THE RATIONAL JUDGE:
ECONOMIC VERSUS LEGAL PARADIGM

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Introduction

The personage of the judge is at the heart of much of law-and-economics, and yet few scholars are willing to relate their models to the complex professional reality of the man or woman in a black robe. The purpose of this paper is to evaluate the methodological implications for the economic analysis of law (EAL) of this deliberately limited account of the judicial function.

What is precisely the status of the “judge” in this conceptual framework? The answer to that apparently simple question is surprisingly unclear. Theoretical construct, economic agent, psychologically and politically biased ordinary man or woman, de facto legislator – can the judge be all this at once or, simply, like a chameleon, change status according to the requirements of the model? The problematic heterogeneity of the modeled judge may stem from the fact that law-and-economics is the off-spring of a not always assumed hybridization between fundamentally different (irreconcilable?) economic and legal theories, whereby the legal heritage (itself the result of a variety of sometimes contradictory, sometimes complementary, traditions) is almost entirely occulted by a literature that, obviously, prefers to present itself as a form of applied economics rather than as a genuine legal theory. Unless economic analysts of law do not confront these epistemological

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issues, there is little chance for them to overcome the inner inconsistencies of their theories of adjudication.

This paper traces the evolution of the figure of the judge over the forty years of existence of the law-and-economics movement, by exploring a range of paradoxes that render the theory vulnerable to critiques, starting with the fact that in neoclassical EAL, judicial action is reduced to a strictly economic function (social wealth maximization/social cost minimization) and that, in order to be operational, the theory has (at least in its basic version) adopted assumptions concerning judges’ knowledge and motivations that stand in full contradiction not only with judicial reality but, most of all, with its own conception of human rationality as self-interested behavior. Part I describes how in mainstream law-and-economics, since the beginning, the judge has been a central and, at the same time, contradictory figure, as it amounts to an abstract (and hence malleable) hypothesis in a basic, stability and equilibrium seeking, microeconomic model which, and this may be more questionable, has clearly established normative pretensions. Part II focuses on the recent behavioural amendments in law-and-economics that import analytical tools from cognitive psychology in order to reconsider the rationality of the model’s actor, thereby creating a new and, as will be argued, still not assumed theoretical fragility.

How Judges Think\(^2\) – the title of one of Richard Posner’s recent books expresses quite well a drastic change of perspective in contemporary law-and-economics which goes beyond a strictly economic or rationality analysis. Already announced in a series of previous works\(^3\), Posner draws a more and more wide-ranging, across-the-board, portrayal of what he calls the “pragmatic” adjudicator, hence incorporating the economic, cognitive and legal facets of the figure of the judge. In this extended analytical framework, fundamental legal questions come up that, so far, the EAL had systematically eluded, such as judicial legitimacy. Part III raises the question whether Posner’s return to legal realism and sociological jurisprudence is susceptible either to undermine the entire project of the EAL or, on the contrary, give it a new élan.


I. The puppet judge

From the start, the EAL has taken over all the key rationality assumptions of the standard neoclassical microeconomics framework. The behavioral conjecture of optimization under given constraints is applied to two basic categories of agents: first, private individuals (those governed by law), the focus being on how institutional constraints affect their decisions; and second, producers of law, in the large sense of the term, including judges, legislators, regulators, as well as any other legal officials. It is here that a first paradox comes up concerning the expression of the rationality hypothesis. In the 1970s, the law-and-economics movement had largely adopted the assertions of the Public Choice literature, according to which rationality leads certain types of public decision-makers (such as regulators or legislators) to maximize their own, personal interests (career, prestige, money, power...), rather than those of the community – assumption which implies that the notion of general interest is to a large extent illusory. Underlining informational as well as motivational problems affecting those who are called to intervene in the economic or social sphere and insisting on the direct and indirect costs of these interventions, but also the regulatory and legislative distortions created by the existence of a political market, Chicago celebrities such as Stigler, Becker, Peltzman, Coase and Posner had succeeded in giving the economic theory of regulation an entirely new orientation. To the, at that time, prevailing economic theory of market failure (which recommended regulation to correct situations of market malfunctions), they had opposed a theory of regulation failure based precisely on the argument of economic rationality or, rather, a comparative institutional analysis of both, market and government failures – a perspective that is nowadays widely acknowledged by economists as well as lawyers. What is amazing, however, is that, in the same years, the same rationality assumption had led more or less the same people (Posner, among others) to elaborate a theory of law presenting an omniscient, fair-minded, perfectly disinterested judge whose assumed purpose is to impartially maximize a social welfare function, rather than his own utility function.

But by what miracle does rationality, in this particular case, no longer lead a public actor to pursue his personal interest, but those of the community, or more precisely,
the wealth of society? On what ground can a theory consider that judges put their rationality in the service of the public good and, at the same time, maintain that other categories of public decision-makers are rational if they pursue their private interests to the detriment of collective welfare? Like so often concerning methodological questions, the EAL remains largely silent on this issue.

The figure of the rational judge gives rise to a few more paradoxes. On one hand, at least in the initial version of the EAL, the judge plays a primordial role as a substitute for deficient or non-existing market mechanisms that he is supposed to mimic by maximizing social wealth. But on the other hand, one could say also that this agent plays no significant role at all, because he is supposed to act in a general equilibrium setting in which a priori, or by definition, there are no uncompensated costs, no externalities to internalize, in other words, no real problems to be solved, and hence, no scope for a judge. So this actor appears to be all at once central and absent to the functioning of the model. Furthermore, this judge who is balancing social costs and benefits is not really judging, he is above all calculating.

As a consequence, the contrast between the ideal judge of the neoclassical law-and-economics framework and the one of the real world is flagrant. It is even more intriguing (another paradox?) if we consider the fact that among those who have initiated this purposely reductionist model of judicial decision-making, several scholars are (or have been) themselves professional judges. Posner, Easterbrook, Calabresi and Bork, to quote just a few, are among the most reputed and influential judges of their generation in the U.S.A. They certainly know better than anyone else the complex reality, the biases and the constraints that weigh on judicial professions. How then explain this apparent contradiction: be a judge oneself as a practitioner and, as a social scientist, elaborate such an unrealistic and simplifying account of this function?

