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Justice without romance.

The history of the economic analyses of judges behavior[1]

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Abstract

Richard Posner's "What Do Judges and Justices Maximize?" (1993) is usually viewed as the first analysis of judges' behaviors made by using the assumption that judges behave as rational utility maximizers. In this paper we show that Posner's article is not the beginning of a new stream of analyses but represents the end of a maturation process that started in the 1970s. We propose a history of the economic analyses of judicial decision showing how Posner actually introduced incentives to link the behavior of judges and the efficiency of Common Law in the early 1970s and that this then gave birth to the first articles on judicial behavior. Then, the controversy led Posner, and for that matter other economists, to postpone his analysis until the evolutionary approach had given a justification of efficient legal change independent of judicial conduct. But, in the 1990s, the situation had changed. New and conclusive evidence of judges' utility maximizing behavior demanded for a general theory to be expressed. The context was even more favorable to the economists of Chicago and to the imperialism of economics, thus supplying Posner the opportunity to publish his article.

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Introduction

Public Choice – or the economic analysis of politics – is known for having given a vision of "politics without romance" because it replaced the "romantic and illusory set of notions about the workings of governments … with more realistic notions" (Buchanan 1979). This expression covers 2 aspects. The de-romanticization of politics is first supposed to result from the fact that politics was no longer be viewed as a means to satisfy a sort of public interest but rather "as a set of arrangements, a game if you will, in which many players with quite disparate objectives interact so as to generate a set of outcomes that may not be either internally consistent or efficient by any standards" (Buchanan 1979). Indeed, public choice is a theory of government failure – as Buchanan explained, "politics without romance" means that governments fail and it is the role and object of public choice to study those failures (Buchanan 1983: 8). The second, and related, aspect of the de-romanticization of politics refers to the abandon of the "the romantic image of the benevolent despot" (Buchanan 1986). With public choice, politicians and bureaucrats were viewed "as ordinary persons much like the rest of us" (Buchanan 1979). Thus, as a consequence, their behavior could be investigated by assuming that they are rational self-interested utility maximizers. This assumption was concomitant and even constituent to – indeed, the very *raison d'être* of – public choice.

Politics was not the only domain of activity that was analyzed with economic models. The legal system was another one. From this perspective, the economic analyses of law that started to develop at the end of the 1960s and in the early 1970s can also, as it is the case with public choice, be viewed as having contributed to de-romanticize the judicial system or, to echo Buchanan, to give a view of justice without romance – an expression that has, to our knowledge, never been used before. Not only did these consequentialist economic analyses of legal phenomena focus on efficiency,

instead of justice, as a criterion that should be used to evaluate legal rules but they also, as with public choice theories, started with the assumption that actors are rational self-interested utility maximizers. But, when was this assumption about how judges – like politicians and bureaucrats – behave introduced? Or, to paraphrase Buchanan once again, when was the romantic image of the benevolent judge abandoned? Was it also, as with public choice, at the origins of economic analyses of law? Was it introduced later? These are the questions we discuss in this paper. More precisely, our objective is to propose a history of how economics was applied to judicial decision making and to judicial behavior.

Parts of this history may already be known but the history remains incomplete and, according to us, misleading. What is known is that, in the early 1970s, Richard Posner's *Economic Analysis of Law* (1972) somehow opened the door for a possible economic analysis of judicial behaviors. Indeed, Posner's book demonstrated that economics could be used to reach "the very heart of the legal system" (Manne 1993), to analyze the working of the legal system. It also seems that Posner had in mind that economics should be used to analyze judicial behaviors (Harnay and Marciano 2009; 2011). However, what is also usually omitted is that the assumption that judges are rational self-interested utility maximizers was not introduced in those years in 1993 only, in Posner's significantly entitled article "What Do Judges and Justices Maximize? (The Same Thing Everyone Else Does)". Then, the paper imposed itself as a turning point in the economic literature on judges. Before Posner, the "pervading" (Schauer, 2000: 615) view was that judges were disinterested and motivated only by the general interest. Posner challenged this view and his article became by far the most cited paper dealing with this topic[2]. It is now so (in)famous that many scholars refer to it as if it was the first published paper to propose an economic analysis of judicial behavior and, as a corollary, as if Posner was the first to adopt an economic perspective on judicial behavior (among many, see

[2] Almost 800 citations achieved by October 2015 (source: Google Scholar).

