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## **Justice without romance.**

### **The history of the economic analyses of judges behavior – 1960-1993<sup>1</sup>**

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**Abstract:** Richard Posner's "What Do Judges and Justices Maximize?" (1993a) is not, as usually believed, the first analysis of judges' behaviors made by using the assumption that judges are rational and maximize a utility function. It arrived at the end of a rather long process. This paper recounts the history of this process, from the "birth" of law and economics in the 1960s to 1993. We show that economic analyses of judge behavior were introduced in the early 1970s under the pen of Posner. At that time, rationality was not modeled in terms of utility maximization. Utility maximization came later. We also show that rationality and incentives were introduced to explain the efficiency of Common Law. A controversy then took place that led Posner, and other economists, to postpone their analysis of judicial behavior until the 1990s. By then, the situation had changed. New and conclusive evidence of judges' utility maximizing behavior demanded for a general theory to be expressed. In addition, the context was favorable to Chicago economists. It was time for Posner to publish his article.

**Keywords** Judges, Judicial decision making, Rationality, Utility Maximization, Self-interest, Efficiency, Common Law, Posner

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## **Introduction**

Public Choice – or the economic analysis of politics – has been nicknamed by one of its founders, James Buchanan, as “politics without romance” for having replaced the “romantic and illusory set of notions about the workings of governments ... with more realistic notions” (1979). To Buchanan, realism meant abandoning ~~the~~ “the romantic image of the benevolent despot” (1986). With public choice, Buchanan added, politicians and bureaucrats were viewed “as ordinary persons much like the rest of us” (1979). These behavior of individuals could thus be investigated by assuming that they are rational, self-interested and even utility maximizers. Actually, the assumption of individuals’ rationality can be found in the very first economic analyses of politics (see, for instance, Downs 1957). It was concomitant and even constituent to – indeed, the very *raison d’être* of – public choice.

As with public choice, law and economics and economic analyses of law can also be viewed as having contributed to de-romanticize the judicial system or to give a view of justice without romance – an expression that has, to our knowledge, never been used before. Indeed, as Richard Posner particularly clearly put it in “What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)” (1993a), echoing what Buchanan had written, justice is rendered by “ordinary people” (4), “"ordinary" human beings” (14) who, as any ordinary human being, “respond rationally to ordinary incentives” (1). Hence, it could be argued that “judges *are* rational” (1993a, p. 3, emphasis in original)<sup>2</sup>. A claim that also allowed Posner to conclude in favor of another of his famous claims, namely “that the common law and other areas of judge-made law are on the whole efficiency-enhancing” (pp. 39-40).

Published in 1993, Posner's article was not the first to assume that judges are rational *and* utility maximizers (see Higgins and Rubin, 1980; Landes and Posner, 1980; Cooter, 1983; Cohen, 1991) as he acknowledged it – there were “[o]ther papers that analyze judicial behavior in utility maximizing terms” (1993a, p. 6) – and as it has sometimes been recognized in the law and economics literature. Most of the time, however, Posner was

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<sup>2</sup> On the differences between “law and economics” and “economic analyses of law” see Medema, 1998, Harnay and Marciano, 2009; Marciano & Ramello, 2014; Marciano, 2016. More details will be given below.

entitled the place of honor, his article was cited as *the* article that had changed how too look at judges and was even taken as the starting point in the economic analyses of judicial behavior.<sup>3</sup> Up to the point that, as with Ronald Coase and his article on “The Problem of Social Cost” (1960)<sup>4</sup>, it is even considered that there is a before and an after “What Do Judges and Justices Maximize?”: before, the “pervading” (Schauer 2000, p. 615) view was that judges were disinterested and motivated only by the general interest; after, it was admitted that judges were self-interested, rational and maximizers. and, as a corollary,

One may then wonder why it was Posner’s article – and not the others’, published a decade earlier – that gave birth to the economic analyses of judicial making. Or, alternatively, one may look back and try to trace the origins of the paper and inquire on the emergence of such analyses. This is precisely the object of this article, to recount the history of how the behavior of judges became an object of analysis for economists, from the origins of law and economics in 1960 to the publication of Posner's article in 1993. Adopting a historical approach helps to dissipate some ambiguities that may result from giving too much importance to Posner’s article. We identify three problems that constitute the arguments around which this paper is structured.

First, to take Posner's article as a reference may lead to believe that the economic analyses of judicial decision making started in 1993, twenty years after the publication of Posner's *Economic Analysis of Law* (1972) and the origins of an economic analysis of law, twenty-five years after the assumption that criminals are rational had been introduced by Gary Becker in “Crime and Punishment” (1968), and about thirty-five years after public choice theorists had assumed that politicians are rational. This would then imply that judges had had a special status in law and economics, a privilege that politicians had not had in public choice theory and that had immunized them from economic analysis and the assumption of rationality as utility maximization. That was however not the case: “What do Judges and Justices Maximize” does not represent the beginning of a new era – in which the *homo æconomicus* sits on benches and “romance” disappears from courtrooms – but the end

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<sup>3</sup> Citing the literature is impossible. Indeed, Posner's article has become by far the most cited paper using economics to analyze judge's behavior, achieving about 950 citations by November 2018 (source: Google Scholar).

<sup>4</sup> One reminds that George Stigler (1992, 456) wrote about Coase that “[i]n the field of law and/or economics, B.C. means Before Coase. B. the economists paid little attention to most branches of law. A.C., "Problem of Social Cost" became the most cited article in the literature of the field, perhaps in the entire literature of economics.”

of a process that started earlier and in which many economists and legal scholars participated. The assumption that judges are rational was introduced in economic analyses of the law in the early 1970s – exactly when the field was born – by Posner himself (1971b, 1971c; 1972a, 1972b, 1973a). Actually, judges have always played an important role in law and economics, even before their behavior was analyzed with economic tools. This is the first and main point we demonstrate in this article.

Second, because Posner had assumed that judges were utility maximizers, focusing on his article may give the impression that rationality has always been equated with utility maximization. This would be wrong. The first works, from the early 1970s, on judges' behavior analyzed rationality in terms of costs-benefits. In 1980, Jack Higgins and Paul Rubin switched to utility maximization, a perspective that was then adopted by other scholars. Thus, and this is our second point, this story is also about how the rationality of judges changed forms over the years until 1993. Finally, it is also a story about the efficiency of legal systems, which is the final point we make in this paper. In 1993, Posner only alluded to efficiency in the conclusion, as if it was an aside and the main purpose was rationality. This gives the impression that rationality was introduced to gain realism and, in a way, to bring judges down from their pedestals. The ambiguity is understandable. After all, Posner (1993a, p. 40) had claimed that the “value of the approach is that it demystifies judges”. This might have been one of Posner's objective. Yet, not the only or main one. Again, focusing too much on the 1993 paper, does not allow to understand what it was. Tracing the economic analyses of judicial making from the first steps allows us to show that the main concern has always been to understand the efficiency of legal systems.

## **2. Early analyses: law, economics and judicial decision making**

The articles that mark the beginning of “new” or “modern” law and economics<sup>5</sup> – “The Problem of Social Cost”(Coase1960) and “Some Thoughts on Risk Distribution and the Law of Torts” (Calabresi, 1961) – both gave judges a central role in particular with respect to

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<sup>5</sup> It is said that “The Problem of Social Cost” represents the “origin [of ...] the modern law and economics movement” (Hovenkamp 1990, p. 494) and marks the passage from an “old” to a “new” law and economics (Posner 1975). Calabresi's article received less formal praise but its founding role was nonetheless eventually acknowledged. And his author came to be viewed as one of the “founding father of the law and economics movement” by the American Law and Economics Society in 1991.

efficiency<sup>6</sup>.

