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Is There Any Morality Here? Richard Posner's Economic Approach to Judge Behavior

Czy jest tutaj jakaś moralność? Ekonomiczne podejście Richarda Posnera do zachowań sędziowskich

ABSTRACT

Richard A. Posner in American jurisprudence is known mainly for his research on the economic analysis of law. Its purpose is to force the view that morality is not the most important value in law – this value is the maximization of goods. Posner believes that the relationship between morality and law begins and ends with lectures on law. The texts, judgments, and above all class discussions shape the morality of lawyers. And that's it. Law enforcement lawyers who issue opinions and decisions always pursue only one goal. This goal is to maximize goods. These goods vary, but they all stem from the economic understanding of maximizing happiness. The creator of the economic theory of goods maximization in the process of human decision-making is Gary S. Becker. From his views and works, Posner derives the conceptual framework, methodology, and assumptions of the economics of law. Becker's views are based in part on Jeremy Bentham's utilitarianism. Linking these concepts to the law means Posner will have a different vision of man and his nature than most American thinkers. These studies are part of Posner's thought and concern of judge behavior. The purpose of this article is to present Posner's economic approach to judicial behavior as part of the currently thriving behavioral jurisprudence theory in American jurisprudence.

Keywords: judicial behavior; human nature; Posner; behavioral jurisprudence theory

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INTRODUCTION

The current discourse of American jurisprudence asks more and more frequently about the possibility of building a model of correct judicial behavior. It is about proposing a model of correct behavior in the judge's decision-making process.[1] The theme of morality in American law, which has been undertaken for years, is slowly turning toward problems of everyday judge's behavior, which can be empirically tested.[2] As shown by the previous works on the relationship between morality and law, most of the positions express views reflecting the role and importance of natural law. Many of these considerations are philosophical, hence they are not of interest to most American lawyers who treat the law pragmatically. Researchers interested in the law in action replace the judge's morality that cannot be analysed empirically by their behavior in specific decision-making processes. The pioneer of such research is the American judge and scientist Richard A. Posner. However, Posner is often criticised in American jurisprudence. In current discourse, only a few scholars include him in the canon of jurisprudence classics, alongside Ronald Dworkin and Joseph Raz.[3] The Posner problem is that he seeks to develop a pure economic theory of law. Posner believes, and for this he is famous, that the central task of analytical jurisprudence is, or at least should be, not to answer the question – What is law? – but to show that it should not be asked because it only confuses matters. The American pragmatist wants to create a purely economic analysis of law without looking at the shadows of the relationship between morality and law.

This article presents Posner's main achievements within the framework of the new American jurisprudence issue of judicial behavior which Posner must be considered as one of the Founders. Presenting it in detail requires an extensive work.

The aim of the article is to try to find a positive answer to the question whether here are moral elements in Posner's economic conception of judicial behavior.

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[1] R.A. Posner, W.M. Landes, *The Positive Economic Theory of Tort Law*, "Georgia Law Review" 1981, vol. 15, pp. 851–924.

[2] R.A. Posner, *1997 Oliver Wendell Holmes Lectures: The Problematic of Moral and Legal Theory*, "Harvard Law Review" 1998, vol. 111(7), p. 1681.

[3] P.F. Lake, *Posner's Pragmatist Jurisprudence*, "Nebraska Law Review" 1994, vol. 73(3), pp. 575–622.

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THE RISE OF BEHAVIORAL JURISPRUDENCE

In the current American discourse judicial behaviorism is present as an integrated American jurisprudence theory of adjudication.[4] Although not concerned with the development of systematic theory it has evolved a really new approach to jurisprudence.[5] This new approach has been more concerned with an attempt to provide case studies which offer a realistic political description of facets of court and lawyers' decision-making.[6] It also focuses on what human beings, cast in socially defined roles in certain characteristic types of decision-making sequences which traditionally have been identified as "legal", do in their interactions and transactions with each other. Glendon Schubert defines the new branch of US jurisprudence as new human (i.e., behavioral) jurisprudence.[7]

