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Posner

Abstract

Posner is one of the main contributors to what is known as “economic analysis of law”. In this entry, we restrict our presentation to a few controversial claims he made (efficiency, wealth-maximization, Hicks-Kaldor, judicial decision making).

Biography

Richard A. Posner was born in New York city January 11, 1939; he graduated from Harvard Law School and taught at Stanford University Law School and at the University of Chicago Law School; he is judge of the U.S. Court of Appeals for the Seventh Circuit where he was appointed in 1981 and for which he was chief judge from 1993 to 2000.

General presentation

The first point that could be noted is that Posner is one of the most important judges of all times in the USA. Christopher McCurdy and Ryan Thompson noted in 2011, he “can arguably be called the most influential judge currently on the bench” (50). Indeed, Posner is “a staple in legal casebooks ... his name continues to show up in public discourse and peer judge interviews.” (2011, 3) They cite a few figures that impressively witness of Posner's influence: between 1998 and 2000, Judge Posner was cited 1,406 times (figure computed by Choi and Mitu Gulati, 2004); between 1989 and 1991, he ranked third on the list of the “Top Twenty-Five Prestige Scores (Klein and Morrisroe, 1999) and finally 118 Judge Posner opinions appeared in casebooks used in the 1999-2000 school year – ten times more than 90% of federal circuit judges. Yet, the American Bar Association – on a scale going from “exceptionally well qualified”, “well qualified”, “qualified”, to “not qualified” – gave him the “lowest possible ratings, ‘qualified/not qualified’” (Lott, 2006).¹ This is also impressive and reveals that, as important as he might be, Posner remains controversial in his judicial decision making.

Second, Posner is and has always been a public intellectual (Fleury and Marciano, 2013). Writing for non-academic audiences has never been secondary for Posner. It became more and more important these last ten years, after 2004, when he launched the Becker-Posner blog (becker-posner-blog.com/), with economist and 1992 nobel prize winner Gary Becker. What Posner posts on these blogs might seem a bit far-fetched sometimes. It would have been useful and interesting to look at these writings in detail. For a lack of place, we left it aside.

Third, and obviously a major aspect of Posner’s work: his academic and scientific writing. Posner has been so prolific that is impossible to summarize his ideas – one can find his list of publications on the website of the University of Chicago.² One can nonetheless emphasize a few important ideas he put forward.

1 John Lott, 2006, Pulling Rank, New York Times, January 25, http://www.nytimes.com/2006/01/25/opinion/25Lott.html?_r=2&

2 <http://www.law.uchicago.edu/faculty/posner-r>. For more on Posner, see Medema, 2010; and a recent biography, Domnarski, 2016.

Innovative and original aspects

Economic Analysis of Law

In 1973 was published the first edition of *Economic Analysis of Law*. At the time, the book was reviewed as a contribution in law and economics: the book could “serve very well for a law and economics course” (Diamond 1974, p. 294) and indeed is a “coursebook in law-and-economics” (Krier 1974, p. 1697). At best, it was noted that, “[w]ith the publication of Richard A. Posner’s economic analysis of law, that field of learning known as ‘Law and Economics’ [had] reached a stage of extended explicitness” (Leff 1974, p. 451). What was not viewed was that Posner had launched a new field. Economic analysis of law is not simply another name for from law and economics (see Harnay and Marciano, 2009). By contrast with “law and economics” that defines economics by its subject matter, an economic analysis of law assumes that economics is a method, an approach or a set of tools that is used to understand non-market phenomena. It emerged in the early 1970s under the influence of Gary Becker (Fleury, 2015). In this perspective, the law became an object that economists could analyze. The latter (1968), William Landes (1967, 1968, 1971) or Isaac Ehrlich (1970) proposed the first economic analyses of legal problems. Posner was not only the first one to name the field, with the title of his book, he was also the first to systematically adopt such an approach.³

Efficiency, as wealth maximization

One of the advantages that comes with an economic analysis of law lies in the possibility of using the concept of efficiency to assess legal systems: rules, behaviors or judicial decisions are legitimate when or because they are efficient; which, to Posner, means when or because they maximize society's wealth.

Let us start by saying that Posner defines wealth in monetary terms exclusively, as “the value in dollars or dollar equivalents (...) of everything in society. It is 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. 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” (Posner, 1979, 119). Or, “the sum of all tangible and intangible goods and services, weighted by prices of two sorts: offer prices (what people are willing to pay for goods they do not already own); and asking prices (what people demand to sell what they own” (Posner, 1995, 356).

