Should I help my neighbour? Self-interest, altruism and economic analysis of rescue laws.

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> "A certain man was going down from Jerusalem to Jericho; and he fell among robbers, and they stripped him and beat him, and went off leaving him half dead. And by chance a certain priest was going down on that road, and when he saw him, he passed by on the other side. And likewise a Levite also, when he came to the place and saw him, passed by on the other side. But a certain Samaritan, who was on a journey, came upon him; and when he saw him, he felt compassion and came to him, and bandaged up his wounds, pouring oil and wine on them; and he put him on his own beast, and brought him to an inn, and took care of him." Luke, 10, 25-37.
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> "The original Good Samaritan extolled by St. Luke was fortunate in not arriving on the scene until after thieves had set upon the traveler, robbed him and beaten him half to death. The Samaritan cared for him and showed him great kindness, but he did not put himself in any peril by doing so. Perhaps this is about as much as can be reasonably asked of the ordinary mortal man." Alan Barth, 1966, p. 163.

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1. Introduction

In the early seventies, the economic analysis of the law becomes an established and recognized field of research, the purpose of which is to use economic tools, methods and assumptions to investigate the functioning of legal systems. This perspective in particular implies that an important assumption has to be made: any individual involved in the functioning of the legal system — criminals, litigants, judges, advocates, and lawyers — supposedly behave as a rational and self-interested utility maximizer. At first sight, thus, this analytical framework does not appear to be much relevant to analyze those behaviours that are not obviously the consequence of selfishness, as it is the case the behaviour adopted by good Samaritans, saviors, and rescuers when they, at least apparently, depart from the pursuit of their interest to help others. Hence, two complementary questions can be raised: is it possible to analyse and explain these behaviours within the frame of the standard economic model? or, alternatively, is it necessary to use another set of behavioural assumptions to understand why, when and under which conditions these *rescuers* apparently choose to depart from the pursuit of their self-interest? Actually, the claims and conclusions of the economic analyses of rescue behaviours and rescue laws that are proposed in the 1970s tend to give a positive answer to the first of these two questions: there is no necessity to modify the standard economic model that is in effect sufficiently rich to allow explanations of disinterested or unselfish behaviours. To say it differently, *because* the self-interested economic model is able to explain also unselfish behaviours, then it becomes possible to develop economic analyses of the legal rules aimed at regulating unselfish behaviours.

The purpose of this article is precisely to investigate the circumstances and conditions under which economic analyses of rescue laws were made possible, first as a consequence of the development of an economic analysis of law and second as a consequence of the development of economic analyses of unselfish behaviours. More precisely, we show that the economic analyses of the regulation of rescue behaviours published in the ‘70s are the outcome of a long-term process that began at the end of the 1950s with the passing of the first legislations intended to promote and control rescue behaviour (the so-called “good Samaritan” legislations, acts or statutes) and that

finally results in the economic models of rescue developed by Landes and Posner (1978 a and b) and building upon the economics of altruism. The process was progressive: it consisted of moving rescue behaviours out of the sphere of ethics or morals and in the legal sphere. Those behaviours were in effect no longer viewed as depending on internal incentives. On the contrary, helping — in fact, one should rather say "not" helping — others was a matter of external incentives, a matter of *costs and benefits*. It therefore was necessary to transform them into a legal issue (section 2). Once this first step taken, and after it became admitted that economic analyses of legal problems were legitimate, the first economic analyses of rescue laws and Good Samaritan laws were proposed, in the early seventies. Interestingly, the emergence of these studies is almost accidental: rescue laws and helping behaviours are used as illustrations in a debate on strict liability (section 3). They become an issue in its own right after economists — at least some of them — develop analyses of altruistic behaviours. The economic literature on altruism then reshapes the intellectual framework available to analyze the issue of rescue behaviour and makes it possible to put forward new models on rescue laws (section 4). The last section provides a summary and elements of conclusion (section 5).

2. The emergence of rescue behaviours as a legal issue : the "de-moralization" and legalization of rescue behaviours

According to the traditional view of common law, rescue behaviour is neither a legal or even an economic issue. Namely, no legal provisions exist in the United States of America at that time that impose a duty to rescue or aid others. Similarly, there do not exist sanctions for failure to help or rescue someone in distress. Individuals are therefore not under a common law duty to take steps to aid strangers (see Bohlen, 1908 a and b). Further, this absence of legal provision is specific to the Anglo-american tradition:

> "Over the past 130 years it [duty to help, behaving as a good samaritan] has been made a legal requirement. In the Russian criminal code of 1845, and since then in almost every continental European country, the failure to be a good Samaritan has been declared a criminal offense. The glaring exceptions to this trend have been the countries in the Anglo-American legal tradition" (Kleining,

1976, p. 382).

Three characteristics can be put forward to explain such perspective on helping. First, as put forward either by judges in their decisions or commentators, to impose any duty to aid or to condemn a failure to help through a legal provision would represent a threat to individual freedom, independence or individualism — all values viewed as pillars of the American society. In other words, helping others, or behaving as a good Samaritan, *i.e.* unselfishly, is fundamentally a matter of individual choice. Second, helping others, rescuing their person or property is viewed as a moral duty rather than as a legal obligation. In fact, it is both "a problem of law and morality" (Jarret, 1954, p. 779) in which it seems particularly difficult to reconcile moral considerations and legal obligations (*ibid.*, note 4) and therefore to agree on the establishment of a statute that would regulate unselfish behaviour. Rescue is thus seen as an individual and moral issue. In Ames' words, "it is left to one's *conscience* whether he shall be the Good Samaritan or not" (Ames, 1908, p. 112, emphasis added). Further, the absence of legal provisions imposing a duty to rescue on individuals also relies on a more or less implicit belief that individuals are sufficiently concerned by others to spontaneously adopt unselfish behaviours and help or rescue them without any binding legal provisions.

The moral and individual decision of helping or rescuing other individuals progressively turns into a legal problem during the decade that precedes and prepares the emergence of an economic analysis of law. In the late 1950s and early 1960s, two crucial events trigger a change in the attitude to adopt in these matters and mark a shift from the moral sphere to the legal one. The first occurs in 1959 in Northern California, where a skier broke his leg on a ski slope and "was left unattended even though physicians were available for emergency treatment" (Oberstein, 1963, p. 822). Thus, refusing to help a person in need, some physicians acted as selfish and bad Samaritans. This type of behaviour was certainly not frequent but altogether not uncommon in the USA at that time. This *specific* event could therefore have remained unnoticed or interpreted as a merely additional instance of selfishness, therefore belonging to the individualistic realm of morals. However, this is not the case. The behaviour of these physicians is then perceived as evidencing "an immediate and compelling problem"

(*Ibid.*, p. 817) that lies in a decrease in unselfishness or an increase in selfishness among doctors. This is viewed as sufficiently problematical to require the passing of a legal provision. Thus, the very same year this event occurred, in 1959, the first statute ever promulgated in the USA on rescue behaviours is adopted in California — the so-called Good Samaritan Act, with the aim of protecting physicians who behave unselfishly in case of emergency. More precisely, the law provides that doctors and physicians who behave unselfishly in case of emergency cannot be held liable for civil damages as a consequence of the negative impact or unintentional harm that their acts may yield.

The attempt to legislate on helping behaviour is important because it represents a departure from the traditional common law position and a first step to take rescue behaviour explicitly out of a purely moral and individual sphere and to bring rescue into the legal field. This therefore represents a first step towards the legalization – or the "de-moralization" — of the control of rescue behaviours. However, the attitude of lawyers and legislators is not surprising. In effect, it echoes the way these matters were perceived by medical doctors and nurses at that time. Namely, the latter did not envisage that helping or rescuing bystanders could result from a sense of moral duty. Thus the 1953 *Principles of Medical Ethics of the American Medical Association* (reproduced in Fitts and Fitts, 1955, pp. 32 *sq*) does not make any mention to anything that could connect such behaviour with altruism or unselfishness. It is nonetheless indicated that doctors *must* "respond to any request for his assistance in an emergency", which then appears as a *professional* obligation. As a consequence, the relationship with a patient, even an injured one, can be viewed as a contract – that is, a legal matter. From this perspective, a failure to help *but also* a failure to perform medical assistance correctly can be interpreted as a breach in the contract. Consequently, physicians or nurses can possibly be sued for negligence or for malpractice and, therefore, have to bear the costs of their action[3]. In other words, unselfish behaviours are a matter of costs because they are a matter of liability as well. Hence, this leads to and accounts for the promulgation of the Good

3 Some argue that this "fear" is legitimate, "substantiated by the more than five thousand actions brought each year. In most states, at least one doctor in every seven has been sued for negligent treatment; in New York the percentage is one out of five and in California one out of four" (Columbia Law Review, 1964, p. 1302). Others that "apprehension persists" even if "there is not much for doctors to fear" (Blythe Stason, 1967, p. 566).

Samaritan statutes providing for exemptions of civil liability for doctors and physicians — in 1959 — and nurses — in 1963 — who help someone and render care in emergency situations. This means that physicians and nurses may behave unselfishly if they do not have to pay for the consequences of their action. Their altruism is thus *impure* – when it exists. A non negligible number of physicians and nurses are ready to behave selfishly even if they are not expected to bear any costs as a 1965 editorial of the *New England Journal of Medicine* reports: "50 percent of doctors would not stop to help, even after the passage of a Good Samaritan act" (quoted in Sheleff, 1980, p. 140).