The new approach focuses on humans who act in adjudicatory roles and are interested in understanding judges as people – or, better put, people as judges. The old approach studies institutions which it calls courts, and the purported objective of investigation is whatever courts do. The new approach is very much concerned with understanding the effect that cultural – and subcultural – differences have upon adjudicatory behavior. The old approach recognizes that cultural variation results in institutional differences among courts, but it is not concerned with cross-cultural analysis as the basis for identifying both the commonalities and the differences that can be observed to obtain among courts in differing cultures.[8]

"The new human (i.e., behavioral) jurisprudence has had an important influence in redirecting research, publication, and teaching in political science. Among the many dimensions useful in distinguishing between the approaches, four are of particular importance: their respective stand-points toward theory, data, the object

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[4] See S. Burbank, *On the Study of Judicial Behaviors*, "Faculty Scholarship at Penn Law" 2009, vol. 266(1).

[5] According to S. Burbank (*ibidem*, p. 7), the study of judicial behavior in legal scholarship became available for empirical research, reducing obstacles that had discouraged legal realists in the 1930s. Such research was not valued at most elite law schools. Rather, law professors advanced conceptions of judicial behavior, and for a decade or more the most prominent such conceptions were advanced by scholars of opposite policy preferences and, usually, political persuasions.

[6] K. Greenfield (*Using Behavioral Economics to Show the Power and Efficiency of Corporate Law as a Regulatory Tool*, "U.C. Davis Law Review" 2002, vol. 35, pp. 581–599) claims that "during the last several years, 'behavioral law and economics' (BLE) has become the hottest area of legal scholarship". According to his opinion, while adopting some of the conventional premises of law and economics, such as the belief that legal rules affect behavior, BLE distances itself from many of the traditional assumptions of law and economics, such as a dependence on individual economic "rationality" as the determinant of behavior.

[7] G. Schubert, *Behavioral Jurisprudence*, [in:] *Human Jurisprudence: Public Law as Political Sciences*, Honolulu 2019, p. 44.

[8] *Ibidem*, p. 43.

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of inquiry, and the importance of culture".[9] The new approach seeks to relate what we think, know and can learn about how persons behave in adjudicatory roles and institutional relationships, to a general body of theory about human decision-making behavior. The traditional approach emphasizes, quite to the contrary, what are the unique and indeed the idiosyncratic aspects that are said to characterize "law", "courts", and the decisions of judges; and the objective therefore is to build a segregated theory of adjudication which will distinguish judicial from other forms of human behavior.

The new approach defines its data based on observations of what kinds of factors influence adjudicatory decisions, what kinds of values are preferred in such decisions, and how the decisions affect the behavior of other people.[10]

Nancy Maveety presents an interesting conception of evaluating judicial behaviorism. She describes this development as the act of moving judicial practice into public law. She also believes that this happened paradoxically because of the crisis in political science that occurred in the 1950s. This crisis resulted in an increased focus on public law toward individuals. Political science shifted from research synthesizing law, history, or philosophy to the empirical study of politics and governance. "American public law at the turn of the twentieth century embraced 'the belief that inquiry akin to that of the natural sciences could ultimately uncover the laws underlying political evolution and development".[11] Maveety believes that the utility of descriptive concept and objectively perceived facts has already been appreciated by the father of American political science and the founder of its first school, John Burgess. Political science has developed analytical tools that have influenced public law scholars to shift toward behavioral approach. Over time, scholars of law and courts have incorporated behavioral tools and methodology into their research. This scorned the mechanistic model of judging embraced by legal formalism, replacing it for judicial process as situated in a political context, which saw judicial decision-making as influenced by overtly political factors.[12]

The first signs of this change came from judicial activism. Activism appeared as an ideology of judicial adjudication focused on examining the political nature of judicial adjudication. After several decades of research by scholars on activism, the polemic over whether a particular judge is an activist has exhausted research possibilities. It turned out that the concept of judicial activism is undefinable and is

[9] *Ibidem*, p. 44.

[10] See T.G. Walker, D.J. Danielski, *Social Psychology and Group Choice*, [in:] *The Pioneers of Judicial Behavior*, ed. N. Maveety, Ann Arbor 2003, pp. 248–265.

[11] N. Maveety, *The Study of Judicial Behavior and the Discipline of Political Science*, [in:] *The Pioneers…*, p. 1.

