POSNER, ECONOMICS AND THE LAW: FROM *LAW AND ECONOMICS TO* AN *ECONOMIC ANALYSIS OF LAW*[1]

Sophie Harnay[2] and Alain Marciano[3]

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The purpose of this article is to discuss Posner's economic analysis of law and to analyse the differences between his economic analysis of law and law and economics. We propose and demonstrate a twofold original argument. First, we show that Posner does not only propose an economic analysis of the working of the legal system but also that his approach has changed in the early 1970s, shifting from a law and economics perspective in which the focus is put on the working of the economic system to an economic analysis of law in which the emphasis is put on the functioning of the legal system. He appears then no longer influenced by Aaron Director and Ronald Coase but rather by Gary Becker. Therefore, and this is the second part of our demonstration, we show that the evolution in Posner's works essentially derives from the influence of Becker and the adoption by the former of the methodological views of the latter. More precisely, we claim that Posner no longer retains a -- restrictive -- definition of economics by subject matter but that he aligns himself on Becker and his broader definition of economics placing nonmarket decisions and method at the core of the discipline. In other words, we argue that Posner is the first who transposes Becker's definition of economics in law and economics and that this is precisely what makes Posner's economic analysis of law possible and specific, and also of particular importance.

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2 Université Paris Ouest Nanterre La Défense and EconomiX – CNRS UMR 716; postal address: Maison Max Weber, Avenue de la République, F-92001 Nanterre Cedex, France; electronic address: sophie.harnay@u-paris10.fr

3 Université de Reims Champagne Ardenne, OMI-EDJ and EconomiX-Cachan CNRS; postal address: Université de Reims Champagne Ardenne; Faculté des Sciences Economiques et de Gestion; 57 bis, rue Pierre Taittinger, F-51096 Reims Cedex, France - electronic address: alain.marciano@univ-reims.fr

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I. INTRODUCTION

The purpose of this article is to discuss Posner's economic analysis of law and its place in the evolution of the law and economics movement. Certainly, the specificity of Posner's analysis is acknowledged. However, most of the time, it is simply considered as another step in the evolution of the law and economics movement, rather than conceived as strongly peculiar or of its own. Usually, in effect, the standard law and economics history makes no clear-cut difference between law and economics and the economic analysis of law, and any economic work dealing with law or legal rules published after 1960 -- *i.e.* any contribution to "new law and economics" -- is alternatively viewed as "law and economics" or an "economic analysis of law".

Thus, for his part, Coase receives a central place because of his path-breaking 1960 article, *The Problem of the Social Cost.* A turning point in the evolution of the field, it represents the "origin [of …] the modern *law and economics* movement" (Hovenkamp, 1990, p. 494; emphasis added) and marks the passage from an "old" to a "new" law and economics approach (Posner, 1975). The reason is that Coase's article "established the paradigm style for the *economic analysis of law*" (Manne, 1993; emphasis added). In other words, Coase is praised for having founded the "new law and economics" by delineating an economic analysis of law. That the expression is coined by Posner when he publishes an eponymous book in 1973 is not viewed as problematic, probably because Posner's economic analysis of law is just held for a contribution in law and economics. Commentators and reviewers agree that 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). Besides, "[w]ith the publication of Richard A. Posner's economic analysis of law, that field of learning known as "Law and Economics" has reached a staged of extended explicitness" (Leff, 1974, p. 451). Even Posner's more innovative researches -- *i.e.* those that are not viewed as a summary of previously existing works -- supposedly contribute to an increase of the domain of investigation of law and

economics. Thus, after Posner "[n]ever again would Law and Economics be thought of as exclusively the domain of antitrust and corporate law. Now its domain was the very heart of the legal system, torts, property, contracts, domestic relations, procedure, even constitutional law" (Manne, 1993). After all, Posner himself defines his economic analyses of law as "recent developments in *law and economics*" (Posner, 1975, emphasis added).

In this article, we depart from a dominant interpretation that amounts at minimizing Posner's economic analysis of law to mere additions to law and economics. We rather argue that several essential differences exist between law and economics and an economic analysis of law. These differences justify to consider Posner's contributions as specific and original compared to law and economics. More precisely, we claim that these discrepancies make it actually difficult to reconcile both fields as parts of a same movement and account for Posner using the expression "economic analysis of law" preferably to law and economics, in order to label his own work at the beginning of the 1970s. From this perspective, we build upon Coase's statement that "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) and "are separating more and more as time goes by" (Coase in Epstein *et al.*, 1997, p. 1138). Thus, a first part to which Coase has attached his own name aims to "study the influence of the legal system on the working of the economic system" (1996, p. 104; 1997, p. 1138) while a second part, "often called the economic analysis of law" (Coase, 1996, p. 103) consists in an economic analysis of the working of the legal system. To this second part, as Coase acknowledged (Coase in Epstein *et al.*, 1997, p. 1138), "Judge Posner is the person who has made the greatest contribution".

