Richard A. Posner (1939-)

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Abstract

Richard A. Posner was the most important actor in the transformation from "law and economics" to an "economic analysis of law". Posner applied Chicago price theory to the analysis of law and legal rules. He not only contributed to the field but also structured it. This is what this chapters shows. We also show that Posner's work illustrates the Chicagoan dimension of his economic analysis of law. That Posner, especially later in his career, introduced some elements that might seem to be at odds with Chicago economics – pragmatism, notably – or that he claimed having become a Keynesian does not change much to the claim that it was Posner who crafted Chicago's economic analysis of law.

Keywords

Posner; Chicago; law and economics; economic analysis of law; wealth maximization; efficiency; common law; judges; Kaldor-Hicks; justice.

1 Introduction

"Law and economics" is almost consubstantial with economics in the sense that economists have more or less always been aware that understanding how the economy works requires taking legal rules into account (Medema 1998). It was after the Second World War that law and economics became an autonomous sub-field within economics. The process started at the Law School of the University of Chicago with the "Free Market Study" and "Antitrust" projects, which investigated whether monopolies were actually dominating the American economy, if it was a good or a bad thing and, if the latter, how to remedy the problem. Aaron

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Director was in charge of these projects (see more details in Van Horn and Mirowski 2009: 148; Van Horn 2009: 214, 2010, 2014).

Another milestone was the publication in 1960 of "The Problem of Social Cost", by Ronald Coase. This article is supposed to mark the beginning of what is known as 'new' (Posner 1975) or 'modern' (Hovenkamp 1990: 994) law and economics, marking a shift from interwar studies in law and economics permeated by the institutionalist tradition. In the decade that followed Coase's article, even if the field remained rather marginal among the profession of economists and lawyers, and may have occasionally faced hostility (Manne 2005), the study of law and economics kept growing and also changed in nature. Indeed, a small number of scholars, from the 1960s on, developed yet another way of looking at the relationship between law and economics, by applying economic tools to legal problems. This was the case with the early and major contributions of Guido Calabresi (1961), Harold Demsetz (1964, 1966, 1967), Gary Becker (1968), and William Landes (in Downs et al. 1969; 1971).

Without a doubt, Richard A. Posner was the most important actor in the latter transformation. Posner applied Chicago price theory to the analysis of law and legal rules. But he not only contributed to the field through the publication of a huge number of articles and books that stirred controversy and debate. Posner also structured it by, for instance, creating and editing the *Journal of Legal Studies* (1972–1981). His intellectual trajectory illustrates the shift in the relationship between economics and law during the 1970s. Posner started his career as a law and economics scholar in the Director-Coase sense, but then switched to an economic analysis of law. In this development, the influence of scholars pertaining to the first, second and third generation of Chicago economists, such as George Stigler and Becker, was fundamental. This makes Posner essentially a Chicago "economist" –

even if he was not an economist by training, and somewhat still refuses to consider himself as an economist. The very impetus for his research, his specific methodological approach, which involves the use of tools such as wealth maximisation, rational behaviour, and market equilibrium under perfect competition, are strongly associated with Chicago economics. That Posner – especially later in his career – introduced some elements that could seem at odds with Chicago economics – pragmatism, notably – or that he claimed to having become a Keynesian does not change much to the claim that it was Posner who was the prime mover in crafting Chicago's economic analysis of law.

2 Biographical Summary

Richard Posner was born on 11 January 1939. At the age of sixteen, he was accepted by Yale, where he enrolled in the Directed Studies Program. During his third year, he showed a particular interest in the study of English (Domnarski 2016: 20). In his senior year, while he was considering graduate studies in English, he nonetheless applied to the Yale and Harvard Law Schools, and eventually enrolled at Harvard, where the Socratic method fitted perfectly with his desire to improve and challenge his intellectual skills.

In 1962, Posner clerked for Supreme Court Associate Justice, William Brennan, following which he worked from 1963 to 1965 as an assistant to Philip Elman, a Federal Trade Commissioner, where he was introduced to problems related to economics, competition, and antitrust. From 1965 to 1967, Posner took his first job as a lawyer, working at the Office of the Solicitor General, and then for the President's Task Force on Communications Policy. The Task Force had been set up to investigate communications regulation and the possible need for more competition in the industry (Litan 2014: 237–238). To his biographer, William Domnarski, Posner's work for the Task Force, alongside

economists Leland Johnson and Roger Noll, may have marked a turning point in his career. As he had just read Coase's work, Posner decided to apply economic theory to the various regulatory issues faced by the Task Force on communications. One can clearly see the resonance between the work conducted by the Task Force and Coase's research on the Federal Communications Commission in the late 1950s.