[12] *Ibidem*, pp. 2–3.

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mainly used by the public to criticize the attitude of a judge.[13] Research on activism did not achieve the intended result, but thanks to it a possibility of distinguishing research in jurisprudence that focuses on the analysis of judicial behavior was established behavior. "Judicial activism" has been replaced by "judicial behavior" as this concept no longer refers only to theoretical and political science, but also to sociological, psychological, and even linguistic science. The modern understanding of the term "judicial behavior" should be understood as the mental state of judges, statements made by them, sentences, and their justifications.[14] Sometimes judicial behavior is defined as any state that influences the creation of law by a judge.[15]

POSNER'S RESEARCH ON JUDICIAL BEHAVIOR

At the beginning of research on judicial behavior, Posner gave nine different theories[16] trying to analyse judicial behavior.[17] By taking economical approaches to judge behavior as a basis, he adopts Olivier W. Holmes' concept of the "bad-human".[18] By developing it, he has a desire to create the conception of law free from moral theory.[19] Posner says that there is nothing to a certain type of moral reasoning, but it was only one type, what he called academic moralism.[20] Only this morality is associated with a subset of contemporary moral philosophers.[21] The main argument

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[13] R.A. Posner, *An Economic Theory of the Criminal Law*, "Columbia Law Review" 1985, vol. 85(6), p. 857.

[14] See A. Tomza, *Spór o poprawną interpretację Konstytucji Stanów Zjednoczonych. Od pasywizmu do aktywizmu sądowego*, "Jurysprudencja" 2016, no. 7.

[15] See A. Tomza-Tulejska, J.P. Higgins, *Do the Words of the American Constitution Still Matter? The Question of "the Meaning of Meaning" in Current Judicial Argumentation*, [in:] *Law, Language and the Courtroom: Legal Linguistics and the Discourse of Judges*, eds. S. Goźdź-Roszkowski, G. Pontrandolfo, London 2021, pp. 185–197.

[16] R.A. Posner, *How Judges Think*, Cambridge 2010.

[17] Before defining the concept of judicial behavior Posner worked on an economic analysis of law. This analysis led him to the economic theory of judicial behavior. See idem, *The Problems of Jurisprudence*, Cambridge 2000, p. 13.

[18] The dominant view in the literature is that Holmes introduced the concept of the "bad man" to separate law from morality. Jill E. Fish (*The "Bad Man" Goes to Washington: The Effect of Political Influence on Corporate Duty*, "Fordham Law Review" 2005, vol. 75, pp. 1593–1614) noticed that "Judge Richard Posner convincingly argues, although the law overlaps with moral principles, there is considerable difference between the two. The law does not enforce many moral principles", and, at the same time, "the law prohibits or attaches sanctions to a great deal of morally indifferent conduct". See also R.A. Posner, *1997 Oliver Wendell Holmes Lectures…*, pp. 1707–1708.

[19] W.O. Holmes, *The Path of the Law*, "Harvard Law Review" 1897, vol. 10(8), pp. 2–5.

[20] R.A. Posner, *1997 Oliver Wendell Holmes Lectures…*, p. 1684.

[21] Posner's critique of morality focused on the meaning presented by Ronald Dworkin, mainly that "as Ronald Dworkin has long and persuasively argued, legal positivism is an inadequate descriptive or normative theory of American law, because so much of it is the product of judicial decisions

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is that moral theory has nothing for law. There is only an academic moralism.[22] Many academic moralists can carefully analyse, but they lack the tools for resolving moral disagreement. In hard cases, they cannot help the judges.[23] The above assumptions are theoretical elements of the thought direction that Posner creates and calls "pragmatic moral scepticism".[24] Pragmatists believe that the judge or other legal decision-maker thrust into the pragmatic area, not into morality. A question must therefore be asked, how do judges decide? If not morality than what? Posner says that the answer is easy, and that it is practical consideration. "Practical consideration can be used to resolve many constitutional issues that do not turn on disagreement over moral or political ultimates".[25]