We put these claims in a historical perspective and concentrate our analysis mainly on the changes that occur at the turn of the 1970s. It allows us to propose and demonstrate a twofold original argument. First, we show that Posner does not only propose an economic analysis of the working of the legal system but also that his approach has changed in the early 1970s, shifting from a law and economics perspective in which the focus is put on the working of the economic system to an economic analysis of law in which the emphasis is put on the functioning of the legal system. He appears then no longer influenced by Aaron Director and Ronald Coase but rather by Gary Becker. Therefore, and this is the second part of our demonstration, we show that the evolution in Posner's works essentially derives from the influence of Becker and the adoption by the former of the methodological views of the latter. More precisely, we claim that Posner no longer retains a -- restrictive -- definition of economics by subject matter but that he aligns himself on Becker and his broader definition of economics placing nonmarket decisions and method at the core of the discipline. In other words, we argue that Posner is the first who transposes Becker's definition of economics in law and economics and that this is precisely

what makes Posner's economic analysis of law possible and specific, and also of particular importance.

II. POSNER'S EARLY WRITINGS: CONTRIBUTIONS TO *LAW AND ECONOMICS*

Posner is known, among other things, for being a (quantitatively and qualitatively) prolific writer. His debut in the academic career is no exception. Thus, at the end of the 1960s -- he is then assistant professor at Stanford University -- and then in the early 1970s -- as a professor of Law at the University of Chicago --, more specifically in the three years from 1969 to 1971, Posner publishes eight articles. Through their topics and the issues they deal with, these works form a remarkably consistent set and can be classified as "law and economics" papers. In other words, Posner's early works cannot yet be considered as instances of *economic analyses of law*. In these articles, in effect, Posner discusses regulatory policies, antimonopoly or anti-trust rules, non-competitive -- natural monopolies or oligopolies -- markets and the efficiency of legal rules and administrative procedures that can be used to control them (Posner, 1969a, b, c; 1970a, b; 1971a, b, c). He therefore deals with issues that have been continuously discussed and analysed in academic journals as "law and economics" issues since the origins of the field, in the 1940s at the University of Chicago: "[f]or more than thirty years the pages of *The Journal of Political Economy* and *Law and Economics* have set forth the empirical findings and explanations of the adoption and workings of [regulatory] policies, both major and minor" (Mitchell, 1989, p. 287; see also Medema, 1998). In particular, the issues that Posner deals with at that time are also those that appear under the pen of Aaron Director and Ronald Coase, two representatives of the – old – law and economics tradition[4] and major influences on Posner.

Posner gets acquainted with Director in 1968 at Stanford where the latter has retired[5]. Most of the articles that Posner then writes reveal the influence of Director, and Posner acknowledges it. Interestingly, Posner specifically thanks Director for his "help" and also acknowledges to be indebted to him in different articles. In his 1969 "Oligopoly and Antitrust Laws", Posner notes that the approach that he develops "is a product of a collaboration with Aaron Director, who, in addition, first suggested many of the ideas that are developed in [the article]" (Posner, 1969b, p. 1562). Also, in his 1970 "Statistical Study of Antitrust Enforcement", he thanks "Aaron Director and George J. Stigler, who first suggested the study and have made many helpful

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4 *The Problem of the Social Cost* is "an unintended result of law and economics of the *old variety"* (Medema, 1998, p. 213; emphasis in original), or a way through which Coase "continued the early Chicago tradition" (Priest, 2006, p. 358).

5 Posner: "Aaron Director had retired. He was living near Stanford and had an office in the Stanford Law School. I recognized the name when I started teaching at Stanford in 1968, and I went into his office and introduced myself. I became very friendly with him.", in Kurtz, 2001.

suggestions as to its conduct" (1970b, p. 365). Later, he explains that:

> "Aaron suggested to me that I complete a project that he had started with a student. That was to do some descriptive statistics on antitrust enforcement [..] to see what had been the focus and characteristics of Department of Justice enforcement activity" (Posner, in Kitch, 1983, p. 208).

Thus, Director suggested to Posner to use legal rules as data in analyses of what is fundamentally an economic problem. A few years later, Posner still mentions Director and refers to one of his contribution (Posner, 1974a) as one of "some recent testaments of his continuing influence" (Posner, 1975, p. 758). Similarly, and even if he does not specifically thank him for a direct help, Posner insists on the influence of Coase -- with whom he has worked on the "Stigler Report"[6] -- on his work. For instance, he acknowledges that *The Problem of the Social Cost* "has largely influenced [his] own thinking" (Posner, 1971c, p. 209) and, played a decisive role in the evolution of the field (see in particular what Posner writes in 1975).

To understand the nature of their influence on Posner, it is necessary to stress that both Director and Coase shared common views on how to define economics, what economists should do and, as a consequence, why they should pay attention to the law. As to this latter point, both fundamentally agree on the influence of legal rules on economic activities. Thus, Director was involved in the birth of law and economics through the Antitrust Project in the 1950s (1952-1959) at the University of Chicago Law School, a project obviously concerned with antitrust policy (see more details in van Horn and Mirowski, 2006; van Horn, 2006). In effect, the problems Director was interested in were of economic nature or problems of economic (public) policy but, as noted by George Priest (2006, p. 354), he "had no interest in the law or, for that matter, in legal problems. Director looked to antitrust cases as sources of evidence of industrial behavior". This is also the reason for which Posner praises him in the seventies, noting that Director was known for being "the seminal figure" (Posner, 1975, p. 758) in antitrust studies, *i.e.* the analysis of "the antitrust significance of tying arrangements, reciprocal buying, predatory price cutting, vertical integration, and other business practices" (Posner, *Ibid.*).