Further, the problem is obviously not limited to how doctors and nurses behave in one part of the country. Indeed, Good Samaritan statutes spread throughout the USA at a rapid pace, for in 1963, 14 states have already adopted laws on medical assistance in case of emergency, whereas only 13 states have discussed and rejected similar legislation. This apparently general problem that seems to exist across America is thus not only a problem of unselfishness but also a problem of how to solve it — either by relying on morals or by enacting laws? The debate is going to be dramatically fueled by a second event that plays an important role in the transformation of the perception of rescue behaviour in the American society: the murder of Kitty Genovese.

In 1964 (March 13th), 29 years old Catherine Susan (Kitty) Genovese is stabbed to death near her apartment in New York City. The murder is shocking in itself, obviously. Its huge impact on the American society is nonetheless amplified by the account made in a newspaper New York Times article (March 27th)[4] entitled: "Thirty-eight who saw murder didn't call the police". Martin Gansberg, its author, controversially reports that a number of witnesses heard but nevertheless ignored Kitty Genovese's screams and, behaving as bad Samaritans, did nothing to help her for no specific reason[5]. Once again, the event is perceived and interpreted as an instance of a general tendency in the USA according to which altruism is not sufficiently strong among Americans to induce them

4 A first account of the murder is given in the March 14 issue, under the neutral title: "Queens Woman Is Stabbed To Death in Front of Home".

5 Actually, there were only a dozen witnesses and none of them really perceived the situation in its entirety but only bits of what was happening. It nonetheless remains that the apathy of these witnesses is striking. To the question, "Why hadn't he called the police at the time?", one witness answers "I don't know" and another one replies "I was tired. I went back to bed".

to help others. The conclusion that is drawn from this is that internal motives have to be supplemented with external incentives. Therefore, as in the late 1950s, it is claimed that helping others is too important to remain confined within the moral sphere but is actually a legal problem. This precisely provides the very topic of a conference that is held just after the tragedy at the University of Chicago Law School: "Conference on the Good Samaritan and the Bad - the Law and Morality of Volunteering in Situations of Peril, or of Failing to Do So" (see Ratcliffe, 1966). Again, the explanations put forward to explain selfishness insist on the costs that individuals may have to face because of their unselfishness. Similarly, an article published in *Time Magazine* (April 23d, 1965) and dedicated to the conference insists on the importance of costs associated with helping behaviours. Many instances are mentioned:

> "In Chicago in 1961, Negro Cab Driver Lawrence Boyd tried to stop three Negro muggers from robbing two white youths. Boyd was shot twice, paralyzed in one arm, lost his job, and is now 9,000 dollars in debt. In Upper Darby, Pa., last fall, George Senn fired a shotgun in the air to prevent 20 thugs from attacking two girls and a boy outside his window. Senn was convicted of aggravated assault and battery, paid a 500 dollars fine, and now faces a damage suit from his "victims".

A consensus therefore emerges to explain the decision of people to help or not to help in emergency cases as a matter of costs – that is of the costs people have to bear when they engage in unselfish behaviour. At the same time, it is more and more obvious that people fail to help others in case of need, *even when the costs are low*. Thus, one of the most striking dimension of the debate is seen as the fact that not only in California but all over America, not only doctors and nurses but also any American citizens seem to be ready to behave selfishly — they do not help others in case of emergency. This is documented and confirmed by different psychological studies that are conducted in the late 1960s and show that a majority of Americans is ready to behave as bad Samaritans (Latane and Darley, 1968 a, 1968 b; Darley, Teger and Lewis, 1973). For these individuals, therefore, even external incentives are of no use. At best, those who are ready to behave unselfishly ponder costs with benefits and calculate their

"unselfishness". In other words, they are ready to behave unselfishly but for selfish reasons. For those who are ready to help, under specific conditions, unselfishness appears to be a matter of external incentives as well as – obviously – a legal problem. If helping behaviour is a matter of costs but people lack sufficient internal incentives to help others in case of need, this justifies providing them with the proper (legal) incentives to rescue. Based upon this way of reasoning, a trend of "legalization" spreads over the US during the 1960s. As a consequence, in 1971, 12 years only after California, a large majority of the American states — 42 states and D.C. — have adopted good Samaritan legislation. At that time, thus, rescue behaviour has fully become a legal issue and, more precisely, a liability issue.

3. The economics of helping: negligence vs liability -- altruistic behaviours without altruism?

3.1. The emergence of an economic analysis of negligence

Rescue behaviours — in particular the rescue of injured victims by doctors — has therefore be transformed from a moral into a legal problem, at least since the end of the 1950s. At the same time, it is well known that economists have increasingly been interested in legal issues, in particular tort law and accident law has attracted a lot of attention (see, among others, Calabresi, 1961, 1965). However, it is not before the early 1970s that one can read works in which some attention is paid to rescuing behaviours. Between, 1959 and the promulgation of the first Good Samaritan statute and 1971, no "law and economics" article is devoted to this issue, just like no article is devoted to medical liability during the very same decade. These simply are not issues "law and economics" is interested in at that time.

In effect, under the influence of Ronald Coase, "law and economics" focus on the functioning of the economy rather than on the legal system. This is what Coase — who then speaks as the founder and representative of the field — has frequently emphasized, noting for instance that what he "wanted to do was to improve our analysis of the working of the economic system" (Coase, 1993, p. 250) and to "study the influence of the legal system on the working of the economic system" (Coase, 1996, p. 104), as implicitly contrasted with the understanding of legal problems that he viewed as falling

outside the domain of economics. As a consequence of this research program, law and economics concentrates on "certain kinds of activities" (Coase, 1978, p. 206) that are seen as a "natural" object of the analysis or the subject matter for economists. The analysis is therefore mostly restricted to legislative rules and regulations dealing with regulatory policies, anti-monopoly and anti-trust rules, and other topics related to "*explicit* economic markets" and "*explicit* economic relationships" (Posner, 1975, p. 758; emphasis added).

No surprise then, if one has to wait for the early 1970s and the works carried out by Isaac Ehrlich, William Landes, and Richard Posner to see rescue behaviour fall within the scope of economics. These authors, influenced by Gary Becker's pioneering works, "invent" a new approach. Their "economic analysis of law" does not only represent a quantitative increase of the scope of law and economics but also a qualitative reversal of perspective compared to Coase (see Landes, 1998; Posner, 1993). Unlike Coase, these scholars are no longer interested in examining how legal rules affect the functioning of the economy but they rather adopt an economic approach to investigate the functioning of the legal system. This means, therefore, using economics to analyze *legal problems* just like economists use their tools to analyze economic problems. This also yields an extension of the domain of investigation to a wide range of new areas – such as the production of case-law, the functioning of the judiciary, the legal procedure, and more generally "the central institutions of the legal system" (Posner, 1975, p. 39). Finally, the adoption of the beckerian conception of economics as a toolbox – or, in Posner's words, "an open-ended set of concepts" (Posner, 1987, p. 2) – "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) (for more details, see Harnay and Marciano, forthcoming).

This is meaningful therefore that rescue behaviours have shifted from an essentially moral and individual sphere to the legal sphere at that time, as we have shown in our former section. As the economic analysis of law now holds it for acceptable to study legal issues through the economic lens and by using economic tools, it becomes possible and legitimate to analyze rescue behaviour along this line, since it has been turned into a

legal issue. Among the wide array of legal issues that now fall within the scope of the economic analysis of law, rescue laws are no exception. Namely, tort law and the assignment of liability in case of accidents become prominent in the analysis. Now, rescue behaviour has been integrated into the legal area under the form of a liability issue. Therefore, this is no surprise if an economic analysis of rescue laws emerges in the debate around negligence and liability. More precisely, the first references to unselfishness, rescue behaviours, and good and bad Samaritanism from the perspective of an economic analysis of law are made to illustrate the economic theories of liability within the debate on strict liability *v.* negligence.

Posner initiates the discussion. In January 1972, he publishes an article entitled "Theory of Negligence" in his journal — the *Journal of Legal Studies* (JLS). The article is typical of the approach undertaken by the "economic analysis of law", depicted by Posner as the use of an economic approach to "take a fresh look at" (Posner, 1972, p. 32) a legal problem. In that very case "liability for negligent acts" provides the legal problem at stake. Now, when Posner writes his article, liability is not only viewed as an important legal problem but also as a problem with an important *economic* aspects; that is, a problem that can "plausibl[y]", as Posner will note in 1973 (p. 209), be analysed with economics. And that indeed was at the turn of the 1970s. Among the recent economic works on liability, Guido Calabresi's *The Costs of Accidents* occupies a major place. Published in 1970, the subtitle of Calabresi's book — *A legal and economic analysis* — had already attracted Posner's interest. In 1970, he writes a long book review to explain that Calabresi's attempt to use economics is interesting but, to some extent, should be pushed further (Posner, 1970).[6] Certainly, Calabresi's work is "an ambitious effort to employ a social science perspective (again that of economics) in a field of law in which, when Calabresi started his work, there was no supportive tradition, no pioneering work by economists or other social scientists, on which to rely" (Posner, 1970, p. 638) and "Calabresi's debt to economic theory is greater since That theory supplies the very structure as well as the details of the analysis"[7] (*Ibid.*, p. 643). Now, according to Posner,

6 Posner (1973, pp. 213-215) also discusses Calabresi's position rapidly.

7 Even, « [T]he form of *The Costs of Accidents* is that of "cost-benefit" or "systems" analysis" (Posner, 1970, p. 643).