RATIONALITY NOT MORALITY

The main argument for changing the approaches of law from morality to pragmatism is the thesis that rational judge decisions are not made due to morality but rationality. The concept of rationality comes from economics.[26] An economic approach should be used to develop a model of judicial rational-behavior. An economic theory is closely related to the theory of evolution. This theory deals with observable social behavior. The economists usually must fall back on the methods of statistical inference to correct for the other possible causes of observed behavior.[27] A moral theory is a theory of how we should behave. "It tries to get at the truth about our moral obligation. It addresses such questions as the following: Is it always wrong to lie or to break a promise? Is infanticide immoral? Sex discrimination? Prostitution? Euthanasia…".[28] In Posner's opinion, these are questions not about whether moral beliefs are widespread, but where they come from. By using the anonymous paradigm of rationality, one can strive to build a model of correct judge behavior. Only economic analysis can create an ideal model of judicial behavior.[29]

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that cannot be justified by reference to the standard sources yet are not usurpative or even unsound. From time-to-time judges have to go outside those sources, and the question is where they should go; one possible answer is, to moral theory" (*ibidem*, p. 1693). See also R. Dworkin, *A Matter of Principle*, New York 1985.

[22] R.A. Posner, *The Problems…*, p. 141.

[23] *Ibidem*, p. 143.

[24] Posner describes this though more like moral relativism not like moral nihilism.

[25] R.A. Posner, *The Problems…*, p. 142; idem, *1997 Oliver Wendell Holmes Lectures…*, p. 1696.

[26] See G.S. Becker, *The Economic Approach to Human Behavior*, Chicago 1976; idem, *Human Capital*, New York 1964.

[27] R.A. Posner, *The Problems…*, p. 14.

[28] *Ibidem*, pp. 14–15.

[29] I. Ehrlich, R.A. Posner, *An Economic Analysis of Legal Rulemaking*, "Journal of Legal Studies" 1974, vol. 3(1), p. 277.

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As the findings made so far in the moral concepts of adjudicating about the law show, there is no one universal morality that can serve as an example to follow. It is different in economics. She gives specific solutions to the situation, and patterns based on a specific factual state.[30] Its immanent features make it not only a universal tool, but also the only one appropriate for creating the concept of judge behavior. Judges do not make legal decisions based on fundamental moral questions but based on their beliefs. The indicated types of behavior of judges reflect the types of certain beliefs. However, beliefs and morality cannot constitute a research criterion for the behavior of judges. It cannot be tested empirically. The criterion that is suitable for examining the behavior of judges is the economic determination of rationality.[31]

Richard A. Posner and William M. Landes make a model of judge behavior, they call it "rational-choice". They present the analysis of judicial behavior in the classification of the vote of each judge or justice. They describe them as being "liberal", "conservative", "mixed", or "other". It does this through multi-area analyses, that is judges from different courts in different rankings.[32] They claim that analysing of the judicial behavior from a "rational-choice" it can test a model of self-interested judicial behavior. As they assume, "plausibly in the case of federal judges, who enjoy life tenure (and our empirical analysis is limited to such judges), that judges have leisure preference or, equivalently, effort aversion, which they trade off against their desire to have a good reputation and to express their legal and policy beliefs and preferences (and by doing so perhaps influence law and policy) by their vote, and by the judicial opinion explaining their vote, in the cases they hear".[33] "The 'mixed' and 'other' categories are found only in the

[30] R.A. Posner, *Free Speech in an Economic Perspective*, "University of Chicago Law School Chicago Unbound" 1986, vol. 20(1), pp. 29–36.

[31] Alani Golanski (*Argument and the "Moral Impact" Theory of the Law*, "Washington University Jurisprudence Review" 2019, vol. 11(2), p. 306) argues "whether our institutional focus is that of morality or something else, we are burdened by the need to know how to proceed and what the rules of the game are. Legal practice integrates higher-level assumptions and understandings about how law is done. Even if law's mostly backward-looking argumentative structure is morally motivated or justified, as may be the case, we can infer from practice that the jurist knows, by virtue of a higher-order understanding, to conscientiously engage with the argument in nonmoral terms".