Schauer, 2000: 615; Heise, 2002: 841). Thus, it is as if the economic analyses of judicial decision making started in 1993 with Posner's paper – 25 years after the assumption that criminals are rational had been introduced by Gary Becker in his article on "Crime and Punishment" (1968), 20 years after Posner's *Economic Analysis of Law* was published and more than 30 years after the assumption that politicians are rational was made by public choice theorists.

In this paper, we challenge this view. Our argument is that Posner's "What do Judges and Justices Maximize" does not represent the beginning of a new era – in which the *homo œconomicus* sits on benches and "romance" disappeared from courtrooms– but rather the end of a maturation process that found its inception earlier and in which many economists, and legal scholars, participated. We show that the first models using the assumption that judges are rational were proposed in economic analyses of the law in the late 1960s/early 1970s, exactly when the field was born. In addition, we also show that the first economic models of judicial decision-making were not developed per se but were the results or, more properly, the collateral by-products of analyses intended to shed light on the efficiency of legal systems, the Common Law ones in particular. Thus, by contrast to what happened with Public Choice theory, the assumption that judges are rational and self-interested was not introduced and used to evidence some failures but to prove a success. We analyze this maturation process and identify the different contributors and also the various steps they took that led, by trial and error, to the publication of Posner's article in 1993.

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

The de-romanticization of politics started at the end of the 1950s and in the early 1960s when the first economic analyses of politics were published (Downs 1957a,1957 b; Black, 1958; Schelling, 1960; Buchanan and Tullock, 1962; or Riker, 1962). The assumption that politicians are rational, self-interested and maximizers was central, a means to legitimate the analyses.

At about the same period, were published the first 2 articles that mark the beginning of

"new" or "modern" law and economics[3]: "The Problem of Social Cost" by Ronald Coase, in 1960 and in 1961, "Some Thoughts on Risk Distribution and the Law of Torts" by Guido Calabresi[4]. And, one must note, in these 2 articles judges played a central role. Also of importance, they were presented as making *efficient* decisions – in the sense that they make decisions that correspond to what economic theory said that they should have done. To Coase, there was no doubt "that the courts 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: 19). He insisted that, at least "from time to time" (1960: 19) judges think "of the economic consequences of alternative decisions" (1960: 20) and "take these economic implications into account, along with other factors, in arriving at their decisions" (1960: 19). For his part, Calabresi explained that the judges who in the 19th century had chosen to apply a principle of fault liability had understood – in a "rough and ready, noneconomist's, way" (1961: 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" (1961: 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." (1961: 517)

However, neither Coase nor Calabresi entered into the details of how judges did make their decisions, nor analyzed judicial behavior. For Coase, the explanation is mainly methodological, and has to do with his conception of law and economics. Indeed, Coase's objective was to understand the working of the economic system, a point he repeatedly stressed[5], rather than to analyze the

[3] 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 was eventually viewed as one of the founding articles in law and economics. And his author has been granted the "title" of "founding father of the law and economics movement" by the American Law and Economics Society in 1991.

[4] Both articles were published in 1961. The publication of the 1960 issue of the *Journal* of *Law and Economics* was delayed.

[5] Coase explained that his interest in law and economics was that of "an economist" (see, for instance, Coase in Epstein et al. 1997, 1138). He wrote: "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

functioning of the legal system, the origins of rules or judicial decision making. To use Coase's own words, in law and economics, economists "study … legal cases both to learn about the details of actual business practices (information largely absent in the economics literature), and to appraise the impact on them of the law." (1996, 104) He looked for judicial decisions to illustrate an economic claim – namely that his claim that efficiency, when there are nuisances, damages or harmful effects, is a matter of reciprocity: "I (and no doubt others) have used the legal cases to illustrate the economic problem" (1996, 104). In other words, judges' decisions were important because of the influence they would have an economic activities but not as "objects" of analysis.