The few methodological or founding texts of the law-and-economics movement provide some elements of answer to this enigma, to start with the well-known Essays on Positive Economics by Milton Friedman (1953), to which Posner relates since the very first editions of his Economic Analysis of Law (1973). Posner regularly quotes Friedman’s formula according to which the realism of the model’s assumptions is without much importance. What counts is the formal coherence of the model, rather than the concordance between the model’s hypotheses and social reality. For Friedman, it was obvious that the general equilibrium models were not destined to
explain how markets work in reality, but only in a clearly defined theoretical framework. Thus the homo economicus is not even an abstraction of real economic behavior but merely a theoretical solution to a theoretical problem of standard microeconomics. It is this assumption of rationality that allows the models to be operational. However, and this raises of course new ambiguities, the ultimate goal of neoclassical theories (and this applies to law-and-economics as well) is to lead to straightforward policy conclusions.

Initially, indeed, the EAL had been developed as an extension of the mainstream market model. To quote again Richard Posner (1987, p. 3) from one of his early writings: “Law-and-economics can be defined as broadly as to be virtually coextensive with economics.” One might say that, at least in its beginning, the EAL has been no more, no less, than a defense of the free market. In this sense, one could argue that there is no fundamental contradiction with the public choice argument evoked earlier. In that theory as well, the purpose had been to emphasize the self-regulatory capacities of the market, precisely in contrast to the distortions that may result from a regulator’s self-interested interference with market processes.

The conjecture of the social wealth-maximizing or cost-minimizing judge was precisely what allowed the microeconomic theory of law to have all the elements at stake converge toward an optimum. The judge of this model is what permits the market to achieve social optima even in case of failure (for instance, when too high transaction costs make it impossible to imagine an efficient exchange to take place). In this sense, the judge, at least in the law-and-economics setting of the early days, was above all an hypothesis, a theoretical instrument, a device or a function (Alfred Schutz would have called it a “puppet”, Fritz Machlup a “fiction”). Just like the firm was reduced to a “black box” in the initial, very basic neoclassical price theory, the judge of the primitive EAL can be seen as a conceptual tool allowing the market model to work against all odds.

Issues fundamental for the understanding of the legal process, in particular those concerning the nature of judicial knowledge, have thus been assumed away by mainstream law-and-economics. The behavior of judges is treated in an ad hoc manner. The judge’s sole mission, in this peculiar approach, is to push the law toward greater economic efficiency; therefore, he is supposed to possess all the knowledge necessary to achieve this predetermined social goal. This is of course not
a realistic assumption, but without it, the neoclassical microeconomic model of law would not be workable.

Considering the judge as a conceptual device of social coordination is one of the true originalities of the EAL, a perspective that traces back to Ronald Coase’s seminal work “The Problem of Social Cost” (1960) – another founding text of law-and-economics which provides a few more elements of answer to the eventual paradox underlined earlier. Coase too had situated the judge on the side of the market and not of public intervention. In contrast to the regulator (an external authority who intervenes in, or interferes with, the market), the judge has been considered as a force internal to the market; he was presented as a coordination mechanism inside the market, in other words, an element participating to the market’s self-regulation. In this setting, questioning the judge’s “rationality” (and considering his eventual personal motivations) would not have made much sense.

More precisely, Coase had argued that in the absence of transaction costs, conflicting parties will negotiate until they find a mutually satisfactory outcome (corresponding to a social optimum), which implies that under conditions where the price system works correctly and there is a clear assignment of property rights, the market is capable of internalizing externalities without the intervention of any external authority. If, however, transaction costs are positive, as is usually the case in legal disputes, the judge comes into play and his mission is to simulate the outcome the market would have achieved if it had not failed because of too high transaction costs. In other words, in this perspective, the judge acts like a substitute of a deficient market by deciding cases in a way that minimizes social costs or maximizes social wealth.

Is this unusual interpretation of the judicial mission not above all an attempt to overcome the traditional market failure argument? A way of saying: the market has its own institutions that help it overcome its eventual deficiencies? If so, one could wonder whether Coase’s focus on the judicial mechanisms of dispute resolution had not been meant initially to be a contribution to economic rather than to legal theory. This could explain why Coase (1993) has been reluctant to be celebrated as one of the founding fathers of the EAL. He obviously disliked the way his arguments were recuperated and interpreted in a context of what was to become, with the EAL, a major contribution to legal scholarship rather than to economic theory.
The EAL has indeed operated a methodological shift that could be deranging from Coase's point of view. It is one thing to say that the judicial order can efficiently help the market to internalize externalities (Coase's argument), but it is another to praise the judge’s capacities to enforce economic efficiency in legal cases (the EAL’s extrapolation). In the latter perspective, the judge becomes a pivotal decision-maker intervening in the normative sphere. Moreover, he is supposed to possess an extraordinary competence and relevant information about all kinds of things, involving often very subjective data (in accident cases, for instance, he is assumed to be capable of outguessing ex post what could have happened ex ante, or which among the involved parties could have been the “cheaper cost avoider”). This quasi omniscient judge does not seem to be affected by strategic motivations either. And now, clearly, a contradiction has appeared with respect to the public choice line, and the issue of the rationality of the judge, as an economic actor, matters.

II. The behavioral judge

In recent years, more and more authors within the law-and-economics movement have expressed their dissatisfaction with the standard neoclassical assumption of the hyper-rational decision-maker. “As law and economics turns forty years old”, Korobkin and Ulen (2000, p.1051) regret, “its continued vitality is threatened by its unrealistic core behavioral assumption: that people subject to the law act rationally.” Challenging the traditional rational choice theory by introducing more realism into the models has become an important trend in modern law-and-economics, the purpose being to emphasize precisely the recurrent deviations of human behavior from the dominant rationality standard.