Posner's change in orientation towards economics was consolidated when he joined Stanford University as a Professor of Law in 1968. He had already endeavoured to study law with the tools of economics (Domnarski 2016: 53), but at Stanford, Posner met two key figures of the so-called Chicago School of Economics, namely Aaron Director, a professor there, and George Stigler, who regularly visited the Department. Director stood as a major influence in Posner's tutoring in economics, subsequently put to the test when Posner held an antitrust seminar regularly attended by Director and Stigler. This is when Posner began to publish on antitrust and exhibit some Chicago influence. Thus, unsurprisingly, Posner left to Chicago in 1969 on the recommendation of Director. At Chicago, Posner devised a number of strategies to develop and disseminate his economic analysis of the law: through books (Posner 1973a), seminars, scholarly articles, and conferences. He also joined Gary Becker's team at the National Bureau of Economic Research (NBER; see Posner 1993b) and met William Landes, with whom he would write numerous influential papers. Eventually, Posner would help to create an impressive line up at Chicago's Law Faculty, which would include Coase, Landes, Richard Epstein, working alongside luminaries at neighbouring faculties such as Stigler and Demsetz (until the mid-1970s) at the Graduate School of Business and Becker at the Department of Economics.

At Chicago, Posner pushed to create a joint economics and law degree, to hire more economists at the Law School, insisted on hiring Robert Bork, and encouraged his student,

Frank Easterbrook, to consider an academic career. Posner institutionalised his approach to law and economics when he created and edited the *Journal of Legal Studies*, the approach of which to the economic analysis of law made it distinguishable from Coase and Director's *Journal of Law & Economics*. But, as Domnarski argues, Posner's propagandising was also related to his work as a private consultant for his own company, Lexecon Inc., from which he derived a number of papers for the *Bell Journal of Economics and Management Science* (now the *RAND Journal of Economics*) and the *Harvard Law Review* (Domnarski 2016: 76).

Having made a lot of money with Lexecon, Posner would accept lower-paying yet still highly influential positions: under President Reagan, he became a Judge for the Court of Appeals for the Seventh Circuit on 1 December 1981, where he would add to his work as an analyst of law to being a maker of law. He served as Chief Judge from 1993 to 2000, and eventually retired from the Court in late 2017.

Throughout the 1990s, Posner wrote for an increasingly broad audience, as yet another means to disseminate his economic way of thinking about public problems. As he was progressively convinced of the permeation of legal studies to the social sciences, marking the end of law as an 'autonomous discipline' (Posner 1987a), he regarded his public interventions as a way to popularise the findings of many social sciences on a particular topic. The range of topics was very wide, ranging from ageing to sex, national security, President Clinton's impeachment, public intellectuals, and the subprime crisis, to name only a few. Throughout his contributions, Posner always insisted that economics provided the most useful overarching framework to handle such issues. This view had significant implications regarding Posner's debates with other public intellectuals, especially Ronald Dworkin.[3]

[3] See, in particular, Dworkin (1980, 2000a, b) and Posner (1980a, 2000a).

Posner simply believed that because one of the roles of the public intellectual was to analyse topics beyond their own domain of expertise, economics stood as the only way to deliver useful scientific outcomes. He saw other public intellectuals as 'professors of morals', who lacked a consistent causal theory, and worked for the establishment of reforms that would discipline intellectuals who produce 'irresponsible interventions…in public controversies' (Posner 2001: 390).

By the 1990s and 2000s, Posner was considered to be one of the most influential legal scholars of the twentieth century, as well as one of the most prolific and influential public intellectuals. For instance, between 1998 and 2000, he was cited 1,406 times (Choi and Mitu Gulati 2004). In the years 1989 to 1991, Posner ranked third on the list of the "Top Twenty-Five Prestige Scores" (Klein and Morrisroe 1999) and no fewer than 118 of Judge Posner's opinions appeared in casebooks used in the 1999–2000 school year, ten times more than 90% of federal circuit judges. Posner's publication record was unmatched. Considered to be a hyperactive scholar, his 'superhuman output' has included more than 3,000 judicial opinions (Liptak 2017), about thirty books, more than 400 scholarly publications, a controversial blog run with Becker (Fleury and Marciano 2013), and numerous newspapers columns.[4]

3 From Chicago Law and Economics to Chicago Economic Analysis of Law

Let us start by characterising the law and economics movement that was born at the Law School of the University of Chicago after the Second World War. Director, one of the leaders of the movement, insisted on the importance and need to use empirical studies on business practices, with antitrust legal cases being a rich source of such evidence. So, Director was

[4] See https://www.nytimes.com/2017/09/11/us/politics/judge-richard-posner-retirement.html. A search on JSTOR returns dozens of articles authored by Posner. A list of publications can be found at the following: https://www.law.uchicago.edu/faculty/posner-r.

interested in antitrust cases for what they could teach him about the economy. However, he had 'no interest in the law or, for that matter, in legal problems' (Priest 2005: 354). Similarly, as it is well known, Coase was convinced that economists should start from the "real world" rather than from the blackboard. He had written his first major article – "The Nature of the Firm" (Coase 1937) – after having interviewed business managers in the US. Later on, Coase examined judicial decisions to produce "The Problem of Social Cost" (Coase 1960). He paid attention to the law and to legal rules because he wanted 'to improve our [economists's] analysis of the working of the economic system' (Coase 1993: 250). Legal cases were a source of information, allowing economists to 'illustrate the economic problem' (Coase 1996: 104; see also, for instance, Coase 1960: 27–28). In other words, Director and Coase played a major role in the birth of law and economics in the second half of the twentieth century century, but were not interested in the law itself.[5]

