NOTE

ECONOMISTS AS JUDGES: A SELECTIVE, ANNOTATED BIBLIOGRAPHY

JANET SINDER*

This bibliography focuses on the role of judges in applying the values of law and economics, particularly the role of those judges trained in economics. It also includes articles on how economics can be used by judges in certain cases, even if a judge does not have a background in economics. Finally, this bibliography contains articles on whether economic values should be considered and promoted by the judicial system.

Ackerman, Bruce A. "Law, Economics, and the Problem of Legal Culture." *Duke Law Journal* (1986): 929-47.

Ackerman considers how the law and economics movement might be changing the language used by lawyers, and whether this will then change the outcomes of cases. The article reaches no conclusions, rather it poses the questions for consideration. Ackerman mentions that his personal thoughts on the subject are contained in his book, *Reconstructing American Law.* Cambridge, Mass.: Harvard University Press, 1984.

Becker, Edward R. "The Uses of 'Law and Economics' by Judges." *Journal of Legal Education* 33 (1983): 306-10.

Judge Becker discusses the areas to which he believes law and economics scholars have paid too little attention: evidence by economists at trial and the economics of judicial administration. He argues that lawyers need to be trained to present law and economics analysis to the court in appropriate cases. He also considers ways that this analysis should be used by lawyers, and gives a judge's perspective on what factors will influence decisions.

Breyer, Stephen. "Economics for Lawyers and Judges." *Journal of Legal Education* 33 (1983): 294-305.

Breyer considers the role of economics in antitrust and economic regulation. He finds economics relevant to these fields for two reasons: because it influences the rules of law in these fields, and because economic facts are so often used as evidence in antitrust and economic regulation cases. Breyer gives examples and argues that because economics is used so frequently, law students should be taught some basic economic theory.

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* Reference Librarian and Instructor in Legal Research, Duke University School of Law, Durham, North Carolina.

Cohen, George M. "Posnerian Jurisprudence and Economic Analysis of Law: The View from the Bench." *University of Pennsylvania Law Review* 133 (1985): 1117-66.

Cohen analyzes Posner's work on the bench and uses it as a means of discussing the strengths and weaknesses of economic analysis of law. The article gives a brief explanation of the economic theory of law and then considers how Posner has utilized it in his decisionmaking. Cohen criticizes Posner for not using economic analysis consistently and for not realizing its limitations.

Daynard, Richard A. "Use of Social Policy in Judicial Decision-Making." *Cornell Law Review* 56 (1971): 919-50.

For this 1971 article, Daynard analyzed 300 then recent cases decided by three courts: the U.S. Courts of Appeals for the Second and District of Columbia Circuits, and the New York Court of Appeals. He looked to see whether social policy had been used as a basis for court opinions, and concluded that it was employed in only a small percentage of cases. This early article can be used as a basis for comparing how social and economic policy are now used by judges.

Easterbrook, Frank H. "Foreword: The Court and the Economic System." *Harvard Law Review* 98 (1984): 1-60.

Easterbrook examines decisions of the U.S. Supreme Court, mainly from the 1983 term, to illustrate his theory that the Court has become economically sophisticated. He considers three economic principles: ex ante analysis, understanding effects at the margins, and appreciating the interest group underpinnings of statutes. Easterbrook finds these principles present throughout the Court's holdings. He thus concludes that the Supreme Court is asking economic questions and seems to be employing economic analysis.

Easterbrook, Frank H. "Method, Result and Authority: A Reply." *Harvard Law Review* 98 (1985): 622-29.

This piece is a response to Laurence Tribe's "Constitutional Calculus."[1] Easterbrook claims he did not argue that judges should perform cost-benefit analysis. He gives reasons why people, including judges and lawyers, should and do ask economic questions even though economic analysis will not be dispositive of the issue: because they may add extra information which will tip the balance in a particular case. Easterbrook disagrees with Tribe's belief that judges should uphold certain values or be involved in the redistribution of wealth.

Easterbrook, Frank H. "Statutes' Domains." *University of Chicago Law Review* 50 (1983): 533-52.