[32] A large literature, mainly in political science, uses statistical techniques to explain various aspects of judicial behavior. Posner says that legal writers have tended to ignore this literature despite its richness. In part because its vocabulary and empirical methodology are unfamiliar for them. See W.M. Landes, R.A. Posner, *Rational Judicial Behavior: A Statistical Study*, "The Law School. The University of Chicago" 2008, p. 1.

[33] R.A. Posner, W.M. Landes, L. Epstein, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, "John M. Olin Program in Law and Economics Working Paper" 2010, no. 510, p. 1. This model of judicial behavior is based on two criteria, which the authors call "Songer" – it is a court of appeals database which are based on appellate courts' debate. The second database called "Spaeth" is debate from Supreme Court. Analyses concern cases decided by the courts of appeals since 1925 and Supreme Court cases decided since 1937. See W.M. Landes, R.A. Posner, *op. cit.*, p. 2.

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court of appeals database. 'Mixed' means that the judge voted for an intermediate outcome, for example to affirm a criminal conviction but reduce the sentence – in other words, he cast a liberal vote on one issue and a conservative vote on another in the same case. 'Other' means that the vote had no political valence – usually because the opposing sides could not be classified as 'liberal' and 'conservative'. The ideological classifications of votes are dependent variables in studies that seek to explain judicial behavior by reference to judges' characteristics, such as (the particular interest of political scientists who study the courts) whether a judge is 'liberal' or 'conservative'. That characteristic is usually proxied by the party of the President who appointed the judge – if it was the Democratic Party the judge is deemed 'liberal' and if the Republican Party 'conservative'. Other proxies are sometimes used, however".[34]

In summary, factors influencing the choice of conservative behavior among judges depend on economic desires to maximize professional success. In the case of appellate court judges, it is time to fulfill the wish to be a judge of the Supreme Court.

POSNER'S ECONOMIC APPROACH TO JUDICIAL BEHAVIOR

One of the first to use the economic model to understand human behavior in economic theory was Gary S. Becker.[35] His conception is probably the most important and most original development in the economics of education in the past thirty years.[36] The main thesis is that the concept of physical capital, as embodied in tools, machines, and other productive equipment, can be extended to include human capital as well.[37] According to Becker, "there is no reason to make a distinction between some types of human behavior 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".[38] In his opinion, human behavior may become the subject of analysis of various branches of humanities, sociological, anthropological, and even political ones. Economical, despite being distinguished from them by an

[34] *Ibidem*.

[35] Becker's economic theory helps in the use of conceptual apparatus because Becker assumes that economists must not limit their investigations to market decisions or economic activities, but economic theory applies to both market and nonmarket decisions.

[36] J.S. Coleman *Foundations of Social Theory*, New York 1994, p. 304. See also G.S. Becker, *Human…*

[37] J.S. Coleman, *op. cit.*, pp. 300–321.

[38] See G.S. Becker, *The Economic Approach…*, p. 14.

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integrated research approach. The advantage of the economic paradigm is therefore not the research sphere, but the methods and possibilities of conducting research on a broader and integrated with other sciences analyses of human behavior.[39]

In the *Preface* to the Polish edition of Becker's book, Helena Hagemejerowa notices that the main idea that Becker exposes in his economic essays on human behavior is to emphasize the principle of rational behavior. It manifests itself when the economic postulate that Becker describes as "maximizing human behavior" is realized.[40] This principle presupposes that the subject of the decision, who acts towards the achievement of the goal, acts to a certain degree of consciousness. This activity consists in the ability to use all available resources to achieve decisions and to select the amount of resources for the goals in line.[41] In other words, the rational operation of the subject of the decision consists in maximizing the means in order to maximize the benefit, which is the realization of the highest-ranked goals.[42] Thus, the essence of Becker's views on *homo oeconomicus* is to uphold Jeremy Bentham's position on the "pure concept of rationality", in which the Anglo-Saxon philosopher states that even "passion" also "calculates".[43] Behavior calculation is dictated by altruistic behavior, related to constant preferences, reflecting the willingness to pursue one's own interest.[44] The psychological background involved here is survival value, which also occurs in animals. They arise not from ill will, but from altruistic survival behavior. The difference, which Becker shows related to the combination of rational behavior with a pure economic approach to decisions, is that the decision-making subject – rational, in Becker's understanding is an "enlightened egoist", which replaces the "vulgar egoist". The "enlightened egoist" is aware of the relationship between his own actions and the actions of others, of the relation of consumption and one's own wealth to the consumption and wealth of

[39] Posner's thesis is that every human being makes choices when making decisions, and sometimes these choices are rational, for example when we are choosing a cheaper product to save money. However, judicial decision-making behavior is different. The effect of a judge's decision is different from a decision to buy a cheaper product by a human. See R.A. Posner*, Judicial Behavior and Performance: An Economic Approach*, "Florida State University Law Review" 2005, vol. 32(4), p. 1296.