For his part, Coase has always claimed that his interest in law and economics was that of "an economist" (see for instance, Coase in Epstein *et al.*, 1997, p. 1138). Thus, he argues: "in 'The

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6 The "Stigler Report", officially known as "The Report of the President's Task Force on Productivity and Competition" was written for the incoming Nixon Administration and denounced the feasibility of attacking conglomerates using the existing antitrust laws. Posner got involved in the task force in charge of the report through Director: "through Aaron I became very friendly with George [Stigler]. Through Aaron Director I was put on a task force on antitrust policy for the president-elect, the infamous Nixon. The task force was headed by George Stigler, and Ronald Coase was one of the members" (in Kurz, 2001).

Problem of Social Cost' I used the concept of transaction costs to demonstrate the way in which the legal system could affect the working of the economic system, and I did not press beyond this" (Coase, 1988, p. 35). He adds: "[F]or me, "The Problem of Social Cost" was an essay in economics. It was aimed at economists. What I wanted to do was to improve our analysis of the working of the economic system" (Coase, 1993, p. 250). And, from this perspective, Coase finds it necessary to deal with legal rules because they affect the economy (1960, pp. 27-28). For him, this is the only reason for which legal decisions must be drawn into the analysis: to evidence the impact of the law on the economy. In law and economics as Coase conceives it, economists

> "study … legal cases both to learn about the details of actual business practices (information largely absent in the economics literature), and to appraise the impact on them of the law. I (and no doubt others) have used the legal cases to illustrate the economic problem" (1996, p. 104).

For Coase, to be an economist bears a specific meaning. It relates to the specific definition of the discipline that Coase associates with Alfred Marshall and, maybe more surprisingly, with George Stigler. Indeed, both Marshall and Stigler refer to economics in terms of an object to study and of the activities that form this object and "emphasize that economists study certain kinds of *activities*" (Coase, 1978, p. 206; emphasis added; on Marshall, see also Coase, 1975). From this perspective, it is not only assumed that there exists a specific area in human activities that is defined by the nature of these activities and that is called "the economy", but also that economists have to restrict their analyses to these activities. In other words, this means that there exists a subject matter or an object of study for economists and that it consists in analysing economic or market activities. Such is the perspective adopted by Coase, who for instance writes: "I think economists do have a subject matter: the study of the working of the economic system, a system in which we earn and spend our incomes" (Coase, 1998, p. 93). In slightly different terms, he has already written earlier that economists "study the economic system […] What economists study is the working of the social institutions which bind together the economic system: firms, markets for goods and services, labour markets, capital markets, the banking system, international trade, and so on" (Coase, 1978, pp. 206-207)[7].

Thus, the identification of a subject matter is not only a sufficient but also a necessary condition to define economics. In other words, as most economists did, Coase define his

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7 See also Coase (1992, p. 713) where he describes his approach as follows: "What I have done is to show the importance for the working of the economic system of what may be termed the institutional structure of production".

discipline in spatial terms, drawing limits around the set of questions that it can analyse. The delineation or delimitation of the scope of economics allows them to distinguish the discipline from other social sciences and guarantees the unity of the discipline as well, since the subject matter is ”the dominant factor producing the cohesive force that makes a group of scholars a recognizable profession” (*Ibid.*, p. 204), “the normal binding force of a scholarly profession” (*Ibid.* p. 206), what “distinguishes the economic profession” (*Ibid.* p. 207). Accordingly, economists can only use the specific tools that characterise their discipline within the limits of their subject matter and economists “should use these analytical tools to study the economic system” (Coase, 1998, p. 73). Conversely, to envisage economics as tools without subject matter does not make sense: economists who “think of themselves as having a box of tools but no subject matter“ (*Ibid.*) actually behave as if they were studying “the circulation of the blood without a body” (*Ibid.*).[8]

The framework within which Posner sets his early writings clearly follows the law and economics theoretical guidelines Director and Coase adopt in their own works. Posner's early analyses are thus typical instances of law and economics on two main accounts. First, Posner’s early writings primarily focus on economic problems -- the “working of the economic system” in Coase's terms. Dealing with regulatory policies issues, antimonopoly or anti-trust rules, *i.e.* the regulation of non-competitive market -- natural monopolies or oligopolies -- structures and the efficiency of legal rules and administrative procedures to control them, they analyse the behaviour of economic agents in a traditional, explicit and narrow sense of the word “economic”. In that sense, they concern core “economic” issues, such as the allocation of resources, consumer surplus, interdependence pricing between oligopolies and their “tendency to avoid vigorous price competition” (Posner, 1969b, p. 1562),, the impossibility to establish a competitive market when there are natural monopolies (Posner, 1969a) or taxation and subsidies to firms (Posner, 1971a). For sure, Posner does not analyse these economic problems as such but because of their “legal” dimension. Because rules influence the decisions made by firms, and because they can be used to regulate anticompetitive behaviours and the functioning of markets, they raise several important issues that Posner will deal with successively in his papers. For instance, how to regulate those markets in which competitive regulation is impossible (Posner, 1969a; 1970a)? Are antitrust laws an efficient means to control oligopolies (Posner, 1969b, 1970b)? Can administrative agencies -- in that case, the Federal Trade Commission -- play an efficient role in antimonopoly policies (Posner, 1969a)? Following up this line, Posner even outlines a program for the Anti-trust Division of the Department of

8 Coase quotes two “memorable .. lines from a modern poet” that indeed perfectly explain how necessary is the definition of the subject matter of the discipline: “I see the bridle and the bit allright, But where's the bloody horse” (1998, p. 73).