Here Easterbrook uses economic considerations to discuss the situations under which courts construe statutes, and when they decide a statute is inapplicable—meaning that its specific language is irrelevant. He says that

1. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency*, 98 HARV. L. REV. 592 (1985).

unless a statute clearly gives courts the power to create and revise a form of common law, the domain of the statute should be restricted to cases anticipated by its framers and expressly resolved in the legislative process. In all other cases the court should hold the statute inapplicable. One reason for this proposal is that courts cannot be sure why a statute is worded in a particular way, so they cannot know how the legislature would have decided a specific question.

Ehrlich, Isaac, and Richard A. Posner. "An Economic Analysis of Legal Rulemaking." *Journal of Legal Studies* 3 (1974): 257-86.

The authors examine the degree of specificity of a legal rule as a determinant of the efficiency of the legal process. They distinguish between rules, which are specific, and standards, such as "reasonableness," which are not specific.

Fox, Eleanor M. "The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window." *New York University Law Review* 61 (1986): 554-88.

Fox uses examples from antitrust law as a way to test whether economics is value free, as Frank Easterbrook argues, or rather is "ideology masquerading as knowledge," as Laurence Tribe argues. She says that economists can hide their political motivations behind their economics, making it hard for those not skilled in economics to detect these motivations and present the opposing economic argument. Fox feels that decisions in some areas, such as constitutional law, should disregard economics. In others, for example antitrust, judges should take care not to let economics be the only consideration. Lawyers and judges should not confuse economics with law.

Gerhart, Peter M. "The Supreme Court and Antitrust Analysis: The (Near) Triumph of the Chicago School." *Supreme Court Review* (1982): 319-49.

This article discusses the antitrust analysis employed by the U.S. Supreme Court. Gerhart argues that until the Court's decision in *Arizona v. Maricopa County Medical Society*,[2] the Court had been formulating a cohesive antitrust policy which considered the efficiency of its rules. He concludes that antitrust analysis would improve if the Court, rather than applying per se rules, looked at restraints of trade to determine whether they improve efficiency.

Golbert, J.P., and Paul Lowenstein. "The Court and the Marketplace: Who Should Regulate Whom?" *Baylor Law Review* 34 (1982): 39-65.

The authors argue that because the market system will always be imperfect, courts should regulate the market, imposing society's ethical values, rather than having the marketplace regulate the law. This article considers several examples which illustrate the fact that not everyone has equal access to the marketplace. This lack of access, the authors contend, means that the market cannot correctly reflect society's values.

2. 457 U.S. 332 (1982).

Grady, Mark F. "A New Positive Economic Theory of Negligence." *Yale Law Journal* 92 (1983): 799-829.

Grady analyzes formal negligence rules under the conventional theory of negligence law, and proposes an alternative rule which he says is more likely to lead to minimum social cost under uncertain conditions. He contends that this new rule is more consistent with actual court decisions. The new rule proposes a cost-benefit approach which would compare costs and benefits of a precaution not taken by the defendant if that precaution was a "but for" cause of the accident. If the benefits outweigh the costs then the defendant is liable.

Greenwalt, Kent. "Policy, Rights and Judicial Decision." *Georgia Law Review* 11 (1977): 991-1053.

This article criticizes Ronald Dworkin's theory of rights, rejecting the distinction Dworkin draws between principles and policies. (Dworkin says judges should not base their decisions on policy, only principles.) Greenwalt is also critical of Dworkin's belief that judges should base all decisions on institutional materials (i.e., precedent or statute). He believes there are cases where judges should and do decide based upon policy concerns for social welfare, rather than on institutionalized rights.

Hansmann, Henry. "The Current State of Law-and-Economics Scholarship." *Journal of Legal Education* 33 (1983): 217-36.

This article is a discussion and review of law and economics writings. Hansmann reviews the scholarship in various fields of law and concludes that "the extent to which law-and-economics scholarship has developed in any given field of law seems to be directly proportional to the amount of judge-made law that is to be found in that field." He also discusses what this type of analysis has contributed to the law, and what he considers some methodological problems.

Landes, William M. "An Economic Analysis of the Courts." *Journal of Law and Economics* 14 (1971): 61-107.

Landes analyzes the criminal justice system, using the tools of economic theory and statistics. He assumes prosecutors will attempt to maximize the number of convictions weighted by sentence length, subject to budget constraints, and the defendant will maximize "expected utility of his endowments in various states of the world." Both can influence the outcome by the amount of resources they put into a case. The article also lists the major implications of this model.

