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BOOK REVIEW

Posner's Economic Approach to Comparative Law

WILLIAM EWALD[†]

Law and Legal Theory in England and America. By Richard A. Posner. Oxford: Clarendon Press, 1996, pp. xii, 134. Preface, Appendix of the English Judiciary, Appendix of the Udu Case, Index.

What is law? And what is the best way to compare two different legal systems? These two questions are not often discussed together and are typically relegated to different branches of legal scholarship. The first is generally regarded as one of the central questions of jurisprudence, and the second as a question about the methodology of comparative law. But the two questions are evidently related, and it is a virtue of Richard Posner's new book that he appreciates the connection and ventures novel answers to both questions. Although the venture does not seem to me to succeed, this short book, written with Posner's customary *brio*, provides a host of insights into the nature of the English and American legal systems and into the methods of comparative law.

The book is divided into three chapters. Each was originally a lecture delivered at the University of Oxford, inaugurating what Oxford University Press hopes will be the annual Clarendon Law Lectures series. This fact explains the brevity of the book, as well perhaps as the lively, and occasionally polemical, tone of the writing. Although the lectures range over a wide variety of topics, the book has a unifying theme: that "the social sciences in general and economics in particular should inform both the study and the administration of the law."¹ About legal philosophy Posner is less enthusiastic, and this forms a second theme of his lectures:

I have nothing against philosophical speculation. But one would like it to have some pay-off; *something* ought to turn on the answer to the question 'What is law?' if the question is to be worth asking by people who could use their time in other socially valuable ways. Nothing does turn on it. I go further: the central task of analytic jurisprudence is, or at least ought to be, not to answer the

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1. RICHARD A. POSNER, *LAW AND LEGAL THEORY IN ENGLAND AND AMERICA* vii (1996).

question ‘What is law?’ but to show that it should not be asked, because it only confuses matters.²

Lecture One is concerned principally with questions of jurisprudence. Posner addresses himself to what he takes to be “the impoverishment of traditional legal theory,”³ an impoverishment which he finds in the works of two eminent legal philosophers—both, incidentally, holders of the chair in jurisprudence at Oxford—namely, H.L.A. Hart and Ronald Dworkin. Hart and Dworkin stand accused of attempting to define the word “law,” but such attempts, says Posner, are both “futile” and “distracting.”⁴ In particular, the focus on acontextual definitions leads to “a confusion . . . of the nominal with the functional”⁵—that is, to a concern with what legal institutions (like courts, barristers, or solicitors) are *called* rather than with what they in fact *do*. This confusion can be illustrated by examples from comparative law, and Posner in the remainder of the chapter argues that *functionally* barristers should be seen, not as attorneys, but as judicial adjuncts. Seen in this way, the English legal system is more similar to the Continental legal systems than to the American.⁶

Lecture Two then turns to the examination of a number of recent English cases in tort and contract law. Posner offers his views on the reasoning of the judges in those cases, and urges English judges to learn from the merits of the economic approach to the common law.

Lecture Three leaves these concrete matters behind and ponders the more general question, How is one to make a functional, systemic comparison between the American and the English legal systems? The principal point of novelty here is Posner’s advocacy of an economic and sociological approach based on a careful gathering of data about the two systems.

Of the three lectures, Lecture Two is the most successful. Here, in the discussion of concrete common law cases, Posner is entirely in his element and makes numerous solid points about how the cases can be best analyzed. One does not need to be an adherent of the economic approach to law to find these discussions illuminating and at times persuasive. A similar point holds for his more concrete observations about the English and American legal systems in Lectures One and Three. The argument that barristers can be usefully viewed as judicial adjuncts and the observations on such matters as the case loads of English judges, the practical day-to-day aspects of the judicial role, and the similarities of the English and Continental legal systems are insightful; and the statistics he assembles to back up his observations will be of interest to comparative scholars.

But the more interesting questions raised by these lectures are the interlinked questions of jurisprudence and of the methodology of comparative law. Here Posner’s argument seems to me not to succeed. To see why, let us begin with the topic of the third lecture, that is, with the methodology of comparative law. Posner begins this lecture with some large claims. He announces at the start of the lecture that “a full comparison . . . of any two legal systems, requires the use of techniques unfamiliar to lawyers.”⁷ What precisely are these new and unfamiliar techniques? The answer, given his general orientation, should not be surprising. A full comparison must be a comparison of the *entire* legal systems at the operational level, and such a comparison requires the techniques of *economics*:

2. *Id.* at 3.