Justice, in which he develops an approach "seeking to maximize the efficiency of antitrust enforcement by discovering and implementing those policies whose net social product is largest" (Posner, 1971a, p. 501). Also close to these topics, he finally devotes a last paper to regulation as a means of taxation (Posner, 1971b).

A second feature of Posner's analyses at that time is also particularly interesting and important from the perspective of a connection with law and economics. It relates to the nature of the rules that Posner takes into consideration in his analyses. Namely, Posner deals with regulatory antitrust laws, for instance the Sherman or the Clayton Acts, *i.e.* those laws issued by legislators and regulators, the Congress and administrative agencies respectively. In that sense, Posner does not propose an analysis of all legal rules but rather focuses on what can be called "political" rules, *i.e.* produced by elected officials and bureaucrats. This does not imply that courts are absent from the reasoning. On the contrary, the references to decisions made by courts, especially the U.S. Supreme Court of Justice, are frequent. Posner refers to them because they do not only influence firms behaviour but also result from their behaviour and, therefore, influence the way the economy functions and its efficiency. This makes it legitimate for economists to study legal rules because and whenever they relate to the economic problem that has been identified in the first place. As a corollary, the decision-making processes that give birth to legal and judicial rules are not discussed in themselves. To the contrary, rules are assumed to be given. For instance, the decisions made by courts are not examined *per se*, but as Posner notes, because they "provide a rich mine of information about business practices"" (Posner, 1975, p. 758)[9], thereby echoing Director's and Coase's views on how to use legal decisions in economic analyses to learn about "business practices".

In sum, at the turn of the 1970s, Posner's works still belong to law and economics, a field he will later describe himself as concentrating on "explicit economic markets"" and "explicit economic relationships" (Posner, 1975, p. 758). Furthermore, his analysis mainly focuses on legislative rules and regulations, while he devotes no specific attention to case-law and judicial decision-making. Posner's law and economics has not yet begun to shape itself into an economic analysis of law. The change will take place after his meeting with Becker.

III. BECKER: A MISSING LINK AND AN IMPORTANT INFLUENCE

In 1969, Posner moves from Stanford to Law School of the University of Chicago. There, he meets with William Landes, former Ph.D. student of Becker. The latter, almost at the same time,

9 From this perspective, Posner's "Statistical Study of Antitrust Enforcement" (1970b) is the most significant illustration of this "informative" status of legal rules in these analyses.

in 1970 to be precise, comes back from Columbia to Chicago. Posner then makes his acquaintance when he is involved in a research program sponsored by the National Bureau of Economic Research in law and economics. The project is attributed to Becker who insists to have Landes and Posner as co-directors (see Landes, 1998; see also Posner, 1993). From then on, Becker's influence on Posner and, from a broader perspective, on the evolution of law and economics into an economic analysis of law (see also Medema, 2005, pp. 14-15) is obvious. Thus, on several occasions, Posner acknowledges the huge debt of the law and economics movement to Becker, writing that "Gary Becker's contributions to the law and economics movement have been very great" (Posner, 1993, p. 211), and that "a list of the founders of new law and economics would be seriously incomplete without the name of Gary Becker" (Posner, 1975, p. 760).[10] However, Posner mostly insists on the decisive methodological role played by Becker. Indeed, Becker's direct and quantitative contributions to the field remain scarce – besides his seminal 1968 paper on criminal behaviours, *Crime and Punishment*, he wrote few articles devoted to legal issues (*e.g.*, see Becker and Stigler, 1974). Yet, "Becker's significance for the law and economics movement […] lies in general economics, in economic methodology, and in personal influence and example" (Posner, 1993, p. 212). In effect, Becker has not only attracted scholars such as William Landes and Isaac Ehrlich – another of Becker's students – to areas of study that remained ignored by economists and legal scholars before him. But also, Becker's contributions "provided the foundations for a number of promising areas of law and economics research" (*Ibid.*, p. 212) and "opened up to economic analysis large areas of the legal system not reached by Calabresi's and Coase's studies of property rights and liability rules" (Posner, 1975, p. 761). Because of his insistence -- "immensely important for the law and economics movement" (Posner, 1993, p. 213) Posner adds tellingly -- "on the relevance of economics to a surprising range of nonmarket behavior" (Posner, 1975, pp. 760-761), Becker opens the door to works breaking with the previous law and economics perspective and dealing with "new" topics, beyond the borders of economic activities and "explicit" markets studied by Coase and his followers so far.

Becker innovates because he assumes that economists must not limit their investigations to market decisions or economic activities: "the economic approach is clearly not restricted to material goods and wants, nor even to the market sector" (Becker, 1976, p. 6). To the contrary, economic theory "applies to both market and nonmarket decisions" (Becker, 1971, p. viii). In

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10 He also writes that "[T]he publication of three essays in the economics of nonmarket behavior between 1959 and 1962 may be taken, somewhat arbitrarily to be sure, to mark the rebirth of the economic analysis of nonmarket law. These were Becker's monograph on racial discrimination, Calabresi's first article on torts , and Coase's article on social cost […] There was little further work on the legal regulation of nonmarket behavior for several years. The current period of sustained and rapidly expanding scholarly activity can be dated – again rather arbitrarily – from the publication in 1968 of Becker's paper on the economics of crome and punishment" (Posner, 1979, p. 283). See also Parisi and Rowley (2006) who include Becker in a list of 16 "founding fathers".

effect, "there is only one kind of economic theory, not separate theories for micro problems, macro problems, non-market decisions and so on" (*Ibid.*). Therefore, economic theory provides "unified framework for *all* behaviour involving scarce resources, nonmarket as well as market, nonmonetary as well as monetary, small group as well as competitive" (Becker, 1973, p. 814; emphasis added; see also Michael and Becker, 1973, p. 381). Accordingly, following Becker, there is no reason to make a distinction between some types of human behaviour that should be analysed by economic theory and others that should not: "human behavior is not compartmentalized, sometimes based on maximizing, sometimes not, sometimes motivated by stable preferences, sometimes by volatile ones, sometimes resulting in an optimal accumulation of information, sometimes not" (Becker, 1976, p. 14).