In “The Problem of Social Cost”, Ronald Coase explained that judges and courts were important because they “have often recognized the economic implications of their decisions and are aware (as many economists are not) of the reciprocal nature of the problem” (1960, p. 19) – a condition for economic efficiency. He insisted that, “from time to time” (p. 19) and even if it is “largely unconscious and certainly not very explicit” (p. 22), judges think “of the economic consequences of alternative decisions” (p. 20) and “take these economic implications into account, along with other factors, in arriving at their decisions” (p. 19). Thus, judges “compare costs and benefits” or, put it in different terms, “introduce economic efficiency considerations in their deliberations” (Bertrand, 2015, p. 414) and it can be said “that efficiency enlightens the judge’s path.” (ibid.)<sup>7</sup> For his part, Calabresi explained that the judges who in the 19<sup>th</sup> century had chosen to apply a principle of fault liability had understood – in a “rough and ready, non-economist’s, way” (1961, p. 517) – that it was the most efficient liability rule for the structure of the economy, “that nonfault liability would deprive our land of the benefits and promises of industrial expansion” (p. 517) and “that industry was simply not ready to bear all of its costs, and that the country would in the long run be better off if it did not.” (p. 517)

However, despite the importance judges had for them, neither Coase nor Calabresi entered into the details of how judges did make their decisions, nor analyzed judicial behavior. For Coase, the explanation has partly to do with his conception of economics and of law and economics. Indeed, to Coase, economists should limit themselves to the analysis of the working of the economic system, a point he repeatedly stressed<sup>8</sup>. As a consequence, legal cases were important for economists to “study ... both to learn about the details of

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<sup>6</sup> Both articles were published in 1961. The publication of the 1960 issue of the *Journal of Law and Economics* was delayed.

<sup>7</sup> However, the efficiency judges promote is “relative” (Bertrand 2015, p. 431). Judges do not “*always* choose the economically efficient solution: for they may be mistaken, they do not pursue economic efficiency alone, and some do not take economic considerations into account at all.” (ibid; italics in original)

<sup>8</sup> Economics is a science that studies “the working of the economic system, a system in which we earn and spend our incomes” (Coase 1998, p. 93). In a slightly different way, economists study “the working of the social institutions which bind together the economic system: firms, markets for goods and services, labour markets, capital markets, the banking system, international trade, and so on” (Coase 1978, p. 206-207). And this is precisely what he did in “The Problem of Social Cost”: “in ‘The Problem of Social Cost’ I used the concept of transaction costs to demonstrate the way in which the legal system could affect the working of the economic system, and I did not press beyond this” (1988, p. 35; also 1960, pp. 27-28). Or, “[f]or me, ‘The Problem of Social Cost’ was an essay in economics. It was aimed at economists. What I wanted to do was to improve our analysis of the working of the economic system” (1993 p. 250).

actual business practices (information largely absent in the economics literature), and to appraise the impact on them of the law.” (1996, p. 104) He looked for judicial decisions to illustrate an economic claim – namely the reciprocal dimension of nuisances, damages or harmful effects: “I (and no doubt others) have used the legal cases to illustrate the economic problem” (1996, p. 104). But, to Coase, the working of the legal system and judicial decision-making did not belong to the subject matter of economics. Hence, although judges were indeed important to take into account because of the influence their decisions have on economic activities, they should nonetheless not be taken as “objects” of analysis. That was not possible because economists do not analyze non-market behaviors – and, to Coase, saying or making the law is a non-market activity – and also because, to Coase, individuals are not rational utility maximizers. He criticized the theories of utility “which are abstract because they represent individuals as atomised rational utility maximisers (Coase 1978, p. 244; see also Coase, 2012, and Coase and Wang 2013). Thus, in Coase’s article, “the specific motivations and abilities of judges remain unexplained.” (Bertrand 2015, p. 431)

They were not an object of analysis and their behavior remained unexplained for Calabresi too, even though he was using economics to analyze a legal problem, that is, if his analysis was of a kind that could have allowed him to analyze judicial behavior<sup>9</sup>. But, Calabresi’s goal was to understand which liability rule – strict or no-fault – was to be preferred in order to minimize the costs of accidents. Or, to put it in other words, he was trying to explain which liability rule was the most efficient. He was, at least implicitly, convinced that judges made and would make efficient decisions. But he did not explained why, according to him, judges would choose to assign liability to one party or the other. He simply denied that judges could explicitly follow a “rather complicated economic theory” (1967: 517) or make an explicit cost-benefit calculus, and stated that judges make “guesses” that are efficient because they are “*practical ... men*” (1961, p. 515; emphasis added). In other words, Calabresi evacuated the question of how judges make decisions and did not try to rationalize it. More broadly, this also corresponds to his skepticism towards the assumption that individuals behave rationally: “the whole “rational economic man” approach strikes me as so unreal” did he write (1961, p. 515). This assumption could not be used to model the

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<sup>9</sup> Calabresi thought that the main question in tort law is not to ascribe liability to a tortfeasor or a wrongdoer, but rather “when and how we wish to distribute losses” (1961, p. 500) caused by accidents. As we noted elsewhere, “Some Thoughts” bore only indirectly on liability (Marciano and Ramello, 2014; Marciano and Romaniuc, 2015, 10; Marciano and Medema, forthcoming).

behavior of workers or motorists. Why could it be applied to judges? He thus reached a conclusion similar to Coase's, and that was not so different from what the (very) few economists who studied "legal" behaviors with economic tools wrote.

It was the case of Harold Demsetz (1964) or Simon Rottenberg (1965), to start with. None of them hesitated to assume that individuals behave self-interestedly and rationally – which, to them meant maximizing utility – even when they were involved in non-market transactions. Rottenberg, in particular, used this assumption to analyze liability. Convinced that accident law could affect individuals' behaviors – precisely because individuals react to incentives –, he claimed that accidents, and the subsequent damage, could be prevented if individuals were made to pay for the costs their behavior impose on others (1965). What matters for our purpose is that Rottenberg referred to the role of judges and juries in the way the rule of law is applied, stressing that "the outcome of every case depends upon the subjective judgment of judge or jury" (1965, p. 110). It was not, however, a move towards an analysis of judges' behavior. To the contrary. Here, Rottenberg mentioned judges and juries to emphasize how different their reasoning was compared to economists. To him, judges and juries rely on how "a hypothetical "reasonable man" would act in like circumstances" (ibid.) while economists use "a different standard, and this is the standard of the maximizing man" (ibid.). Rottenberg thus did not enter into the "subjective judgement of judges". As with Calabresi, judicial decision making remained outside of the analysis.

As it remained outside of the analysis led by Gary Becker in his 1968 article on crime. Becker was the first to assume that individuals choose to commit a crime by making, as he put it, an "economic calculus" (1968, p. 209).<sup>10</sup> But Becker did not refer to the rationality of criminals nor to the fact that they would maximize a utility function. Here rationality simply meant comparing the costs to the benefits of a crime.<sup>11</sup> From this perspective, the decision to commit a crime or to behave illegally depends on the costs of punishment and on the probability to be arrested and convicted. And, quite interestingly, Becker made a remark similar to the one made by Rottenberg about the role of judges and juries. He mentioned, in a

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<sup>10</sup> At least, in the 20<sup>th</sup> century. There were precursors, that Becker mentioned: Bentham and Beccaria (see Marciano and Ramello, 2018). On Becker and economic analysis of law, see Fleury (2015, 2019a, 2019b).

<sup>11</sup> Calabresi and Rottenberg analyzed accidents. Becker adopted a broader perspective. To him, a crime included any kind of law violation: "felonies-like murder, robbery, and assault, which receive so much newspaper coverage-but also tax evasion, the so-called white-collar crimes, and traffic and other violations." (1968, 170).



footnote only, that both the probability of conviction per offense and the punishment per offense “depend on the judge, jury, prosecutor, etc., that  $j$  [the potential criminal] happens to receive” (p. 176). Later in the article, Becker added that “judges or juries may be unwilling to convict offenders if punishments are set very high.” (p. 184). For which reason? Becker did not say, not trying to analyze why certain judges or other individuals involved in the process of conviction could decide differently than others.