Calabresi fails to propose practical and operational solutions to shape tort law efficiently: "Having established the goals and methods of accident control, he Calabresi then asks whether the prevailing system of accident control in this country, the "fault system" (negligence law), is a rational system for optimizing accident costs. He concludes that it is not" (*Ibid.*, p. 642). Further, "while asserting that we could do better, Calabresi proposes no alternative system". Finally, "The last part of his book is devoted to an inconclusive discussion of the same proposals for reform with which he opened" (*Ibid.*, p. 642). Therefore, to push Calabresi's analysis further is undoubtedly what Posner has in mind when he writes his 1972 *Theory of Negligence*. In this article, he develops an "economic theory of negligence liability" (Posner, 1972, p. 39) in which economic analysis[8] helps to defend a theory of liability based on negligence. By doing so, Posner does not only propose an original view on liability but also endorses further an approach that has already been used by Judge Learned Hand in the late 1940s.[9] From that perspective, according to Judge Hand, liability should be imposed for a negligent tort only if the burden of preventing the injury does not exceed the magnitude of the injury multiplied by its likelihood of occurring. In other words, a behaviour is found negligent when the agent's burden (B) is less than the probability (p) of harm, multiplied by the degree of loss (L). Eventually, Posner also demonstrates that the common law negligence rules have been used consistently and efficiently during the last quarter of 19th century. However, none of the cases upon which he builds his demonstration involve rescue situations. No reference is made to good Samaritan acts either

3.2. Epstein: the limits of an economic analysis of Good Samaritan statutes

The first to discuss the merits of an economic analysis of good Samaritan laws is

8 In Posner's views, the word "economic" corresponds to a cost-benefit analysis and there is no reference to maximization of individual utility as a behavioural norm.

9 This is thus the first time then that Posner refers to the famous Learned Hand formula according to which liability has to be determined by comparing costs and benefits. The Learned Hand formula was formulated by Judge Hand in a case concerned with civil tort liability in a situation alleging damage after a boat-owner's failure to adequately secure his vessel at harbor (*United States vs. Carroll Towing Co.* 1947). It is also interesting to note that the mathematical formulation is used by Judge Hand himself, who expresses his conclusion in the following terms: " if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B< PL" (United States v Carroll Towing Co, 1947, 159, F., 2d 169, 2d Cir.). Epstein (1973, p. 154) suggests that this may be intended "to demonstrate its applicability to the entire law of torts".

Richard A. Epstein in an article entitled "A Theory of Strict Liability" that is published in 1973 in the *JLS*, under Posner's suggestion and as a critical answer to his *Theory of Negligence*[10]. In his article, Epstein defends strict liability against the idea of negligence, on the account that "the rules of strict liability avoid both the unfairness and complications created when negligence, in either its economic or moral sense, is accepted as the basis of the law" (Epstein, 1973, p. 189). More precisely, his disagreement is based on two elements, respectively his "instinctive unhappiness with cost-benefits formula *à la* Learned Hand" (Epstein to Marciano, 23 February 2007) and his rejection of the law and economics treatment of causation, the key concept of Epstein's demonstration. First, Epstein appears unconvinced by the dramatic innovativeness of Judge Hand's argument, noting that despite the use of an implicit cost-benefit analysis, the argumentation soon goes back to a more traditional line relying on the idea of "reasonableness".[11] Moreover, he not only stresses the difficulty that may be encountered in implementing Hand's formula, especially in situations of contributory negligence but he also shows that some situations may occur in which no party has carried out a behaviour that can be considered "unreasonable or improper from either an economic or a moral point of view" (Epstein, 1973, p. 157).[12] In his eyes, it is irrelevant then to

10 Epstein recalls that in December of 1971, he went to hiring convention in Chicago, met Richard Posner who showed him the draft version of a theory of negligence that was due to come out in January 1972 in the *JLS* and then, after having heard the defense made by Posner, "proceeded to take after him". Posner "once he saw that I was in earnest [...] said that you had to write this up, and added "in my journal," which I did" (Epstein to Marciano, 23d February 2007)

11 "The use of the concept of "excuse" in Hand's formulation of the particular grounds for decision suggests that some of the elements material to determining "blameworthiness" in the moral sense are applicable with full force *even after the statement of the general economic formula*" (Epstein, 1973, p. 155, emphasis ours). Further, "although Hand alludes to some noneconomic concept of excuse, both its specific content and its relationship to the economic concept of negligence remain unclear" (*Ibid*., p. 156). In this respect, this is interesting to note here that Epstein explicitly remarks in a footnote (footnote 14, p. 156) that "the relationship between the economic tests for responsibility and the notion of excuse [is precisely the issue] that troubles Calabresi in his recent article, because a theory of fairness is required to admit "excuses" into a system of liability rules. […] Moreover, the need to take excuses into account explains why the concept of the "reasonable man" remains part of the law of negligence even after *Carroll Towing*".

12 Epstein's discussion relies here on two cases that he finds inconsistent with the economic theory of negligence, respectively *Vincent v. Lake Erie Transport Co.* (1910), 109 Minn. 456, 124, N.W. 221 and *Morris v. Platt*. (1864), 32 Conn. 75. In the first case, during a storm, the captain of a ship ordered his crew members to keep the boat moored fast to the dock. Due to the bad weather, the vessel was constantly being lifted and thrown against the dock, which eventually yielded a damage to the dock to the amount of $ 500. The court decided that the defendant had to compensate the plaintiff for the damage, despite the fact that necessity provided the former with a valid defense to trespass. In the second case, the plaintiff

found a legal sanction on the ground of economic or moral considerations and other reasons should be used to justify which party should be preferred to the other one. Epstein concludes thus that "☯i☸f the defendant harms the plaintiff, then he should pay even if the risk he took was reasonable just as he should pay in cses of certain harm where the decision to injure was reasonable". Second, Epstein fundamentally disagrees with the treatment of causation in law and economics analyses, especially Coase's (1960) and Calabresi's (1970). On the one hand, because "Coase argues that the harms in question resulted because two persons each wished to make inconsistent uses of a common resource", he "adopts a model of causation that treats as a cause of a given harm any *joint condition* necessary to its creation". Therefore, "since the acts of both parties are "necessary" it follows that the concept of causation provides, in this analysis, no grounds to prefer either person to another. The problem is "reciprocal" in both causal and economic terms" (Epstein, 1973, p. 164, Epstein's emphasis). On the other hand, Calabresi "makes clear that the does not think the concept of causation plays any part in the development of his theory" (*Ibid.*, p. 163). Both analyses are thus equally flawed in Epstein's eyes, since they "share the belief that the concept of causation should not, because it cannot, play any role in the determination of liability for harms that have occurred" (*Ibid.*, p. 165). By contrast, Epstein puts forward that liability has to be connected to a cause: an individual is liable when and because s/he has caused a damage only and must not be viewed as liable because of his/her negligence, that is because of his or her failure to take all the measures to prevent a damage.[13] Hence, the lack or absence of prevention cannot be viewed as a cause to a damage and there is no cause of action against him/her.

Interestingly for our purpose, Epstein uses Good Samaritan laws as a case study to illustrate his demonstration. Part of the explanation for the use of this example stems from the memory of the murder of Kitty Genovese, that makes this issue sensitive and

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accidentally shot the plaintiff while defending himself against an attack by a third party. Arguing that the defendant had acted prudently, the court decided that the plaintiff could not be held for liable and ordered compensate the plaintiff.

13 In his paper, Epstein endeavours to show that the concept of causation can be helpful to assign liability. However, he recognizes that causation is a complex and polysemic concept. He therefore discusses four meanings of the term, respectively based upon notions of force, fright, compulsion, and dangerous conditions.

thus important[14]. Also, in his view, Good Samaritan cases and Good Samaritan laws do trigger Epstein's reaction against Posner because they evidence its failure of his argument. The problem is that, in Epstein's views, that a theory of negligence misses the "distinction between those cases in which the defendant acted and those cases in which he did not act, failed to act, or omitted to act" (*Ibid.*, p. 190). As a consequence such theory suggests no valid reason for which a potential rescuer should not be held liable for not having come to the aid of someone in distress, as soon as s/he has a sufficiently low cost of prevention of rescuing the rescued compared with the possibly high harm borne by the latter if not rescued. Yet, Epstein notes, one cannot but observe "the common law's refusal to extend liability in tort to cases where the defendant has not harmed the plaintiff by his affirmative action" (*Ibid.*, p. 189) and its "refusal to require men to be good Samaritans" (*Ibid.*, p. 191).[15] Further, "the good Samaritan problem receives special treatment even under the modern law of torts" – that is, building upon the negligence theory (*Ibid.*, p. 190). For him, "the reasons for the special position of this problem are clear once the theories of strict liability are systematically applied" (*Ibid.*, p. 190). Indeed, they make it clear that there is no cause of action against Samaritans since they have not caused actually the problem or the emergency situation that other individuals happen to face. More precisely, a strict liability rule requires that the defendant act to consider him as having caused harm to the plaintiff. As a consequence, a defendant cannot be considered then as having harmed a plaintiff for having *failed* to help him or her.[16] Finally, Epstein considers that in such good Samaritan situations, causation has only one direction that goes from the defendant (rescuer) to the plaintiff

14 "The feeling that matters were bad all stemmed from the one awful case of Kitty Genovese who died when stabbed on NY streets because no one would call the cops" (Epstein to Marciano, 25 February 2007).