This was precisely the route that Posner took in the first few years of his career. From 1969 to 1971, possibly under the influence of Director – who had an office at the Stanford Law School, where Posner was teaching – Posner published articles that were about economic and, more specifically, antitrust problems such as: how to regulate markets in which competitive regulation is impossible (Posner 1969a, 1970a, 1971a); the efficiency of antitrust laws in controlling oligopolies (Posner 1969b, 1970b; 1974a); and the role of administrative agencies in anti-monopoly policies (Posner 1969c; 1974b). Also, like Director's and Coase's work, these articles had a strong empirical flavour and used legal decisions to ground their analysis. Legal decisions were, in Posner early works, exogenous,

[5] Coase was still at the University of Virginia when "The Problem of Social Cost" was published. But his article is certainly not unrelated to the old Chicago School of Economics. In addition, after Coase moved to Chicago, he did not change his methodological perspective. He always defended the law and economics approach.

and provided ‘a rich mine of information about business practices’' (Posner 1975: 758; see, in particular, his “A Statistical Study of Antitrust Enforcement” (Posner 1970b)).

However, at the beginning of the 1970s, a radical change occurred which, as we stated above, concurred with Posner’s meeting Chicago economists such as Stigler, Becker, and Landes, and moving to the University of Chicago and taking part in the NBER project on law and economics. Becker and Landes – along with Isaac Ehrlich, another of Becker’s students working on economics and crime – had already started to use economics to analyse legal phenomena in the late 1960s when Becker was still at Columbia.

Becker, Landes and Ehrlich were not the first to apply economics to legal problems. In 1961, Guido Calabresi – a law professor at Yale – had proposed analysing the assignment of liability by using economics. Calabresi had even put forward a result very close to Coase’s (Marciano 2012). However, he did not believe in the rationality assumption (Marciano and Romaniuc 2015). Calabresi offered an alternative to the nascent Chicago economic analysis of law, one which Posner was aware of since he had reviewed Calabresi’s 1970 book on *The Costs of Accidents* (Posner 1970c), even if he did himself adopt it. Rather, Posner was immediately convinced by Becker’s – and Landes’s – approach and became the main promoter of Chicago’s approach to the economic analysis of law. Reading Becker’s famous 1968 article on crime and punishment, one clearly sees the kind of influence that Becker exerted on Posner. In particular, the last part of the article argues that the main function of the law is to maximise social welfare. To do this, punishment aims at compensating the loss in utility due to criminal activity. According to this view, ‘the primary aim of all legal proceedings would become the same: not punishment or deterrence, but simply the assessment of “harm” done by defendants, in order to calculate levels of compensation (Becker 1968: 198). Thus, ‘much of traditional criminal law would become a branch of the

law of torts, say, "social torts", in which the public would collectively sue for "public harm"' (ibid.).

Posner was also influenced by these Chicago economists in an indirect way, namely through their promotion of a particular view of economics, defined not by its subject matter but as a method of inquiry, an approach that could be used to analyse any kind of social phenomenon, 'both market and nonmarket decisions' (Becker 1971: viii). Becker and his group no longer saw any reason to distinguish between the behaviours that could be analysed by economic theory and those that should not. As Becker (1976: 14) wrote that, 'human behavior is not compartmentalized, sometimes based on maximizing, sometimes not, sometimes motivated by stable preferences, sometimes by volatile ones, sometimes resulting in an optimal accumulation of information, sometimes not'. Rational behavior included, therefore, individuals' attitude towards the law; "nonmarket" phenomena such as those taking place within the legal system could thus be analysed with economic tools. This was what Becker (1968) and Ehrlich (1967, 1970) argued in their very first works on crime and illegal activities, as did Landes in his analysis of how firms apply fair employment law (Landes 1967). It was even possible to analyse the supply side of the legal system, as Landes did in his analyses of pre-trial settlements and prosecutors' decision-making (Landes in Downs et al. 1969, 1971). Posner quickly adopted the definition of economics that Becker had suggested as early as his 1971 textbook, *Economic Theory*, as a 'true example of economic imperialism!' (Becker 1971: 2).

Posner claimed that economics was 'an especially apt tool' (Posner 1971b: 202) and spoke of the 'powerful tool of economic theory' (Posner 1973b: 399). More explicitly, he proposed describing economics as 'an *open-ended* set of concepts (Posner 1987b: 2; italics added), pointing to an absence of limits associated with the use of certain ideas and echoing

Becker's refusal to define economics by the boundaries of its subject matter. In fact, Posner insisted that a study can be considered an economic one when it is based on certain concepts rather particular topics: '[W]hen used in sufficient density these concepts make a work of scholarship "economic" *regardless* of its subject matter or its author's degree' (ibid.; italics added). It is not the nature of the problem analysed that does or does not trigger the use of economic tools. These tools can actually be used to deal with any kind of problem, including legal ones. Accordingly:

> [The] domain of economics is broader than…the study of inflation, unemployment, business cycles and other mysterious macroeconomic phenomena remote from the day-to-day concern of the legal system ... [E]conomics is the science of rational choice in a world – our world – in which resources are limited in relation to human wants (Posner 1973a: 3).

