Cir. 2017); *In re Montgomery Ward Holding Corp.*, 326 F.3d 383, 391 (3d Cir. 2003).

162. Some exceptions are *Cal. & Hawaiian Sugar Co. v. Sun Ship, Inc.*, 794 F.2d 1433, 1438 (9th Cir. 1986); *Sutton v. Epperson*, 631 So. 2d 832, 835 (Ala. 1993); *Spirit Locker, Inc. v. EVO Direct, LLC*, 696 F. Supp. 2d 296, 306 (E.D.N.Y. 2010).

163. See generally *Walgreen Co. v. Sara Creek Property Co., B.V.*, 966 F.2d 273 (7th Cir. 1992).

164. *Id.* at 274.

165. *Id.*

166. *Id.* at 276 (affirming lower court's granting of an injunction).

167. *Id.*

168. The search term used was "966 F.2d 273" and either "specific performance" or "injunct!" *Search Results*, WESTLAW, [https://1.next.westlaw.com/Search/Results.html?query=advanced%3A%20\(%22966%20F.2d%20273%22\)&jurisdiction=ALLCASES&contentType=CASE&querySubmissionGuid=i0ad62af00000164c05180c320e528a2&startIndex=1&searchId=i0ad62af00000164c05180c320e528a2&originationContext=SearchListView&transitionType=ListViewType&contextData=\(sc.Search\)](https://1.next.westlaw.com/Search/Results.html?query=advanced%3A%20(%22966%20F.2d%20273%22)&jurisdiction=ALLCASES&contentType=CASE&querySubmissionGuid=i0ad62af00000164c05180c320e528a2&startIndex=1&searchId=i0ad62af00000164c05180c320e528a2&originationContext=SearchListView&transitionType=ListViewType&contextData=(sc.Search))

language in the opinion explaining the availability of injunctive relief generally.<sup>169</sup> Nevertheless, a couple of cases are notable because they seem to embrace the Coasian analysis explained by Judge Posner.<sup>170</sup> In a Ninth Circuit case, *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*,<sup>171</sup> the dissent discusses the Coasian analysis at length.<sup>172</sup> Similar analysis is found in *United States v. One Rural Lot Identified as FINCA No. 5991 Located in Barrio Pueblo, Puerto Rico*.<sup>173</sup> Despite these two cases, it cannot be concluded that the Coasian analysis, as explained by Judge Posner, has found its way into judicial considerations of specific performance.

## V. CONCLUSION

Empirical work can be quite subjective and this effort is no exception. I made decisions about methodology and classifications which could have gone differently. Here, the effort was to assess the impact of Richard Posner's scholarship and judicial opinions on modern contract law. Given the massive citation of his work by legal scholars, one would expect he would have an impact. In addition, the impact would be in the direction of making contract law more efficient by one measure or another. On the other hand, Posner writes that the common law is already efficient and his work on contract law, specifically, is probably best regarded as a defense of the status quo.

So, what can be said of Judge Posner's actual contributions to contract law? His contributions to contract law are comparable to minor donations to an already established substantial endowment. The donations have often been in the form of rationales for justifying existing contract law. Four particulars stand out to this researcher:

1. Although Judge Posner did not invent the notion of the efficient breach, it seems clear that his articulation of efficient breach has meant that courts have a new justification for the expectancy measure of damages.
2. Although the common law seems to have consistently filled gaps in

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2d%20273%22%20%26%20%22specific%20performance%22%20or%20%22injurct!%22)&jurisdiction=ALL CASES&contentType=CASE&querySubmissionGuid=i0ad62af000000164c09319bb20e530d1&startIndex=1&searchId=i0ad62af000000164c09319bb20e530d1&originationContext=SearchListView&transitionType=ListViewType&contextData=(sc.Search) (last visited July 21, 2018) (on file with *The University of the Pacific Law Review*).

169. See, e.g., *Planned Parenthood Gulf Coast, Inc. v. Kliebert*, 141 F. Supp. 3d 604, 649 (M.D. La. 2015); *Cmty. Servs., Inc. v. Heidelberg Twp.*, 439 F. Supp. 2d 380, 395 (M.D. Pa. 2006); *Associated Builders & Contractors of Ga., Inc. v. City of Atlanta*, No. 1:94-cv-2012-ODE, 1995 WL 606778, at \*1 (N.D. Ga. Aug. 5, 1995).

170. *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1067–68 (Bybee, J., dissenting); *U.S. v. FINCA No. 5991*, 726 F. Supp. 2d 61, 74–75 (D.P.R. 2010).

171. 602 F.3d 1019 (9th Cir. 2010).

172. *Rincon Band of Luiseno Mission Indians*, 602 F.3d at 1067–68 (Bybee, J., dissenting).

173. 726 F. Supp. 2d 61, 74–75 (D.P.R. 2010).

contracts with the terms the parties would have agreed to, it appears that Judge Posner has successfully promoted this idea.

3. Judge Posner has provided support for courts already disposed to *not* look closely at the distributive impact of contracts or to apply doctrines like duress and unconscionability to achieve more equitable distributive outcomes.

4. Judge Posner provides a rationale for the enforcement of penalty clauses that is available to lower courts to justify a departure from the standard rules against enforcing those clauses.

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