LAW AND LEGAL THEORY IN ENGLAND AND AMERICA, By Richard A. Posner, Oxford: Clarendon Press, 1996, Pp. 134 ($48.95).

FUNDAMENTALS OF AMERICAN LAW, Edited by Alan B. Morrison, New York: Oxford University Press, 1996, Pp. 666 ($94.95).

The answer to the question of whether or not the "Anglo-American legal system" is one coherent system of law or two, may well depend on the eyes of the beholder or even the spectacles through which the two national systems of law are beheld. Judge Posner concludes that they are now distinctive, while the New York University School of Law in *Fundamentals of American Law*[1] describes a system of law remarkably similar in most essentials to England, or even Canada. Judge Posner examines the Anglo-American legal systems from the perspective of the social sciences, especially economics, while the "N.Y.U." volume describes and explains in bold black letters the fundamental principles and rules of American law. Judge Posner decides, contrary to widely-held belief, that the English[2] legal system is more similar to continental European legal systems than to the American legal system; the "N.Y.U." volume is content to describe a system of law that is evidently a common law system and to claim historical and substantive continuity with the English common law tradition. The problematic discrepancy between these two outcomes suggests that it is more than just an accurate characterization of two national systems of law that is at issue. It is also the credibility of the social sciences, as opposed to strict legal analysis of law, that is at stake as a method of understanding legal systems.

This review will focus primarily on the book by Judge Posner. It is most controversial, both in its assumptions, explicit and implicit, and in its conclusions. Conversely, the "N.Y.U." volume is a descriptive handbook to American law and, as such, may be judged on the basis of its descriptive accuracy and utility. It provides, as well, a standard against which to assess the Posner book for accuracy in characterizing the American legal system and will be so used in this review.

Law and Legal Theory in England and America is an enlarged and revised version of the inaugural lecture series, the Clarendon Law Lectures, sponsored by Oxford University Press, and presented at the Faculty of Law in the University of Oxford, in October 1995. In these lectures, Judge Posner, now Chief Judge of the Court of Appeals for the Seventh Circuit, attempts a comparative analysis of the two legal systems. At the outset, he distinguishes his perspective from that of previous comparativists such as Atiyah and Summers[3] in two ways: first, on the basis of being a judge, and secondly, as one who believes "more deeply" than other judges and academics that the social sciences, especially economics, should inform the administration of the law.[4]

To prove his thesis about the alleged drift between the English and American legal systems, Judge Posner relies on arguments based on disparate legal materials: the jurisprudential futility of trying to define "law" as evidenced by the attempts of Hart and Dworkin; a comparative economic analysis of certain doctrinal principles of contract and tort in England and America; and an operational analysis of how the two legal systems function. Through jurisprudential, doctrinal and

---

[1] *Fundamentals of American Law* is a volume to which 24 New York University School of Law faculty members have contributed [hereinafter "N.Y.U." volume].

[2] Judge Posner rightly distinguishes the English and Scottish legal systems and restricts his analysis to England. Scots Law is a hybrid system.

[3] P.S. Atiyah & R. S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory and Legal Institutions* (Oxford: Clarendon Press, 1987).

[4] R.A. Posner, *Law and Legal Theory in England and America* (Oxford: Clarendon Press, 1996) at vii.

operational analysis of the two systems, Judge Posner reaches the conclusion that there is, indeed, a gulf between them.

Essentially, Judge Posner's jurisprudential argument is as follows: taking Hart and Dworkin as exemplars of their respective national jurisprudential traditions, it may be asserted that neither one provides a credible explanation of law or of a legal system. Yet, each exemplifies peculiar national approaches to the question of what is law. Hart, the positivist, admits that judges make law when deciding cases for which there is no rule, but Dworkin, the antipositivist, believes that judges administer law in such situations and should feel free to do so since they are acting out principles within the legal process. Hart's acknowledgement of the ability of politically unaccountable judges to make law compels him to support judicial restraint and deference to the legislature — to be a subordinate organ in the political life of a nation.