The idea is that because of a range of flaws or biases, on average, “real people” act far less rationally and efficiently than the neoclassical decision-maker. For example, they tend to be either overoptimistic or too pessimistic; they are inclined to overemphasize short-term consequences or underestimate long-term effects; eventually, they are disposed to believe that small samples are representative; they are likely to assign greater importance to more recent experience, etc. As a consequence, they do not always correctly evaluate risks, especially with respect to low probability events, nor are they capable of accurately comparing magnitudes.
such as the utility of present consumption with future costs, for instance. Furthermore, while in some circumstances people might be more cooperative than the self-interested homo economicus, in others, they might be far more malicious than traditional economics would predict.

In order to understand the rationale underlying the imperfect psychological mechanisms that are at work in real life, legal economists have turned to other disciplines such as sociology or cognitive psychology whose experimental methods have been integrated into what was to become, within less than a decade, an extremely successful new paradigm for law-and-economics, most commonly labeled “behavioral law-and-economics” (BLE). The empirical analyses conducted so far in BLE have brought to the fore three major bounds on human behavior that seem to undermine the possibility of utility maximization: bounded rationality (cognitive limits due either to limitations in information processing capabilities or to a lack of adequate knowledge), bounded willpower (lack of self-control or “weakness of will”) and, last but not least, bounded self-interest (the fact that people care for others or simply act out of motives that appear as incompatible with the purely self-interested attitude of the rational, efficiency-seeking, economic man). Eventually, “fairness” is considered to be such a motive, which may have intriguing implications for the way BLE would approach the nature of judicial duty. However, as Posner (2001, p. 262) argues, “lumping fairness with cognitive quirks and weaknesses of will suggests that behavioral economics is merely the negative of rational choice economics – the residuum of social phenomena unexplained by it.”

It is obvious that BLE does not content itself with a description of a variety of cognitive illusions or biases that characterize ordinary people. It is not just about defining patterns of non rational behavior and predicting how these come into play in relation to the social and legal frameworks, but a normative dimension has immediately been associated to the behavioralists’ empirical findings. The ultimate purpose of this new, experimental, branch of law-and-economics is indeed to design so called debiasing strategies referring to a host of cognitive methods that reach from education to behavior therapy, over to psychiatry, and that are supposed to cure (or at least reduce) people’s systematic behavioral biases and weakness of will,

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4 See in particular Jolls, Thaler and Sunstein (1998).
7 A typical example is the printing of choc pictures on cigarette packs, supposed to deter people from smoking.
precisely by increasing their incentives to make accurate judgments. According to Rachlinski (2000, p.98), this should be done essentially by restructuring behavior so as to force people to “unlearn” their bad habits.

To some extent, one may argue that BLE remains faithful to at least two fundamental propositions of standard EAL: first, the assertion that policies and legal rules can be analyzed and evaluated in terms of their efficiency and, second, that it is desirable for policies and legal rules to be efficient (in the sense of creating incentives for individuals to act efficiently). What differs from the initial approach is of course the content given to the normative conclusion. While, in many policy contexts, a typical rational-choice based perspective would argue that it is most appropriate to leave wide freedom of action to rational individual decision-makers, the behavioral approach could come to the exact opposite conclusion. The movement away from the initial perspective of law-and-economics is thus, above all, of an ideological nature. While integrating the behavioralist paradigm, the EAL has obviously drifted away from the initial liberal, _laisser-faire_, oriented spirit (Coase’s framework) to a much more _dirigiste_ attitude (the BLE framework). This comes out clearly in the following statement by Thaler and Sunstein (2003a, p.1159): “Often people’s preferences are ill-formed, and their choices will inevitably be influenced by default rules, framing effects, and starting points. In these circumstances, a form of paternalism cannot be avoided.”

The two authors have launched in recent years a new debate about paternalism, defined as the conscious attempts by policy makers to alter the “choice architecture” that people face in their everyday lives. More precisely, Thaler and Sunstein defend a soft form of dirigism that is meant to operate with “gentle nudges” rather than “hard shoves”, he purpose being to help people improve “their decisions about health, wealth and happiness.” In this context is advanced the controversial notion of “libertarian paternalism”, an allegedly well-intended public interventionism in the private sphere of individual choice. So far, Thaler and Sunstein’s argument that liberal (or libertarian paternalism) is _not_ an oxymoron does not seem, however, to have convinced many contemporary economics professionals.

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8 Even though as Rizzo (2009) argues, the debate is not really new.
9 To use the terms of Kahan (2000, pp. 607-645).
10 Thaler and Sunstein (2009).
11 See also Thaler and Sunstein (2003b).
12 For a thorough critique of the new forms of paternalism emerging in law-and-economics, see Rizzo (2009) or Rizzo and Whitman (2009).
It is nevertheless from a methodological point of view that behavioralism has operated the most far-reaching departure from the initial law-and-economics framework. When rejecting the central assumption of the neoclassical model, the economic approach to law has rapidly gone from one extreme to another, trading its “standard of perfect rationality” for a new assumption of “equal incompetence”. To quote Mitchell (2002, p.67), “whereas law and economics treats all legal actors in all situations as if they were perfectly rational, behavioral law and economics treats all legal actors in all situations as if they were equally predisposed to commit errors of judgment and choice.”

It is in this new (ideological as well as methodological) context that the question of the role of the judge in the law-and-economics framework, all of a sudden, takes an interesting turn. Where indeed does the judge stand between the reality of predictable, non rational, behavior and the requirements of paternalism? A priori, nothing exempts him “from the cognitive quirks, from weakness of will, or from concerns with fairness.” So, to what extent is the judge, too, what Posner (2001, p.287) would call a “behavioral man, behaving in unpredictable ways”? In other words, does BLE provide us with a more comprehensive portrayal of a judge confronted with bounded rationality and uncertainty?