They were not an object of analysis for Calabresi either, even though he was using economics to analyze a legal problem[6], that is a kind of analysis that could have allowed him to analyze judicial behavior. But, Calabresi was trying 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 and was convinced that judges 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: 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, 515). This assumption could not be used to model the behavior of workers or

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did not press beyond this" (1988, 35; see also 1960, 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, 250).

[6] 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" (Calabresi 1961, p. 500) caused by accidents. As we noted elsewhere, "Some Thoughts" bore only indirectly on liability (Marciano and Romaniuc, 2015, 10).

motorists. Why could it be applied to judges?

A (very) few economists nonetheless reasoned differently and did consider that such “legal” behaviors could really be studied with economic tools. It was the case of Harold Demsetz (1964) or Simon Rottenberg (1965), to start with. None of them hesitated to assume that individuals behave as self-interested, rational utility maximizers. 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, damages, could be prevented if individuals were made to pay for the costs their behavior impose on others (1965). Interestingly enough, 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, 110). But it was only to emphasize that judges and juries rely 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.). Thus, he 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, which was, let us insist, the first to assume that individuals choose to commit a crime by making a cost-benefit calculus[7]. In particular, the decision to commit a crime 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 added, in a 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” (1968: 176), and he also added that “judges or juries may be unwilling to convict offenders if punishments are set very

[7] 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).

high." (1968: 184) Thus, he admitted that how judges decide can have, at least indirectly, an impact on how criminals behave. But, as with Rottenberg, Becker did not try to see how one might explain why certain judges or other individual involved in the process of conviction could decide differently than others. No more than Coase, Calabresi or Rottenberg, did Becker look into how judges could decide to convict criminals. This is all the more surprising that that, obviously, how individuals are convicted, if they are convicted, not only affects the decision to commit a crime but also the efficiency of the legal system – and this is precisely what Becker was trying to do in his article: to model how criminals behave as well as to determine "how many resources and how much punishment should be used to enforce different kinds of legislation" (Becker, 1968, 170). Isaac Ehrlich, one of Becker's students who was working on illegitimate activities adopted the same kind of approach, did not distinguish either between apprehension and conviction and did not discuss the behavior of judges and judicial decision making.

The first to discuss the behavior of one of the actors of the enforcement side of the law in terms of rational behavior was William Landes, another of Becker's students[8]. Actually, to be more precise, Landes followed Becker's and Ehrlich's, or even Rottenberg's, path. He did not assume that judges behaviors 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. This interest in prosecutors came from his dissertation on the impact of fair employment laws on the wellbeing of discriminated nonwhites (Fleury, 2014, 13), 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 remembers that he was looking for topics that could be usefully analyzed with the expected utility model[9]. He read a newspaper article on plea

[8] More precisely, Landes wrote his dissertation under Becker's and Jacob Mincer's supervision at Columbia.

[9] Personal communication to Alain Marciano, November 25, 2015.

bargaining that pointed out that less than 10 percent of criminal cases went to trial[10], and found that this phenomenon could be expected by using the same framework – expected utility theory – as in his dissertation. The preliminary version of the paper was presented in 1967 to the labor workshop at the University of Chicago, and then, more importantly, at a "Round Table on Allocation of Resources in Law Enforcement" during the 81st annual meeting of the American Economic Association before being published under 2 versions (1969 and, under the title "An Economic Analysis of Courts", in 1971).