Such perspective is reminiscent of Robbins and his views on how to define economics. In effect, in his 1932 *Essay on the Nature and Significance of Economic Science*, Robbins claims that economists should not define their discipline around economic activities. He criticises what he names "a classificatory conception" (Robbins, 1932, [1984], p. 16) relying on the assumption that there are certain behaviours that should be analysed by economists while others should not. Very close to Becker for that matter, he considers that should be rejected any view that "marks off certain kinds of human behaviour […] and designates these as the subject-matter of Economics. Other kinds of conduct lie outside the scope of its investigations" (*Ibid.*, p. 15). By contrast, Robbins proposes an "analytical" (*Ibid.*) definition of economics that "does not attempt to pick out certain kinds of behaviour, but focuses on a particular aspect of behaviour, the form imposed by the influence of scarcity" (*ibid.*, pp. 16-17). Hence, "[E]conomics is the science which studies human behaviour as a relationship between ends and scarce means which have alternative uses" and "[t]he economist studies the disposal of scarce means" (*Ibid.*). . As a consequence, any kind of human behaviour can be analysed by economists as soon as it is influenced or constrained by limited – scarce – resources. In Robbins' terms:

> "[i]t follows from this, therefore, that in so far as it presents this aspect, any kind of human *behaviour* falls within the scope of economic generalisations" (Robbins, 1932 [1984], p. 17);

and

> "[e]very act which involves time and scarce mans for the achievement of one ends involves the relinquishment of their use for the achievement of another. It has an economic aspect" (Robbins, 1932 [1984], p. 14).

Therefore, "there are no limitations to the subject-matter of Economic Science save that" (Robbins, 1932, [1984], p. 16), *i.e.* save that imposed by scarcity.

Becker, who begins his coursebook in *Economic Theory* (1971) with a chapter entitled "What is Economics?", does not directly and explicitly refer to Robbins. His references are indirect and implicit, through the use of scarcity. He thus mentions that a "serious definition" of economics consists in saying that it "is the study of allocation of scarce means to satisfy competing ends" (Becker, 1971, p. 1); a definition with an obvious Robbins flavour. However, one should not conclude too rapidly that Becker's analyses and views on economics only correspond to a modernised and extended version of Robbins. The latter has given a definition that is neither sufficient to characterise what economics is for Becker nor , therefore, to describe Becker's economics. Thus, Becker significantly notes that Robbins "broad" (Becker, 1971, p. 1) definition is too narrow: "The definition of economics in terms of scarce means and competing ends is the most general of all and also the narrowest and the least satisfactory" (Becker, 1976, p. 4)[11]. The paradox merely expresses that, in Becker's eyes, economists have interpreted Robbins' definition restrictively and remain concentrated on certain types of problems that belong to the subject matter of the discipline. Thus, he notes, "[p]articularly in Western countries, economists are primarily concerned with the operation of the market section in an industrialized economy" (Becker, 1971, p. 1). When economists and other social scientists as well put the focus on the subject matter, as they usually do, they "*simply* define the scope" of their discipline (Becker, 1976, p. 4; emphasis added). This is no surprise, from this perspective, that economists frequently define their discipline with the famous "economics is *what* economists do" (*Ibid.*, emphasis added).

As a corollary, for Becker, this way to define economics as a "what" implies that the "how" is not considered. Indeed, no economist "tells us one iota about what the 'economic' approach is. […] Similarly, definitions of sociology and other social sciences are of equally little help in distinguishing their approaches from others" (*Ibid.*, p. 4). Therefore, when and because a discipline is primarily defined in terms of its own limits, subject matter or scope, then, the nature of tools or approach that can be used to analyse the problems is neglected. In other words, what is neglected is the way of approaching problems that is specific to this discipline, whereas for Becker this is precisely what makes it possible to define economics – or any other social science. By contrast, problems are not a key element of the definition by themselves and a definition based only on the subject matter occults that different social sciences do have the

11 Interestingly, Becker is not the only major contributor to economic imperialism who finds Robbins definition narrow. In his analysis of the "expanding domain of economics", Jack Hirshleifer makes a similar claim. After having criticized Marshall – "how terribly narrow, dull, bourgeois! Must we economists limit our attention to the ordinary, the crassly material business of life?" –, Hirshleifer explains that Robbins' ""relationship between ends and scarce means does not open the door wider than Marshall's. After all, the ends that men and women seek include not just bread and butter but also reputation, adventure, sex, status, eternal salvation, the meaning of life, and a good night's sleep - the means for achieving any of these being, too often, notably scarce" (Hirshleifer, 1985, p. 53).

same subject matter, since "many kinds of behavior fall within the subject matter of several disciplines" (*Ibid.*, p. 5). Furthermore, scarcity affects all human behaviours. Therefore, no definition in terms of subject matter is sufficient to define economics and, as a consequence, to grasp the differences between economics and other social sciences. To define a discipline and to draw a distinction between this discipline and other social sciences, one has to refer to their approach of the problems and behaviours *independently from the subject matter* within which they use them. The criterion of the subject matter is thus useless and the reference to the method, tools or assumptions is primary to define a social science in general or economics in particular. This implies that Becker does not confine himself to make Robbins definition of economics effective, as it may seem at first sight, but he makes a still more radical move than usually assumed and establishes the pre-eminence of tools over a subject matter.