15 The controversy between Posner and Epstein is made obvious in the very formulation of the argument here. Whereas in his 1972 *Theory of Negligence* Posner claims that the common law obeys the economic theory of negligence liability during the last quarter of the 19th century, Epstein puts forward cases that precisely contradict Posner's assertion.

16 In Epstein's words, "[N]o matter how the facts are manipulated, it is not possible to argue that B caused A harm in any of the senses of causation […] when he failed to render assistance to A in this time of need. In typical negligence cases, all the talks of avoidance and reasonable care may shift attention from the causation requirement, which the general 'but for' test distorts beyond recognition. But its importance is revealed by its absence in the good Samaritan cases where the presence of all those elements immaterial to tortious liability cannot, even in combination, persuade judges who accept the negligence theory to apply it in the decisive case" (Epstein, 1973, p. 191).

(rescued) exclusively. In other words, Epstein implicitly adopts an anti-Coasean perspective in refusing to place the (good or bad) Samaritan and the rescued in symmetrical or reciprocal situations. On that premise, no legal justification can be found to impose a duty to aid upon a Bad Samaritan or to sanction him or her for failing to rescue. This criticism of negligence in Good Samaritan cases represents the first important aspect of Epstein's analysis. A second aspect is worth mentioning, namely his refusal to discuss Good Samaritanism in terms of self-interest.

Certainly, Epstein continues playing the devil's advocate, Samaritanism can be envisaged from an economic perspective, *i.e.* put in terms of costs, benefits and incentives. In other words, and even if he does not explicitly refer to utility maximisation, Epstein accepts to start — to turn it down — a reasoning with the assumption of self-interested potential rescuers. This therefore implies that those would-be Samaritans indeed choose to help or not to help on the basis of a comparison between the costs of their behaviour and also the possible benefits that they would receive to compensate or reward them for their altruism. This starting point being accepted, the question that legal scholars have to to ask is whether it is possible or not to ground legal rules upon this assumption. Interestingly enough for someone who is now counted as one of the founding fathers of the law and economics movement (see Parisi and Rowley, 2005), Epstein answers by the negative and opposes to "the cost-benefit analysis [that] has in recent literature been regarded as the best means for the solutions of all problems of social organization in those cases where market transactions are infeasible (Epstein, 1973, p. 201). Rather than on the advantages of such analyses, he insists on their limits and dangers that would result from the use of economics in legal issues, referring to "the strand of economic thought [...] which emphasizes the limitations of economic theory for the solution of legal problems" (*Ibid.*, p. 201). Accordingly, to Epstein, a conception of legislation and legal rules as means to encourage a certain type of behaviour, *i.e.* as "incentives", is "perilous" (*Ibid.*, p. 203).

Epstein explains his views by proposing three arguments. First, he claims that to determine whether the burden of the costs should be placed on Samaritans or not, one has to compare the utilities of the individuals involved; that is, an economic analysis of

legal rules precisely requires to "make the very kind of interpersonal comparisons of utility that economic theory cannot make in its own terms" (*Ibid.*, p. 202). Quoting Arrow's *Social Choice and Individual Values*, he recalls the "very restricted set of conditions" under which "an economist can make utility comparisons between alternative social arrangements" (*Ibid.*, p. 202) and points out the irrelevance and inappropriateness of the notion of Paretian improvement in the setting of legal disputes. In effect, "the resolution of every dispute requires a trade-off between the parties, for no one has yet found a way in which both parties could win a lawsuit" (*Ibid.*, p. 202). Thus, he concludes, economic criteria are insufficient to found a theory of liability and to ensure the assignment of responsibilities. In the end and for that matter, judges always have to refer to non-economic arguments to make a legal decision. As a consequence, their power, in particular their power to impose duties (in that case, duties to help others) on individuals, increases. As a straightforward consequence of this increase in judicial power, the reliance of economic criteria to determine liability indirectly represents a threat to individual liberty. To put it differently, self-interest is self-defeating or, in other words, a defense of individual liberty cannot rest on self-interest.

Furthermore, and this is Epstein's second argument, to assume that individuals – including Samaritans – are self-interested implies that they react to external incentives. Therefore, the existence or absence of a good Samaritan rule will create incentives for individuals. Self-interested individuals, notes Epstein, "will act in a manner to minimize their losses" and will act efficiently "regardless of the rules adopted" (*Ibid.*, p. 203). On the one hand, they will increase their protection if no reward exists for good Samaritanism or "will on their own take steps to keep from being placed in a position where they will need assistance where none may be had" (*Ibid.*, p. 203). Symmetrically, they will decrease their protection if such a legal protection exists. On the other hand, Epstein adds, self-interested Samaritans may also have their behaviour impacted by good Samaritan legislation and the associated increase in their probability of being litigated. In particular, a reasoning based on self-interest and incentives should take "other rules of substantive law" (*Ibid.*, p. 203) and not only rules of liability into account. In other words, one should not reason all other things being equal, since the creation of

rules rewarding Samaritanism may have consequences that cannot be anticipated and yield unexpected outcomes. It is therefore "important to ask what modifications of behavior could be expected" from such rules and what would be "the possible effects of public honors and rewards for Samaritans" (*Ibid.*, p. 203). Finally, although no economic argument is conclusive in favour of one rule over the other (namely, the existence or the absence of a good Samaritan rule), Epstein insists on the danger of using a purely economic approach to justify legal rules.

Therefore, Epstein opposes to both a self-interested approach to unselfishness and to a self-interested model of liability in cases of rescue, like that at the basis of Good Samaritan acts.

3.3. Posner, a first economic analysis of rescue laws

The article – "Strict liability: a critique" – that Posner publishes in 1973 is an economic "comment" (Posner, 1973, p. 205) on the legal literature on liability including the works of Baxter, Calabresi, Fletcher, Franklin and, more specifically, Epstein: "I shall argue in this comment that the authors of these articles fail to make a convincing case for strict liability, primarily because they do not analyze the economic consequences of this principle correctly" (*Ibid.*, p. 205). Then, in the course of his economic reading of these articles, and more specifically in the section devoted to the critique of Epstein's claims, Posner makes an explicit reference to rescue behaviours and Samaritan laws, what he had not done before in his former works. He then transposes his arguments in favour of negligence to rescue laws, developing thereby a first version of his economic analysis of rescue laws.

Essentially, the criticism Posner levels at Epstein relates to the use of the notion of cause to define liability. In case of bad Samaritanism, Posner agrees with Epstein that there is no cause of action against a passerby who fails to rescue someone in distress. But, he adds, the problem should not be presented in this manner. From an economic perspective, the problem is not one of cause but rather one of costs. Therefore, the question may not be that of "who has caused the incident" but of "what is the most efficient (less costly) system". Now, as shown by Coase, to whom Epstein refers without

fully seeing the importance of the reference, it does not make a difference to place the liability on the bad Samaritan or on the negligent passerby.[17] In order to decide in favour of one rule of liability or the other, one has to enter the details of the costs borne by the individuals who are involved in the accident. Then, in contrast to what Epstein claims, this does not imply an increase in the discretionary power granted to judges and in their capacity to "conscript people for all sorts of activity upon a finding that the benefit of the activity exceeded the cost to them » (Posner, 1973, p. 219). Indeed, transaction costs provide an objective – in the sense that it does not depend on the subjective interpretation of judges – limit on the costs that can be imposed on individuals. When the costs of negotiation are prohibitive, it is "unsound" to impose liability on good Samaritans.[18] Posner illustrates his argument with the example of "a flower pot falling on someone's head" and the impossibility to "pause to negotiate over an appropriate fee for warning him of the impeding danger" (*Ibid.*, p. 219) — an example that he will use again in his analyses of altruism and rescue. Then, if a good Samaritan chooses to jump and stop the pot exposing himself to a danger, *i.e.* if a good Samaritan renders an unbargained service, first, he or she must not be held liable in case his or her act fails and, second, must be compensated in case his or her intervention succeeds. The law, Posner adds (*Ibid.,* p. 219), will even "sometimes create an incentive to help a stranger by recognizing a good Samaritan's legal right to be compensated for the assistance rendered". In other words, according to Posner, it is indeed possible to use a cost – benefit analysis to determine who is liable and on which basis.

Therefore, the two analyses of rescue – i.e. unselfish behaviour and good and bad

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17 Posner (1973, p. 217) writes: « It might appear that Epstein has committed the same error as Fletcher, that of failing to understand the reciprocal nature of an accident or other tort injury. He reinforces the impression of error by quoting and then criticizing the passage from Professor Coase's article on social cost in which Coase, in explaining the reciprocal relationship, says that the crop is as much the cause of the spark damage as the engine. But Epstein has not in fact committed this error. He is prepared to concede that from an economic standpoint an inquiry into causation is vacuous; but he insists that in an ordinary language sense it is proper to view the engine and improper to view the crop as a cause ».