Thus, no more than Coase, Calabresi or Rottenberg, did Becker discuss the motives of judges or how they make decisions to convict criminals. This is all the more surprising that, obviously, how individuals are convicted, if they are, not only affects the decision to commit a crime but also the efficiency of the legal system, and Becker was precisely aiming at understanding how criminals behave as well as to determine “how many resources and how much punishment should be used to enforce different kinds of legislation” (p. 170). Isaac Ehrlich, one of Becker's students who was working on illegitimate activities adopted the same kind of approach. He did not distinguish either between apprehension and conviction and did not discuss the behavior of judges and judicial decision-making (see for instance Ehrlich 1972, 1973).

The first to discuss the behavior of one of the actors of the enforcement side of the law in terms of rational behavior was another of Becker's students, William Landes<sup>12</sup>. Yet, with regards to judges, Landes followed Becker's and Ehrlich's, or even Rottenberg's, path. He did not assume that judge behavior could affect the functioning, and the efficiency of justice. He stopped just before entering the court, focusing on pre-trial settlement and on the behavior of *prosecutors*. Landes's interest in prosecutors came from his dissertation – on the impact of fair employment laws on the wellbeing of discriminated nonwhites – in which he used expected utility to model the decision of firms to comply or violate the anti-discrimination law (see also Landes 1967). After having finished and defended his dissertation, it was in 1966, Landes was looking for topics that could be usefully analyzed with the same type of expected utility model. He read a newspaper article on plea-bargaining that pointed out that less than 10 percent of criminal cases went to trial, and found that this phenomenon could be expected by using the same framework as in his dissertation.<sup>13</sup> Two

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<sup>12</sup> More precisely, Landes wrote his dissertation under Becker's and Jacob Mincer's supervision at Columbia.

<sup>13</sup> Personal communication to Alain Marciano, November 25, 2015.

versions of the paper were published in 1969 and, under the title “An Economic Analysis of Courts”, in 1971. But a preliminary version was ready earlier. The paper was presented, first, in 1967 at the labor workshop at the University of Chicago, and, more importantly, a second time at a “Round Table on Allocation of Resources in Law Enforcement” during the 1968 annual meeting of the American Economic Association.

Analyzing “the conditions under which a pretrial settlement or trial will take place” (Landes 1969, p. 505), Landes made two assumptions. First, following Becker 1968, he assumed that the suspect (1969) or the defendant (1971) maximize a utility function. Much more interesting and original was the second assumption Landes made and that bore on prosecutors. Let us start by noting the specific place prosecutors occupy in a legal system: they are lawyers – at least, they possess a law degree – but are employed by an office of the government. In other words, they can be viewed as bureaucrats as much as they can be viewed as lawyers. Even if, in those years, economic analyses of bureaucratic behaviors were still in their infancy, the assumption that bureaucrats as other public officials were rational was in the air since the origins of public choice at the end of the 1950s.<sup>14</sup> This may explain why Landes did not hesitate to reason in terms of rationality and in terms of utility maximization – “The basic assumption of the model is that both the prosecutor and the defendant maximize their utility, appropriately defined, subject to a constraint on their resources.” (1971, p. 61) More precisely, the utility of prosecutors is assumed to depend on “the expected number of convictions weighted by their respective S[entences]” (1971, p. 63). This is how prosecutors are supposed, according to Landes’ model, to – rationally – choose between negotiating a pre-trial settlement, or not, and then offering a certain sentence to a suspect by maximizing the expected number of convictions.

Then, Landes went on, thanks to this behavioral assumption, one would be able to “predict charges would be dismissed when the prosecutor sees little chance of conviction regardless of his resource input into the trial, or given a conviction he expects a negligible sentence.” (p. 64) Or, in other words, one may say that prosecutors do not offer the sentence they find just or unjust. There is an optimal level of conviction that depends on the amount of resources they devote to the cases. But this does not mean that these rational decisions may be detrimental to the society. On the contrary, and this is important to note, rational decision

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<sup>14</sup> Besides Tullock's book, that had been recently published (1965), not much had been written about this issue. In particular, Niskanen's article would be presented at the AEA conference only in 1968.

making also contributed to the *efficiency of the legal system* and, even, to the maximization of “the community's welfare for a given resource level.” (p. 63) Indeed, a sentence is the price “the community charges for various offenses” (p. 63). Therefore, a prosecutor chooses what is best to do for the society, not for his own sake. Prosecutors are not supposed to have ideological preferences. Actually, Landes did not say much about these preferences. The only precision Landes gave was that the prosecutor “prefers longer to shorter sentences” (p. 63).

### **3. From Landes to Posner, from prosecutors to judges**

When his 1971 article on Courts was published, Landes was working for the National Bureau of Economic Research that he had joined in 1968. 1971 was also the year in which the Bureau launched a program in law and economics in which were involved Isaac Ehrlich, Becker himself and Posner. The latter had just been hired at the Law School of the University of Chicago and had made personal acquaintance with Gary Becker. Influenced by the latter, Posner started to view an economic analysis of law as “the application of economic theory to law” (1971b, p. 22)<sup>15</sup>. Following Becker, he started to emphasize that economics should be viewed as a “tool” (1971c, p. 202)<sup>16</sup>. Precisely, one of the first applications of economics to the law that made Posner involved judges – it was his first contribution to the topic – and also bore on the efficiency of the law. In “Killing or Wounding to Protect a Property Interest” (1971c), Posner analyzed the legitimacy of the use of deadly weapon to defend private property from an economic perspective. On the one hand, he put the emphasis on the optimal allocation of resources: for instance, he started with the premise that “the dominant purpose of rules of liability is to channel people's conduct, and in such a way that the value of interfering activities is maximized” (1971c, p. 223). On the other, Posner assumed the rationality of individuals involved in the decision process and, among them, judges.

But, there was no reference to a possible judicial utility function that judges would maximize. Following Becker or Coase, rather than Landes, Posner interpreted rationality in

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<sup>15</sup> Later, he insisted again: “an economic approach to law” means “applying economics to law” (1975, p. 37). Or that an “economic approach to law” can be viewed as “an applied field of economics” (1988, p. 929).

<sup>16</sup> He repeated this claim about economics as a tool many times, describing economics as “a powerful tool” (1973a, p. 3) and speaking of the “powerful tool of economic theory” (1973b, p. 399). A few years later, Posner insisted on the difference between economics defined by its method and economics defined by its subject matter. In 1987, he stressed that economics is “an open-ended set of concept's” (1987a, p. 2) and that “when used in sufficient density these concepts make a work of scholarship ‘economic’ regardless of its subject matter or its author's degree” (2). To understand why Posner started to insist on this distinction, one must refer to Coase. See Harnay and Marciano 2009 for an explanation.

the terms of a cost-benefit or, to use Becker's words, of an "economic" calculus. And, as Coase had already claimed, Posner argued that judges do take into account the costs of applying a rule when they decide a case and compare them to its benefits. At the same, it was equally a first statement about the fact that judges seem to display a certain propensity towards efficiency. That judges "are guided by concern with economic efficiency" (1971c, p. 223) and "think in economic terms" (p. 224) was a premise upon which the rest of Posner's analysis rested. To be more precise, Posner admitted that judges do follow legal principles, but that they also take into account the consequences of such applications: "I expect that most judges, before deciding a case, conceive it in highly practical terms... I mean that they consider the probable impact of alternative rulings on the practical concerns underlying the applicable legal principles." (p. 208) By "impact", Posner meant "economic impact". And judges' concern with efficiency is such that they even take into account administrative costs in their calculus:

Because the costs of different types of legal rule have never (to my knowledge) been seriously studied, it is very difficult to introduce the element of administrative expense into the economic calculus but I assume that judges attempt to do so in a rough way. Our law is replete with instances where judges explicitly rejected a more complex in favor of a simpler rule because the costs of administering the former were thought to outweigh its benefits." (p. 211)