Landes, William M., and Richard A. Posner. "The Independent Judiciary in an Interest-Group Perspective." *Journal of Law and Economics* 18 (1975): 875-901.

The authors say that economic analysis may be able to reconcile what many think of as the conflicting notions of an independent judiciary and a political system which emphasizes the importance of interest groups. This reconciliation can be accomplished by recognizing that an independent judiciary will enforce continuity in the law by looking to the intention of

the legislature that originally enacted the legislation. Thus, once bargained-for legislation has been enacted, it will have longer-term, and therefore greater, value to those who bargained for it. This article contains an appendix of empirical studies of judicial independence which examine the number of times the courts have nullified acts of Congress.

Lempert, Richard. "Statistics in the Courtroom: Building on Rubinfeld." *Columbia Law Review* 85 (1985): 1098-116.

Lempert discusses the introduction of statistical evidence with regard to the Federal Rules of Evidence. He disagrees with Rubinfeld's argument that the required level of significance be chosen so as to affect the behavior of the litigants (that is, making it more or less likely that they will go to trial), because one cannot be sure what the effects of such changes will be. He concludes that ultimately the use of statistics in the courtroom must be governed by legal values.

Michelman, Frank I. "A Comment on Some Uses and Abuses of Economics in Law." *University of Chicago Law Review* 46 (1979): 307-15.

In reaction to Posner's article,[3] Michelman argues that Posner's hypothesis should be understood to mean that judges act as though they were following economic principles, not that these principles are a correct description of the world or that the judges' decisions bring about "economically virtuous" results.

Miller, Jeremy M. "Economic Analysis of Legal Method and Law: The Danger in Valueless Values." *Gonzaga Law Review* 21 (1985-86): 425-55.

Miller focuses on Posner's views about criminal law in considering the validity of using efficiency as the central legal value. He concludes that by emphasizing efficiency Posner is ignoring fairness, and he criticizes Posner for being willing to sacrifice moral values if they appear to be inefficient.

Posner, Richard A. "Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger, and Potential Competition Decisions." *Columbia Law Review* 75 (1975): 282-327.

Posner considers antitrust decisions of the United States Supreme Court on restricted distribution, horizontal merger, and potential competition according to what he considers coherent rules, and finds that the Court has not followed rules consistent with a general theory of antitrust liability. He claims that the Court has done an unsatisfactory job of relating its decisions to the purposes of the antitrust statutes.

Posner, Richard A. "Some Uses and Abuses of Economics in Law." *University of Chicago Law Review* 46 (1979): 281-306.

This article attempts to give a brief overview of economic analysis of law. The discussion of the "positive economic analysis of law," defined as the use of economic analysis to explain what has been or to predict what will be, reviews some literature on the economic analysis of judicial decisionmaking. Positive analysis is distinguished from normative

3. Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281-306 (1979).

analysis, which concerns itself with whether economic efficiency *should* be the goal of the legal system.

Posner, Richard A. "Wealth Maximization and Judicial Decision-Making." *International Review of Law and Economics* 4 (1984): 131-35.

A comment on Samuels and Mercuro's "Posnerian Law and Economics on the Bench."[4] Posner discusses his beliefs about the actual and the appropriate role of wealth maximization in the decisions of federal courts of appeals. He says that wealth maximization is the only social value courts have the power to promote.

Priest, George L. "The Common Law Process and the Selection of Efficient Rules." *Journal of Legal Studies* 6 (1977): 65-82.

Priest argues in this article that economically efficient rules are more likely to endure regardless of the attitudes of individual judges toward efficiency, or the interest or ability of judges or litigants in developing efficient rules. Inefficient rules will prove more costly to the parties subject to them. Thus, those parties will be more likely to relitigate those rules until the rules eventually become more efficient, even where judges prefer inefficiency.

Rizzo, Mario J. "The Mirage of Efficiency." *Hofstra Law Review* 8 (1980): 641-58.

Rizzo contends that in order to determine whether legal rules are efficient for society in general, rather than only between litigants, more information is required than can realistically be obtained by courts. Therefore, it is impossible for judges to make decisions on the basis of efficiency, and this value should be disregarded as impractical.

Rubinfeld, Daniel L. "Econometrics in the Courtroom." *Columbia Law Review* 85 (1985): 1048-97.