[40] G.S. Becker, *Ekonomiczna teoria zachowań ludzkich*, Warszawa 1990, p. 8.

[41] Posner tries to define maximization in the form of an economic formula, of which time is also a component. See R.A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, "Supreme Court Economic Review" 1993, vol. 3, pp. 34–35.

[42] See T.J. Zywicki, A.B. Sanders, *Posner, Hayek, and the Economic Analysis of Law*, "Iowa Law Review" 2008, vol. 93(2), p. 562.

[43] G.S. Becker, *Ekonomiczna teoria…*, p. 8.

[44] "Attributes can include race, gender, sexual orientation, sexual identity, religion, and socioeconomic background. Experience can include education, occupation, and political activism. Social background theory treats these factors as an explanation for a judge's actions" (T.E. George, G. Weave, *The Role of Personal Attributes and Social Backgrounds on Judging*, "Vanderbilt Law Research Paper" 2016, vol. 17(3), p. 2). Cf. T.G. Walker, D.J. Danielski, *op. cit.*, p. 251.

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others.[45] An "enlightened, rational egoist" works to obtain the maximum desired effect in accordance with the principles of the theory of demand, equilibrium, and social interaction, in the spirit of Bentham's utilitarianism.[46]

It seems that Posner started the main economic aspect of research on the behavior of judges from the assumptions already presented by Becker. He says that the economic analysis of human behavior does not evaluate the decisions made, such as those relating to life, marriage, having children. According to Becker, although economics teaches calculation, economic analysis dissociates itself from the calculation of non-economic values, thanks to which it becomes a broad tool for researching human behavior.[47] This way the analysis of judicial behavior in a judiciary career should be essentially the same as the analysis of bureaucratic behavior in general.[48]

Posner takes economical tools for analyse the behavior of judges.[49] He presents the rational model of judicial behavior, concerning the likely behavior of judges in these different systems and compare predictions with indicates that a factor that encourages conservative behavior, among judges, is also the desire for a career. "A career judiciary can be expected to be methodologically conservative and therefore unadventurous. Promotion in a career judiciary as in any other branch of the civil service depends ultimately on one's ability to perform to the satisfaction of one's superiors, and it is difficult to see how the supervisors in a career judiciary will benefit in their own careers from having bold, experimentally minded subordinates. It is not like a business firm, in which a division head's hard-driving, innovative subordinates may produce increases in revenues and profits that will redound to

[45] G.S. Becker, *Ekonomiczna teoria…*, p. 11. Cf. R.A. Posner, *Gary Becker's Contribution to Law and Economics*, "Journal of Legal Studies" 1993, vol. 22(2), pp. 211–215.

[46] Posner says that Bentham was the first to apply economics to laws for regulating nonmarket behavior. See R.A. Posner, W.M. Landes, *The Positive Economic Theory…*, p. 852. Cf. R.A. Posner, *An Economic Theory…*, pp. 1193–1231.

[47] See G.S. Becker, *The Economics of Discrimination*, Chicago 1971.

[48] Taking economic tools approach to analyse judge behavior Posner shows that "we can think of $\delta = 1$ as a benchmark – how a judge would vote if he always dissented when he disagreed with the other judges on the panel. How a judge does vote (VR and VD above) will depend on dissent aversion (how far δ is below 1; the composition of the panel, which depends on the number of Rs and Ds in a circuit; and the ideological distance between the Ds and Rs. Notice in Table 2 that as the ratio of Rs to Ds falls, all the judges vote less conservatively, holding constant both δ (provided $\delta < 1$) and a judge's own ideology. This is a pure panel effect and implies that comparing the voting behavior of judges in courts that have different ratios of Rs to Ds can yield misleading inferences concerning a judge's ideology. For example, in Table 2, an R in a court with 3 Rs and 9 Ds will appear to be less conservative than a D in a court of 10 Rs and 2 Ds if δ is less than or equal to .25" (R.A. Posner, W.M. Landes, L. Epstein, *op. cit.*, p. 12).