Such definition of wealth is not as narrow as might appear at first sight. Indeed, Posner adopts a rather extended conception of markets. First, he does not restrict to explicit markets. But he considers implicit markets, in which services are sold that can be monetized by reference to substitute services sold in explicit markets. This enables Posner to use the wealth maximization criterion to assess the pecuniary value of a wide set of goods and services. Second, he also considers hypothetical markets, defined as those markets in which high transaction costs prevent individuals to transact with each other voluntarily and, therefore, efficient transactions to occur – for instance, individuals may be forced into involuntary transactions in the case of accidents, when a victim is obliged to transact with the injurer and the victim and the injurer cannot agree on a common price. Then, using a third party (e.g., a court...) within a hypothetical market to determine the price of the transaction is a way to have the transaction occur actually and to achieve an efficient allocation of resources. Indeed, agents will consent to the accident-as-a-transaction as long as it is wealth-maximizing, i.e. when it is less costly to let the accident occur than to prevent it. On the contrary, they will let the accident occur when it is wealth-enhancing. Then, transactions within hypothetical markets reconcile the possibility of involuntary transactions with the idea of individual consent that lies at the core of the wealth maximization criterion.

3 Criticisms of this economic approach to law can be found in Backhaus, 2017 and Malecka, 2017.

Indeed, Posner equates efficiency with wealth maximization. Thus, from this perspective, “[r]esources are efficiently allocated in a system of wealth maximization when there is no reallocation that would increase the wealth of society” (Posner, 1980a, p. 243). That is, Posner remains in the standard maximizing framework of utilitarianism but substitutes wealth for “utility”.

Using wealth, instead of utility, as most economists usually do, allows Posner to solve the vexed problems of how to measure and to compare individual utilities. In a system based on “wealth maximization”, interpersonal comparison of wealth are possible, making it possible to compare the gains of one individual or a group of individuals to the losses incurred by another individual or group. Therefore, a transaction will be considered as legitimate and desirable when it increases the wealth of the society. For instance, Posner gives the following example: “I offer you \$5 for a bag of oranges, you accept, and the exchange is consummated. We can be confident that the wealth of the society has been increased. Before the transaction you had a bag of oranges worth less than \$5 to you and I had \$5; after the transaction you have \$5 and I have a bag of oranges worth more than \$5 to me. We are both richer, as measured by the money value we attach to the goods in question.” (Posner, 1979, 120). The transaction is then legitimate and even desirable.

Another example is given by Posner: “[c]onsider an accident that inflicts a cost of \$100 with a probability of .01 and that would have cost \$3 to avoid. The accident is said to be a wealth-maximizing “transaction” [...] because the expected accident cost (\$1) is less than the cost of avoidance.” (1995, 358) Thus, clearly, what this accident costs to the society is less than what it would have costed to avoid it. An individual who does not spend the \$3 to avoid a \$1 cost is not negligent. Conversely, if the cost of avoidance are lower than the accident cost, not only the accident is not wealth-maximizing but also an individual who would have not tried to avoid the accident would have been negligent. This is precisely why Posner also praised judge Learned Hand for his 1942 decision in a liability case: it was a wealth maximizing – and therefore efficient – decision (e.g. Posner, 1972, 32; or 1999, 91).

Wealth and capacity to pay

Posner considers that wealth must be determined by using individuals' willingness to pay for a good rather than by its price. This is understandable for 2 reasons: first, on implicit and hypothetical markets, there are no prices and therefore the only way to value a transaction is to know what individuals would like to pay for a good; second, the real value of a good for an individual is not represented by the price but by his or her willingness to pay. Wealth relates to consumers' surplus.

But then, one must also note that individuals may not only value a good they desire. They should be able to pay for it. Posner meant capacity to pay as a means to determine wealth:

"a desire not backed by ability to pay has no standing--such a desire is neither an offer price nor an asking price. I may desperately desire a BMW, but if I am unwilling or unable to pay its purchase price, society's wealth would not be increased by transferring the BMW from its present owner to me." (Posner, 1995, p. 357).

or,

"that wanting 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, although it might do so in a system of utility maximization. Wealth maximization thus excludes claims based on pure desire-claims not backed up by willingness (implying ability) to pay." (Posner, 1980a, p. 243)

One would say that, for a criterion that Posner also wanted to be “ethical” – he “argued that “wealth maximization” provides an ethically attractive norm for social and political choices, such as those made by courts asked to determine whether negligence or strict liability should be the rule for deciding whether an injurer must compensate his victim.” (Posner, 1985, 85) –, grounding “wealth” on individual's “capacity to pay” is problematic. Posner replied mainly by saying that one should distinguish efficiency from justice and the allocation from the distribution of resources. If a rule, a legal decision or a policy increases and maximizes wealth, then it directly benefits to certain

individuals and not to others. Nothing prevents the use of redistributive policy to compensate the effects of such a wealth-increasing rule, decision or policy.

This relates to another and quite important aspect of Posner's conception of wealth maximization: the Kaldor-Hicks criterion.

