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International Review of Law and Economics 23 (2004) 421–437

International  
Review of  
Law and  
Economics

## Economic analysis and legal pragmatism

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Received 15 December 2002; accepted 20 July 2003

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### Abstract

This paper attempts to underline a recent evolution in the law-and-economics movement concerning its underlying methodological and epistemological foundations. The question of concern is whether the contemporary economic analysis of law has operated a sort of paradigm switch from the neo-classical, rather mechanical conception of legal decision-making (social wealth maximization) to a new form of pragmatism considering legal decision-making as a branch of practical reasoning, hence as largely subjective, fallible and unpredictable. The descriptive component of the efficiency theory is indeed more and more explicitly associated with a critical component. This shift to critical analysis, as well as the growing emphasis on the importance of experience over formal logic in law making, has recently increased the affinity of a part of law-and-economics with a vision of legal realism as it lives on, in our times, in movements like critical legal studies, which traditionally have stood as a major counter-argument to traditional law-and-economics. Richard Posner's recent work [in particular, R.A. Posner, *The Problems of Jurisprudence*, Harvard University Press, Cambridge, MA, 1993; R.A. Posner, *Overcoming Law*, Harvard University Press, Cambridge, MA, 1995; R.A. Posner, *The Problematics of Moral and Legal Theory*, Harvard University Press, Cambridge, MA, 1999; R.A. Posner, *Law, Pragmatism, and Democracy*, Harvard University Press, Cambridge, MA, 2003] displays a particularly strong and original pragmatist component, which at times comes close to the radical conception of postmodern thinkers like Rorty, whose jurisprudence is generally associated with culturally relativistic pragmatism.

Is the economic analysis of law actually taking a decisive turn? Does Posner's new way of defining pragmatism reflect a change of perspective within the movement of which he has been one of the most influential originators three decades ago? Or can we find a continuity in his new understanding of law? These questions subsequently will lead us to explore the implications of pragmatic conceptions of legal decision-making for legal evolution. Is legal evolution inherently indeterminate, contingent and hence, unpredictable, as argued by most postmodern thinkers? Is it then possible to envisage

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a positive jurisprudence? In other words, what does legal pragmatism imply regarding the theorization of law, and, more particularly, regarding the economic analysis of law?

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*Keywords:* Economic analysis; Pragmatic conceptions; Law-and-economics movement

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## 1. The pragmatist shifts of law-and-economics

Traditionally, legal pragmatism has been associated essentially with legal realism. It has been rooted in pragmatist philosophy,<sup>1</sup> itself resulting from heterogeneous, mostly interdisciplinary, scientific traditions. After a short period of success, legal realism as well as philosophical pragmatism almost entirely disappeared by the end of the second world war, the first being largely replaced by analytic philosophy, and the second absorbed into mainstream legal thought (Posner, 1993, p. 462). In recent years, legal pragmatism finally experienced an interesting revival with postmodern philosophies, like neo-pragmatism, critical legal studies, and a growing part of recent law-and-economics.

### 1.1. *The pragmatism of early law-and-economics*

Legal pragmatism has become a widely used term with different and sometimes contradictory meanings. It can be argued that economic analysis of law has always adopted a pragmatic approach, but its pragmatism has undergone important changes over time. Law-and-economics is an intrinsically pragmatic approach, be it only in the sense that its goal-understanding how courts work and what are their effects on individual behavior is in itself a realist maxim. Furthermore, the underlying logical positivism requires a validation of theory through a confirmation by reality. The traditional method of law-and-economics consists indeed of building a coherent and refutable theory of legal rules, processes and institutions, which, in a next step, is supposed to be confronted to the empirical world. In this perspective, only empirical investigations can refute or confirm the hypotheses derived from the theory.

Thus, the arguments for wealth maximization, advanced by the first generation of law-and-economics, have essentially been pragmatic. They are built on the empirical observation that, over centuries, most common law judges have developed an intuitive sense of economics and that legal decisions and doctrines are most adequately described as an explicit, or at least an implicit, application of the principles of social wealth maximization or social cost minimization.<sup>2</sup> Law-making, in this approach, is a matter of calculation, management, resource allocation and optimization. Strongly influenced by the spirit of utilitarianism, the early law-and-economics literature has undeniably started out as an instrumental and practical view of law, contrasting with the formalism and conceptualism of a large part of mainstream legal scholarship.

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<sup>1</sup> As represented in the late 19th and early 20th centuries, among others, by Peirce, James, Dewey, and Mead.

<sup>2</sup> For instance, Posner (1977), Kronman (1978), and Landes and Posner (1981). For the evolutionary version of the descriptive economic analysis of law, see Rubin (1977).

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