18 "There is no occasion for compelling transactions where negotiations are feasible. Indeed, because market transactions are preferable to legal transactions except where market transaction costs are prohibitive, a system of liability that coerced people into performing services in circumstances where negotiations between them and the beneficiaries of the services were possible would be economically unsound" (Posner, 1973, p. 219).

Samaritanism – share one feature: they do not make any reference to altruism. However, they differ greatly with regard to the role of self-interest. For his part, Epstein assumes that unselfishness should not be viewed as a matter of costs. In this view, tort law has a "political function" that he stresses also to underline that it actually has no economic function. Along this line, therefore, tort law and related cases cannot be analyzed relevantly through the lens of self-interest. By contrast, Posner develops his criticism of Epstein's analysis into an economic theory of rescue behaviour. In a way, this can be seen as a first draft of his analysis of unselfishness as self-interest. Even if he does not refer to the concept of utility maximization explicitly, he nonetheless assumes that rescue behaviour and Samaritanism can be explained in terms of costs and benefits and he considers that incentives may impact on these behaviours. Thus, this is reasonable to argue that the few pages that Posner devotes to the question of rescue in 1973 already prefigure the elements that he will develop in his future works.

4. From the economic theory of altruism to the economic analysis of the rescue laws

A further step toward an economic analysis of rescue law is made with the development of an economic analysis of altruism during the 1970s. Since Adam Smith, the concern for altruistic behaviour had been a long-standing issue within economics, due to the obvious tension between altruism and the self-interest assumption. In the 1970s, the question of the possibility to analyse altruistic behaviours with economic tools and assumptions received a positive answer by those economists who develop alternative *economic* analyses of altruism (4.1). Building upon this new theoretorical background, Landes and Posner develop an economic analysis of rescue laws that renews the terms of the Posner/Epstein controversy (4.2).

4.1. From altruism in economics and sociobiology...

Economists progressively become interested in altruism and gain (at least momentarily) confidence in their capacity to use economic tools to model and elucidate altruism, stopping to treat it mostly as a deviant case challenging economic theory and rationality. They approach altruism in two main ways. Following Becker (1973, 1974 a

and b), a first family of models uses interdependent utility functions in which the welfare of others enters an individual's utility function (Fontaine, 2007).A second line assumes dual utilities of agents, following up Harsanyi's works (1976) according to which there is a dual nature of man associating an egoistic and an altruist side within a single individual (Monroe, 1994). This interest of economists is partly the outcome of discussions within the discipline but is also fueled by the developments proposed by biologists and the emergence of a new field of research, sociobiology. Indeed, the debates among economists and with biologists become particularly intense after biologist Edward O. Wilson publishes his book, Sociobiology, the new synthesis, in 1975. Some economists accept his claims on the biological foundations of human behaviour and the possible integration — even if under the dominance of biology — of the two disciplines. From this perspective, Jack Hirshleifer, then professor at UCLA, occupies a particularly important place. In effect, very soon after the publication of Wilson's book, he writes a paper entitled "Economics and Sociobiology" (1976) in which he notes that "the various social sciences devoted to the study of man, economics among them, constitute but a subdivision of the all-encompassing field of sociobiology" (Hirshleifer, 1976, p. XX). Still more interesting for our purpose, Hirshleifer publishes in 1977 a slightly revised version of this paper in the Journal of Law and Economics (JLE), then edited by Ronald Coase.In this article, Hirshleifer devotes himself to establishing a parallel between economics and biology, pointing out the numerous borrowings from one discipline to the other. In particular, he remarks that "the more significant influence has been [in the other direction], from biology to social sciences" (Hirshleifer, 1977, p. 6), especially through the development of "Social Darwinism". However, although the article is published in the JLE, there is not much about law in the article. [19] In particular,

19 Explicitly in relationship with legal issues, he mentions Bagehot as an illustration for those "for whom the key lesson of Darwinism is the competitive struggle for survival", noting that "there are a variety of interpretations, ranging from individualistic versions of Spencer and Sumner to a number of collectivist versions: the idea of superior or fitter social classes (Karl Marx), or systems of law and government (Bagehot), or of course racial groups." (Hirshleifer, 1977, pp. 6-7). He also mentions legal dispositions "by default when discussing the parallelism between "exchange" in the economic field and "the more general category called "mutualism" by biologists" (*Ibid.*, p. 26). On this subject, he writes that "[I]n the absence of legal enforcement of compensation for acts conferring advantages on others, such patterns of mutual aid in the biological realm may represent instances of altruism on the part of one or more of the participants" (*Ibid*., p. 27). He also rapidly discusses property (*Ibid.*, p.46). However, from a more general point of view, the status of economic references in this article is merely illustrative and

altruism is not treated in relation to its possible legal implications or with from a legislative standpoint. Therefore, Hirshleifer makes no mention of any rescue behaviour that could be motivated by some kind of altruism or individual preference. Merely, after having regretted that economists have abandoned the study of preferences to other sciences ("Modern neoclassical economics has forsworn any attempt to study the source and content of preferences, that is, the goals that motivate men's actions. It has regarded itself as the logic of choice under conditions of "given tastes", Hirshleifer, 1977, p. 17), he devotes a section of his article (the fourth one) to discussing the issue of those "preferences taking the form of attitudes toward other humans", like "anger and envy" or "benevolence" (Hirshleifer, 1977, p. 18) and altruism. He thus recognizes the aporia within the economic analysis dealing with altruistic behaviour, writing for instance that: "[I]n any attempt to broaden the application of economic reasoning, to make it a general social science, a key issue is the problem of altruism (the "taste" for helping others): its extent, provenance, and determinants [and that] [O]ld-fashioned, narrow economics was often criticized for employing the model of economic man – a selfish, calculating, and essentially nonsocial being" (Ibid., p. 19). He adds that "[O]f course, it was impossible to postulate such a man in dealing with that essential social grouping, the family. Neoclassical economics avoided the difficulty by abandoning attempts to explain intrafamily interactions!" (Ibid., p. 19). He finally recalls the the recent attempts made by economists to account for altruistic behaviour and notes that "☯M☸odern economic "imperialists" have been dissatisfied both with the excessively restrictive postulate of individual selfishness and with the exclusion of intrafamily behavior from the realm of economic analysis. The modern view postulates a generalized preference or utility function in which selfishness is only the midpoint of a spectrum ranging from benevolence at one extreme to malevolence at the other" (Ibid., p. 19). Hirshleifer here clearly points Becker out, whom he mentions in a footnote of the article (footnote 66), quoting his Theory of social interactions. And he adds that "standing alone, this is really an empty generalization. Where any individual happens to lie on the benevolence-malevolence scale with regard to other individuals still remains a merely arbitrary

intended to show that economists and biologists do share close devices, albeit most of the time implicitly or without being aware of it.

"taste." And yet we all know that patterns of altruism are not merely arbitrary. That a parent is more benevolent to his own child than to a stranger's is surely capable of explanation." (Ibid., pp. 19-20) That is precisely where, according to Hirshleifer, biology may be helpful. Indeed, "[F]rom the evolutionary point of view the great analytical problem of altruism is that, in order to survive the selectional process, altruistic behavior must be profitable in fitness terms. It must somehow be the case that being generous (at least sometimes, to some beneficiaries) is selectively more ad- vantageous than being selfish!" (Ibid., p. 20). Hirshleifer then reviews different forms of altruism, relying on different illustrations : intra-family altruism, but also "incidental altruism of the alarm-call type" that he explicitly compares with "the private provision of a public good". (Ibid., p. 25-26, emphasis his) while opposing Olson's and Buchanan's viewpoints on the free-rider problem.

Thus, Hirshleifer hardly mentions legal issues in his article. However, the publication of the article in the JLE establishes a possible connection to legal issues and evolutionary — that is, based on biological concepts — approaches to the origins and existence and performance of legal rules begin to appear. A conference, attended by economists, a biologist, philosophers, and legal scholars is then organized in Miami around Hirshleifer's Evolutionary models in economics and law: cooperation versus conflict strategies and the proceedings are published in a law and economics journal — under the form of a special issue of Research in Law and Economics. Neither Becker nor Landes nor Posner participate in the Miami conference. More probably, they belong to a second group of scholars who, without being opposed to sociobiology as such, are at worse hostile to its application to law or at best indifferent to this new approach. Thus, Becker comes to read Wilson's Sociobiology incidentally (Fontaine, 2007) . Certainly, he recognizes the sociobiologists' contribution to the understanding of altruism. Nevertheless, he takes the opportunity of reading Wilson's book to express his skepticism towards what this new field can bring to economics and remarks that "sociobiologists have stopped short of developing models having rational actors who maximize utility functions subject to limited resources [and] [I]nstead they have relied solely on the "rationality" related to genetic selection" (Becker, 1976, p. 818). By contrast, he notes,

"[E]conomists have relied solely on individual rationality and have not incorporated the effects of genetic selection" (Ibid., p. 818). Becker's claim is then that economic analysis is sufficient to explain those behaviours that sociobiologists want to explain and that "models of group selection are unnecessary, since altruistic behaviour can be selected as a consequence of individual rationality" (Ibid., p. 818).