In 1972, Posner gave more precise and deeper presentations of his claim. The same year, he published many articles and conceived the first edition of his masterpiece, *Economic Analysis of Law*. It is therefore difficult to know which work was written first. However, for the purpose of our paper, these works nicely complement each other and the order of publication is not an issue. In "A Theory of negligence" (1972a), Posner explained "Judge Learned Hand's famous formulation of the negligence standard" (p. 32) and advanced a claim about the propensity of judges to promote efficiency:

"[i]n a negligence case ... the judge (or jury) should attempt to measure three things: the magnitude of the loss if an accident occurs; the probability of the accident's occurring; and the burden of taking precautions that would avert it." (p. 32)

He then concluded that "Hand was adumbrating, perhaps unwittingly, an economic meaning of negligence." (p. 32) To Posner, Hand did not only speak of the economic content of a liability rule. He also stressed that judges should make their decisions by comparing the costs and benefits of each option. In other words, he emphasized that judges should promote

efficiency. And this was also what Posner himself stressed in the very first edition of “Economic Analysis of Law” (1973a, § 23.1), when he insisted that one can “*assume* that judges make their decision in accordance with the criterion of efficiency” (p. 325; emphasis added) and wrote that “rights and liabilities continue to be assigned, on the main, on the basis of a politically neutral comparison of costs.” (p. 326)<sup>17</sup>.

Thus, Posner’s primary goal was broader than analyzing how judges make their decision nor in arguing that judges were making efficient individual decisions. Posner was rather interested in the efficiency of the *entire* Common Law system. But Posner could not simply *state* the efficiency of the Common Law. He had to explain it to give his claim a certain credibility. Now, since judges are the main source of the law and of legal change in Common Law systems<sup>18</sup>, Posner naturally involved judges in the discussion and came to discuss the role of judges and to analyze their behavior. In other words, Posner's analyses of judge behavior were a by-product of his primary interest in the efficiency of the legal system. Once this had been done, Posner had also to explain why judges are biased towards efficiency. He then sketched – in less than 10 pages – an analysis of judicial decision-making, that is not without ambiguity. For the first time, he made a further logical step and tried (unsuccessfully) to explain the reasons why judges ought to foster efficient legal changes. But, it is worth stressing that he came to the behavior of judges and to judicial decision-making because of the possible connection between their propensity towards efficiency and “judges' self-interest” (1973a, p. 325). Here, Posner was simply *asking* if it was possible to explain “the promotion of efficient resource use” by assuming that judges are self-interested and behave according to the standard economics’ paradigm.

However, this answer turned out to be negative, since a major difference exists between decisions made on markets and decisions made by judges. Comparing the behavior of judges to that of consumers, he noted that the latter is “motivated by a desire to maximize his satisfactions, a goal affected by relative costs” (p. 325), but denied that it could be the

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<sup>17</sup> One may note here that Posner jumped from a normative version – in the description of Hand's formula – to a positive one. Also, in “Killing or Wounding”, he was explicitly describing the behavior of judges and was not being normative. As it is now well known, this is one of the ambiguities of Posner's analysis. It is not clear whether Posner was positive or normative in his analysis of judicial decision making. Did he mean that judges do make decisions that promote an efficient use of resources or that they should promote efficiency? The question is important but nonetheless secondary for this paper.

<sup>18</sup> Later he would have defined judges as the “central actors in the drama of the common law” (1993, p. 2)

case with judges. He spoke of “the aloof disinterest of the judge” (p. 322), and insisted that the legal system was designed to guarantee the expression of such disinterest: judges are “insulate[d] ... from any pecuniary interest in the outcome of the case” (p. 325). Or, “[t]he method by which judges are compensated and the rules of judicial ethics are designed to assure that the judge will have no financial or other interest in the outcome of a case before him” (322). He also added that, in certain circumstances, when “constraints are loose” (326), judges may act “as agents for carrying out the desires of the dominant political authority” (326), and he seemed to suggest that judges could try to maximize their personal utility.

Thus, there was a sort of hesitation and ambiguity between two types of behaviors, self-interested and rational – but *not* utility maximizers – (when constraints are loose) or disinterested (when constrained by the rules of judicial ethics). But there was no ambiguity in his analysis of “the behavior of administrative agencies” (1972b). Indeed, Posner did not hesitate to treat those agencies as individual entities that are rational utility maximizers. He was explicit about this assumption when he wrote, for instance, that the goal of these “agencies”, did he write, “is assumed to be to maximize the utility of its law-enforcement activity” (1972b, p. 305)<sup>19</sup>, which was *not* the goal judges aim to achieve. Thus, Posner drew a frontier between “judges” and “bureaucrats”. The latter are rational, self-interested and make decisions by trying to maximize their utility or their income. Judges on their side pursue a more neutral and less self-interested goal. They try to promote economic efficiency through their decisions by comparing costs and benefits. However, at this stage, the intrinsic motivation of judicial conduct was not clear, which accounts for the ambiguity. From these early works it was not possible to understand whether judges, while promoting efficiency, behave in a disinterested way or, more prosaically, are constrained by the institutional system that prevents them from pursuing their own egoistic goals; something that judges would otherwise be inclined to do.

The lack of conclusive evidence with respect to judicial behavior equally affected his attempt to supply strong foundations for his primary theory on Common Law’s efficiency. Only after having achieved his major objective with respect to legal change (something that we are going to show in the next section), Posner was able to unlock this ambiguity regarding judicial behavior. It seems that, once relieved from his main concern about Common Law,

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<sup>19</sup> Obviously and surprisingly, Posner treated those agencies as “individuals” analyzing the behavior of a group by using assumption usually applied to individuals.

Posner became free to solve the puzzle behind judges' decision-making.

#### **4. Evolutionist analyses and new views on judicial decision making**

Thus, for both Landes and Posner, prosecutors – before the trial – and judges – during the trial – contribute to the efficiency of the legal system. Indeed, both Landes and Posner had in mind and were primarily concerned by the efficiency of the entire legal system, that was a consequence of a rational behavior and this led them, more or less incidentally, to analyze how judges actually behave. But their analysis left a gap between a behavioral assumption – judges are biased towards efficiency – and a conclusion – the Common Law is efficient – that could be, to a certain extent, disappointing. At least, this is what Paul Rubin wrote. To him, Posner

“is less persuasive in his explanation of why this is so-his argument is essentially that judges may as well decide in terms of efficiency, since they have no other criteria to use. To an economist accustomed to invisible hand explanations of efficiency in the marketplace, this justification seems weak.” (1977,p. 51)

The additional explanation, that consisted in arguing that judges could indeed make efficient decisions by comparing the costs and benefits because they are independent from political pressures (see also Landes and Posner 1975), was equally insufficient. A more persuasive theory was thus required. But, from the preceding quotation, one understands very well that Rubin's objective, or concern, was to demonstrate why the Common Law is efficient, rather than to clarify or substantiate Posner's argument about judges. This is what he, and others after him, started to struggle with in the second half of the 1970s with evolutionary analyses of the law. Those analyses focused on the efficiency of a legal system and concluded that legal systems could be efficient even if judges were not behaving efficiently. Thus, it was not necessary to explain how judges behave to explain the efficiency of the system. Despite the apparent remoteness with our purpose – the development of economic models of judicial behavior – these works are important because they eventually set the premises for a more precise economic analysis of judicial decision-making.

When he wrote “Why the Common Law is Efficient” (1977), Rubin had already written articles on law and economics (Rubin, 1973; Kau and Rubin, 1975). He was more particularly interested in crime and deterrence and had demonstrated that deterrence depended more on the probability of conviction than on the length of the sentence. The

argument echoed and gave more empirical legitimacy to Becker's claims about punishment<sup>20</sup>. At the same time, this claim gave less credence to Landes's analysis in which, one would recall, prosecutors have a preference for longer than shorter sentences and, therefore, for which the length of the sentence could be of importance. That was clearly not the case for Rubin. But this does not account for why, as with Becker or Ehrlich, Kau and Rubin had not taken into account the role of how judges behave and the impact their behavior would have on the individuals' participation in illegal activities. Indeed, judges should have been central in all these models on deterrence since the "probability of conviction" depends on the decision made by a judge. Yet, judges did receive a central role in these models. The focus was rather put on the system and how it works rather than on individual agents.