In fact, it does so only in a very limited way. As shown in a recent statistical study by Niclas Berggren (2012), focusing on research projects in behavioral economics published in the ten most highly ranked economic journals over the last ten years, 95.5 percent of the papers that propose paternalistic policies (which is the case of 20.7% of the studied articles) deal essentially with the behavioral flaws and the bounds of rationality of private individuals and almost not at all with those of policymakers – as if the “equal incompetence” affected everyone in society except them.

Among the 4.5 remaining percent of the research papers that do address the question of the cognitive limitations of the general category “policy makers”, how many focus on the behavior of judges? Berggren’s study does not specify it. But as it seems, not many BLE models focus on adjudication and those that do so are essentially concerned with the ways the “paternalistic judge” is anticipating and integrating the biases of the conflicting parties that come to trial. This implies that the

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13 In reference to the title of Mitchell (2002).
efficiency-seeking judge of the BLE framework (the “libertarian paternalist”) must be even smarter than the one of the initial EAL model, and his role becomes ever more extensive. Let us again quote Thaler and Sunstein (2003a, p. 1159): “Equipped with an understanding of behavioral findings of bounded rationality and bounded self-control, libertarian paternalists should attempt to steer people’s choices in welfare-promoting directions without eliminating freedom of choice.” The authors further argue that it is “possible to show how a libertarian paternalist might select among the possible options and to assess how much choice to offer.”

The BLE models that expressly deal with the biases affecting judges are extremely rare. Among the few exceptions, a series of models by Rachlinski, Guthrie and Wistrich are noteworthy applications of the methods of experimental psychology to the study of judicial behavior.\textsuperscript{15} Even the most experienced, well-trained and motivated judges are vulnerable to cognitive illusions, they argue. Thus, they seem to challenge, at least implicitly, the paternalistic project of BLE. The purpose of one of their studies entitled “Inside the Judicial Mind”\textsuperscript{16} (involving a sample of 167 federal magistrate judges) is to test how common cognitive illusions such as anchoring, framing, hindsight bias, inverse fallacy, and egocentric biases, come into play in the judicial decision-making process. Their conclusion is somewhat alarming: each of those cognitive quirks has a significant impact on judges’ decisions.

Another inquiry conducted by the same group of scholars deals with the racial biases that eventually affect trial judges. In this context, a distinction is made between explicit and implicit biases.\textsuperscript{17} Their results, based on an experimental multi-part study involving a large sample of trial judges that had been recruited from different parts of the U.S., are the following: (1) Judges hold implicit racial biases. (2) These biases can influence their judgment. (3) Given sufficient motivation, judges can, at least in some instances, overcome their implicit biases.\textsuperscript{18}

Tsaoussi and Zervogianni (2007) push further the analysis of the cognitive limitations of the judge by focusing on the issue of negligently inflicted harm by judges. “If judges are guardians of the law” they ask,\textsuperscript{19} “who is to protect the

\textsuperscript{15} For instance, Guthrie et al. (2001); Guthrie et al. (2007); Guthrie et al. (2009); Wistrich et al. (2005); Rachlinski and Johnson (2009).

\textsuperscript{16} Guthrie et al. (2001).

\textsuperscript{17} “By explicit bias, the authors mean the types of bias that “people knowingly – sometimes openly – embrace”. By implicit bias they mean “stereotypical associations so subtle that people who hold them might not even be aware of them”. Rachlinski and Johnson (2009, pp. 1196-97).

\textsuperscript{18} Rachlinski and Johnson (2009, p.1197).

\textsuperscript{19} By referring to King (1978).
individual member of society from the occasional corrupt, malicious, or reckless judge?” Drawing on Herbert Simon’s concept of bounded rationality, they describe judges as satisficers rather than maximizers. In complex and uncertain situations, all judges can do is attempting to take acceptable decisions, given the constraints they have to face. This may to a large extent explain the occurrence of judicial misbehavior and error. “Because their goal is not to optimize but to render opinions that are merely satisfactory”, the authors argue,20 “judges often act as poor agents of their principals’ interests. In this light, it becomes clearer why judges tend to engage in behavior that is ‘improper’, especially under the circumstances of the currently overloaded judicial caseloads.”

The model offers a missing contribution to law-and-economics in so far as it evaluates the impact of various incentive schemes on judicial behavior, among which civil liability of judges, a particularly efficient response, as it seems, to deter judges from committing what Tsaoussi and Zervogianni call “inexcusable” judicial errors. However, many more studies applying the analytical tools of behavioral economics to judicial behavior would be needed in order to overcome the flagrant asymmetry in BLE concerning the treatment of decisional structures of private versus public actors.

But maybe there is a plausible reason that could explain why a vast majority of behavioralists persist in focusing essentially on the cognitive limitations and biases of individuals subject to law, while remaining amazingly evasive with respect to those of legal decision-makers. Is it not the validity (viability?) of the law-and-economics project that is at stake? As a matter of fact, the efficiency theory of law encounters serious conceptual difficulties as soon as it starts to integrate the flaws of lawmakers. How indeed justify the invasive role of the “paternalistic judge” when this figure appears itself as not perfectly reliable? So, is it not for fear of endangering the EAL that BLE is careful not to confer too much realism to the judicial actor in their models, because this would ineluctably lead them to conclude that judges are not fully rational and, hence, not necessarily equipped to promote the goal of economic efficiency? But as it seems, in BLE, nobody really wants the efficiency theory of law taken off the table.

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III. The pragmatic judge

Since the mid-nineties, Richard Posner, certainly the most influential representative of the law-and-economics movement, has clearly taken distance from the instrumental vision of the hyper-rational neoclassical judge – without however adhering to the methodology of BLE. 21 In many of his writings of the last two decades, he operates with a concept of the judge that is standing in sharp contrast with the mechanical judicial decision-maker whose clearly defined action (social wealth maximization) is formalized in the standard EAL setting – a model that Posner had himself contributed to elaborate some forty years ago.