Dworkin, on the other hand, according to Posner, conceives of the judicial role more expansively; indeed, in setting out reasoned principles (but not policies which are reserved for the legislature), judges may rely on their moral feelings, properly disciplined and reasoned. Judge Posner argues that Hart's theory of law and Dworkin's theory of judging demonstrate significant agreement at a higher level of abstraction in that Hart's appellate court discretion as legislation, is what Dworkin would regard as practising applied moral philosophy. What is of greater interest to Judge Posner is what each says implicitly about their respective legal cultures. Hart's concept of law assumes that judges are timid appliers of rules laid down by legislatures and that law should be set apart from politics to a modest place in public life; Dworkin assumes that judges will be bold, bold enough to deny that they are legislating when they step over the line from law to politics.

Judge Posner further argues that Hart's view of the role of the judiciary in England is similar to that in Europe: a career judiciary applying rules devised by legislatures. In contrast, Dworkin's view assumes a political judiciary, confident because politically accountable either through Senate confirmation hearings or popular election. In pursuit of the thesis that the English judiciary is continental in character, he argues that, from a functional perspective, the English judiciary consists of both judges and barristers because of the integrated and hierarchical career pattern and professional expectation of moving from Bar to Bench. The nature of higher court litigation is that a few barristers appear frequently before the same small group of judges whose goodwill must be retained by bringing only meritorious cases and being extremely helpful to judges who lack the American-sized armies of clerks and secretaries. The English "loser pays" rule about costs encourages high competence. Typically, barristers also serve as deputy judges through the middle portion of their careers and expect to top off their professional career on the Bench. By adding the number of barristers to the number of judges in England, Judge Posner concludes that the ratio of functional judges to the population approaches continental figures. When the deferential nature of the judiciary is added, he concludes that in operation, the English legal system is continental rather than American in nature. By contrast, in Judge Posner's view, American lawyers are a separate caste from the American judiciary, more adversarial and professionally aggressive than English lawyers and more political. Election or confirmation to judicial office and continued extensive reliance on the jury system provide checks on excessive judicial politicization but also make for a more political and less deferential judiciary as well.

Posner then proceeds to the doctrinal stage of his comparison, examining especially negligence in tort law and damages where there is substantial performance in contract law. Needless to say, economic analysis is the favoured approach, although the conclusion is somewhat disappointing for Judge Posner. While he concludes that slightly more algebra would help with tort adjudication in England, the contract results are "quite adequate",[5] although the English judiciary does not adopt

---

[5] *Ibid.* at 65.

an economic analysis approach. The reason postulated for this outcome is that because English judges are less political, they have not attempted to shape contract law doctrine to produce certain liberal political outcomes, such as redistributive outcomes. By enforcing older 19th century rules based on the free market, they have coincidentally allowed the market to determine outcomes, and (of course) markets maximize economic efficiency: law and economics, by default.

Finally, Judge Posner turns to an operational comparison in his third lecture to demonstrate that the English legal system operates more like a continental one than a common law system. Rather than a simple comparison of how each system functions in several similar transactions or cases, Judge Posner attempts to compare function through the issue of reform of each legal system, cautioning throughout that piecemeal reform of legal systems is tricky and risky because single functions or features of a system are part of a whole in imperceptible ways. He compares the costs of litigation in each country, the relative size of the systems in terms of numbers of cases filed and heard per head of population and then attempts a general qualitative comparative analysis. He concludes that it is impossible to say which legal system is better, noting that the English law is clearer and more predictable; the English legal system smaller; and that English courts are less likely to make mistakes. Nevertheless, because in his view, English law is less flexible and the "English have fewer rights"[6] the two systems balance out on the qualitative scale.

Judge Posner concludes that the professional cultures and legal systems of England and America reflect their respective cultures and that the English system is more akin to Europe than America. Despite his commitment to economic analysis, he falls back on alleged national caricatures to explain why this might be: England, like Europe, in Judge Posner's view, is dominated by concepts of class, deference and social trust across class lines so that lawyers and courts can be trusted and can act in a depolitical manner. America is egalitarian, individualistic and democratic, so that lawyers and courts are not trusted and subject to various democratic and political controls as a result.