The analysis that Rubin was developing on the efficiency of the common law extends this reasoning: the common law system does not really need judges to be efficient. Yet, how could it be possible to explain the tendency of the legal system towards efficiency without making room to the actors that were particularly important according to Posner? Rubin solved the problem by using the biological analyses that were becoming controversially fashionable in economics after the publication of Michael Ghiselin's bioeconomics (1974) and even more after Edward Wilson's sociobiology (1975). Rubin had read a review of *Sociobiology* published in "Scientific American" that incited to read the book that then led him to biology<sup>21</sup>. The particularly favorable review, written by John Bonner, was published towards the end of 1975 – the very same year Kau and Rubin's article was published. Not long after, Rubin started to write his article that gave birth to a set of works about the efficiency of the common law that "shifted from a Posnerian view that efficiency is a result of the wisdom of the judge" (Rubin 1982, p. 205)<sup>22</sup>. Thus, these works shifted away from a view in which efficiency is the consequence of the voluntary action of individuals. This is exactly what a biological or, one should rather say, an evolutionary perspective says: a society does not evolve or change because of the intentional and voluntary acts of the individuals. Evolution is a process that is led by no one in particular, very much like a market process.

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<sup>20</sup> Becker had written: "a common generalization by persons with judicial experience is that a change in the probability has a greater effect on the number of offenses than a change in the punishment" (1968, p. 176).

<sup>21</sup> Personal communication to Alain Marciano, November 19, 2015.

<sup>22</sup> For instance, George Priest recalled that he was one of the referees for Rubin's paper. He tried to suggest the author to generalize his argument. Rubin refused. Posner, then editor of the *Journal of Legal Studies*, suggested that Priest wrote an article explaining the broader point behind Rubin's paper and gave him "only two weeks to do so" (Personal communication to Alain Marciano, November 20, 2015).



This was exactly what was put forward in the literature Rubin's article gave birth to.

The common argument was thus that the Common Law – as a whole, globally – is efficient because its functioning rests on an evolutionary process, based on a sort of natural selection that only allows the most efficient rules to “survive” to legal change (Goodman, 1978; Priest, 1977, 1980; Rubin, 1977, 739 1980; Terrebonne, 1981). The thesis defended in these works – that became known as “selective litigation” – was that the result of the Common Law process depends on the behavior of litigants<sup>23</sup>. This then meant, as a corollary, that judges no longer had the central role Posner had given them. The evolutionary forces that are supposed to push the system towards efficient outcomes should work independently from judges favoring efficiency. This sort of “invisible hand” applied to legal change ought to hold even if judges are “ignorant” of the consequences of their decisions (Priest 1977, p. 72; Cooter and Kornhauser 1980, p. 140) or “decide cases randomly” (Goodman 1978, p. 394). Thus, as an unsurprising consequence, these analyses do not provide any insight regarding an economic analysis of judicial decision-making. Goodman, for his part, claimed that “no particular assumption about the motivation of judges (judges may be initially neutral with regard to the issue of economic efficiency)” (1978, p. 394) ought to be formalized. And, as Cooter and Kornhauser made it clear, by commenting assumptions<sup>24</sup> that were considerably reducing “the insight and learning ability of the judiciary” (1980, p. 143), “[w]e make these assumptions because we wish to characterize a process of blind evolution, not because we believe that they are true or that legal evolution is blind.” (1980, p. 143).

The reason why we linger on this debate, seemingly deviating from our initial focus, is that we believe that it was crucial in the evolution of Posner's thinking. In fact, in 1979, Landes and Posner published a paper entitled “Adjudication as a Private Good”, in which they take a position in favor of the evolutionary theory. At the end of a very accurate analysis of the reasons motivating the existence of public judicial systems, the authors “cannot conclude that private provision, with all its problems, is less efficient than public” (1979, p.

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<sup>23</sup> Litigants are supposed to contribute to the efficiency of the system because they have an interest to challenge more frequently inefficient than efficient rules that progressively occupy more room in the legal system.

<sup>24</sup> The assumptions were: “the probability of a judge abandoning one legal rule and adopting another depends upon the most recent legal decision, but not upon its predecessors (A2). In other words, the inclination of a judge to affirm or amend an existing precedent does not depend upon what happened before its adoption.” (Cooter and Kornhauser 1980: 141-142). And they added “that there is a positive probability that a judge will replace any rule which is litigated by a neighbor on the scale of goodness (A3).” (1980: 142)

240), while at the same time they claim that judges “do not automatically generate efficient rules” (p. 284). Landes and Posner also supplied various examples (customary law in primitive societies and commercial arbitrations) of evolutionary processes in which “rules emerge by a competitive or evolutionary process without need for a formal organ to promulgate them in a deliberate or self-conscious fashion” (p. 244). They argued that “where parties can feasibly stipulate the forum, public or private, for adjudicating disputes arising between them, competition is feasible and we would expect efficient rules of substantive law to emerge” (p. 257). Although limiting the range of the evolutionary theory to this area in which private and public supply of justice are competitive, Landes and Posner stressed that “the tendency of the common law toward efficiency is accelerated even if the judges are indifferent to the loss of business that contracting around entails” (p. 262).

We believe that once having granted a solution to the issue of Common Law’s efficiency and made it independent from judges’ conduct, Posner was in some sense relieved from the greater burden of linking legal change to judicial behavior. At this point, the debate became mature enough so that he could place judges at the center of his attention. Accordingly, they were no more ancillary to other problems in Posner’s narrative. They started to be treated as autonomous “economic actors” rather than “economic instrument” at the service of the Common Law.

## **5. When rationality-as-utility-maximization was put at the center of the analysis**

If the 1970s had brought the scientific debate finally to unveil the reasons behind the efficiency of judge-made law, the following decade represents the period in which the definitive premises for Posner (1993a) were made. Posner and others pushed the debate into considering explicitly judges as self-interested rational utility maximizers individuals for the first time (Higgins and Rubin, 1980; Landes and Posner, 1980; Cooter, 1983). These works are somewhat in the “middle” of the development of Posner’s view on judges, and are important steps towards the 1993 paper. On the one side, these papers now place judges at center of attention by explicitly considering incentives from an economic perspective, while in Posner’s previous articles (such as in 1973a) the idea was just sketched. However, contrasting what Posner will do in the 1993 article with which our story ends, these papers still linked judicial behavior to legal change, although not anymore in a subordinate matter. Something was still missing in order to make Posner’s provocative claim as explicit and

autonomous as in his 1993 article. Accordingly, this is the reason why we believe that these papers, although chronologically antecedent, were not equally referred to by the following literature.

Higgins and Rubin were the first, in their article on “Judicial Discretion”, to explicitly make and use the assumption that “judges maximize a utility function” (1980, p. 130). In a work that they conceived as a sort of reply to the previous “evolutionist” papers<sup>25</sup>, Higgins and Rubin introduced the idea of judicial maximization by comparing long and short considerations with respect to legal process. Specifically, they claimed that if previous works “have proposed theories ... which do not rely on the behavior of judges ... as these theories deal with long-run equilibria, there is still room for judicial discretion in the short run” (1980, p. 130). Higgins and Rubin thus still conceive their model of judicial behavior as a derivation, a by-product of the broader debate on legal change. However, differently from before, they supply a formal model in which judges are motivated by egoistic goals: precisely, they are wishing to exploit the discretion granted to them by the legal system and maximize their chances of promotions. In their model, judges’ utility function depends on “judicial discretion” and “wealth”. Judges, it is assumed, “like to impose their values on society, which is accomplished by precedent-setting” (Higgins and Rubin 1980, p. 130-131) but do not want to be overruled and are averse to reversal, because it reduces their wealth by reducing their possibilities to be promoted. However, the empirical analysis conducted does not yield conclusive evidence that judges arbitrate between discretion and wealth. This led Higgins and Rubin to state that their “results are mainly negative” (p. 137) and Rubin, referring later to this very article, to add that “[e]fforts to model or explain the behavior of such judges are notoriously unsuccessful.” (1983, p. 134).