Posner's early –yet best – illustration of his endorsement of such a Chicago perspective is given by his 1973 book, *Economic Analysis of Law*. Commentators immediately perceived that the scope of the volume was 'exceptionally wide' (Diamond 1974: 294), ranging from topics that were traditionally addressed by economists (antitrust, regulation, taxation) to topics 'of great recent interest of the impact of the legal system on private use of the market (property rights, contracts, torts, crime control, anti-discrimination regulations) and of the economics of the functioning of the legal system (due process, civil and criminal procedure, law enforcement)' (ibid.: 294–295). Posner had moved from "law and economics" to an "economic analysis of law". His achievements in broadening the scope of the application of rational choice theory opened the door for an economic analysis of judicial behavior, as well as provided tools to analyse, from an economic point of view, numerous litigations involving discrimination at work, wage differentials, employment at will, no-fault divorce, inheritance, and taxation. All the dimensions and aspects of the legal system could be analysed by using

economics. There were no limits to what economists could do, no boundaries to the discipline.

To Posner, however, this should not pose a problem for legal scholars. On the contrary. Since the 1960s, Posner has claimed that the law has progressively lost its autonomy with respect to other social sciences. In the late 1980s, he argued that recent developments had revealed the considerable influence of the social sciences in making law (Posner 1987a). There was an increase in the political nature and interpretations of law making and other developments that had rendered a strict reliance on legal knowledge largely insufficient to settle debates. Radical thinking and critical theory, which had emerged in the late 1960s, had undermined, for instance, the use of strict textual interpretations of the constitution. Economics – which had rigorously addressed an everincreasing range of nonmarket phenomena of particular interest to legal scholars – was the best, if not the only, social science that could help to deal with such a wide range of topics within a single consistent framework. The cross-disciplinary dialogue on matters dealing with law, as well as other social phenomena, should be framed with the tools of economics. This is what Posner did, as we will now demonstrate.

4 Posner's Economic Analysis of Law as a Contribution to Chicago Economics

4.i. Judges, the Law, and the Market

In addition to being the first to systematically use economics to analyse legal phenomena, Posner was also among the first to explicitly and systematically link an efficient allocation of resources to the common law. However, as Posner himself notes, Coase had predated him when he had 'suggested that the English law of nuisance had an implicit economic logic' (Posner 1975: 760). Calabresi had made similar claims in his "Some Thoughts on Risk

Distribution and the Law of Torts" (Calabresi 1961). Thus, in works that dated from the early 1960s, both Coase and Calabresi had insisted on the efficiency of the common law but had restricted their claims to specific areas, respectively nuisance and accident law. Posner went further. To him, it was the entire Anglo-American legal system that was efficient: 'The common law method is to allocate responsibilities between people engaged in interacting activities in such a way as to maximize the joint value, or, what amounts to the same thing, minimize the joint cost of the activities (Posner 1973a: 98). Thus, the common law was presented as a device that was able to orient individual behaviour toward efficiency in resource use. Or, in other words, '[t]he logic of the common law is an economic logic' (Landes and Posner 1987: 312).

Interestingly, Coase and Calabresi had also anticipated one of Posner's major claims, i.e. the role of judges in making common law efficient. Coase noted 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 (Coase 1960: 19). He argued that, at least 'from time to time' (ibid.), judges think 'of the economic consequences of alternative decisions' (ibid.: 20) and 'take these economic implications into account, along with other factors, in arriving at their decisions' (ibid.: 19). For his part, Calabresi (1961: 517) explained that the judges who in the nineteenth century had chosen to apply a principle of fault liability had understood, in a 'rough and ready, noneconomist's, way' – 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' 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'.

The connection between judges and the efficiency of the common law would also be a very important aspect of Posner's work. Early on, Posner noted that judges 'are guided by

concern with economic efficiency' (Posner 1971b: 223) and 'think in economic terms' (ibid.: 224), or that one can 'assume that judges make their decision in accordance with the criterion of efficiency' (Posner 1973a: 325). The first instance of such behaviour that he gave was the famous decision made by Judge Learned Hand in 1947 in United States v. Carroll Towing Co., which Posner interpreted as Hand 'adumbrating, perhaps unwittingly, an economic meaning of negligence' (Posner 1972a: 32). Having assigned liability based on a comparison of the costs of accident prevention to the expected cost of the accident, Hand had introduced a cost-benefit analysis in legal decision making. Posner's positive statement as to how judges do behave was immediately turned into a normative claim by him about how judges should behave: 'In 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' (ibid.).