Therefore, two perspectives on how to define economics can be contrasted. A first, standard approach, consists in analysing economic activities or market decisions. Following up this line, there exists a subject matter that determines when the use of economic tools is possible and legitimate. Consistently with this perspective, social sciences deal with problems that differ from one discipline to the other. To be an economist means to analyse some well-defined problems that other social scientists do not analyse. Alternatively, Becker promotes a second approach that does not only claim that economics should not be restricted to the analysis of market behaviours but also that no subject matter should be attached to the definition of the discipline. In effect, a discipline is not characterized by a subject matter but, rather, is specific because it uses tools and methods that other social sciences do not employ. As a consequence, to be an economist means to adopt a certain approach on any possible problem. The issues that can be analysed do not belong to any subject matter and, therefore, it is possible to analyse a much larger array of problems than those economists are usually interested in.

Clearly, this second approach lead strong implications for the analysis of legal issues. Posner's rejection of the first methodology and his endorsement of a beckerian approach will mark his shift from a coasean "law and economics" towards what he will call later an "economic analysis of law".

IV. POSNER MOVE TOWARDS AN *ECONOMIC ANALYSIS OF LAW*

Posner indeed adopts a definition of economics similar to the one proposed by Becker and, as a consequence, modifies the way he had previously envisaged the interactions between economics and the law. Not that Posner ceases to discuss problems raised by the regulation of monopolies

and anti-trust laws, that still occupy a large place in his research agenda[12], but he rather adopts a new perspective that allows him to address these "old" topics – together with new ones - in a new fashion.

The first visible change relates to the way Posner presents his analyses. From this perspective, the articles published in the 1970s exhibit an interesting addition compared to his preceding works. In the latter, Posner gives no methodological explanation or detail about his works nor does he name the field to which they belong. The titles he then gives to his articles clearly identify a topic or an object of study, *i.e.* they refer to the subject matter to which they belong. Therefore, they are considered as falling within the scope of economic studies because of the kind of questions they analyse. By contrast, in the articles he writes at the turn of the 1970s, Posner characterises his works by the approach and method that he adopts, thereby endorsing Becker's view on the necessity to indicate *how* the problems are going to be analysed. This is obvious from the examination of the titles of Posner's works, very largely based on the scheme "an economic approach/analysis/perspective…". Furthermore, Becker's influence is also patent in the fact that the articles published by Posner in the 1970s do no longer concentrate on economic problems (*i.e.* on "explicit markets" or "explicit economic relationships", in Posner's 1975 own words, p. 758), as it was the case before, but are now concerned with legal problems. Here again, the very titles of his works exemplify his shift from an analysis of the economic system toward a study of non economic problems. For instance, the change is made particularly explicit in the title of his books – an *Economic Analysis of Law* (1973a, 2007 for the 7th edition), *Antitrust Law: An Economic Perspective* (1976, 2001) – and articles – *e.g.* "An Economic Approach to Legal Procedure and Judicial Administration" (1973b), "An Economic Analysis of Legal Rulemaking" (co-authored with Isaac Ehrlich in 1974), "The Economic Approach to Law" (1975), "The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision" (1977). Also, in "Killing or Wounding to Protect a Property Interest", Posner for the first time explains that he "explore[s] .. an economic approach" (Posner, 1971c, p. 202). In sum, Posner's evolution – the emphasis put on the method and the shift toward non economic issues – clearly echoes Becker's views on the irrelevance for economists to restrict economic analysis and tools to a subject matter. In other words, Posner's endorsement of Becker's perspective allows him to develop an economic approach to analyse legal problems. Put otherwise, it makes Posner's approach that of an economist, no longer due to the nature of the problems he investigates but rather because of his methods and tools.

Certainly, titles can be deceiving and their interpretation is delicate. Furthermore, other

12 For instance, in 1976, Posner publishes a book entitled "Antitrust Law: An Economic Perspective"(University of Chicago Press; second edition published in 2001).

scholars predated Posner in the use of economics in the titles of their works (see Baxter, 1966; Calabresi, 1970; Landes, 1971; Landes and Solmon, 1972; Johnson, 1972; Phillips and Votey, 1972). But, strikingly, they were very few, none of them is as clear as Posner in signalling his approach as economic and, most interestingly, the clearest ones are precisely those who publish articles in 1972. Clearly enough, therefore, to include an explicit reference to an "economic approach" in a law and economics book or article can be called an innovation at the very beginning of the 1970s.