For Posner (1994, p.1), first of all, it is time to get to the bottom of a “mystery” that lies at the heart of the EAL (precisely the first of our previously underlined paradoxes) and that is, as he argues, “also an embarrassment”: the divorce of judicial decision-making from incentives. Posner (1994, p.2) admits that, so far, the economic analyst had “a model of how criminals and contract parties, injurers and accident victims, parents and spouses – even legislators and executive officials such as prosecutors – act, but falters when asked to produce a model of how judges act.” However, “if economics is the science of rational choice”, he takes up, “why shouldn’t it be fully applicable to judges?” 22

Thus, in his new positive economic theory of appellate judges and justices, he proposes a complete revision of the judicial utility function, exploring the extent to which personal elements such as money income, but also the quest for popularity, prestige, public interest, reputation or simply the desire to avoid reversal, come into play in judges’ decisions. “Although judicial candidates are pretty carefully screened for honesty and basic professional competence,” and “the vast majority of judges are neither power seekers, like some politicians, nor truth seekers, like many scientists,” 23 there are no valuable reasons to suppose that judges are not at all subject to self-interested behavior, or that they are perfectly insulated from external (in particular, political) pressure. So, to the question “what do judges and justices maximize?” Posner’s answer is unambiguous: “the same thing everybody else does.” In other words, the rational judge is no longer presented as a quasi omniscient and fair-

21 For a critique of BLE, see Posner (1998).
23 Id. at 26.
minded actor, maximizing a social welfare function; he ceases to be seen, to use Posner’s terms, as a sort of genius, Promethean or saint devoid of human weaknesses, quirks, and foibles. On the contrary, he is described as an “ordinary person responding rationally to ordinary incentives” – a way for Posner (1994, p. 26) to “demystify” and “domesticate” this category of legal decision-makers for economic analysis.  

Posner’s uncompromising reconsideration of judges’ rationality has been the first move in the direction of the elaboration of an extensive, voluntarily realistic, approach of adjudication that clearly goes beyond a strictly economic framework. In a series of works published over the past years, Posner applies the notion of “pragmatism” all at once to the methods of the legal scholar (pragmatic jurisprudence) and those of the judge (pragmatic adjudication). In both cases, thinking pragmatically is understood in the broadest understanding of the term, where it means “looking at things concretely, experimentally, without illusions, with full awareness of the limitations of human reason, with a sense of the ‘localness’ of human knowledge..., the unattainability of ‘truth’.”

Assessing which rules and decisions produce the “best” consequences in the world of facts, the pragmatic judge is thus still seeking efficiency, but he seems to be doing so in a rather loose sense. Indeed, the value of efficiency eventually acquires any meaning the judge wishes to attribute to it (he may want to privilege systematic or individual effects; he may focus on long-term or short-run consequences, etc.). Also, economic efficiency no longer appears to be that supreme legal goal to be defended at any cost, as was the case in the initial EAL. It has become a means rather than an end in itself; one criterion among many others, on which judges eventually rely for evaluating the soundness of decisions, policies or rules.

Pragmatism, Posner (2008, p.9) argues, becomes a particularly valuable method of adjudication when judges “thrust into the open area” – the area where conventional sources of guidance (such as previously decided cases and statutory or

24 In a next step, Posner’s model discusses the impacts and relevance of prevailing incentive structures in judicial professions such as, for instance, life tenure, compensation systems, etc.
27 “The soundness of legal interpretations and other legal propositions is best gauged... by an examination of their consequences in the world of facts”. Posner (1993, p.467).
constitutional texts) fail to generate acceptable answers to the legal questions they are required to solve. This standpoint makes clear that Posner has not, as one might think, moved from the paradigm of mainstream economics to the one of conventional legal theory. He remains deeply skeptical indeed about the basic contention of traditional American legal thought according to which judges do (and should) decide cases based on a straight-forward application of pre-existing rules or precedents. He emphasizes the fact that legal rules are often “vague, open-ended, tenuously grounded, highly contestable, and not only alterable, but frequently altered”. As a consequence, they are “more like guides or practices” to judges rather “than like orders”.

Above all, Posner (2001, p.159) rejects the conventional views of judicial duty according to which “the past is, for lawyers and judges, a repository not just of information but of value, with the power to confer legitimacy on actions in the present.” He disagrees for instance with Paul Kahn (2000, p.43) that legal arguments “begin from a commitment to the past” and that “the rule of law is for us the manner in which the authoritative character of the past appears.” He wonders on what grounds Ronald Dworkin (1986, p.167) defends the idea that “the past must be allowed some special power of its own in court.” Posner asks. Why should the past rule the present? Why should the dead be ruling over the living? Posner does not see any serious answer to these questions except, eventually, the fact that legal innovations may involve more or less heavy transitional costs. But he categorically refuses to admit that “our ancestors had a freshness of thought that is denied to us moderns.” Nothing allows concluding, according to him, that judges of the past had been better equipped to take good decisions than those of today. With all the more reason, Posner rejects legal propositions maintaining that judges, in order to motivate their decisions, seize upon some overarching concepts of

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29 Id. at 455.
31 Posner (2001a, p.159).
33 Id. at 160.
34 Id. at 169.
35 Id. at 154.
36 Id. at 154.
justice.\textsuperscript{37} Judges do not seem to rely much on moral, jurisprudential or constitutional theories either.\textsuperscript{38}