3. *Id.* at vii.

4. *Id.* See also *id.* at 1–20 *passim*.

5. *Id.* at 21.

6. See *id.* at 20–37.

7. *Id.* at 70.

I emphasized functionality in Lecture One when I redefined the English 'judge' to include the barristers and the American 'judge' to include law clerks, thus substituting a functional for a formal definition of the word 'judge'. Failure to consider the operating level of a legal system is a traditional shortcoming of legal scholarship. . . . Interest in systemic interactions is traditional in economics and is one of the strengths that economics brings to the study of social system.⁸

Posner decries the tendency of legal scholars to rest their evaluation of whole legal systems on anecdotes, isolated cases, and "a few headline-grabbing anomalies."⁹ His aim, he says, is to provide greater precision to sharpen the terms of the analysis. He has firm convictions about how the sharpening is to be done. As he succinctly puts the point: "How then is one to make a comparative evaluation of the systems? My answer is: with data."¹⁰

Having made this declaration (and giving us almost nothing more in the way of an abstract description of his methodology), Posner proceeds to heap up a mighty pile of comparative statistics about the American and the English legal systems. Over the next thirty pages we get a mass of mathematical data: statistics about the cost of litigation, statistics about the relative sizes of the two systems, statistics about the number of cases filed, and statistics about the number of cases tried.¹¹ We get historical statistics on English caseloads, comparative accident statistics, and comparative crime statistics.¹² Posner even invokes statistics about appeal rates and about the average age of citations in judicial opinions to establish the proposition that English law is clearer than American law.¹³

What is one to say about this statistical approach to comparative law? To the extent that the data cast light on the differences and similarities of the two legal systems, of course they are to be welcomed—as is anything that would increase the precision of a comparative analysis. But there is reason to fear that the methodology at work here—the search for comparative, numerical, sociological data that can be subjected to quantitative scrutiny—if elevated into a general methodology for comparative law, far from making the analysis more precise, would distract attention from more illuminating points of comparison.

In the first place, it should be noted that the idea of a "functional" comparison of legal systems is hardly a new idea. Indeed, it is commonplace among comparative lawyers and legal historians that the comparativist should study, not "law in books," but "law in action." Posner's statistical proposal is entirely in this spirit.¹⁴

Unfortunately for Posner's argument, the very idea of a functional, sociological approach to comparative law has come under powerful attack from comparative lawyers—notably from the historian Alan Watson. Watson, in a celebrated and richly documented series of books and articles, has closely examined the evolution of the rules of private law in the civil law countries, and has argued that there is *no* interesting connection to be found

8. *Id.* at 69.

9. *Id.* at 76.

10. *Id.*

11. *See id.* at 76–106.

12. *See id.*

13. *See id.* at 84–89.

14. I note in passing that Posner does not deliver on the promise to bring the "techniques of economics" to bear on the comparative functional study of legal systems. Perhaps the brevity of the book is responsible for this omission. He does not attempt here to supply sophisticated, functionalist, economic models; instead, he supplies us with tables of statistics. The principal departure from the methodology of a social historian of law like Lawrence Friedman is that, while both emphasize the importance of seeing "law in action" in its relationship to the sociological background, Posner is more self-conscious in his attempts to supply the sociological data in numerical form.

between the social, economic, or even political structures of those countries and the rules of their private law.¹⁵ In other words, if Watson's argument is correct, the common dogma that law is a mirror of society is just that—a dogma with no basis in fact. It then follows that one cannot, as Posner seems to try to do, simply “read off” from lists of sociological statistics significant facts about the specifically *legal* nature of the given legal system. To put the point in a different way: the sociological facts are not adequate to determine the legal facts; they are too coarse-grained for what we want to know.

This is not the place to attempt to decide whether Watson's argument is correct. But it is important to observe that Posner nowhere attempts to address it (and indeed does not appear to be aware of its existence). I am inclined to accept the *negative* part of Watson's thesis (the argument against “mirror theories” that would attempt to deduce significant legal facts purely from sociological data) and reject his *positive* thesis (that the concern of the comparativist should be with legal *rules* or “law in books”). I have argued that the appropriate concern should be with core legal *ideas*—as it were, with “law in minds.”¹⁶ But for present purposes this refinement is not important. Even if only the negative part of Watson's argument is correct, then Posner's tables of statistics should provide an inadequate foundation for a comparative study of legal systems.