Similarly, Posner and Landes never read Wilson's book that they never quote in their 1978 articles. Rather, they become interested in altruism and biology through Becker's works. More specifically, Becker's economic analysis of the family (Becker, 1973, 1974 a and b) is what Posner reminds as having stimulated his interest in altruism (Posner to Marciano, 9 november 2007). Thus, the line of reasoning developed by Landes and Posner in their analyses of altruism in rescue laws can be viewed as a "mere" extension and endorsement of Becker's economic analysis of altruism. More precisely, three key elements or features of Becker's analysis are reused by Landes and Posner, respectively the interdependence of utility functions, a relative skepticism — at least, indifference as an economist — towards biological explanations of altruism, and an interesting and important conclusion about altruism and the law.

4.2. ... To altruism in legal theory and the development of an economic analysis of rescue laws

The two articles written by Landes and Posner and published in 1978 are obviously not independent from each other. Both derive from a similar inspiration and rely on a similar reasoning – more precisely, the "Altruism in Law and Economics" (Landes and Posner, 1978 b) is based on the analysis developed more extensively in "Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism" (Landes and Posner, 1978 a).

The problem Landes and Posner analyze in these two articles is rescue that they define as "all attempt to save a person or his property" (Landes and Posner, 1978 a, p. 83). Thus, they deal with the very same issue that has been progressively transferred from the individual and moral sphere to the legal sphere since the 1959 first Good Samaritan act and that Posner has already investigated in economic terms in 1973. Therefore, that is no surprise if Posner's economic theory of negligence provides the

theoretical background of their analysis and if there are numerous references to his controversy with Epstein in the two articles that he writes together with Landes.[20] However, a major advance in their 1978 work is that Landes and Posner now explicitly take the influence of altruism on rescue behaviour and its consequences in terms of regulation into consideration. Thus, for the first time since 1959, rescue behaviour is presented as an "important area of *altruistic* activity" (Landes and Posner, 1978 b, p. 417; emphasis added)[21]. Therefore, Landes and Posner are not only aware of departing from the standard analyses of rescue behaviours – legal theories and Posner's former economic analysis – that assume that individuals are self-interested or egoist but they are also convinced of the legitimacy of their approach. For instance, after a brief discussion of the "traditional" analyses on rescue based on the concept of externalities and a reminding of the corresponding internalization devices, they emphasize that all these analyses fail to recognize the importance of altruism in rescue situations, as altruism remains "a factor ignored in most discussions of externalities" – albeit, possibly, "an unexpensive substitute for costly legal methods of internalizing external benefits". With this statement, they suggest an analysis explicitly encompassing this dimension of human behaviour (Ibid., p. 418). Thus, in their JLS article, the displayed objective is to develop "an economic model of rescue" (Landes and Posner, 1978 a, p. 85). Even, it is to contribute to the so-far underdeveloped field of "the economics of altruistic rescue" (the very title of the second part of the first section of their article, devoted to the construction of a theoretical model of rescue; Ibid., p. 93), as opposed to "the economics of professional rescue" that they define as "the sale (whether voluntary or through operations of law) of rescue services by profit-maximizing forms to victims of hazards" (Ibid., p. 85-86) and treat as a benchmark for altruistic rescue in the first part of the first article section.

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20 It is interesting for the remainder of the argumentation to recall that Posner moves from Stanford to Law School of the University of Chicago Law School in 1969 while William Landes, former Ph.D. student of Becker, comes back from Columbia to Chicago in 1970. 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).

21 Posner insists that the major difference between his articles on liability indirectly devoted to rescue and helping and those he explicitly devoted to rescue and helping precisely lies in the fact that the latter takes altruism into account (Posner to Marciano, 25 november 2007).

However, Landes and Posner intend to refer to some specific kind of altruism. In this view, they define a rescuer as "altruistic if he is willing to supply rescue services in the absence of any expectation of being compensated for doing so", considering that "compensation could take many forms besides money" (Ibid., p. 93). In this regard, both articles carefully justify why reciprocal altruism may not be sufficient to account for rescue behaviour and, therefore, not be relevant for the set of situations that the authors have in mind. Thus, they precise that "altruism motivated by expectation of future benefits, "reciprocal altruism" as it is called, is probably unimportant in most present-day rescue settings involving strangers" (Ibid., p. 93) and a similar argument is put forward in their second article as well in order to dismiss those situations of reciprocal altruism that may be relevant in small communities but do not matter actually in "modern urban communities" (Landes and Posner, 1978 b, p. 419). Landes and Posner's purpose, therefore, is to develop an analysis of a pure form of altruism. They thus write that "[T]he formal model is one of altruistic rescue in its purest sense" (Landes and Posner, 1978 a, p. 94; emphasis added), i.e. an altruism "devoid of all expectation of any form of compensation" (Ibid., p. 94) and defined as "the making of any transfer that is not compensated" (Landes and Posner, 1978 b, p. 417) or as the "willing[ness] to supply rescue services in the absence of any expectation of being compensated for doing so renders in saving B or punishing" (Landes and Posner, 1978 a, p. 93).

Then, this perspective raises a practical question: how is it possible to take into account pure altruism in a formal economic model? The question would have been particularly difficult to answer a few years before the publication of Landes and Posner's articles. But, in the mid-1970s, economists have eventually come up with the idea that altruism can be interpreted and modeled as interdependence of utility functions or of preferences. Consistently with Becker's work, this is precisely the perspective within which Landes and Posner locate their analysis, noting that the difference between an egoist and an altruist is that the altruistic rescuer's utility function "becomes a function in part of the welfare of the endangered person" (Ibid., p. 94). Sticking to an economic approach but nevertheless departing from the so far prevailing theoretical framework, they transpose Posner's cost-benefit negligence theory from a framework in which

individuals compare costs and benefits to a framework in which they maximize a utility function. Interestingly, the step has already been taken by Posner in a 1977 article on "Gratuitous Promises in Economics and Law" in which he argues that it is possible to explain "why (some) gifts or transfers are made [...] by invoking interdependent utilities" (Posner, 1977, p. 412) but without explicit reference to "altruism". In other words, Landes and Posner are already familiar with the idea of interdependent utilities - à la Becker – when they write on "altruism in law and economics" and adopt a formal economic representation of altruistic preferences.

However, their analysis is also doubly innovative with regard to Becker's — more broadly, to economists' — works on altruism. A first innovation consists in the level at which the analysis is set. Indeed, at that time, economists (including Becker) dealing with altruism and more specifically with altruism as interdependence of preferences focus on transfers within the family or within groups of friends or acquaintances. Then, altruism is supposedly restricted to this range of kin relations while interactions between strangers are considered as based on egoism or selfishness only.[22] In contrast with that view, Landes and Posner are concerned with behaviours that do not take place within families or among friends and acquaintances since, most of the time, "the rescuer and the victim are strangers" (Landes and Posner, 1978 a, p. 96; emphasis added). Thus, the problem

22 More precisely, Becker (1974 a) develops three applications of his analysis, namely family interactions, charity, and envy and hatred. In his analysis of family interactions, Becker assumes "a two-person family" (Becker, 1974 a, p. 1076) but precises that "[the] discussion is equally applicable to larger families that include grandparents, parents, children, uncles, aunts, or other kin" (*Ibid*., p. 1076). He then extends the analysis of family interactions to charity straightforwardly, writing that "the numerous implications about family behavior developed in the previous section [*i.e.* the family] fully applies to the synthetic "family" consisting of a charitable person *i* and all recipients of his charity. For example, no member's well-being would be affected by a redistribution of income among them, as long as *i* continued to give to all of them. For he would simply redistribute his giving until everyone losing income was fully compensated and everyone losing income was fully compensated and everyone gaining was fully "taxed". Moreover, all members, not simply *i*, would try to maximize "family" opportunities and "family" consumption, instead of their own income or consumption alone. In addition, each member of a synthetic "family" is at least "partly "insured" against catastrophes because all other members, in effect, would increase their giving to him until at least part of his loss were replaced. Therefore, charity is a form of self-insurance that is a substitute for market insurance and government transfers" (*Ibid.*, p. 1083-4). Last, Becker also analyzes envy and hatred through the lens of "social income", defined as "the sum of a person's own income [...] and the monetary value to him of the relevant characteristics of others, which [he] calls his social environment" (*Ibid.*, p. 1090). Nevertheless, these situations do not include interactions between strangers as Landes and Posner intend to account for. Becker provides a wide and general definition of a "family" in the conclusion of the article according to which, among other features, a family is defined as "a highly interdependent organization" (*Ibid.*, p. 1091).

that they analyze — "the rescue of the person or property of strangers" (Landes and Posner, 1978 b, p. 417) — obliges them to reconsider the perspective that economists have adopted about egoism and altruism sor far. Certainly, they recognize their tribute to Becker.[23] However, in contrast with his analysis of altruistic behaviour, they claim that unselfish behaviours go beyond the boundaries of family and close-knit groups and may extend to strangers as well. Further, they derive an important new question from that perspective shift, that is "why [individual] A derives any utility from the welfare of a complete stranger" (Ibid., p. 418, emphasis theirs). In effect, the question has been obviously overlooked in the analyses of altruism within families. While it "has generally been elided in economic discussions of altruism" (Ibid., p. 418), in which "[i]t is assumed that family members (say) have interdependent utility functions but the source of the interdependence is not investigated" (Ibid., p. 418), the interdependence of utility functions among strangers is far less obvious than within a family, as "one it is observed that gifts are by no means limited to family members the source of this component of the utility function [i.e., to derive utility from the welfare of another individual] becomes difficult to accept as a matter of pure assumption" (Ibid., p. 418).

