

# The judge, the academic and the public intellectual: the totemic scholarship of Richard A. Posner

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**Abstract** Richard A. Posner plays a totemic role within law and economics, and not only. His scholarship is so wide to the point that it is quite impossible to face any topic without finding a seminal contribution by him. This introduction presents a special issue devoted to Posner’s scientific and academic work.

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Richard A. Posner plays a totemic role within law and economics, and not only. His scholarship is wide to the point that it is quite impossible to face any topic without finding a seminal contribution by him. Any scholar in law and economics cannot really become such without having studied at some point his book *An Economics Analysis of Law*, now at the 9th edition. His work as a judge is equally relevant expanding thus his influence across the whole legal community, national and international. As a corollary, this also means that it is really difficult to find a simple way to introduce Posner. The easiest way out seems to simply mention a few objective, and indisputable biographical facts—like, he 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

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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. All these details are important for understanding his scholarship but can be found easily on the internet—for instance on the website of the University of Chicago,<sup>1</sup> where can also be found his seemingly endless list of publications,<sup>2</sup> the incredible number of decisions he made and his amazing 170-page long curriculum vitae! Certainly, one would say that size does not necessarily matter. Yet it does not per se account for his important role into the debate at the intersection of law with economics and in legal studies generally speaking. With Posner, quality always rhymes with quantity. Undoubtedly, Posner is one of the most important legal scholar of his times.

First of all, it worth being reminded that he is one of the most important judges of all times in the USA. As Christopher McCurdy and Ryan Thompson already noted in 2011, he “can arguably be called the most influential judge currently on the bench” (p. 50). Indeed, Posner is “a staple in legal casebooks... his name continues to show up in public discourse and peer judge interviews.” (2011, p. 3) They cite a few figures that impressively witness of Posner’s influence: between 1998 and 2000, Judge Posner was cited 1406 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<sup>3</sup>). This is also impressive and reveals that, as important as he might be, Posner remains controversial in his judicial decision making.

Controversial, Posner has also (and one might add *always*) been in his non academic and non judicial writing. Indeed, Posner has always been a public intellectual. As one of us has stressed elsewhere (Fleury and Marciano 2013), writing for non-academic audiences has never been secondary for Posner. It became more and more important these last 10 years, after 2004, when he launched the Becker-Posner blog ([becker-posner-blog.com/](http://becker-posner-blog.com/)), with economist and 1992 nobel prize winner Gary Becker (Fleury 2015). 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.

In this special issue, the focus is put on a third aspect of Posner’s writings and more relevant for a scholarly journal in law and economics: his scientific work. Indeed, Posner a judge, a public intellectual and an academic. More precisely, he is also one of the most important contributors to an “economic analysis of law”. The importance of his contributions come, in the first place, from the fact that he was not only the first to use the expression “economic analysis of law” to name the field (1973) but he was also the one who, along with economists William Landes and

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<sup>1</sup> <http://www.law.uchicago.edu/faculty/posner-r>.

<sup>2</sup> A couple of them have also been published in this journal (see Posner 1995).

<sup>3</sup> [http://www.nytimes.com/2006/01/25/opinion/25Lott.html?\\_r=2&](http://www.nytimes.com/2006/01/25/opinion/25Lott.html?_r=2&).

Isaac Ehrlich, launched this *new* way to look at that discipline lying at the intersection between law and economics in the early 1970s.

To understand what it precisely means, one must bear in mind the difference that exists between law and economics and an economic analysis of law (see Harnay and Marciano 2009; Marciano 2016; see also Medema 1998). Indeed, as Ronald Coase once noted, “two parts” co-exist in law and economics (1996, p. 103; or Coase in Epstein et al. 1997, p. 1138), that are “quite separate although there is a considerable overlap” (Coase 1996 pp. 103). The first part corresponds to what is called law and economics—and, implicitly corresponds to the analyses to which Coase attached his name. The second part, to which “Judge Posner is the person who has made the greatest contribution” (Coase in Epstein et al. 1997, p. 1138), is “often called the economic analysis of law” (Coase 1996, p. 103). This way of envisaging the interactions between economics and the law differs from Coase’s and from law and economics, in that it consists in using economics as a set of tools to analyze legal problems.<sup>4</sup> With Posner, the law no longer mattered because of its impact on economic activities. It became an object that economists could analyze. This implies that economists could go beyond the areas that were usually analyzed in law and economics—basically, antitrust and the regulation of markets—but could also could analyze the working of the legal system: crime and criminal behaviors, and the behavior of judges and of prosecutors; the relevant—that is the efficiency—of any legal rule. This is what the field owes to Posner. It was all the more legitimate to dedicate a special issue of the *European Journal of Law and Economics* to this particularly important scholar, judge, lawyer-economist.

This special issue is made of 6 articles. They are not meant to give an exhaustive of all that Posner studied and wrote about. As previously explained the bulk of his writings would make such an operation almost impossible for anyone. This objective cannot be met in a single issue of a journal and would require however many issues. Therefore the ambition of the project is simply to gather a handful of contributions on the whole evidencing the importance, and richness, of his work, with a special section—that comprise 3 essays—focused on his last book, *The behavior of federal judges: a theoretical and empirical study of rational choice* co-authored with Lee Epstein and William Landes. The book is the last step of a long lasting reflection about judge’s behavior and judicial decision making one of the relevant questions that Posner contributed to make visible in the field. As we have shown elsewhere (Marciano et al. 2017), he was not the first to analyze the behavior of judges with economic tools. Yet, his 1993 article—“What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)” (Posner 1993)—imposed itself as a turning point in the economic literature on judges. Before Posner, the “pervading” (Schauer 2000: 615) view was that judges were disinterested and motivated only by the general interest. Posner, already a judge himself at the time, challenged this view and his article became by far the most cited paper dealing with

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<sup>4</sup> Guido Calabresi can also be said to be one of the precursors of an economic analysis of law even if his views on an economic analysis of law are completely different from Posner’s (see Ramello and Marciano 2014; Marciano, 2016).

this topic.<sup>5</sup> More than 20 years later, Posner still writes on judicial decision making. And his work remains controversial. The 3 comments—respectively written by Charles M. Cameron<sup>1</sup> and Lewis A. Kornhauser, Diana Davis and Alessandro Melcarne—show that!

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<sup>5</sup> Almost 800 citations achieved by October 2015 (source: Google Scholar).