[49] R.A. Posner, *Judicial Behavior and Performance…*, p. 1260. See also idem, *The Economic Approach to Law*, "Texas Law Review" 1975, vol. 53, pp. 757–782; idem, *The Economics of Justice*, Cambridge 1981.

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his credit for having selected and encouraged those subordinates".[50] In Posner's opinion, there is no important difference between a career judiciary and any other professional civil service, such as the diplomatic service or the armed forces.[51] For example, the arbitrators when they are not lawyers, are business people who have experience relevant to the case at hand they behave other than lawyers.[52] This advantage is at least partially offset, however, by the fact that arbitration awards cannot be appealed (presumably to reduce the cost of arbitration and thus reduce the cost advantage of the courts), though they can be challenged in court on narrow grounds.[53] "Because of that offset, I am inclined to stress the splitting the difference character of arbitration in explaining the attractiveness of this substitute for adjudication as well as in elucidating the behavioral effects of privatizing judging, rather than to emphasize the more conventional differences between adjudication and arbitration".[54]

According to Posner, the aspiration to become a judge of the Supreme Court has a significant impact on the behavior of judges, especially judges of appellate courts. The factors influence of their behavior are reason of prominence, political connections, race, or ethnicity. Thus, a study found that after Robert Bork's nomination to the Supreme Court failed, in part because of his extrajudicial writings (the largest component of the "paper trail" that did him in), the publication rate of court of appeals judges, after adjustment for other factors, declined precipitately.[55] Posner claims also that one of the motivation the federal district judges to economic behave is sensitive to the quarterly statistics compiled by the Administrative Office of the U.S. Courts showing how many cases the judge has had under advisement for more than a specified length of time – so sensitive that judges will sometimes dismiss cases at the end of a reporting period, with leave to reinstate the case at the beginning of the next reporting period, in order to improve their statistics.[56] Moreover, judges do not like to be reversed, even though a reversal has no tangible effect on a judge.

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[50] *Ibidem*, p. 1264.

[51] Idem, *An Economic Theory…*, p. 1194.

[52] See C.R. Drahozal, *A Behavioral Analysis of Private Judging*, "Law and Contemporary Problems" 2004, vol. 67(1/2), pp. 105–132.

[53] R.A. Posner, *Judicial Behavior and Performance…*, p. 1260.

[54] *Ibidem*, p. 1261.

[55] *Ibidem*, p. 1274. See more in R.A. Posner, W.M. Landes, L. Epstein, *op. cit.*, p. 2.

[56] See R.A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, "Journal of Legal Studies" 1973, vol. 2(2), pp. 399–458; idem, *The Behavior of Administrative Agencies*, "Journal of Legal Studies" 1972, vol. 1(2), pp. 305–347.

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EVALUATING ATTEMPT

Posner's works mainly concern the broadly understood theory of economic analysis of law. He does not only propose an economic analysis of the legal system but also an economic analysis of law in which the emphasis is put on the functioning of the legal system. In every analysis of judging behavior, he focuses on economic factors influencing the type of judge's behavior. Mainly purpose of Posner's research is to complete an economic conception of judge behavior without morality. He claims that judges, like other people, are maximizers of their utility.[57] "Deciding a particular case in a particular way might increase the judge's utility just by the satisfaction that doing a good job produces, which is what we would like. But it might also do so by advancing a political or ideological goal, economizing on the judge's time and effort, inviting commendation from people whom the judge admires, benefiting the local community, getting the judge's name in the newspaper, pleasing a spouse or other family member or a friend, galling a lawyer whom the judge dislikes, expressing affection for or hostility toward one of the parties – and the list goes on and on".[58] Based on the above argument Posner claims that moral theory does not provide a solid basis for moral judgments. Even if moral theory can provide a solid basis for some moral judgments, it should not be used as a basis for legal judgments. Moral theory is not something that judges are, or can be, made comfortable with or good at, it is socially divisive, and it does not mesh with the actual issues in cases.[59]