It seems to me that the limitations of Posner's method of comparative law can be seen in several of the analyses he himself offers. Consider, for example, his discussion of the case of *Rookes v. Barnard*.¹⁷ Posner criticizes Lord Devlin for his reluctance to impose punitive (or “exemplary”) damages in a tort lawsuit.¹⁸ The reason for Lord Devlin's reluctance, he says, “seems to be the felt ‘anomaly’ of imposing punishment in a civil case. But the reason it is anomalous is never very fully explained and the proposition, I have emphasized, is not self-evident.”¹⁹ More precisely, Posner's criticism rests on his functionalist understanding of the legal facts:

Rookes v. Barnard illustrates the tendency of conventional legal thinking to be excessively dichotomous. The conventional legal thinker draws an extremely sharp line between civil law and criminal law This tendency is due in part to failing to take a functional approach. Functionally, civil and criminal law alike, and tort and contract law alike, ‘price’ conduct that the law wishes to discourage or at least regulate

The idea that criminal law is about deterrence and civil law about compensation is a product of the same kind of conceptual or essentialist thinking that underlies efforts to define the word ‘law’. The alternative to thinking of civil law and criminal law . . . as concepts is to think of them as tools. Economics encourages such a shift of focus, and by doing so can help to remove the blinders that judges sometimes wear.²⁰

It is not clear to me that Lord Devlin is the one wearing blinders here. In the English legal system—and in most of the legal systems of Europe—the resistance to punitive

15. I have discussed Watson's writings, and in particular his controversy with the sociological approach to comparative law, in William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489 (1995), which contains full references to Watson's writings and to the literature advocating the study of “law in action.”

16. William Ewald, *Comparative Jurisprudence (I): What Was it Like to Try a Rat?*, 143 U. PA. L. REV. 1889, 2111 (1995).

17. *Rookes v. Barnard*, [1964] 1 All E.R. 367 (H.L.).

18. See POSNER, *supra* note 1, at 50–54.

19. *Id.* at 53.

20. *Id.* at 54.

damages is indeed based on a distinction between criminal and civil law. But the distinction is not, as Posner and “pricing theory” would have it, based on an underlying distinction between deterrence and compensation. Both criminal law and at least some—though not all—large parts of civil law are concerned with deterrence of certain kinds of conduct. The distinction is rather one between compensation and *punishment*. And this is a different distinction altogether. Punishment, in the eyes of most European legal thinkers, carries a specifically *moral* condemnation, and for this reason should only be administered after the full procedural safeguards of the criminal law have been observed. An award of civil damages, in contrast, carries no necessary element of moral condemnation, and is designed merely to compensate the plaintiff; it therefore needs to meet only a lower standard of proof.

It is important to emphasize that we are dealing here with ideas about *justice*, not about *economics*. It is even more important to observe that we are dealing with *ideas*. If the task for a comparative lawyer is to understand the reasoning of Lord Devlin, then one should not begin by sponging away the distinction between criminal and civil law in favor of the single category of “deterrence.” Posner’s functionalism here seems to me to have obscured what is going on. Instead of explicating Lord Devlin’s reasoning, the economic approach makes one of the great English judges of the twentieth century seem merely confused, and Posner is left with the lame and unlikely verdict that Lord Devlin’s opinion is driven by “an inarticulate sense of the anomalousness of punitive damages.”²¹

Despite the promise that he would employ economic “techniques unfamiliar to lawyers” and thereby make more rigorous the comparison of legal systems,²² Posner ends his book with the candid admission that, although he had originally hoped to be able to call his third lecture “A Theory of Legal Culture,” he gradually realized that he in fact possesses no such theory.²³ He ends with piecemeal observations about the possible legal significance of “national character.” For instance: “The salient English characteristics of self-restraint and non-aggressiveness are not characteristic of Europeans as a whole and do appear to be plausibly related to low rates of both civil and criminal litigation.”²⁴ Perhaps this is so, but it is fair to note that “national character” is hardly a rigorous and quantifiable concept of the sort we were promised.