With this, however, Posner was neither following the old Chicago School path of Coase nor adopting Calabresi's Yale perspective. He was inventing a new Chicago approach on the efficiency of the common law and judges' behaviour. This was made in two steps. First, Posner translated the *assumption* about judges and the efficiency of the common law into a claim about the common law as a market mechanism. For him, 'the common law is best understood not merely as a pricing mechanism but as a pricing mechanism designed to bring about an efficient allocation of resources' (Posner 1987b: 5). In cases when high transaction costs prevent markets from working properly, the common law replaces the market: '[T]he common law prices behavior in such a way as to mimic the market' (Posner 1992: 252). As such, judicial decisions can be said to be made "as if" they intended to replicate the functioning of a perfectly competitive, efficient, market (Backhaus 1978, 2017; Marciano 2019). There is a clear connection between the Chicago postulate that competitive

markets allocate resources efficiently, what Reder(1982) called the ‘tight prior equilibrium’ (Reder 1982: 11).

Posner’s economic analysis of law also used economics to examine how judges behave and make their decisions. He was not the first to do this, but he was instrumental in pushing the analysis to its logical conclusion: judges maximise ‘the same thing everybody else does’ (Posner 1993a; see Marciano et al. 2020). In doing so, Posner debunked the traditional representation of judges as ‘judicial titans’ (Posner 1993a: 2), impervious to external influences. Notably, he argued that judges’ utility function was made up of both monetary and nonmonetary arguments, including prestige, reputation and leisure but also public interest and avoiding reversal of their decisions on appeal (ibid.: 14–15). Making legal decisions and producing legal rules could be thought of, under this view, as delivering consumption values, the same way as artists or craftsmen who value aesthetic excellence in their field (Posner 2008). This, in return, incentivised judges not to follow precedent, but to create their own rules and lead them to act as ‘interstitial litigators’, and sometimes, policy makers. What mattered, then, to Posner, was to analyse the reasons explaining why judges performed satisfactorily in terms of resource allocation. One reason is found in their utility function: as top sports or chess players, they derive utility when they abide by the informal rules of the judicial game, which implies deference and other types of rewards. However, the institutional setting was also important. By drawing on an analogy between courts and nonprofit enterprises, Posner underlined the kinds of norms and rules that characterise the judicial game, and their effects in binding judges’ output.

4.ii. Efficiency, Wealth Maximisation (Kaldor-Hicks), and Illegal Activities

Another of Posner's crucial contributions was his definition of efficiency. At the end of the 1970s and early 1980s, he introduced the concept of wealth maximisation as a challenge to Pareto optimisation and utility maximisation. This became a trademark of Chicago's economic analysis of law. From this perspective, a transaction – and, by extension, a legal rule – will be considered as legitimate and desirable when it increases the wealth of society instead of its utility, welfare, or happiness: 'Resources are efficiently allocated in a system of wealth maximization when there is no reallocation that would increase the wealth of society' (Posner 1980a: 243). More precisely, for Posner, wealth is measured by money estimates, 'the value in dollars or dollar equivalents…of *everything* in society' (Posner 1979a: 119; italics added). Such a value is given or 'measured by what people are willing to pay for something or, if they already own it, what they demand in money to give it up' (ibid.).[6] Indeed, Posner insisted that, 'The only kind of preference that counts in a system of wealth maximization is thus one that is backed up by money—in other words, that is registered in a market' (ibid.).

However, and this is also typical of Chicago economics and Chicago's economic analysis of law, '[t]he market…need not be an explicit one' (ibid.: 119–120). As mentioned above, Becker explained that economists could analyse market and nonmarket transactions. Posner went one step further. In addition to explicit markets, he identified two other types of markets. There were "implicit" markets, which involved nonmonetary transactions such as

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[6] Such a willingness to pay is also crucially related to a capacity to pay. Without a capacity to pay, the desire to have an object means nothing: '[W]anting something very much, but not being able to pay more for it than its owner or competing demanders, does not establish a claim to a good in a system of wealth maximization … Wealth maximization thus excludes claims based on pure desire-claims not backed up by willingness (implying ability) to pay' (Posner 1980a: 243).

‘the “marriage market”, child rearing, and a friendly game of bridge’ (ibid.: 120). The value of the goods and services exchanged on these markets– or their shadow price, to use Becker’s words – could be approximated ‘by reference to substitute services sold in explicit markets or in other ways’ (ibid.). In addition, there were also “hypothetical” markets, where there are no transactions and where no equivalent or similar explicit transaction exists. An example is theft – more generally, crime – or accidents. Obviously, no transaction can take place between a motorist and the pedestrian struck by his car. The only solution – the hypothetical market solution – consists in designing an ex post transaction to determine the value that each party attributes to the event. Courts and judges may be those who handle these types of situations by comparing the costs and benefits involved in the accident, its prevention and consequences, which clearly indicate that maximising wealth is more or less another form of cost-benefit analysis based on individuals’ willingness to pay.