CONCLUSIONS

The economic analysis of legal research results in the distinction of types of judicial behavior. However, it takes Posner into the depths of human nature, and more specifically into the depths of judicial behavior. For its analysis, research on human nature is mainly used. This one cannot be studied purely economically.[60] Psychological and philosophical tools are used for this research. The nature of the mind is examined, as Posner does in *How Judges Think*, and if one insists with the American jurist that there is no place for morality here, then metaethical

[57] Idem, *What Do Judges…*, pp. 1–41.

[58] Idem, *Judicial Behavior and Performance…*, p. 1270.

[59] Idem, *1997 Oliver Wendell Holmes Lectures…*, p. 1595.

[60] Posner draws inspiration from Bentham's principle of utility, which states that all people are driven solely by the pursuit of their own self-interest. Egoism characterizes people regardless of the time and place in which they live and therefore egoism is a universal feature of human nature. Bentham's research are not guided. See T. Tulejski, *Od zasady użyteczności do demokracji. Filozofia polityczna Jeremy Benthama*, Łódź 2004, pp. 21–27.

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considerations are undoubtedly undertaken. And these belong to the general reflection on morality. According to Peter F. Lake, Posner performs a metaethical analysis. Adopting such a methodological assumption lends itself to the claims of Isaiah Berlin who proposed a way of seeing the ideal of analytic moral philosophy: "Ethical thought consists in the systematic study of the relations of human beings to one another, of the concepts, interests, and ideals from which human ways of treating one another flow, and of the value systems on which such purposes of life are based".[61] Moreover, when Posner runs away from the question of "What the law is?", he paradoxically gives another definition of law. Law is the result of the behavior of judges. The behavior of judges, on the other hand, is another broad concept of American jurisprudence, impossible to examine with mere economic tools or to define, as are the terms "law" and "morality". Thus, Posner gives himself a lesson in the methodology of law, in which the omission of morality is simply impossible. In conclusion, answering the question posed in the title of this article as to whether – Is there any morality here? – the answer could be affirmative.

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[61] P.F. Lake, *op. cit.*, p. 558.

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ABSTRAKT

Richard A. Posner w amerykańskiej jurysprudencji znany jest głównie ze swoich badań nad ekonomiczną analizą prawa. Jej celem jest przeforsowanie poglądu jakoby moralność nie stanowiła najważniejszej wartości w prawie, tą wartością jest bowiem maksymalizacja dóbr. Posner uważa, że związek moralności z prawem zaczyna się i kończy na wykładach prawa. Teksty, orzeczenia,

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a przede wszystkim dyskusje prowadzone na zajęciach kształtują moralność prawników. I na tym koniec. Prawnicy stosujący prawo oraz wydający opinie i decyzje zawsze kierują się osiągnięciem tylko jednego celu. Celem tym jest maksymalizacja dóbr. Dobra te są różne, ale wszystkie wywodzą się z ekonomicznego rozumienia maksymalizacji szczęścia. Twórcą ekonomicznej teorii maksymalizacji dóbr w procesie podejmowania decyzji przez człowieka jest Gary S. Becker. To właśnie z jego poglądów i prac Posner czerpie ramy pojęciowe, metodologię i założenia ekonomii prawa. Poglądy Beckera są częściowo oparte na założeniach utylitaryzmu Jeremy'ego Benthama. Powiązanie tych koncepcji z prawem oznacza, że Posner będzie prezentował inną wizję człowieka i jego natury niż większość amerykańskich myślicieli. Badania te stanowią fragment myśli Posnera i dotyczą zachowań sędziowskich. Celem niniejszego artykułu jest zaprezentowanie ekonomicznego podejścia Posnera do zachowań sędziowskich, które stanowią element aktualnie prężnie rozwijającej się w amerykańskiej teorii jurysprudencji behawioralnej.

Słowa kluczowe: zachowania sędziowskie; natura ludzka; Posner; teoria jurysprudencji behawioralnej

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