Therefore, altruistic behaviour in cases of rescue must be justified and explained. Landes and Posner (1978 a) then insist on the recognition that rescuers receive from helping others, writing that "the recognition factor is present in many altruistic transactions" and that it is especially "relevant here because [...] some methods of promoting rescues, notably imposing legal liability for nonrescue, may reduce the public recognition accorded the altruistic rescuer and by so doing [...] reduce the number of altruistically motivated rescues".[24] However, the recognition factor is granted with an uncertain status in their analysis. Indeed, it is ignored in the formal model explicitly, just as it was already the case in Becker's article in 1974. Now, even though Landes and Posner's model officially ignores the recognition factor, they discuss it at length in the paper nevertheless. As a consequence, "the formal model is one of altruistic rescue in its purest sense" (Landes and Posner, 1978 a, p. 94), but the discussion of the legal implications for the rescue laws is also concerned with impure altruism. In other words,

23 In their article (1978 b), they refer to Becker (1974 a) and Becker and Stigler (1974).

24 The recognition factor is also discussed at length in the 1978 b article.

Landes and Posner on the one hand argue that they are building a model based on pure altruism — altruism devoid of compensation but, on the other hand, they nonetheless assume that the main reason for altruistic behaviours lies in a form of psychic gain. Thus, their project to extend the analysis of altruism to relations between strangers comes up against insufficient justification for the interdependence of utility functions. Or, to put it in another – and possibly caricatural – way, it fails to provide a convincing explanation for interdependent utility functions that is also consistent with their discussion of the model. Finally, the kind of altruism they attribute to rescuers in their model may not be as pure as they wish – or claim it – to be.[25]

This is where biologists enter the game. In contrast with their JLS article, Landes and Posner take care to discuss the biological explanations of altruism in the AEA paper, referring to Trivers (1971) and Dawkins (1976) — references that are conspicuously absent in the much longer article published four months earlier in the JLS. Certainly, they acknowledge that "[T]he biologists have done more work on this question than the economists" (Landes and Posner, 1978 b, p. 418) and, therefore, may improve the economists' understanding of altruism in rescue and its regulation. However, they argue that biological explanations, which in fact consist in Trivers claims on reciprocal altruism, are of poor help. Indeed, "☯Reciprocical altruism may explain some, but surely today only a small fraction, of rescues of strangers" (Ibid., p. 419), as the rescue of strangers may not be a matter of reciprocity since "the probability that one is saving someone who will someday reciprocate will often be very close to zero – if he is indeed a stranger" (Ibid., p. 419). A similar argument, put almost in identical terms, was already present in the JLS article, according to which "[A]ltruism motivated by expectation of future benefits, "reciprocal altruism" as it is called, is probably unimportant in most present-day rescue settings involving strangers : the chance that B, whom A pulls out of

25 Landes and Posner also face up this problem in their other article (1978 b). After having claimed that reciprocal altruism is insufficient to account for rescue in sufficiently large societies and suggested that the recognition factor may provide "a possible alternative to the biological approach", they acknowledge that "this analysis may appear merely to push the inquiry back one step: why do donors, whether of money or services, receive favorable public recognition ? Presumable, this results from a public sense, however dim, of altruism as an economizing force […] Notice that this this analysis does not require that anyone be in fact altruistic in the sense that he derives utility from making a transfer to a stranger. Conceivably everyone who makes such a transfer does so not out of true altruism but to obtain a reward which consists of favorable publicity" (Landes and Posner, 1978 b, p. 419).

the lake, will one day be in a position to provide a reciprocal service to A will ordinarily be too remote to motivate A in rescuing B" (Landes and Posner, 1978 a, p. 93). Therefore, they dismiss the explanatory power of reciprocal altruism in large modern societies and, like in their JLS article, move on the discussion of the recognition factor as an incentive for rescue behaviour between strangers.[26]

This apparently sudden interest of Landes and Posner in biology relies on two main reasons. First, it is congruent with a growing interest of economists in the development of sociobiology. As aforementioned, Becker himself has written an article on this very topic (Becker, 1976). Landes and Posner referring to biologists' works is thus fully consistent with their intellectual path and can simply be interpreted as a step further in the search for a valid justification of interdependent utility functions. A second argument accounting for their interest in biology may be of a more contextual nature. Indeed, the two papers that Landes and Posner have written on altruism and rescue (1978 a, b) have not been written for the same purpose and the same audience. They therefore differ with regard to two important aspects. On the one hand, the shorter of these two articles (Landes and Posner, 1978 b) has been written for a presentation at the 1977 annual conference of the American Economic Association (AEA) that is particularly important from the perspective of the interactions between economics and other disciplines. Namely, many sessions are devoted to these interdisciplinary relationships.[27] Of utmost interest for our discussion is the fact that Landes and Posner prepared their paper for a session on "Economics and Law" in which Coase, alleged founder of "law and economics" and editor of the JLE, does not participate. Coase actually attended the conference but contributed as a discussant in the session on "Economics and biology" organized by Hirshleifer, whose own contribution entitled "Competition, cooperation, and conflict in economics an biology" makes room to

26 Now, a few paragraphs after their discussion of the recognition factor, as if unconvinced by their own argumentation, they remark that "the basis for altruistic impulses toward strangers in peril is obscure" (Landes and Posner, 1978 b, p. 419).

27 Three sessions are of utmost interest for our purpose, "Economics and law", "economics and ethics: altruism, justice and power", "economics and biology: evolution, selection, and the economic principle". Other sessions on interdisciplinary issues such as "Economics and anthropology" and "psychology and economics" can also be found in the table of contents of the American Economic Review publishing the Annual Papers and Proceedings of the 19th Annual Meeting of the American Economic Association (1978, vol. 68, 2, May).

altruism and helping.[28] Therefore, attending the conference was not only an opportunity to Landes and Posner to present their analysis on altruism and rescue laws. They also had an interest in defending the legitimacy of (their vision of) "law and economics". Thus, they take care to introduce their paper with a definition of "law and economics" as "a new field of applied economics" that rests on "the use of economics to understand the legal system". Now, they go further in claiming that law and economics is not only relevant and interesting for the understanding of legal problems but also of broader economic questions and, therefore, can shed light on questions that may prove to be tricky for economists otherwise.[29] Such a definitional concern is far less obvious in the JLS article. Indeed, beginning with a review of the legal settings in which a rescue question may arise, this article rather insists that "economics can contribute to the understanding of rescue law by demonstrating the intellectual unity of the rescue problem" (Landes and Posner, 1978 a, p. 85) to which legal scholars fail to provide a consistent solution – the "scattered legal literature on rescue ☯employing☸ a colorful and suggestive, but also value-laden and obscure, vocabulary" (Ibid., p. 84).[30] The aim of the two papers appears thus quite different.

A second innovation of Landes and Posner with regard to Becker deals with the relationship between altruism and law and the implications for the design of liability rules. Indeed, Becker (1976) has claimed in his article about altruism and sociobiology that altruism and government intervention cannot be viewed as substitutes. More

28 Quite surprisingly, neither Stephen Breyer nor A. Mitchell Polinsly who were in charge of the discussion of the session on "Economics and law" do actually comment on lands and Posner's paper. Breyer focuses his comments on Smith and Phelps' presentation ("The subtle impact of price controls on domestic oil production"), whereas A. Mitchell Polinsky focuses on Wolpin's paper ("capital punishment and homicide in England: a summary of results"). No hint of any comment of Landes and Posner's paper can be found in the Annual Papers and Proceedings of the 19th Annual Meeting of the American Economic Association published in the *American Economic Review* the year after (Breyer, Mitchell Polinsky, 1978).

29 They write: "[T]his new field of applied economics is worthwhile for its own sake because the legal system is an important part of the social system. It is also interesting for its potential feedback into the analysis of economic problems in other fields. For example, the analysis of the social costs of crime has led to a change in the thinking of economists about the monopoly problem" (Landes and Posner, 1978 b, p. 417).

30 They conclude that "it is therefore not surprising that specific doctrines and case outcomes are often regarded as being mutually inconsistent, or responsive to some profound but unanalyzable intuition of justice or equity, or determined by national character, or ideologically motivated" (Landes and Posner, 1978 a, p. 85).

precisely, even if the maximization of total group's income could be reached through alternative means, altruism, law (contract law) or government intervention, only altruism can actually reach this objective (Becker, 1976, p. 222). External interventions always fail due to transaction costs or because of the intervention of pressure groups and, therefore, do not yield the internalization of external effects associated with individual interactions. Altruism, by contrast, allows such internalization. In this respect, once again, the problem analyzed by Landes and Posner leads to a change of perspective. In effect, as shown above, rescue and rescue laws have been analyzed since 1959 from the perspective of the replacement of moral motives by legal incentives. By contrast, in 1978, Landes and Posner – at least partially – break with this line and re-introduce altruism and unselfishness as pre-eminent factors in the debates about rescue. Following up Becker and in quite similar terms, they are brought to consider that altruism provides "an inexpensive substitute for costly legal methods of internalizing external benefits" (Landes and Posner, 1978 b, p. 418) or, in hardly dissimilar terms, that "legal intervention and altruism are substitute methods of encouraging the internalization of the external benefits of rescues in emergency situations" (Ibid., p. 420).[31] Therefore, one can rely on altruism when and if transaction costs are too important to allow an efficient use of legal rules. Then, they argue that to rescue a person and save his or her property is obviously costly for the rescuer but, at the same time, also provides external benefits to the beneficiary of the help. From that standpoint, individuals rescue others when and because the costs are not too high and if they can receive a part of the benefits that their action generates. Of course, the law or any kind of legal regulation could be used either to reduce the costs borne by rescuers – by imposing a liability for non-rescue – or by allowing the internalization of the external benefits generated by rescue – by authorizing a compensation scheme for rescue. But, Landes and Posner object, using the law in all situations indifferently may be inefficient since it may add costs and problems