Later in that year (1980), in the next issue of the *Journal of Legal Studies*, was published a paper by Landes and Posner entitled “Legal Change, Judicial Behavior, and the Diversity Jurisdiction”. As in Higgins and Rubin (1980), and as they had done in their previous works, Landes and Posner focused on judicial behavior as a means to reach a broader goal, namely to analyze the legal process and to demonstrate the efficiency of the Common Law system. More precisely, the authors try to make a further logical step in this debate: assuming that common law is efficient, the authors proposed a sort of exercise in

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<sup>25</sup> The authors refer to Rubin (1977), Priest (1977), Goodman (1978), Landes and Posner (1979).

comparative statics that “changes in economic conditions will lead to changes in common law” (1980: 367) and wished to find empirical evidence of such claim. However, after these premises, Landes and Posner justify their focus on judicial behavior by arguing that “in a common law system...the judge...is an important agent of legal change” (1980: 368). Thus, by contrast with their previous claims, judges were an important but not unique determinant of the evolutionary process.

As mentioned above, we believe that the narrow scope assigned to judges in the evolution of common law allowed opening new perspectives in the investigation of their decision-making process. In fact, the authors claimed that the answers found in the previous literature – among which also Posner’s works can be included, as we have seen – on judicial incentives and behavior, although not incorrect, had not pushed the debate forward. These works, to use Landes and Posner’s words, had not sufficient “explanatory power” (1980: 368). It was to complement, or even to supplement, such inconclusive results, that Landes and Posner explained that they wished to contribute “to the development of a theory of judicial behavior” (1980, p. 368).

Based on these premises, Landes and Posner built a model of judicial decision-making in which they assumed that judges are rational – now in the sense of maximizing their utility – which led them to explicitly make a parallel with how “ordinary” individuals behave. Anticipating what the title of Posner’s 1993 article, Landes and Posner wrote: “judges, like other people, are rational maximizers of their satisfaction” (1980, p. 369). This claim was then followed by an accurate specification (also in a formalized form) of such model. Judges are here depicted as sensitive to economic incentives related to potential career upgrades. As a consequence, Landes and Posner assumed that judges would respond to labor-related incentives, in terms of salary and tenure: the better working conditions in which judges operate, the better their performance (in terms of quality of their precedents). This hypothesis was then corroborated by an empirical analysis conducted on precedents produced by judges serving respectively in federal or state court.

Therefore, the first explicit formulation of a model, which will gain glory only thirteen years later, can be traced back to 1980<sup>26</sup>. However, it is worth emphasizing that the

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<sup>26</sup> Despite being published thirteen years before, this paper has just one tenth of Posner (1993)’s citations.

difference with Posner 1993 lies in the different reasons that motivated both papers. The motivation of the Landes and Posner 1980 paper still derives from the willingness of enriching the debate on legal change, once solved the problem of the efficiency of common law (Landes and Posner, 1979). The perspective is abandoned by Posner in his 1993 article. The focus has now been shifted to the behavior of judges in itself. Indeed, and by contrast with earlier works, Posner 1993 is almost entirely devoted to propose “a new, positive economic theory of judicial behavior” (1993a, p. 1). The reference to efficiency, as mentioned above, arrives only towards the end of the article. Yet, the process was not complete. Some further steps were necessary to emancipate completely the economic analysis of judicial conduct from the study of legal systems.

One last paper belongs to this phase of the debate: Robert Cooter’s “The Objectives of Private and Public Judges” (1983). As in Higgins and Rubin (1980) and Landes and Posner (1980), Cooter proposed in his article an economic theory of judicial behavior, which was still in some sense not completely autonomous from the necessity of linking judges’ decisions to the concept of efficiency. Even if he did not explicitly cited it in the paper, Cooter somehow continued the discussion started by Landes and Posner (1979) about the boundaries between the territory that ought to be assigned respectively to private (that is, arbitrators) and public judges. Although he realized that economic analysis is more suitable for private arbitrators, since they are more exposed to incentives, he believed that “public judges will behave much like private judges” (1983, p. 129). Also, Cooter admitted that public judges were much more constrained by the institutional “insulation” discussed above. But he nonetheless hypothesized that public judges maximize their own prestige, in the same way as private judges maximize their income. With this statement Cooter solved the original ambiguity that was at the beginning of Posner’s thought (see *supra* Section 2). Judges do not change their conduct according to the institutional setting: disinterested when constraints bind and self-interested otherwise. Public judges, just like their private colleague (or any body else, we claim in line with Landes and Posner, 1980 and Posner, 1993a), are rational and self-interested actors wishing to maximize their own personal utility. What changes is the scope of their maximization. When constrained by the legal system, judges will not be maximizing directly their income, but rather other non-pecuniary determinants of their utility such as leisure, prestige or power – that echoed, again, Landes and Posner, 1980, p. 369).

## 6. The final step: judicial decision making – a question in its own right

Thus, in substance, a Copernican revolution had already been initiated by the aforementioned papers. It now remains to explain why it was only in 1993 that the idea of judges as economic actors truly became established in the scholarly debate. As we have shown, all the “ingredients” had already been supplied by Posner and a few others. Why did it take a decade for this idea to gain wide (although still not unanimous) consensus? In this last section we aim to explain what we believe was still missing in the first half of the 1980s for this theory to successfully emerge on its own.

From the perspective of our story, 1992 is certainly an important year. On April 7, Coase delivered the Henry C. Simons Memorial Lecture at the University of Chicago Law School. The article, published one year later (1993) was entitled “Law and Economics at Chicago” – a title that summarizes quite well the object of the lecture and of the paper. In this article, certainly, Coase praised Posner for having “played the major role ... [i]n the development of the economic analysis of law or, as I prefer to put it, of the legal system” (p. 251) This laudatory comment came at the end of a paragraph in which Coase claimed that it was him who had been the first to “point out that the judges in their opinions often seemed to show a better understanding of the economic problem than did many economists even though their views were not always expressed in a very explicit fashion.” (p. 251) Posner, added Coase, “picked up what I had said about the judges and ran with it.” (p. 251) Coase was right and wrong. Indeed, as seen above, judges played an important role in his analysis but to present Posner as a follower who *picked up what Coase had said* seems a bit of an exaggeration: Posner’s work on judges is of a different nature than Coase’s. As William Domnarski wrote, “Posner might have been surprised by Coase’s lecture” (2016, p. 68). Later that year, in autumn, as always, Becker was awarded the Nobel Prize in economics. He was one among many other economists from Chicago who had received the prestigious prize before him – Friedrich Hayek (1974), Milton Friedman (1976), Theodore Schultz (1979), George Stigler (1986), Merton Miller (1990), Coase (1991) and Robert W. Fogel in 1993 to whom one could add Buchanan in 1986. It is hard to tell whether or not the prize affected the image Chicago had in the public and in the discipline. But it was certainly important for the type of economic analysis of law Posner had been promoting since the early 1970s.

Coincidence or causality, it is when Posner wrote three articles – all published in

1993: the one on judges (1993a), an article about Becker (1993b) and one about Coase (1993c). What is interesting is not only that Posner praised Becker on one hand and criticized Coase on the other, but also the reason for which Posner praised Becker: for having played a major, indeed decisive, role in the “law and economics movement”. This is important because, until that date, Posner had always presented Coase as one of the founders of law and economics (see for instance 1975). He was changing his mind. Becker, and, for that matter, Bentham, was the founder of the movement.