Analyzing "the conditions under which a pretrial settlement or trial will take place" (Landes 1969, 505), Landes made 2 assumption. 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 assumption Landes made about prosecutors. Let us emphasize here 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 as well be viewed as bureaucrats as they can be viewed as lawyers[11]. Even if, in those years, economic analyses of bureaucratic behaviors were still in their infancy, the idea that bureaucrats are rational was in the air since the origins of public choice at the end of the 1950s. This may explain why Landes did not hesitate to assume that prosecutors maximize a utility function under resources constraints. More precisely, the utility of prosecutors is assumed to depend on "the expected number of convictions weighted by their respective S[entences]" (Landes 1971: 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, one may "predict charges would be dismissed when the prosecutor sees little chance of conviction

[10] Personal communication to Alain Marciano, November 25, 2015.

[11] 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 in1968.

regardless of his resource input into the trial, or given a conviction he expects a negligible sentence." (Landes 1971: 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 the prosecutor can devote to the cases. But this does not mean that these rational decisions may be detrimental to the society. On the contrary, rational decision 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." (Landes, 1971: 63) Indeed, a sentence is the price "the community charges for various offenses" (Landes, 1971: 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" (1971: 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. In 1971, 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: 22)12. Following Becker, he started to emphasize that economics should be viewed as a "tool" (1971c: 202)13. Precisely, one of the first application of

[12] Later, he insisted again: "an economic approach to law" means "applying economics to law" (1975: 37). Or that an "economic approach to law" can be viewed as "an applied field of economics" (1988: 929).

[13] He repeated this claim about economics as a tool many times, describing economics as "a powerful tool" (1973a: 3) and speaking of the "powerful tool of economic theory" (1973b: 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: 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.

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 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: 223). On the other, Posner assumed the rationality of individuals involved in the decision process and, among them, judges.

It was thus stated for the first time 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. The fact that judges “are guided by concern with economic efficiency” (1971c: 223) and “think in economic terms” (1971c: 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.” (1971c: 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.” (1971c: 211)

In 1972, Posner gave more precise and deeper presentations of his claim. 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", Posner explains "Judge Learned Hand's famous formulation of the negligence standard" (1972a: 32) and advances 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." (1972a: 32)

And concluded that "Hand was adumbrating, perhaps unwittingly, an economic meaning of negligence." (Posner 1972a: 32). Hand was not only speaking of the economic content of a liability rule. He was also stressing that judges should make their decisions by comparing the costs and benefits of each option. He was, in other words, emphasizing that judges should promote efficiency. And this is also what Posner stressed in the very first edition of "Economic Analysis of Law" (§ 23.1), in which he insisted that one can "*assume* that judges make their decision in accordance with the criterion of efficiency" (1973a: 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." (1973a: 326)[14].

Thus, Posner's primary goal was to demonstrate that the Common Law system is efficient. But Posner could not simply *state* the efficiency of the Common Law. He had also to explain it in order to give his claim a certain credibility. Now, since judges are the main source of legal change in Common Law systems[15], Posner naturally involved judges in the discussion and he came to discuss the role of judges and to analyze their behavior. In other words, Posner's analyses of judges' behavior were a by-product of Posner's primary interest in the efficiency of the legal system. Then, once this had been done, Posner had also to explain why judges are biased towards efficiency. Posner then

[14] 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 know, 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.

[15] Later he would have defined judges as the "central actors in the drama of the common law" (1993: 2)

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: 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" (1973a: 325), but denied that it could be the case with judges. He spoke of "the aloof disinterest of the judge" (1973: 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" (1973a: 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" (1973a: 322). But he also added that, in certain circumstances, when "constraints are loose" (1973a: 326), judges may act "as agents for carrying out the desires of the dominant political authority" (1973a: 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 2 types of behaviors, self-interested and 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. Their goal, did he write, "is assumed to be to

maximize the utility of its law-enforcement activity" (1972b: 305)[16], which is 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, thus 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, Posner became free to solve the puzzle behind judges' decision-making.