Obviously, Posner's semantic innovation is not purely formal but, more fundamentally, reveals a substantive change in the content of his analyses. Indeed, the approach that Posner begins to develop at that time not only corresponds to a reversal in the perspective adopted in his earlier works, but also marks a break with the *law and economics* approaches that had been developed so far. His approach will no longer consist in using legal literature to analyse what is considered as economic problems *per se*, as he used to, but he explicitly claims the relevance of economic tools to study legal issues and to develop an *economic analysis of law.* Thus, as to the status of economics, he describes economics as " an especially apt tool" (1971c, p. 202) or "a powerful tool" (1973a, [1986], p. 3) and speaks of the "powerful tool of economic theory" (1973b, p. 399). Even more explicitly, he proposes to "describe" economics as "an *open-ended* set of concept's (1987a, p. 2; emphasis added),[13] thereby suggesting the absence of limits associated with the use of certain concepts and echoing Becker's refusal to "define" economics by the limits – that indeed do not exist – of its subject matter. In fact, Posner insists that a study can be considered an economic one when based on certain concepts rather than when focused on certain topics: "when used in sufficient density these concepts make a work of scholarship 'economic' *regardless* of its subject matter or its author's degree" (*Ibid*., emphasis added). In other words, it is not the nature of the problem analysed that does or does not trigger the use of economic tools. On the contrary, the use of economic tools is possible to analyse any kind of problem, including legal ones. Accordingly:

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

Like for Becker, thus, the absence of a subject matter is associated with a conception of

13 Posner uses the verb "to describe" because, according to him, it is impossible to define economics: "there are words like 'economics' – which are neither conceptual nor referential. Such words resist all efforts at definition" (1987, p. 1)

economics as a science of choice.[14].

Building upon this conception of economics *à la* Becker, Posner multiplies his attempts to justify and legitimate an economic analysis of law. In his eyes, the key argument is that economics provide the law and lawyers as well with tools to make decisions and understand the very functioning of the legal system. Thus, in his first attempt in tort law, Posner explains his focus on the delicate questions raised by "legal interpretation" by the strong support provided by the economic approach to lawyers "I am led to explore an alternative approach, an economic approach, whose utility in helping to answer questions of legal policy and to interpret opaque and apparently conflicting judicial decisions is a major theme of this paper" (1971c, p. 202). Similarly, albeit later, he illustrates his presentation of the basic assumptions made in "an economic approach to law" with an obviously legal question: "[s]uppose the question is asked, when will parties to a legal dispute settle rather than litigate" (Posner, 1975, p. 761) and claims that "economic analysis can be helpful in designing reforms of the legal system" (*Ibid*., p. 764). He will continuously develop and refine the argument until he finally provides a full list of arguments proving that law is no longer "an autonomous discipline" in a 1987 article (Posner, 1987b). As a consequence, an "economic approach to law" can be viewed as "an *applied* field of economics" (Posner, 1988, p. 929; emphasis added) because it actually consists in the use of economic theory to analyse the law or legal problems. In 1971, for instance, Posner describes one of his "major interests" as "the *application* of economic theory to law" (Posner, 1971b, p. 22; emphasis added). Somewhat later, he insists again: "an economic approach to law" means "*applying* economics to law" (Posner, 1975, p. 37; emphasis added).

All things considered, the move from law and economics toward an economic analysis of law is therefore effective. However, the drastic change that occurs under Posner's influence in the field of law and economics in the 1970s does not seem to have been perceived at once in its entirety and importance. It is then particularly interesting to note that the reviews of Posner's *Economic Analysis of Law* only partially perceive the change. Namely, they almost unanimously stress that Posner, even if he uses economic theory, nonetheless speaks as a lawyer *to* lawyers. Thus, Posner has written an "exceptionally interesting book [..] for *law* students knowing little or no economics [..] [t]his is a textbook for *law* students" (Diamond, p. 1974, p. 294; emphasis added) or a book "written specifically for *lawyers*" (Dewees, 1974, p. 232; emphasis added)", and "Richard Posner's book, *Economic Analysis of Law* [..] should greatly interest *political scientists* and *public law scholars* in particular" (Feeley, 1977, p. 421; emphasis added). However, these reviews somewhat mistakenly emphasize that Posner's

[14] In the third edition of his *Economic Analysis of Law*, Posner mentions Becker's 1976 *Economic Approach to Human Behaviour* as a reference that can be associated with his work and Coase's 1978 *Economics and Contiguous Discipline* as a criticism of "so broad a definition of economics" (*Ibid.*)

(text)book is an "introduction" (Feeley, 1977, p. 421), "a much needed guide to integration of these two disciplines" (Dewees, p. 232), a "survey" (Diamond, p. 1974, p. 294; Newberry, 1975, p. 421; see also Feeley, 1977, p. 421) that "*summarizes* excellently much of the good work which is done in the areas of economic analysis of law" (Palmer, 1975, p. 268; emphasis added). Admittedly, Posner discusses analyses that correspond to standard law and economics, *i.e.* analyses of economic problems using (given) legal rules as data. But he also adds undoubtedly new topics, whose novelty is hardly noticed in the reviews of his book. In the same manner, the fact that Posner is able to deal with new questions because he envisages the field from a different angle is not clearly perceived nor the consequences of his methodological innovations[15].