That the hypothetical market approach could be used to put a value both accidents and crime did not mean that either could be viewed as two instances of tort or that tort law and criminal law could be conflated. Criminal offences were very specific in that they could not maximise or ‘increase wealth, for [they are] not the outcome either of a voluntary or of a hypothetical market transaction’ (Posner 1979a: 121). Criminals do not have the required willingness to pay their victims to compensate for crimes committed, otherwise they would not use illegal means to reach their goals. From this perspective, illegal activities and criminal behaviours are attempts to bypass markets or ‘the system of voluntary, compensated exchange’ (Posner 1985a: 1,195). Accordingly, this means that illegal activities tend to coerce others into inefficient transactions. Hence, their activities orient resources toward a

less valuable use, thereby preventing wealth maximisation. This is why illegal activities should be prevented through the use of criminal law.[7]

At the same time, market bypassing should not be confused with high transaction costs. When such costs are so high that no transactions – voluntary or not – can take place and if an individual has the means to pay what the other party would ask if the transaction was possible, then the behaviour cannot be viewed as criminal – even if it breaks the law. An example is when 'someone of monetary means [breaks] into an unoccupied cabin and [steals] food in order to avert starvation' (Posner 1979a: 121). In this instance, transaction costs are obviously 'prohibitive, and there would be reason to believe that the food was worth more, in the strict economic sense, to the thief than to the owner' (ibid.). To a certain extent, the theft is not theft. Stealing food in this case *increases* wealth. Even if the cabin owner did not explicitly and expressly consent to the transaction – it is assumed that he would have done, since what he asks of the "thief" is what they would have paid. Furthermore, wealth increases even if the thief does not *actually* compensate the cabin owner afterwards. This is interesting because it establishes a connection between wealth maximisation and the Kaldor-Hicks criterion. Wealth maximisation and Kaldor-Hicks are "equivalent", as demonstrated by Coleman (1980). If the Kaldor-Hicks criterion is satisfied, then the increase in value due to a transaction is greater than the value lost; hence, wealth is maximised. In addition, as the

[7] From this perspective, it seems clear that criminal law cannot be conceived merely as a specific subset of tort law – as did Becker, who envisaged punishment as a means to compensate the value of the initial harm. Posner departed from Becker – and from Stigler (1970) too – by arguing that the function of criminal law is to prevent future crime, not to merely compensate harm. Harsher sentences for recidivists allow the legal system to detain these people – about which we have more information as to their propensity to act in a criminal fashion – for longer and thus to prevent more crime from happening. This specific distinction from tort law explains many features of the criminal law, for instance why recidivists are charged with greater punishment, why failed attempts at crime that happen to be victimless are still punished, and why criminal intent matters in the severity of punishment.

cabin-starvation example shows, wealth maximisation does not require ex post or actual consent, as in Kaldor-Hicks.

4.iii. Wealth Maximisation, Ethics, and Justice

Consent is crucial for Posner's criterion of efficiency as 'wealth maximization derives support from the principle of consent' (Posner 1980b: 488). A transaction that maximises wealth is a transaction to which parties have consented and, reciprocally, a transaction to which parties do not consent and which does not maximise wealth, should be prohibited.

This applies in tort law – negligence is preferred to strict liability because it is based on consent. Another example Posner used to support his position was that of the 'utility monster' (Posner 1979a: 131), that is, individuals who derive utility from torturing others. Such behaviours, Posner claimed, are impossible in a world based on wealth maximisation – and, accordingly, on consent – because monsters would have to pay what their victims are willing to receive to accept torture but 'these purchases would soon deplete the wealth of all but the wealthiest sadists' (ibid.). By contrast, in a utilitarian world, actions are evaluated by comparing utilities, and limits on the monster's behaviour would not exist.

Consent and wealth maximisation help to address one of the major limits of utilitarianism – interpersonal comparisons of utilities. The example of the moral monster can also be used here. Thus: '[H]ow should we weight the satisfactions of the criminal and the unproductive?' (Posner 1980a: 251). This question is undecidable. On the other hand, by comparing dollar amounts, the problem disappears. As Coleman notes: 'Wealth maximization ranks social states in terms of dollar equivalents, not utilities. Unlike utilities, dollars are comparable' (Coleman 1980: 525). More precisely, 'a dollar is worth the same to everyone' (Posner 2000b: 1,170). Precisely because 'it treats a dollar as worth the same to everyone'

(ibid.: 1,154), wealth maximisation, or the Kaldor-Hicks criterion, 'leaves out of normative consideration…distributive justice' (ibid.; see also Posner 1985b: 104). What matters is only allocative efficiency, in other words 'welfare is increased when a policy inflicts a dollar loss on the losers from it and confers a dollar and five cents gain on the winners even though the losers are not compensated' (Posner 2000b: 1,170). Or, 'efficiency in the Kaldor-Hicks sense' means focusing on 'making the pie larger without worrying about how the relative size of the slices changes' (ibid.: 1,155). Thus, by using wealth maximisation, or Kaldor-Hicks, law and economics ignores the question of the distribution of income. The economist can analyse the effect of a particular law on efficiency and the prevailing distribution of income, but cannot say if it is a better distribution with regards to various (undefined) criteria of social justice (e.g. Hackney 2006).