This article considers the uses of statistical evidence in the courts. Rubinfeld argues that courts need to use an "instrumentalist, efficiency-oriented" criterion to determine the appropriate standard of proof with regard to statistical evidence. He concludes that the role of neutral experts to evaluate statistical evidence should be expanded and that reform of the methods of presentation of statistical information to the trier of fact is needed. He argues that by setting statistical standards courts are assessing the comparative social costs of each outcome.

Samuels, Warren J., and Nicholas Mercuro. "Posnerian Law and Economics on the Bench." *International Review of Law and Economics* 4 (1984): 107-30.

The authors examine Judge Posner's court decisions between 1981 and 1983, to see how his theory of wealth maximization has affected these decisions and what the decisions reveal about this approach.

Shepherd, William G. "Economics in Court: An 8-Case Antitrust Summary." *Antitrust Law & Economics Review* 18, no. 2 (1986): 75-83.

4. Samuels & Mercuro, *Posnerian Law and Economics on the Bench*, 4 INT'L REV. L. ECON. 107-30 (1984).

Shepherd, an economist, summarizes eight antitrust cases with which he was involved. In addition to presenting an economist's opinion of the effect of the courts' rulings, he provides an insider's view of the cases.

Sullivan, Lawrence A. "Antitrust, Microeconomics, and Politics: Reflections on Some Recent Relationships." *California Law Review* 68 (1980): 1-12.

This article, a speech given by Sullivan at Boalt Hall Law School, discusses the application by the courts of the value of efficiency to antitrust cases. Sullivan feels that this trend reflects a policy of seeing markets as the way to solve social problems. He predicts that the economics used by courts will evolve beyond static price theory, and says that courts should not surrender to economists the value judgments that rightfully should be made both by the courts and the Congress.

Tribe, Laurence H. "Constitutional Calculus: Equal Justice or Economic Efficiency." *Harvard Law Review* 98 (1985): 592-621.

In this piece Tribe criticizes Judge Easterbrook's praise for the U.S. Supreme Court's adoption of cost-benefit analysis. Tribe considers that Easterbrook's advocacy of an ex ante approach (looking at the consequences of decisions on other parties rather than fairness to the parties involved) evinces a disregard for the wealth distribution dimensions of problems. He argues that courts should choose the values our society desires to support rather than perpetuating the values that already exist. To illustrate his theory, Tribe analyzes a number of recent Supreme Court decisions.

Wilson, James G. "Justice Diffused: A Comparison of Edmund Burke's Conservatism with the Views of Five Conservative, Academic Judges." *University of Miami Law Review* 40 (1986): 913-75.

Wilson examines the constitutional jurisprudence of Judges Bork, Scalia, Posner, Easterbrook, and Winter. In the first part of this two-part article he summarizes the philosophy of Edmund Burke and concludes that these judges do not adhere to Burkean conservatism. Wilson believes that Burke would be more willing to defer to previous court decisions as embodying the country's collective wisdom than these jurists, who argue that in many cases the Supreme Court has acted illegitimately.

Wilson, James G. "Constraints of Power: The Constitutional Opinions of Judges Scalia, Bork, Posner, Easterbrook, and Winter." *University of Miami Law Review* 40 (1986): 1171-266.

This second article by Wilson examines the decisions of Judges Bork, Scalia, Posner, Easterbrook, and Winter on constitutional issues. Wilson concludes that these men are not as conservative on the bench as in their academic writings. He explores how "judicial power does and does not temper public beliefs" in the case of these judges, all of whom previously were academics. Wilson, however, finds that individual constitutional rights are the exception to their general philosophy, because all of them believe judicial review is illegitimate.

Zwier, Paul J. "The Consequentialist/Nonconsequentialist Ethical Distinction: A Tool for the Formal Appraisal of Traditional Negligence and Economic Tort Analysis." *Boston College Law Review* 26 (1985): 905-44. This article argues that the traditional method of analyzing and deciding tort cases, using "fault" language, is preferable to economic analysis. Zwier discusses the ethics of both systems and concludes that economic analysis is not ethically superior to negligence analysis—both are based on beliefs and assumptions. He criticizes the claim of legal economists that their system is superior because it is based on logic. As these predictions must be based on subjective assumptions about values, they are no better in predicting what the value of the decisions' consequences will be to society in the future.