Yet, the consequences of Posner's conception of economics as a toolbox and his focus on law and legal matters are huge. Indeed, more issues and new topics can now be analysed. In effect, within this new analytical framework, the problem is no longer (economic) markets but how the legal system functions. In other words, the legal system is no longer seen as constraining, facilitating or improving the working of the economic system and explicit economic activities, since "the legal system has never thought to limit itself to regulating markets" (Posner, 1993, p. 213). On the contrary, the very functioning of the legal system becomes itself a matter of interest for an economic analysis of law. Thus, precisely, "[t]he hallmark of the "new" law and economics is the application of the theories and empirical methods of economics to the central institutions of the legal system" (Posner, 1975, p. 39). Then, the shift from an analysis of economic markets toward the study of the legal system opens another particularly important research path since it implies to develop the analysis of the behaviour of people involved within the legal system. Here, once again, Posner crosses Becker's path and his 1968 seminal paper on criminals' behaviour, whose original approach based on rationality he extends to other actors within the legal system. Thus, building on that premise, Posner develops an analysis of courts' behaviour and legal decision-making using economic tools and concepts. In an afterword to the *Journal of Legal Studies* he launches in 1972,[16] he even presents the development of a scientific theory of legal decision-making as one of the major goals of the newly founded Journal. Thus, he not only notes that "the aim of the *Journal* is to encourage the application of scientific methods to the study of the legal system"

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15 James Buchanan (1974) is one of the rare - and even the only - scholars who perceive how innovative is Posner's work (on Buchanan's critical analysis of Posner, see Marciano, 2007).

16 Posner explains that "The idea for the *Journal of Legal Studies* came from Ronald Coase, who as editor of the *Journal of Law and Economics* wished to preserve its *traditional orientation"* (personal communication, July 2006, 1st; our emphasis). This reveals that Coase already perceives the existence of two sufficiently different streams in law and economics (his and the one Posner begins to develop) to avoid mixing them in a single journal.

(Posner, 1972b, p. 437), but also that one "important theme of this [first] volume [of the Journal of Legal Studies] is the quest for a theory of legal decision-making" (*Ibid.*, p. 439). Within this ambitious research agenda, legal rules are no longer taken as given or exogenous and are not only viewed as information on how firms behave, as it was the case before. But the central issue becomes that of the process giving birth to legal – and not only political – rules and the behaviour of the individuals who produce these rules. Thus, it is only within the analytical framework of an *economic analysis of law* such as it is initiated by Posner that the analysis of legal decision-making appears in journals and research agendas.

Above all, the development of an economic analysis of judicial decision-making certainly represents a major, perhaps the most important, innovation that can be attributed to Posner and associated with his economic approach to legal problems. Indeed, an analysis of the law and economics articles published before Posner reveals that the behaviour of courts and judicial decision-making is either ignored or viewed from a law and economics angle. Nothing is said about the process that leads to the decision, the origins of legal rules or the way judges make their decisions. In other words, the behaviour of judges remains outside of the scope of the analysis. This is typical of the two articles Posner refers to, respectively William Landes' "Economic Analysis of the Courts" (1971) and his own "The Behaviour of Administrative Agencies" (1972a), about which he himself notes somewhat later that they "took for granted the rules of procedure that provide the framework of the legal dispute-resolution system" (Posner, 1973, p. 399). This is precisely where Posner's 1973 "Economic Approach to Legal Procedure and Judicial Administration" departs from previous works and "adds to the literature (as yet small) that is developing" (*Ibid.*, p. 399). Namely, the article adopts a new perspective on judicial decision-making – it develops "a positive economic theory of the institutions of the legal system" (*Ibid.*, p. 399; see also Ehrlich and Posner, 1974) – because it "attempts to explain the procedural rules and practices that give the system its distinctive structure" (Posner, 1973, p. 399). In other words, the legal framework is no longer considered as given as it is assumed in the law and economics approach, but it becomes an object that can be analysed through the economic approach of law.

V. CONCLUSION

In this paper, we have tried to demonstrate that Posner moved from a "law and economics" to an "economic analysis of law" and to explain why and how this change happened. Depending on the methodological framework and the definition of economics that he adopts, we identify two stages in Posner's works. During the first stage, he adopts a "standard" definition of economics – viewed as a discipline focusing on activities -- and indeed focuses on economic

problems with a legal dimension, consistently with the then prevailing law and economics analyses. The second stage begins after he made the acquaintance of Gary Becker. He consequently moves from a definition of economics as a discipline analysing activities to a definition analysing problems and begins to use economic tools in order to analyse legal problems, with an emphasis put on judicial decision-making.

We claim that this latter aspect is particularly important since it represents a major departure from the previous law and economics perspective that assumes rules and rules' provision as given and keeps them outside of the scope of economic analysis. Being the first to explicitly ground an analysis of legal decision-making on a definition of economics as a science of choice, Posner makes it possible to analyze the functioning of the legal system as an economic problem and, above all, the behaviour of judges and judicial decision-making as an economic behaviour, thereby breaking with the formerly prevailing approach to law and courts. Doing this, Posner certainly does not invalidate the former law and economics program that some authors will continue to work on, but he nonetheless initiates a new and path-breaking research agenda -- based on new methods and oriented towards new topics -- that will meet a growing success over the years.

Therefore, for all these reasons, Posner has played a role of the utmost importance in the evolution of the field and the emergence of an economic analysis of law. Although he recently happened to qualify his view on the role of economics and economists to help understanding how the legal system functions[17], it nonetheless remains that those doubts were absent from the first stages of his work and were expressed rather recently. Certainly, we do not claim that this evolution is not important. However, in the first stages that our historical analysis has focused on, Posner proved rather enthusiastic about the role of economics… and was strongly criticized on that account precisely, as were all economic analyses of law based on a similar premise. Further research is thus needed to help understanding Posner's evolution in his more recent works.

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17 We thank a referee for having reminded us of the importance of this recent evolution of Posner's views on economics.

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