4. Evolutionist analyses and new views on judicial decision making

Thus, following Landes and Posner, it appears that prosecutors – before trials – and judges – during the trial – both contribute to the efficiency of the legal system. The difference between Landes and Posner was that the former did not focus on the efficiency of the system, that was a consequence of a rational behavior, while the latter did. Posner's concern was primarily that of the efficiency of the Common Law and not how judges actually behave. This left a gap between a behavioral assumption – judges are biased towards efficiency – and a conclusion – the Common Law is efficient – that could led to a certain disappointment. At least, this is what Paul Rubin wrote. To him, Posner

[16] Obviously and surprisingly, Posner treated those agencies as "individuals" analyzing the behavior of a group by using assumption usually applied to individuals.

> "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: 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, what was important to demonstrate was 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 his article about "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 own claims about the severity of punishment[17]. At the same time, this claim gave less credence to Landes' 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

[17] 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: 176).

behave and the impact that it could had on the individuals' participation in illegal. Obviously, criminal activities were not supposed to depend on how the law is applied. What matters is the amount of resources spent on the apprehension of criminals, that is on police activities. Judges were not central at all in these models on deterrence.

The analysis that Rubin is going to develop on the efficiency of the common law extends this reasoning: the common law system does not really need judges to be efficient. But, how could it be possible to explain the tendency of the legal system towards efficiency without making room to the actors that were, according to Posner, particularly importance? 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 Edward Wilson's *Sociobiology* (1975). And it happened that Rubin read a review of *Sociobiology* published in "Scientific American" that incited to read the book that then lead him to biology[18]. 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: 205)[19]. 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. And this is exactly what was put forward in the literature Rubin's article gave birth to.

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[18] Personal communication to Alain Marciano, November 19, 2015.

[19] 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).

The common argument is 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 became known as "selective litigation" and claimed that the result of the Common Law process depends on the behavior of litigants[20]. However, as a corollary, this thesis removed judges from the central role Posner had given them. Indeed, 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: 72; Cooter and Kornhauser 1980: 140) or "decide cases randomly" (Goodman 1978: 394). Thus, as an unsurprising consequence, those analyses do not provide any insight regarding an economic analysis of judicial decision-making. Goodman, for his part, claims that "no particular assumption about the motivation of judges (judges may be initially neutral with regard to the issue of economic efficiency)" (1978: 394) ought to be formalized. And, as Cooter and Kornhauser made it clear, commenting assumptions[21] that were considerably reducing "the insight and learning ability of the judiciary" (1980: 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: 143).

The reason why we linger on this debate, seemingly deviating from our initial focus, is that we believe it was crucial in the evolution of Posner's thinking. In fact, in 1979, Landes and Posner

[20] 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.

[21] 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 "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)." (Cooter and Kornhauser 1980 142)

publish 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 inquiry on 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” (1979:240), while at the same time they claim that judges “do not automatically generate efficient rules” (1979: 284). Landes and Posner equally supply 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” (1979: 244). They claim 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” (1979: 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 stress 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” (1979: 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 motivating legal change with 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 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 (1993) were made. Posner and others pushed the debate into considering explicitly judges as

self-interested 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. On the one side, these papers now place judges at center of attention by explicitly considering incentives from an economic perspective, while in Posner (1973a) the idea was just sketched. However, differently from the ending in our history of the economics of judicial behavior (Posner, 1993), 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's paper on "Judicial Discretion" is the first one to explicitly consider as a working hypothesis the idea that "judges maximize a utility function" (1980: 130). They conceive their work as a sort of reply to the previous "evolutionist" papers[22]. More specifically they introduce the idea of judicial maximization by comparing long and short considerations with respect to legal process. Specifically, they claim 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" (1980:130). Higgins and Rubin thus still conceive their model of judicial behavior as a derivation 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 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: 130-131) but do not want to be overruled and are averse to

[22] Specifically, the authors refer to Rubin (1977), Priest (1977), Goodman (1978), Landes and Posner (1979).

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 conclude, "[t]he results are mainly negative" (1980: 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: 134).