The main reason for which Becker was particularly important for the law and economics movement was his methodology – this echoed the criticisms precisely leveled by Posner against Coase because of his flawed methodology. Indeed, Becker was the one who had claimed that economics should be viewed as an approach, as a method that could be used to analyze any kind of behavior or social phenomena – economic theory “applies to both market and nonmarket decisions” (Becker 1971, p. viii) or “the economic approach is clearly not restricted to material goods and wants, nor even to the market sector” (Becker 1976, p. 6). Now, that behaviors on explicit as well as on implicit markets could be analyzed by adopting the same economic approach implied that the same assumptions could be used in both cases. To put in other words, this meant that the assumption that individuals are rational could be transposed to non-market activities and behaviors. This is exactly what Posner stressed about Becker:

“More than any other economist in the history of the profession, with the possible exception of Bentham, Becker has insisted that the model of rational choice can be applied to all social behavior ... Gary Becker ... has demonstrated through his work how it is possible to model nonmarket behavior in ways that while maintaining the assumption of rationality explain patterns of behavior and generate empirically testable implications.” (1993b, p. 213)

Thus, Posner replaced Coase by Becker as the founder of the law and economics movement precisely because the latter had adopted a behavioral assumption that the former had refused to adopt. And, as if to make his point clearly, Posner published his article on judges the very same year.

However, we believe that some “hard evidence” of the utility maximization process on the side of judges was still missing. Since the very beginning, Posner and the other scholars we have been talking about had uniquely focused on US federal judges. This narrow perspective had some downsides. In this jurisdiction, the regulatory environment had

(more or less) succeeded to isolate judges from the canonical incentives that might influence judges' behavior. The criticism raised by a part of legal scholarship (Epstein, 1990) reflected this situation: at best this approach constituted a rather useless academic exercise. In this sense, even the evidence supplied by Landes and Posner (1980) was not conclusive. First of all, in that paper the authors were not directly testing how judges maximize their utility, but rather how judicial performance – in terms of precedents' productions – responds to incentives in the form of better work conditions (better salary or tenure length). At the same their analysis did not constitute an ideal empirical design to isolate such effect, since it was not possible controlling for every possible other factor that could have a role in precedents' production. In other words, studying judges belonging to different jurisdictions (with different working conditions), but deciding on different issues, could not supply conclusive evidence.

The “smoking gun” was found in 1988. In that year an exogenous event set the premises for a natural experiment to be exploited by scholars: the Federal Sentencing Guidelines. In 1984 US Congress established the US Sentencing Commission, an independent body with the task of writing “guidelines” for federal judges' criminal decisions. The main objective of this reform was to make criminal sentencing more predictable and thus limit the discretion of judges. The guidelines were enacted on November 1987. As a response to this threat to judicial independence, over 200 district court judges ruled on the constitutional legitimacy of the guidelines between January and June 1988. This set the ideal premises for a natural experiment: a sufficiently vast number of judges belonging to the same jurisdiction, but characterized by different personal situations, ruling on the exact same issue in a rather short timespan.

Mark Cohen was the first to exploit this opportunity with “Explaining Judicial Behavior”, an article published in 1991. In this sense, it is ironic to highlight how the first successful attempt to find empirical evidence of judges' utility maximization derived from a context in which judges were reacting to a reform intended to limit their discretion. The author starts with a statement from the 1986 edition of Posner's “Economic Analysis of Law” and embraces the idea that judges are maximizing their utility and that “at the margin, judges are likely to act in ways to promote their own self-interest” (1991, p. 184). However, Cohen does not develop a general theory, but rather focuses over precise judge-specific factors that might influence judicial decisions: reputation among peers, career opportunities or workload



magnitude. The added value of his work relies on the fact that he was then able to test his hypotheses in an ideal situation: since all judges were ruling on the same issues, differences in their decisions might be more easily ascribed to the incentives they were subject to. For example, he predicted that a judge with greater promotion potential would be more likely to rule a decision that could favor her chances of professional upgrade. His estimates allowed him to conclude: “some further evidence has been provided that the utility maximizing framework is useful in analyzing judicial behavior” (1991, p. 198).

At this point all the pieces were in the right place. Judicial conduct was no more considered as instrumental to the promotion of efficiency, but instead raised to an autonomous topic of research. Also, the criticisms raised especially by legal scholars had been refuted by empirical evidence. The times were ready for Posner, who meanwhile was appointed chief-justice of the seventh circuit US court of appeal, to write his paper.

## **6. Conclusion/Summary**

The objective of this paper was to analyze how the assumption that judges are rational, self-interested, utility maximizers was introduced in economic analyses of the law or, put another way, to show how economic analyses of the law gave a vision of justice, of the judicial systems, without romance. Usually, it is assumed that this occurred quite late after economic analysis was first used to understand how the judicial system works. This raises the question of why would economists have waited 20 years before eventually made an assumption that Public Choice theorists had used immediately, in the very first works devoted to politics. In fact, we demonstrate that this assumption was also, as in Public Choice, concomitant to the birth of an economic analysis of law. However, by contrast with Public Choice, it was not introduced to understand why legal systems fail but, on the contrary, why they are efficient. In our analysis, we also show that rationality did not immediately take the form of “utility maximization”. It is only progressively that economists came to associate the rationality of judges with utility maximization. The process took some time. Posner was at the origin and at the end of it. He was the first to introduce the assumption that judges are rational and then the one who wrote the paper that made the assumption visible. Yet, he was not the first to assume that judges are rational utility maximizers.

## References

- Becker, Gary S. 1968. "Crime and Punishment: An Economic Approach." *Journal of Political Economy* 76 (2): 169–217.
- Becker, Gary S. 1971. *Economic Theory*. New York: Alfred Knopf.
- Becker, Gary S. 1976. *The Economic Approach to Human Behavior*. Chicago: The Chicago University Press.
- Bonner, John T. 1975. Review of "Sociobiology: The New Synthesis." *Scientific American*, 233 (October), 129-137.
- Buchanan, James M. 1979. "Politics without romance: A sketch of positive public choice theory and its normative implications", inaugural lecture, Institute for Advanced Studies, Vienna, Austria. *IHS Journal, Zeitschrift des Instituts für Höhere Studien* 3: B1–B11.
- Calabresi, Guido. 1961. "Some Thoughts on Risk Distribution and the Law of Torts." *Yale Law Journal* 70 (4): 499-553.
- Coase, Ronald H. 1960. "The Problem of Social Cost." *Journal of Law & Economics*, 3 (October): 1-44.
- Coase, Ronald H. 1978. "Economics and Contiguous Discipline." *Journal of Legal Studies* 7 (2): 201-211.
- Coase, Ronald H. 1993. "Law and Economics at Chicago." *Journal of Law and Economics* John M. Olin Centennial Conference in Law and Economics at the University of Chicago 36 (1) Part 2: 239-254.
- Coase, Ronald H. 1996. "Law and Economics and A. W. Brian Simpson." *Journal of Legal Studies* 25 (1): 103-19.
- Coase, Ronald H. 2012. *Saving Economics from the Economists*. Available at: <http://hbr.org/2012/12/saving-economics-from-the-economists>.
- Coase, Ronald H. and N. Wang. 2013. 'A New Journal from the Ronald Coase Institute'. Available at: <https://thinkmarkets.wordpress.com/2013/07/24/a-new-journal-from-the-ronald-coase-institute>.
- Cohen, Mark A. 1991. "Explaining Judicial Behavior or What's 'Unconstitutional' about the Sentencing Commission?" *Journal Law, Economics, and Organization* 7(1): 183–199.