Posner acknowledges of course the fact that, in a number of situations, legal materials from the past constitute a precious source of information for judges about how to decide present cases, but he points out to what he thinks is a misleading confusion (frequently made by legal theorists) between the reliance on the past as a source of learning, and the willingness to treat it as normative. He admits as well that the contemporary law is full of vestiges of ancient law,\textsuperscript{39} but these seem to hinder rather than enhance the efficiency of the legal process. The law, Posner writes, is “the most historically oriented – more bluntly the most backward-looking, the most ‘past-dependent’ – of the professions. It venerates tradition, precedent, pedigree, ritual, custom, ancient practices, ancient texts, archaic terminology, maturity, wisdom, seniority, gerontocracy, and interpretation conceived of as a method of recovering history. It is suspicious of innovation, discontinuities, ‘paradigm shifts’, and the energy and brashness of youth.”\textsuperscript{40} In other words, blind idolatry of the past appears to have produced overall negative consequences for the evolution of law: over decades and even centuries, legal doctrine has ended up being shaped by historical requirements rather than by current needs.\textsuperscript{41} “If we were starting from scratch” Posner (2001, p.158) argues, “we could design and (even with due regard for political pressure) would adopt a more efficient system.” And this appears to be the ultimate purpose of the pragmatic judge’s action: forward- rather than backward-looking, he is not afraid of breaking with the past by overruling archaic statutes or obsolete precedents and by going his own way.

If judges are no longer bound by the past, pragmatism implies of course that there is a strong political element inherent to the judiciary\textsuperscript{42}; in other words, that judges (especially American appellate judges) exercise an important amount of discretion. They appear as legislators, at least as much as adjudicators.\textsuperscript{43} For Posner, this is in itself not a problem, but merely the manifestation of the way the American legal system actually works.

\textsuperscript{37} Posner (1993, p.460).
\textsuperscript{39} Posner (2001a, p.157).
\textsuperscript{40} Id. at 145.
\textsuperscript{41} Id. at 158.
\textsuperscript{42} Posner (2008, p. 369).
\textsuperscript{43} Id. at p.118.
What is striking in Posner’s new perspective is that, on one hand, the judge’s mission appears to be much more far-reaching and intricate than most traditional approaches of judicial lawmaking would admit and, on the other, this personage is described as a quite ordinary person, influenced by all kinds of political and ideological opinions, as well as personal and professional values, notions of common sense, and even intuition, sentiment or idiosyncrasy. Legal pragmatism so understood (as “everyday pragmatism”44) is not more than any other form of ordinary practical reasoning, because in reality there is no such thing as legal reasoning.45

Nevertheless, and here Posner makes an interesting observation, judges tend to more or less skillfully hide this reality to the public.46 More importantly, the entire process of precedent-following behavior by judges – typical feature of the common law system, reflects, according to Posner, such a strategy of concealment of the pragmatic (and hence discretionary/political) nature of adjudication.

The reasons why judges tend (or rather pretend) to invoke the authority of texts and legal material from the past are thus far more obscure than one might think at first sight. The use of history for legitimating present judicial decisions is above all rhetorical, Posner argues.47 Judges like to deify for instance the constitutional framers, because this allows them to keep back more easily the fact (difficult to admit openly?) that what they are doing is fabricate “a fictive history in the service of a contemporary, pragmatic project.”48 In other words, concealment can be seen as an expression of judges’ ingenuity. It is an adroit way of bringing up legal innovations without “breaching the judicial etiquette which deplores both novelty and a frank acknowledgment of judicial discretion.”49

Posner thinks that the judges who are not aware of this reality are victims of self-deception.50 It is in particular those judges who, convinced that what they are doing is not creating new rules but merely enforcing immemorial custom,51 risk damaging

45 An insight that Posner has found in the tradition of early twentieth century American pragmatism, as incarnated, in particular, by John Dewey. See Posner (1993, p.459) and (2001b, p. 23).
46 “The secrecy of judicial deliberations”, Posner writes, “is an example of the tactics used by the judiciary to conceal the extent to which such deliberations resemble those of ordinary people attempting to resolve disputes in circumstances of uncertainty.” Masur (2008).
48 Id. at 154.
49 Id. at 154.
50 Posner worries that “some judges fool themselves into thinking that history really does deliver the solutions to even the most consequential legal issues and thus allows them always to duck the really difficult question – the soundness of the solution as a matter of public policy,” Id. at 155.
51 Posner (2001b, p. 32).
most irreversibly the common law process. Posner therefore has a problem with legal theorists such as F.A. Hayek who, he thinks, take such claims “literally”, hence assigning judges a rather passive role by arguing that the essence of judicial duty is merely to enforce custom. In contrast, the pragmatic adjudicator described by Posner is considered as far more active and creative than Hayek’s rule-following judge.

Rather than blaming judicial professionals for building a “carapace of falsity and pretense” around the law, Posner insists on the context of radical uncertainty in which they often operate. Most of the time, they are forced “to exercise an uncomfortably large amount of discretion, casting them often in the role of de facto legislators.” Especially in non-routine cases, where the conventional legal materials fall short, “judges are on their own, navigating uncharted seas with equipment consisting of experience, emotions, and often unconscious beliefs.” Concealment is thus used to “feed a mystique of professionalism that strengthens the judiciary in its competition for power with the executive and legislative branches of government, the branches that judges like to call ‘political’ in asserted contra-distinction to the judicial branch.”

This unconventional portrayal of the judge may lead to rather pessimistic, if not cynical, conclusions about the substance and the evolution of law over time. Posner is aware of the harshness of eventual critiques to come when anticipating, already in the first volume of his trilogy on pragmatism (and, more precisely, in his concluding Pragmatist Manifesto), that his colleagues might accuse him of having “announced the death of law.” But Posner refuses to succumb to the temptation of legal negativism which, he thinks, acts as a damper on useful propositions for reforming the law. It is through a specific method based on a mix between sociological and personalized analysis (drawing heavily upon his own experience as a federal judge) that Posner seeks to overcome the problem. Convinced that we can learn much

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56 Masur (2008).
58 Id. at 441. “Moral and legal nihilism”, Posner maintains, “is as untenable as moral realism and legal formalism.” Id. at 459.
59 Posner (1999, p. XIII) “There is a name for the scholarly niche that this book occupies, and the name – some readers will be surprised to hear me say this – is sociology. This is a book about a profession – or rather professions, not only the law at large…”
60 Since 1981, Posner has been a judge (and for a long time, chief judge) on the United States Court of Appeals for the Seventh Circuit in Chicago.
about judging from what judicial professionals have themselves written about the matter (rather than from some theoretical scholarship?), he proposes to offer his part to a literature that has been, much to his regret, neglected, despite the fact that, among its contributors, some of the most proficient judges in U.S. history can be found (such as Oliver Wendell Holmes, Louis Brandeis, Felix Frankfurter, Benjamin Cardozo, Roger Traynor or Henry Friendly, to quote just a few of the judges and justices for whom Posner has expressed his admiration).