Later in that year (1980), in the following issue published by the *Journal of Legal Studies*, Landes and Posner published a paper entitled "Legal Change, Judicial Behavior, and the Diversity Jurisdiction". As in Higgins and Rubin (1980), also this paper, although focusing on judicial behavior, finds its motivation in the legal process. More precisely, the authors try to make a further logical step in this debate: assuming that common law is efficient, the authors hypothesize in a sort of comparative statics exercise that "changes in economic conditions will lead to changes in common law" (1980: 367) and wish to find empirical evidence of such claim. However, after these premises, Landes and Posner justify their focus on judicial behavior since "in a common law system…the judge…is an important agent of legal change" (1980: 368). Differently from the previous phase in which efficiency in legal change was fostered by judicial action, now judges are one important, but not unique, determinant of such evolutionary process.

As mentioned above, we believe that the narrower 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 claim that the answers supplied by previous literature (among which also Posner's previous works can be included, as we have seen) on the topic of judicial incentives and behavior, although not incorrect, were not pushing the debate forward: using their own words, had not sufficient "explanatory power" (1980: 368). As a response to such inconclusive results, the authors wish to contribute "to the development of a theory of judicial behavior" (1980: 368).

The consequence of these premises is a model of judicial decision-making in which it is

assumed that "judges, like other people, are rational maximizers of their satisfaction" (1980: 369). Not only Landes and Posner made such an explicit statement, but 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. Consequently, they hypothesize 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). Hypothesis then corroborated by an empirical analysis conducted on precedents produced by judges serving respectively in federal or state court.

Accordingly, the first explicit formulation of a model, which will gain glory only thirteen years later, can be traced back to 1980[23]. However, it is worth emphasizing that the difference between this work and Posner (1993) lies in the different motivations behind the two papers. The motivation of the 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). On the contrary, Posner (1993) is entirely devoted to propose "a new, positive economic theory of judicial behavior" (1993: 1). We believe that some further steps were necessary in order 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: Cooter (1983) "The Objectives of Private and Public Judges". As in Higgins and Rubin (1980) and Landes and Posner (1980), also this paper formulates an economic theory of judicial behavior, which is still in some sense not completely autonomous from the necessity of linking judges' decisions to the concept of efficiency. Although not explicitly citing it in the paper, Cooter somehow continues the discussion started by Landes and Posner (1979) about the boundaries between the jurisdiction that ought to be assigned respectively

[23] Despite being published thirteen years before, this paper has just one tenth of Posner (1993)'s citations.

to private (that is, arbitrators) and public judges. Although he realizes that economic analysis is more suitable for private arbitrators, since they are more exposed to incentives, he believes that "public judges will behave much like private judges" (1983: 129). Although their conduct is much more constrained by the institutional "insulation" discussed above, he equally hypothesizes that public judges maximize their own prestige, in the same way as private judges maximize their income. With this statement Cooter solves 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, 1993), 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 (Landes and Posner, 1980: 369).

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

Although, in substance, a Copernican revolution had already being sketched by the aforementioned papers, it 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 being supplied by Posner and others. Why it took 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.

First, in 1992, Becker was awarded the Nobel prize in economics. He was one among many other economists from Chicago to receive this prestigious prize – Hayek in 1974; Stigler in 1986; Coase in 1991 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 fro

the economic analysis of law Posner had promoting since the early 1970s. Precisely, Posner wrote 2 articles – both published in 1993 – : one was about Coase (1993a) and the other one was about Becker (1993b). What is interesting is not only that Posner criticized Coase, on one hand, and praised Becker on the other but rather the reason for which Posner praised Becker: for having played a major, indeed decisive, role in the "law and economics movement". In other words, while Coase had been viewed as one of the founders of law and economics 1 even by Posner himself (1975), the latter was Posner was now changing his mind. The fatherhood of the movement was now attributed to Becker (and, for that matter, to Bentham). And, one of the reasons 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. In particular, Posner stressed that

> "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." (1993: 213)

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 being 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 one to exploit this opportunity with his 1991 paper "Explaining Judicial Behavior". 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 from a statement extracted 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: 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" (1991:198).

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. At the same time, 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 launch his well-known 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. 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.

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