Kaldor-Hicks and wealth maximization

In economics, efficiency is measured in terms of Pareto optimality. However, Posner insisted that "Pareto superiority is not a necessary condition to be wealth maximizing" (Posner, 1995, 357). Posner distinguished wealth from utility maximization à la Pareto. To him, a transaction, decision or policy may be "wealth maximizing even if the victim is *not* compensated" (1995, 358; emphasis added). Precisely, to know if an allocation of resources is efficient without the Pareto criterion, that implies effective compensation, one may use the Kaldor-Hicks test, that rests on potential compensation. In other words, effective compensation is not required to characterize a move from one situation to another one: "[U]nder the Kaldor-Hicks definition of efficiency, which is also widely used by economists, a reallocation of resources is efficient if it enables the gainers to compensate the losers, whether or not they actually do so. This is equivalent to wealth maximization" (Posner, 1980a, 244). Or, to put it in the more figurative terms Posner himself uses, an efficient decision in the Kaldor-Hicks sense consists in "making the pie larger without worrying about how the relative size of the slices changes" (Posner, 2000, 1155).

Interestingly, this latter formulation reveals one important feature of Kaldor-Hicks efficiency and, therefore, of Posner's wealth maximization criterion: the exclusion of distributional issues and "normative considerations of distributive justice" as the Kaldor-Hicks criterion "treats a dollar as worth the same to everyone." (Posner, 2000, 1154). However:

"to the extent that distributive justice can be shown to be the proper business of some other branch of government or policy instrument (for example, redistributive taxation and spending) and that ignoring distributive considerations in the particular domain of decision making that is under consideration will not have systematic and substantive distributive consequences, it is possible to set distributive considerations to one side and use the Kaldor-Hicks approach with a good conscience. This assumes, as I have said, that efficiency in the Kaldor-Hicks sense ... is a social value." (Posner, 2000, 1154-1155)

From that perspective, Posner adds, "efficiency in the Kaldor-Hicks sense is accepted as a social value, albeit not the only social value." (Posner, 2000, 1154). In addition, "even if Kaldor-Hicks efficiency has no social value", it is "a convenient instrument" (Posner, 2000, 1156) that can be used to decide whether or not one should make a decision. This is where Posner links the "Kaldor-Hicks concept of efficiency" to cost-benefit analysis: decisions can be made, rules modified, policy measures taken by comparing costs and benefits without the winners being obliged to compensate the losers. Then, if the benefits are greater than the costs, wealth is maximized; on the contrary, if costs exceed benefits, wealth is not maximized. Thus, the legitimacy of CBA comes from the use of a Kaldor-Hicks definition of efficiency. Reciprocally, Posner's defense of CBA is also a defense of the Kaldor-Hicks principle.

Common law and efficiency

A major positive claim in the law and economics literature that was first formulated by Posner is that the common law is economically efficient. Indeed, the development of common law is mainly driven by judicial decisions issued in response to the needs of the society through cases. When facing new cases for which no precedent is available, judges make decisions relying on the economic efficiency criterion, defined as wealth maximization or Kaldor-Hicks efficiency. Thus, they are assumed to have a preference for efficiency over other moral values (such as income redistribution) and to share that definition of efficiency as a desirable social goal with the society. Further, even if they prefer other values, they issue decisions promoting efficiency because the limitations of the judicial process constrain them in their ability to pursue other objectives. In particular, unlike legislators, they are poorly equipped with tools allowing them to engage in effective wealth redistribution or other unattainable values (See for instance Posner 1973, 1979, 2010). As a consequence, judges having

internalized efficiency as a socially desirable goal, even unconsciously, adopt an economic logic when they make their decisions. Indeed,

"[T]he character of common law litigation forces a confrontation with economic issues. The typical common law case involves a dispute between two parties over which one should bear a loss. In searching for a reasonably objective and impartial standard, as the traditions of the bench require him to do, the judge can hardly fail to consider whether the loss was the product of wasteful, uneconomical resource use. In a culture of scarcity, this is an urgent, an inescapable question. And at least an approximation to the answer is in most cases reasonably accessible to intuition and common sense" (Posner, 1973, 99).

Parties to litigation consent to efficient decisions made by courts because their self-interest is promoted by supporting such decisions. Namely, "by doing so they increase the wealth of the society; they will get a share of that increased wealth; and there is no alternative norm that would yield a larger share" (Posner, 1980b, p. 505). Furthermore, independent judges are insulated from interest group pressures and personal factors (Posner, 1993) and can therefore promote social efficiency.