It is specifically in the line of some of the prominent jurists of the late nineteenth, early twentieth century pragmatist tradition that Posner is situating his recent contribution to the judicial professions’ “self-understanding”. He links his view to the anti-formalist paradigm of American legal realism whose golden age was precisely at that period. More than an extended homage, he presents his work as a revival, in contemporary terms, of the so-called sociological jurisprudence, developed in the wake of legal realism among others by Holmes – except that he wants “to push the engine a bit farther along.”

The affinity of the EAL project with the early twentieth century, pragmatist school of legal realism seems almost natural. Yet, at the same time, it is only a partial kinship. One of the main characteristics of traditional legal realism has indeed been anti-conceptualism – in other words, the categorical rejection of legal formalism. If we consider the excessively formalist turn (even if it is a mathematical rather than a legal formalism) taken by much of the law-and-economics movement from its very beginning, Posner’s recent reconnection with legal pragmatism appears as a rupture rather than a continuity with standard EAL. Nevertheless, his partly sociological, partly psychological and, to a large extent, experience-based, description of the judicial profession, which undeniably displays a deep knowledge and understanding of the complex functioning of the contemporary American Common Law, has been much attacked from the outside as well as from the inside of mainstream law-and-economics. Posner is said to do, at best, some anthropology or sociology of law, but that has no predictive power.

The refusal of scholars to follow Posner on his new track may be symptomatic of their conscience of the negative impacts the framework of the pragmatist judge can

have on the viability of the EAL project. Questioning the judge’s rationality assumption (by conferring the actor of the model more realism or plasticity – with all what this implies: errors, ideological opinions, prejudices, strategic behavior, social and political pressure, but also a recognition of creativity, intuition, emotion, imagination in judging…) could, as previously underlined in the context of BLE, undercut the mainstream law-and-economics paradigm, at least in its basic (positive as well as normative) contention according to which judges are (should be) promoting social efficiency as a legal goal. While, in my view, Posner is willing to take the risk of blowing up the efficiency theory of law, the majority of law-and-economics scholars (obviously including those of BLE) are not. In this sense, Posner continues to be what he has always been: a subversive scholar. In the beginning, when he had launched the movement, he was subversive by bringing the economic logic of optimization into the law. Today he seems to be so by bringing legal realism back into the EAL, knowing perfectly well what this implies for the theory.

In fact, Posner follows in many respects the path laid out by Holmes. Like the famous Harvard law professor and Justice of the U.S. Supreme Court did a century ago, he argues that judges make rather than find law. He shares Holmes' conception of law according to which “the law is best described as the activity of the licensed professionals we call judges.” If, however, law is an activity rather than a “concept or a group of concepts”, Posner (1993, p.457) concludes, “no bounds can be fixed a priori on what shall be allowed to count as an argument in law.” As law is shaped essentially by practical needs, legal rules and their evolution over time are necessarily indeterminate. This explains the realists' interest in the concrete facts related to affairs brought to trial rather than in abstract principles of law or some deductive logic of a so-called legal science. In such a perspective, the personality (psychology?) of the judge becomes a determinant factor of the substance and quality (efficiency?) of law. Focusing on the motivational and behavioral aspects, and even the psychology of the judge, legal realism was in some sense a precursor movement of behaviorism, its main concern being: what do judges do and what are the effects of their decisions? In the Holmesian sociological jurisprudence, judicial decisions had themselves been treated as facts that have social repercussions.

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64 To use the term of Mac Farquhar (2001).
66 Id. at 456-7.
67 Id. at 465.
Echoing with Holmes’ famous maxim “the life of law has not been logic, it has been experience,” Posner is presenting the judge as a sort of satisficing agent who is doing as good as he can to find practical solutions to concrete problems – given his own cognitive and motivational limitations and, above all, given the uncomfortable circumstances generated by the “uncharted seas” he is navigating within a “dauntingly complex, uncertainty-riven legal system – featuring an antique constitution, an overlay of federal on state law, weak political parties, cumbersome and undisciplined legislatures, and executive-legislative tugs-of-war.”

By invoking the quirks and failures of the framers of the constitution and by arguing that judicial authorities can and should not be bound by the “will of the dead,” Posner, as a matter of fact, frees the pragmatist judge from a whole range of constraints. If one believes, like Posner in the line of Holmes, that the law does not live in the statements of the legislator nor in the books of jurisprudence, and even less in sacred texts, but in the concrete day-by-day actions of the courts and in the behavior of judges who create the law (to which we must add the fact that most law is made, as Posner explains, “not by the tiny handful of great judges but by the great mass of ordinary ones”), it could be only one step to conclude that, behind the decisions of courts, all there is to be found are the discretionary choices of judges in particular situations. Would this imply that, at least potentially, all judicial action is built on a form of arbitrariness? As detractors of pragmatism claim, such a conception of law might ineluctably lead to judicial activism and legal nihilism.

Finally, the only way to overcome such an (untenable?) posture is by engaging the issue of judicial (and eventually democratic/constitutional) legitimacy. This issue is, however, almost never openly addressed in the EAL, its primary focus being on what judges do rather than why they should be obeyed. But a fundamental question remains: can the pursuit of efficiency by judges be considered as an argument strong enough to warrant such obedience?