- Cooter, Robert & Lewis Kornhauser. 1980. "Can Litigation Improve the Law without the Help of Judges?" *Journal of Legal Studies* 9 (1): 139-163.
- Cooter, Robert D. 1983. "The Objectives of Private and Public Judges." *Public Choice* 41(1): 107-132.
- Domnarski, William (2016). *Richard Posner*. Oxford University Press.
- Downs, Anthony, William M. Landes, Simon Rottenberg and Richard B. Hoffman. 1969. "Round Table on Allocation of Resources in Law Enforcement", *American Economic Review*, 59 (2, May) pp. 504-512.
- Downs, Anthony. 1957. *An Economic Theory of Democracy*, Harper & Row.
- Ehrlich, Isaac 1973 "Participation in Illegitimate Activities: A Theoretical and Empirical Investigation." *Journal of Political Economy* 81 (3), pp. 521-565.
- Ehrlich, Isaac. 1972. "The Deterrent Effect of Criminal Law Enforcement." *Journal of Legal Studies* 1 (2), pp. 259-276.
- Epstein, Richard A. 1990. "Independence of Judges: The Uses and Limitations of Public Choice Theory." *Brigham Young University Law Review* 827-50.
- Fleury, Jean-Baptiste. 2015. "Massive Influence with Scarce Contributions: the rationalizing economist Gary S. Becker, 1930-2014." *European Journal of Law and Economics*, 39 (1):3-9.
- Fleury, Jean-Baptiste. 2019a. "Becker, Gary S." In: Marciano A., Ramello G.B. (eds) *Encyclopedia of Law and Economics*. Springer, New York, NY.
- Fleury, Jean-Baptiste. 2019b. "Crime and Punishment (Becker 1968)." In: Marciano A., Ramello G.B. (eds) *Encyclopedia of Law and Economics*. Springer, New York, NY.
- Ghiselin, Michael T. 1974. *The Economy of Nature and the Evolution of Sex*, Berkeley, University of California Press.
- Goodman, J. C. 1978. "An Economic Theory of the Evolution of Common Law", *Journal of Legal Studies* 7 (2): 393-406.
- Harnay, Sophie and Alain Marciano. 2009. "Posner, Economics and the Law: From law and economics To an economic analysis of law", *Journal of the History of Economic Thought* 31 (2): 215-232.
- Higgins, Richard S. and Paul H. Rubin. 1980. "Judicial Discretion", *Journal of Legal Studies*,

9 (1), pp. 129-138.

- Hovenkamp, Herbert. 1990. "The First Great Law and Economics Movement." *Stanford Law Review* 42 (4): 993-1058.
- Kau, James B. and Rubin, Paul H. 1979. "Self-Interest, Ideology, and Logrolling in Congressional Voting." *Journal of Law and Economics* 22 (2): 365-374.
- Landes, William M. 1967. The Effect of State Fair Employment Laws on the Economic Position of Nonwhites, *American Economic Review*, 57 (2, May), 578-590.
- Landes, William M. 1968. The Economics of Fair Employment Law, *Journal of Political Economy*, 76 (4), 507-552.
- Landes, William M. 1971. "An Economic Analysis of the Courts." *Journal of Law and Economics* 14 (1): 61-107.
- Landes, William M. and Richard A. Posner. 1975. "The Independent Judiciary in an Interest-Group Perspective", NBER Working Paper No. 110 (October).
- Landes, William M. and Richard A. Posner. 1979. "Adjudication as a Private Good", *Journal of Legal Studies*, 8(2), 235-284.
- Landes, William M. and Richard A. Posner. 1980. "Legal Change, Judicial Behavior and the Diversity Jurisdiction", *Journal of Legal Studies*, 9(2), 367-386.
- Marciano, Alain. 2012. "Guido Calabresi's Economic Analysis of Law, Coase and the Coase theorem." *International Review of Law and Economics*, 2012, 32 (1), pp. 110-118.
- Marciano, Alain. 2016. "Economic Analysis of Law." In: Marciano A., Ramello G. (eds) *Encyclopedia of Law and Economics*. Springer, New York, NY, [https://doi.org/10.1007/978-1-4614-7883-6\\_598-1](https://doi.org/10.1007/978-1-4614-7883-6_598-1).
- Marciano, Alain and Giovanni Ramello. 2014. "Consent, Choice and Guido Calabresi's Heterodox Economic Analysis of Law." *Law & Contemporary Problems*, 77(2), 97-112.
- Marciano, Alain and Giovanni Ramello. 2018. Cesare Beccaria: back to the future of law and economics, special issue, *European Journal of Law and Economics* 46 (3).
- Niskanen, William N. 1968. "The Peculiar Economics of Bureaucracy." *American Economic Review*, Papers and Proceedings of the Eightieth Annual Meeting of the American Economic Association 58(2): 293-305.
- Posner, Richard A. 1971a. "Taxation by Regulation." *Bell Journal of Economics and*

- Management Science* 2 (1): 22-50.
- Posner, Richard A. 1971b. "Killing or Wounding to Protect a Property Interest." *Journal of Law and Economics* 14 (1): 201-32.
- Posner, Richard A. 1972a. "A Theory of Negligence." *Journal of Legal Studies* 1 (1): 29-96
- Posner, Richard A. 1972b. "The Behavior of Administrative Agencies." *Journal of Legal Studies* 1 (2): 305-47.
- Posner, Richard A. 1972c. "Volume One of 'The Journal of Legal Studies': An Afterword." *Journal of Legal Studies* 1 (2): 437-40.
- Posner, Richard A. 1973a. *Economic Analysis of Law*. Boston and Toronto: Little, Brown and Company, 1986.
- Posner, Richard A. 1973b. "An Economic Approach to Legal Procedure and Judicial Administration." *Journal of Legal Studies* 2 (2): 399-458.
- Posner, Richard A. 1975. "The Economic Approach to Law." *Texas Law Review* 53 (XX): 757-82.
- Posner, Richard A. 1993a. "Gary Becker's Contributions to Law and Economics." *Journal of Legal Studies* 22 (2): 211-215.
- Posner, Richard A. 1993a. "What Do Judges and Justices Maximize? (The Same Thing Everyone Else Does)." *Supreme Court Economic Review* 3, 1-41.
- Posner, Richard A. 1993c. "Nobel Laureate: Ronald Coase and Methodology." *Journal of Economic Perspectives* 7 (4): 195-210
- Priest, George L. 1977. "The Common Law Process and the Selection of Efficient Rules", *Journal of Legal Studies* 6 (1): 65-82.
- Priest, George L. 1980. "Selective Characteristics of Litigation", *Journal of Legal Studies, Change in the Common Law: Legal and Economic Perspectives* 9 (2): 399-421.
- Rubin, Paul H. 1973. "The Economic Theory of the Criminal Firm." In Simon Rottenberg (Ed.), *The Economics of Crime and Punishment* (pp. 155-166). Washington, DC: American Enterprise Institute.
- Rubin, Paul H. 1977. "Why Is the Common Law Efficient?" *Journal of Legal Studies* 6 (1): 51-63.
- Rubin, Paul H. 1980. "Predictability and the Economic Approach to Law: A Comment on

- Rizzo”, *Journal of Legal Studies*, Change in the Common Law: Legal and Economic Perspectives, 9 (2): 319-334
- Rubin, Paul H. 1982. “Common Law and Statute Law.” *Journal of Legal Studies* 11 (2): 205-223
- Rubin, Paul H. 1999. “Judge Made Law”, in B. Bouckaert and G. de Geest (eds), *Encyclopedia in Law and Economics*, Cheltenham, Elgar, pp. 543-558.
- Schauer, Frederick. 2000. “Incentives, Reputation, And The Inglorious Determinants Of Judicial Behavior.” *University of Cincinnati Law Review* 68(3):615-636.
- Stigler, George J. 1992. “Law or Economics?” *Journal of Law & Economics* 35 (2): 455-468.
- Terrebonne, R. P. (1981). “A Strictly Evolutionary Model of Common Law.” *Journal of Legal Studies* 10 (2): 397-407.
- Wilson, Edmund O. 1975. *Sociobiology: The New Synthesis*, Harvard University Press.