What has gone wrong here? The answer, I think, is to be found in Lecture One—the lecture on jurisprudence. Posner’s central jurisprudential claim is his “futility thesis” that there is no point in trying to give a noncontextual definition of the word “law.” But there are two distinct interpretations of this thesis, and it seems to me that Posner wanders illegitimately from one to the other.

In the first interpretation, the claim is that the enterprise of “universal jurisprudence” is futile. That is, there is no point in trying to give a single theory of law valid for all cultures, in all places, at all times. Instead, jurisprudence must always be *local*. Its task is to describe and analyze, from *within* any given legal tradition, the conception of law that that particular tradition employs. This thesis seems to me to be correct, and Posner appears to endorse it at numerous points.²⁵ But it is not a thesis that is original to Posner, and it requires a great deal of argumentation if it is to be defended. The classic statement of the thesis, together with the necessary philosophical arguments, is to be found in the writings of

21. *Id.*

22. *Supra* note 7.

23. *See id.* at 106.

24. *Id.* at 109. (footnote omitted).

25. *See, e.g., id.* at viii, 19, 34.

Ronald Dworkin, in particular in his critique of H.L.A. Hart.²⁶ It is important to observe that, in this version of the thesis, the task of the comparative lawyer is not to assemble lists of statistics, but to explore the legal conceptions at work in the foreign system and to describe the system from the point of view of these conceptions.

In the second interpretation of the futility thesis, any attempt to investigate general philosophical issues of law or to give a general characterization of law, even within a given system, is pointless. Posner appears to endorse this thesis as well.²⁷ But it is hard to see how one could hope to engage in any substantive investigation of a foreign legal system without at least *some* general view about what law is. In practice it is clear that Posner, no less than anybody else, operates with his own tacit answer to the question, “What is law?” His is a conception that draws a sharp distinction between questions of “practical law” and questions of “philosophy,”²⁸ and that seeks to “divorce” jurisprudence from the study of “the working level of the law.”²⁹ It is a conception that views law as concrete, as “practical,” and as a set of functional relationships to be studied by the precise and scientific methods of economics.

An important point to observe is that, in this conception of law, the task of the comparative lawyer will be to gather the statistics, uncover the functional relationships, and do the economic analysis that will reveal the fundamental properties of the foreign legal system. I do not deny that these are important tasks, or that Posner’s comparative statistics shed valuable and welcome light on the U.S. and English legal systems. Nor do I deny that his conception can appeal to the practicing attorney’s mistrust of “theory.” But it is important also to observe how much this conception rules out as being not “really” law. The realm of ideas, abstract principles, and underlying jurisprudential conceptions is swept aside in favor of “hard” data and functional analysis. It is not surprising, given this jurisprudential starting point, that Posner’s approach to comparative law has difficulty explicating the reasoning of a Lord Devlin, or that it submerges crucial distinctions like that between civil and criminal law.

It is important to note that these observations do not leave Posner without a reply. He can declare that indeed the *reasoning* of Lord Devlin is not what comparative lawyers should be concerned with explicating—that it is far more important to give an account of the practical social functioning of the legal system, its style of thought be what it may. That is, as comparative lawyers, we could, as it were, adopt the point of view of a Holmesian “bad tourist” who wishes to know of the foreign legal system only “what its courts will do in practice, and nothing more pretentious.” I do not deny that this view of the purposes of comparison can be grounded in a conception of law that possesses a venerable pedigree, especially in America. It does not seem to me that that underlying jurisprudential conception is ultimately tenable, but to establish this conclusion would require a prolonged argument. It is one of the chief merits of Judge Posner’s book that, despite his attempt to forswear questions of legal philosophy, he clearly shows—not always in ways that he intended—that the question of the methodology of comparative law is at bottom a question of jurisprudence.

26. See RONALD. DWORIN, TAKING RIGHTS SERIOUSLY 14–80 (1978); RONALD. DWORIN, LAW’S EMPIRE 114–50 (1986). *Pace* Posner, I can think of no place in Dworkin’s writings where he attempts to “give a definition of the word ‘law’”—and plenty of places where he rejects such an enterprise. See DWORIN, LAW’S EMPIRE, *supra*, at 45–86.

27. See *id.* at 1–2, 10.

28. *Id.* at 9–10.

29. *Id.* at 3.