Resting on the examination of particular common law fields, much of Posner's works are forceful attempts to determine what legal rules would be efficient and to examine how they correspond to the legal rules that exist. Along this line, he analyzes various fields of common law, including contract law, liability rules, property law, criminal law, family law and sex law, using the lens of economic efficiency. Then, common law appears to differ from a collection of multiple and conflicting precedents whose coherence may at first sight be uneasy to grasp. But it may rather be best understood as shaped by an economic – albeit most of the time implicit – economic logic underlying all judicial decisions and intending to maximize social wealth. Posner's theory of the efficiency of common law helps thus rationalize common law within a single – economic – framework. In his own words (Posner, 2011, 315-316), "economics is the deep structure of the common law, and the doctrines of that law are the surface structure. The doctrines, understood in economic terms, form a coherent system for inducing people to behave efficiently, not only in explicit markets but across the whole range of social interactions".

Posner's claim that the common law is efficient has fueled an important literature either supporting or criticizing. One of the most debated issues deals with the mechanisms likely to explain the evolution of law towards efficiency. A substantial body of literature has raised doubts about the existence of such mechanisms, for various reasons. First, the judicial preference for efficiency over other moral values and preferences (for leisure, reputation...) has been a matter of considerable debate whereas the apparent disinterest of judges in efficiency, at least as expressed in common-law court opinions, has been emphasized. Thus, in response to Posner's seminal analysis, various demand-side models have been developed, calling attention to forces other than judicial preferences in explaining the law and suggesting that selective litigation of rules by parties may actually drive legal evolution and help promote efficient legal common law rules, regardless of judicial preferences, as inefficient rules may be challenged before courts and therefore overturned more often than efficient ones (See for instance Goodman, 1978; Landes and Posner, 1979; Priest, 1977; Rubin, 1977). Also in response to Posner's theory of the evolution of common law, other works have cast doubt on the very fact that common law is efficient. Some authors point out that common law adjudication may rather lead to cycles of efficiency and inefficiency (Cooter and Kornhauser, 1980). Others argue that the excessive amount of information needed for judges to decide cases may prevent them from making efficient decisions (Aranson, 1992; Rizzo, 1980). It is also been argued that common law may lead to inefficient lock-in and path-dependency when it preserves obsolescent rules. Furthermore, Tullock (1980) has argued that the English common law adjudication is less efficient than legislation – public choice critics mainly focusing on the idea that judicial processes are subject to the same sorts of interest-group pressures as are legislatures. More recently, the legal origins literature has revived the debates on the common law efficiency through its attempts to demonstrate the superior economic performance of common-law legal systems over other systems.

Judges (judicial preferences and behavior)

Posner devoted a lot of work analyzing Judges and judicial behavior. It was one of the first areas that he viewed as important when he started to use economics to analyze the law. In 1971, he thus wrote that judges seem to display a certain propensity towards efficiency – they “are guided by concern with economic efficiency” (1971: 223) and “think in economic terms” (1971c: 224). Or, in 1973, he insisted that one can “assume that judges make their decision in accordance with the criterion of efficiency” (1973: 325; emphasis added). What was important to Posner was to explain the efficiency of the Common Law. To be more precise, there were two versions of this theory. First, the positive version holds that rational judges having a preference for efficiency do actually issue decisions that maximize social wealth; hence, common law tends towards efficiency. Second, the normative view argues that judicial decisions should help common law to evolve towards efficiency, as rational judges should make their decisions with the wealth maximizing criterion (Posner, 1980).

Eventually, Posner criticized the traditional and idealized view on judicial behavior according to which public interest may be a judicial goal – assuming this is actually the case would amount to acknowledging that judges do not behave as ordinary human beings. To him, there is no reason to argue that judges are different from other individuals. Hence, it can be assumed that they are self-interested utility maximizers – they maximize “the same thing as everybody else does” (1993). Their utility function may contain both monetary and non-monetary arguments, such as leisure, popularity, prestige, and reputation. Judicial decisions may also have some pure consumption value for judges who may therefore derive some kind of positive utility from their decisions close to that derived by “artists or craftsmen who value aesthetic excellence in their field” (Posner, 2008).

One of the consequences of this view is that judges may not follow the precedent and may be led to innovate. This means that this is consistent with the idea that judges create the law, that they acting as *interstitial legislators* and significant policy-makers.

Over time, Posner himself has also continued documenting the key role played by judges from both a theoretical and empirical standpoint, regularly publishing contributions on adjudication and judicial behavior – the room continuously dedicated to that issue in the successive editions of his textbook *Economic Analysis of Law*, as well as his most recent publications (2008, or 2013 with Epstein and Landes), obviously express his continuing interest for the topic.

Legacy

It is impossible to summarize Posner's legacy. His impact on economic analyses of law is huge. It is probably not exaggerate to claim that all contributors to law and economics/economic analysis of law are in one way or another "Posnerians". Either because they agree or because they disagree with him. Posner has radically transformed law and economics and also probably the legal system.

Cross references

Becker

Coase

Economic analysis of law

Wealth maximization

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