This point has been the subject of criticism, in particular by Calabresi (1980) (see also Marciano and Ramello 2014). Calabresi insisted that the initial distribution of rights or wealth matters. However, this is not an issue which overly concerned Posner. To him, there was no issue at stake as long as there was a kind of 'division of labor' in public life in which the courts could 'focus on wealth maximization (making the pie as big as possible) while legislatures focus on redistributing some of that wealth (reslicing the pie)' (Posner 1985b: 105).[8] The conclusion was straightforward. Courts could 'set distributive considerations to one side and use the Kaldor-Hicks approach with a good conscience' (Posner 2000b: 1,155). Posner could even argue that efficiency becomes a principle of justice (Posner 1981). One

[8] Posner was even clearer. In the absence of a clear, consensual definition of justice or of what could be 'the optimum distribution of wealth…it is very hard to see how courts could adopt a redistributive ethic to guide their decisions' (Posner 1985b: 104). This is why courts should focus on efficiency and use 'social wealth, however distributed, [a]s a social value' (Posner 2000b: 1,155). This was a means for courts and judges to make decisions without being affected by considerations of morality.

could thus say that Posner supports a generalisation of property rights in order to let individuals exchange these rights efficiently through mutually beneficial transactions, with the ensuing distribution of wealth depending on the initial endowment of rights, itself derived from the maximisation of wealth principle. In other words, once individuals have been endowed with property rights in an efficient fashion, any ensuing trade and distribution will be beneficial.

5 Posner's Jurisprudence, Notes, Opinions: Attempts to Put Chicago Econ into Law

According to a number of analyses of Posner's opinions and decisions as a judge, it seems that while he does not often resort to economic analysis explicitly, he implicitly uses economics as a guide. George Cohen (1985) examined Posner's decisions and opinions during the first four years of practice, and underlined the presence of economic analysis. Cohen highlights a number of cases where Posner explicitly employed economic analysis, in particular cost-benefit analysis, the analogy of perfectly competitive markets, the so-called Coase theorem, and his reformulation of Learned Hand's formula. A textbook case is provided by Posner's decision in *United States Fidelity & Guaranty Co. v. Jadranska Slobodna Plovidba*. In 1976, a longshoreman employee of a stevedore company had died after falling through an open hatch of a ship. One of the questions was to decide whether the owner of the ship should be liable for the death. Posner supported his argument using Hand's formula: for the shipowner to be found negligent, one would have to prove that the probability of accident due to the open hatch was high. This would have made the shipowner's expected costs of accident exceed the costs of preventive measures, so the shipowner should have rationally spent more on preventive measures himself. Not doing so would have, in other words, made him negligent. Posner, then, focused on the probability of

accident, and eventually argued that it was low. Leaving open hatches was indeed a 'dangerous practice', but it was 'cost-justified' (ibid.: 1,135). Furthermore, assuming that the market for longshoremen was competitive, Posner concluded that the shipowner had actually paid a wage premium to the stevedore company to compensate for the danger involved in the longshoreman's activity. Thus, Posner concluded that the shipowner was not liable for the longshoreman's death.

In other cases, Posner used cost-benefit analysis to estimate free speech rights (*LaFalce v. Houston*), whether behaviours of truckers in cases of strike fell under statutory protection (*NLRB v. Browning-Ferris Industries*), to demonstrate that the towing of parked cars without prior hearing was a cost-justified practice (*Sutton v. City of Milwaukee*), and that the predisposition of certain criminals could be revealed cost-effectively by certain undercover police activities which should not be conflated with entrapment (a cost-ineffective allocation of police resources; see also *United States v. Kaminsky* and Cohen 1985). Throughout his career, as Domnarski argues, Posner consistently used economic analysis, whether explicitly or implicitly, in his opinions and decisions, with the Hand formula perhaps being one of the most common (Domnarski 2016: 115–116).[9]

6 Transition: Is Posner a Chicago Economist?

In spite of Posner's strong ties and contributions to the Chicago School, this does not necessarily make him a dogmatic proponent of Chicago price theory. Indeed, over the course of his career, Posner developed a view that emphasised pragmatism over any other type of

[9] According to Domnarski (2016: 116), Posner 'put the formula to use twenty-four times through 2014 and nine times in his first judicial decade, if we can call it that, 1982–89. The decade showed a gradual progression from the introduction of the formula and then to its uses, first in an admiralty case and then in a wide variety of cases, most notably involving preliminary injunctions'.

approach, even the economic one. Thus, he has consistently refused to be entrapped in a particular framework, best illustrated by his recent support of Keynesianism. As such, one may wonder to what extent Posner's work has developed outside the Chicago School, making him something of a "rogue" member.

6.i. Pragmatism

In the 1990s, Posner outlined his views on pragmatism, beginning with his "Pragmatist Manifesto", the concluding chapter of *The Problems of Jurisprudence* (Posner 1990). He argued that because legal rules were vague, they had to be understood more as directives rather than strict orders to the judge. Thus, adjudication was far more than a strict scientific analysis and interpretation, limiting the input of science itself: 'Unable to base decision in the difficult cases on either logic or science, judges are compelled to fall back on the grab bag of informal methods of reasoning that I call "practical reason"' (ibid.: 455). However, in this case there are also limitations, for instance because the use of, say, analogies, has epistemic flaws. To quote Posner: 'Changes of legal doctrine owe nothing either to analogies…or to logically or empirically powerful arguments or evidence. Instead, they are the result of gestalt switches or religious-type conversions' (ibid.: 456).