Is any of this factually true? Is any of this proveable? Has Judge Posner proven any of it? No. Judge Posner ranges superficially over large areas of law, legal philosophy, legal process and sociological chit-chat, in a confused and confusing manner to come to answers which are neither necessary nor proven nor obviously commonsensical. Why focus only on civil litigation since it constitutes such a small part of legal services? Does the English Bar really act as a junior judiciary or does civility in the courtroom mean necessarily that advocates are less independent in the substance of their advocacy? Do the English Bar and Bench really function together like a civilian magistracy? Without a comparative analysis of the English and continental practices how can we know? Are the English and continental judiciaries really more servile to the state than an American judge is to the next judicial election? Does it matter that the English judiciary shows greater deference to legislation? Should a "career judiciary" be less capable, *ipso facto*, of reaching appropriate solutions for litigants than as elected judiciary? Why should judges substitute the social sciences generated by inexperienced professors for their own real-life experiences prior to appointment, or even their own coherent moral systems as standards for adjudication, especially when by Judge Posner's own admission they do not necessarily produce better results? Is Post-Thatcher England really a more class-ridden society than Post-Reagan America? And why, at the end, must Posner resort to alleged national caricatures to explain what his previous social sciences analyses have not? And are the doctrinal rules really that much different?

One could go on in a similar vein. But it scarcely matters. Surely the point about law and legal systems is that they provide acceptable solutions for disputes in the societies and to the societies in which they are found. Does the law command respect? Do the law-makers command

---

[6] *Ibid.* at 94.

respect? Is justice done? Judge Posner does not address these questions which, I would argue, are fundamental.

Had he done so, he would have been required to remove his economist-judicial spectacles to look bald-eyed at the actual law in England and America to find that in the fundamentals of the common law, legal principles, policies and doctrines, they are remarkably similar. Whatever the role of legal actors, their relationship to political actors or their national cultural backgrounds (caricatured or not), human disputes tend to take similar shapes in similar economic systems, so it is hardly surprising that litigation results are, as Judge Posner admits, largely similar. A bottom-up rather than a top-down comparative study might have been more enlightening.

Thus, in the second book under review, one finds a comprehensive survey of the "fundamentals of American law", over a wide range of legal areas: constitutional, administrative, contract, tort, property, criminal, business organizations, commercial, family, competition, bankruptcy, banking and securities law. This is a worthwhile volume not only for the fresh breath of reality after reading Judge Posner but simply as a handy source of American law for non-American readers: the ultimate "hornbook". Written by faculty members of the N.Y.U. School of Law as one project of its Global Law School Program, the volume succeeds in presenting a useful and integrated one-volume handbook of American law. While the common law chapters resonate with the common law throughout the common law world, even the statutorily-based chapters are familiar insofar as legal discourse about the constitution or the environment or the regulation of securities is similar throughout the common law world; indeed, throughout the civilian world as well. As the existence of a Global Law Program would suggest, viewed from the bottom-up, legal issues are similar in most jurisdictions and jurisdictions look increasingly around the world for suggestions for local solutions. The volume is not meant to be a substitute for consulting the law directly but a guide for the non-American lawyer to the need to consult a lawyer or the primary law itself. While all the chapters are well-organized and clearly written, for a Canadian reader, the chapter on the Bill of Rights Supreme Court jurisprudence may be one of the best, brief (44 pages) introductions available.

Judge Posner's implicit wish to place an economics-based American jurisprudence head-and-shoulders, if not full body lengths, above the other major common law system in the world, requires better founded arguments than are contained in his Clarendon Law Lectures. The N.Y.U. volume is merely one evidence of the coherence and integrity of American law with the rest of the common law world. Despite the best efforts of the social sciences in the 20th century to confound the fundamental principles of the common law, they continue to resonate as deeply within the societies of the late 20th century common law jurisdictions as they have done for the eight preceding centuries.

M.H. Ogilvie*

*Professor of Law, Carleton University, Ottawa, and of the Bar of Ontario.