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69 To use the expression of Easterbrook (1998, p.1119).
70 “Posner (1993, p.467 and p.460) writes: “Law is not a sacred text...but a usually humdrum social practice vaguely bounded by ethical and political convictions”.... “Law is functional, not expressive or symbolic either in aspiration or in effect”.
71 Posner (1994, p.3).
72 This is indeed what happened to several, late twentieth century, projects of resuscitation of the tradition of legal realism (reaching from Critical Legal Studies to so called postmodern legal theories of deconstructivism or antifoundationalism).
enough to confer validity to their decisions? In other words, can a criterion for evaluating the soundness of legal rules, decisions or institutions (what, initially, the efficiency standard has been about) explain and justify why anyone should accept the verdicts of the man or woman in a black robe? The emphasis on the systematic flaws and biases that eventually reduce judges’ capacity and willingness to pursue the goal of efficiency (the voluntarily under-explored research agenda of BLE?) should even more urgently call for consideration of the question of legitimacy. The systematic silence on this issue could eventually mean that, in law-and-economics, the legitimacy of judicial authority has simply been assumed. Nevertheless, with the significant extension of the scope of the pragmatist theory of law operated by Posner and his repeated reference to judicial discretion, it seems no longer suitable for economic analysts of law to just elude the problem.

Posner’s attempt to come to terms with the question of judicial legitimacy may again surprise. In one of the rare texts situating the EAL within the various traditions of legal thought, he connects his own approach with Hans Kelsen’s positivist theory of law, concerned precisely with the issue of the validity of legal norms. Rejecting of course arguments such as the autonomy of law as a discipline (brought to its paroxysm by the author of the Pure Theory of Law73), Posner sees nevertheless many epistemological similarities,74 especially with respect to the understanding of the judicial role within a legal system and, above all, with respect to the notion of lawfulness. He can obviously relate to Kelsen who “pictures the judge as either deriving a specific legal norm to resolve the case before him from a higher norm, or, if there is no higher substantive norm to guide him in the particular case, creating such a norm, as he is authorized to do by the jurisdictional norm that authorizes judges to decide cases. In either situation the judge is doing law; it’s just that in the second he creates rather than derives the legal norm that he applies to decide the case.”75 By the same token he disagrees with legal positivists such as H.L.A. Hart for

73 Kelsen (1978).
74 Many of the features that Posner attributes to Kelsen’s theory may apply to his own as well, such as, for instance, the “rejection of natural law”, the “emphasis on jurisdictional at the expense of substantive norms,” the “claim that the application of law is not mechanical but often involves the creation of a ‘lower norm on the basis of a higher norm’,” the “acknowledgement that sometimes the only preexisting law that a court can apply to decide a case is the law that confers the power of decision on the court,” the “concept of interpretation as a frame rather than an algorithm...” See Posner (2001b, p.20).
75 Id. at 21.
whom the judge, in the latter scenario, would be clearly “stepping outside the law” and hence, “turn into a politician.”\textsuperscript{76}

Simultaneously, Posner suggests that a pragmatic conception of law like Kelsen’s is indefensible without, at one point or another, referring to the rule of law whose role is precisely to set limits to judicial arbitrariness. Can we suppose that, for him, the same applies to his own perspective, based on a revival of legal realism? A fact is that, as pointed out earlier, he rejects the point of view of F.A. Hayek for whom (at least according to Posner’s interpretation), “custom is the only legitimate law and so a legal judgment not based on it is not true law.”\textsuperscript{77} For Posner, Hayek’s attempt to limit judicial discretion as tightly raises a number of problems, such as the difficulty to ascertain what can be counted as custom.\textsuperscript{78} Above all, it could lead to the confusing presumption that “legislatures have superior competence to judges when it comes to prescribing rules of conduct”\textsuperscript{79} – standpoint that, as Posner recognizes himself, Hayek would certainly not have defended, since he is “so distrustful of legislatures.”\textsuperscript{80} For Posner, Hayek has thus missed some major points, in particular (and this may seem intriguing), with respect to fundamental distinctions such as the one between the law and the rule of law, or between a formal and a substantial conception of law.\textsuperscript{81}

Last but not least, Posner refutes the theory of constitutional legitimacy advanced by his law-and-economics colleague, Frank H. Easterbrook.\textsuperscript{82} For the latter, it is indeed “only because (and if) the Constitution has a single meaning, the textual meaning,” that federal judges should be obeyed,\textsuperscript{83} whereas for Posner (in the line of Kelsen), judicial decisions, on the contrary, are obeyed “even when the textual basis for a decision is exceedingly tenuous.”\textsuperscript{84} In other words, for Posner, the propensity to obey judges is “unrelated to the textual basis for their decisions; it is much more closely related simply to their jurisdiction.”\textsuperscript{85} For it is precisely when founding legal documents such as the Constitution are unclear, and hence call for interpretation, that judges are needed. “If those documents were clear”, Posner insists, “there would

\textsuperscript{76} Id. at 21.
\textsuperscript{77} Id. at 37.
\textsuperscript{78} Id. at 37.
\textsuperscript{79} Posner (2005, p.152).
\textsuperscript{80} Id. at 152.
\textsuperscript{81} Posner (2001b, p.41).
\textsuperscript{82} Easterbrook is also a judge at the U.S. Court of Appeals for the Seventh Circuit (where he has, a few years ago, replaced Posner as chief judge).
\textsuperscript{83} Posner (2001b, p.25), referring to Easterbrook (1998).
\textsuperscript{84} Id. at 26.
\textsuperscript{85} Id. at 27.
be fewer disputes, so fewer judges, and in a sense less law; if they were perfectly
clear maybe we wouldn’t need any judges.”86

Can we deduce from Posner’s positioning within the established legal paradigms
that, for the EAL (in its initial as well as amended version) the decisions of the
efficiency-seeking judge, unbound by preexisting norms or rules, are lawful – simply
because he is a judge?

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86 Id. at 26.


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