31 Consistent with the first sentences of their article according to which law and economics and "the use of economics to understand the legal system" are "also interesting for its potential feedback into the analysis of economic problems in other fields" (Landes and Posner, 1978 b, p. 417), they suggest that "the pattern of legal intervention in rescues might provide a clue to variations over time or across societies in the level of altruism" (*Ibid.*, p. 420). Thus, the fact that the first legislations imposing liability for non rescue appear only after 1867 seems to indicate that law and reciprocal altruism in small communities are substitutes.

to those that it aims at reducing or solving. For instance, introducing legal entitlements to compensation in situations where altruism is sufficient to induce rescue may go against the objective of maximizing efficiency, as it would simply amount to "substitute a costly legal transaction for a costless altruistic exchange" (Landes and Posner, 1978 a, p. XX). In particular, introducing compensation into low-cost rescue situations may simply add new costs to the existing ones, under the form of transaction costs between the parties and administrative and enforcement costs. As a consequence, "liability may be less efficient than nonliability" (Ibid., p. 119). Landes and Posner thus identify several classes of rescue cases for which a legal entitlement to compensation may turn out irrelevant. Practically, this is the case for instance when the rescuer and the victim have "a strong personal relationship prior to the rescue", when they are strangers but "the losses to the victim are great and the costs to the rescuer are slight", and "when the costs of administering a compensation scheme" are high due to rescue involving cooperation among several individuals (Ibid., p. XX). However, Landes and Posner do not deny all relevance to liability rules. On the contrary, they take a great care not to conclude that "the imposition of liability for failure to rescue would be inefficient". Thus, consistent with Posner's recurring concern with proving the efficiency of common law, they do precise that "although ☯their☸ analysis does not prove that the common law's refusal to impose liability for failure to rescue is efficient, neither can one conclude ☯…☸ that the absence of such a rule is necessarily a sign of inefficiency". Below, they mention again that they have "merely suggested that the results under the common law, occasionally imposing liability but mostly denying it, may be consistent with efficiency" (Ibid., p. 126). Echoing Posner's previous controversy with Epstein and pushing it further, they still add that "this conclusion will not satisfy the strongest critics of liability for nonrescue, such as Professor Epstein" (Ibid., p. 126).

Finally, Landes and Posner's (1978 a and b) import major advances in the economics of altruism into the field of the economic analysis of law. Doing this, they mainly endorse Becker's analysis to develop and reshape their understanding of rescue behaviour from an economic perspective and – following Becker's position thereby – dismiss the contribution of socioeconomics to the debate (Landes and Posner, 1978 b). Further, they

depart from Becker's seminal work in questioning the legal implications of altruism for liability and they achieve conclusions that differ somehow from Becker's as for the design of efficient liability rules. In particular, an important conclusion of Landes and Posner (1978 a) is that common law may be efficient in denying any obligation to help and liability for failure to rescue – at least under some circumstances. This, clearly, both extends and reexamines the traditional view of common law but also leads to a shift compared with Posner's former conclusion (1972), that clearly recommended to ground liability rules on Learned Hand formula. Therefore, despite an evolution in Posner's analysis of rescue between the early and the late 1970s, the emphasis put on an economic approach – mostly under the form of a cost-benefit analysis – remains at the very heart of Posner's analysis of liability. The disagreement with Epstein remains an invariant in Posner's analysis as well. At the end of the 1970s, thus, rescue is no longer seen as a moral and strictly private issue as it used to be formerly but as a legal and economic matter. Further, following up Becker, Landes and Posner, behaviours that used to be considered originally as unselfish and then as selfish and as the outcome of an individual cost-benefit analysis are progressively studied through the innovative lens of the economics of altruism and legal recommendations are derived from this new vision of rescue behaviour.

5. Conclusion

While common law traditionally considers rescue as a private and moral issue and holds that there is no duty to rescue, this original position has been progressively challenged in the course of the 20th century in the USA. At the end of the 1970s, an economic analysis of rescue laws has been developed using neoclassical economic tools and concepts. At first sight, this may be seen as paradoxical, if one considers that rescue and helping behaviour was originally considered as the epitome of unselfishness and disinterested behaviour, and therefore unlikely to be put in terms of self-interest and rational calculation. The question is thus to understand how rescue can fit into the self-interest framework of the economic analysis of law. This article shows that this step was taken in three consecutive stages. First, rescue behaviour was progressively taken out of the moral sphere and became a legal issue. We show that both the "demoralization" and

"legalization" of rescue behaviour were made possible because of the specific historical context in the US during the 1950s and 1960s. Further, this was only after helping and rescue behaviour was conceived and understood as a legal issue that it became possible and justified to develop an economic analysis of rescue laws. Accordingly, the economic analysis of rescue is mainly analyzed as a matter of liability at the beginning of the 1970s – rescue is used as an example and an argument in the controversy on the optimal design of liability rules. A last step is made towards an economic analysis of rescue law with the development of the economics of altruism that allows Landes and Posner to use a new analytical framework to study rescue, Samaritanism, and apparently unselfish behaviours. At this step, apparently unselfish behaviours are no longer treated as actually selfish but as effectively altruistic through the assumption of interdependent utility functions. Since then, very few works have been devoted to the issue of rescue and without any decisive shift in the analytical apparatus.[32]

Interestingly, thus, the determining step in that evolution that made an economic analysis of rescue law possible is the "legalization" of rescue. Indeed, we argue that rescue could actually become an economic subject only after it was already turned into a legal issue. Since the economic analysis of law purports to study legal issues through the economic lens and by using economic tools, it becomes both relevant and possible to analyze rescue behaviour along this line, since it has been turned into a legal issue. This accounts why rescue is finally conceived and analyzed as a liability issue. This shift first

32 After the debate of the 1970s, few works have been devoted to the issue of rescue. This is not to say that no questions remain unanswered. In particular, a discrepancy remains unexplained between the model of the economic analysis of law and recent empirical results. In his recent empirical study on rescue behaviour and no-duty rules, David Hyman (2005) notes the following paradox: on the one hand, a widespread perception of Americans as "non-rescuers" or as being "insufficiently civil minded" while, on the other hand, it appears that "verifiable non-rescues are extraordinarily rare, and verifiable rescues are exceedingly common" (Hyman, 2005, p. 3) — the documented cases of non-rescue being exceptional ("during the past decade, no more that two [...] each year in the entire United States", *Ibid*., p. 20) while rescue is more than frequent ("a thousand non-risky rescues and approximately two hundred and sixty risky rescues", *Ibid*. p. 64). In other words, since there is still no rule that legally imposes a duty to help ("The no-duty rule may prevail in forty-seven of the fifty states", *Ibid.*, p. 1), this means that helping others results from intrinsic rather than extrinsic motivations. In other words, rescue is a good instance of altruism or unselfishness rather than of selfishness. Now, in the economic analysis of rescue laws, altruism appeared quite lately in the economic analyses of rescue laws and did it under the very specific form of interdependent preferences. This obviously challenges at least some of the conclusions of the economic analyses of rescue laws in the 1970s and opens the door to new works inspired for instance by psychology and other sciences.

from the moral to the legal field, then from the legal to the (legal and) economic field also accounts for the lesser importance of context in shaping the debate from the 1970s on. Rather, rescue behaviour tends to become an intellectual problem as well that opposes law and economics scholars to the tenants of alternative theories. Practically, the controversy no longer appears driven by current affairs exclusively, as it was mostly the case in the 1950s, but it is also structured around intellectual arguments and concerned with the underlying debate on the relevance of the economic analysis of law for the study of rescue – and, more generally, on the relevance of economic tools to study non market behaviours. This can also explain why, after Landes and Posner's 1978 articles, few works will be devoted to rescue behaviour explicitly. To put it differently, before Becker, it was almost impossible to propose economic analyses of rescue behaviours because the theoretical apparatus did not exist. Then, at the end of the 1970s, rescue is no longer seen as a problem per se within the field of the economic analysis of law: Landes and Posner have shown that economics could be used to analyse a legal problem involving altruistic or unselfish individuals. After having solved this major puzzle, Landes and Posner themselves will abandon rescue behaviour as a privileged object of analysis and turn to other issues also deserving insights from the economic analysis of law.

This is however not to deny the strong impact of the debate on rescue laws on the structure of US tort law and its practical influence on the optimal design of liability rules. Considering that the decision to help others in emergency situations is the outcome of an individual cost-benefit analysis, it becomes justified providing individuals with legal incentives (mostly liability rules) so as to induce them to engage in the right "amount" of helping. This reasoning not only explains the passing of good Samaritan legislations over the USA from the 1960s on, but also accounts for the search for optimal liability rules in emergency situations and in more general situations. From that standpoint, the progressive building of an economic analysis of rescue laws belongs and contributes to the larger story of US tort law reform under the influence of the law and economics movement.

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