Posner's views were developed in the wake of his work on the end of the autonomy of legal thinking, which had already emphasised the problem raised by competing interpretations of texts, science and social reality. He concluded that there was no interpretive law, and no overarching criterions of justice on which everybody agrees. Consequently, law is the result of practices, those of judges, who are professionals. This tends to erase the distinction between natural law and positive law: 'Judges make rather than find law' (ibid.:

457).[10] Again, pragmatism overstepped the use of a particular method, because 'neither can provide a complete framework that will enable adjudication to be made determinate' (ibid.: 458), even wealth maximisation. This did not mean, though, that Posner turned against science. He strongly believed (and still does) that economics was a very useful tool for adjudication and legal thinking. In other words, from a pragmatist standpoint, economics provided important guidelines. Posner claimed that wealth maximisation promoted not only political stability, a welcome social goal, but also a mode of thinking more immune to political pressures (Medema 2010).

6.ii. Switch to Keynesian Economics and Criticisms of Modern Chicago Economics

Although not really an economist, and certainly not a μmacroeconomist, in 2010, Posner published *The Crisis of Capitalist Democracy* (2010), in which he attempted to provide an analysis of the systemic flaws that led to the subprime crisis. His book openly attempted to revive Keynes's *General Theory* by lauding its economic insights to the wider public, which may have been perceived as a provocation to a number of his macroeconomist colleagues at Chicago. Posner's discovery of Keynes, which he promoted – instead of his friend and major source of inspiration, Gary Becker – as the best economist of the twentieth century, promoted an intellectual tradition of loose thinking that was not fashionable, but close to his pragmatist views (Posner 2009).[11] Posner's arguments were directed at the way that economic theory, and in particular theory developed at Chicago, had evolved since the 1980s. As Posner

[10] For instance, in a recent interview in *The New York Times*, Posner recalled that being a judge is, after all, about solving disputes: 'The first thing you do is ask yourself – forget about the law – what is a sensible resolution of this dispute?' (Posner in Liptak 2017).

[11] 'The more informal economics of Keynes has made a big comeback because people realize that even though it is kind of loose and it doesn't cross all the "t"s and dot all the "i"s, it seems to have more of a grasp of what is going on in the economy' (Posner 2009).

claimed in an interview:

> I think there is a question of whether modern economics, including Chicago economics, is too formal and too abstract. Another question is whether modern economists have lost interest in or feel for institutional detail that might be very important. I don't know how many of these economists really knew anything about how modern banking operates, how the new financial investments operate – collateralized debt obligations, credit default swaps, and so on (Posner in Cassidy 2010).

Putting Keynes at the forefront was a way of criticising modern economists of different traditions, e.g. Gregory Mankiw and Robert Lucas, and call into question their confidence in the fact that macroeconomics is in a better shape now than in the late 1940s (Posner 2009).[12] Needless to say, Posner's views on the current state of macroeconomic theory made him the target of many criticisms, from Chicago colleagues to his opponents in the legal sphere. One argument was that Posner had, throughout his career, promoted a form of neoliberalism, in a rather dogmatic way, and had now switched sides to support government intervention and pragmatism (Campbell 2010). Posner's view that economics is too mathematical and had become too confident in the self-regulating properties of markets make him hard to follow for some. Moreover, he noted that the criticisms he had received from economists, which blended ideological or political views with strong attachments to specific methodologies (such as the efficient markets hypothesis), had revealed economists' methodological position that had become, over the years, diametrically opposed to his own pragmatism (Posner in Cassidy 2010).

[12] 'To expel him [Keynes] from the profession is to confirm the worst prejudices of present-day economists by embracing their bobtailed conception of their field' (Posner 2009).

Posner's criticism of macroeconomics coupled with his faith in pragmatism as an overarching methodological principle seemed to introduce a clear difference between him and the hard-nosed Chicago School economists. At the same time, it remains the case that Posner still considers that his support of Keynesian economics, as with his belief in pragmatism, does not compromise his analyses of law based on price theory, rational choice, and market equilibrium. Thus, although he seems to depart from the Chicago tradition in a number of ways, these deviations are in fact only marginal.

7 Conclusion

During an interview, Posner stated:

> Well, the Chicago School had already lost its distinctiveness. When I started in academia – in those days Chicago was very distinctive … We used to say the difference between Chicago and Berkeley was Chicago was economics without models, and Berkeley was models without economics. But over the years, Chicago became more formal, and the other schools became more oriented towards price theory, towards micro. So, now there really isn't a great deal of difference … But I'm not sure there's a distinctive Chicago School anymore … So probably the term "Chicago School" should be retired (Posner in Cassidy 2010).

Posner's work is an interesting illustration of these remarks. As a lawyer, he never resorted to modelling, but always grounded his analyses on the Chicago tradition of price theory, mostly developed by Friedman, Stigler, and Becker. Posner's recent criticisms of macroeconomics, although a sign of departure from what Chicago economics may have turned into, show his dedication to a tradition of price theory that has been developed after the Second World War by the second and third generations of Chicago economists.

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