

## For the Commonwealth Reader

Antony W. Dnes, *The Economics of Law*, International Thomson Business Press, London, 1996

*Reviewed by Stephen Franks*

ANTONY DNES, a professor of economics at Nottingham Trent University in the UK, describes his book in the Preface as an 'accessible survey of law and economics that is aimed at practitioners and advanced students of both economics and law ... located in England or in other Commonwealth countries'.

For my limited purposes as a lawyer, Dnes's book is invaluable. It gives references to leading articles on themes of contemporary debate. The material is dense, but this is not an impediment. Dnes surveys current thinking on vital issues that I nevertheless remember only dimly.

Such a wide and dense survey may, however, be irritating to the newcomer to the discipline. Even supported by references, the summary conclusions may seem tendentious. For example, the introductory chapter refers to D. J. Pyle's 'Economics of Crime in Britain' (*Economic Affairs*, vol. 9, 1989, pp. 6-9). The summary states: 'If the cost of increasing the severity of prison sentences is compared with that for increasing detection and conviction of criminals, it turns out to be much cheaper to obtain a target reduction in crime by increasing the length of sentences' (p. 2). The extended discussion of the topic in Chapter 7 is more balanced.

For the Commonwealth reader, the recognition of Commonwealth cases and the evident poverty of modern law scholarship outside North America will please and alarm respectively. As Dnes notes,

... in North America, economics has had a terrific influence on law. There, academic lawyers have been heard to comment that one needs training in the economic analysis of law to understand the law literature, let alone the law and economics literature. This is not yet the situation on the other side of the Atlantic but there is a growing interest in law and economics in both of the parent disciplines. (p. 9)

That may account for a continuing inability in the Commonwealth to recognise what is lost in abandoning the common law for statute. It can mean that even signal achievements in statute go uncelebrated. A telling example appears in a flaw in this book. Dealing with property rights, Dnes looks at common property problems in high-seas fisheries (but without using the evocative phrase 'tragedy of the common'). He reviews the irrationality of various mechanisms for enforcement and suppression of distributional conflict, but says 'in the case of fishing, it seems that the costs of establishing private rights are too high relative to the benefits' (p. 14). Have New Zealanders been too modest to trumpet their successful creation of transferable quota entitlements (property rights in maximum fish harvest shares)? It has been

operating for years within the vast fisheries controlled under New Zealand's Fisheries Act 1983.

The comparative element in this text is particularly helpful. Lawyers in Australasia have debated, relying on little more than intuition and anecdote, the cost effect of differences in law and procedure in the US, UK, Australia and New Zealand. Dnes's chapter on contingency fees, cost rules and litigation compares studies not only from the US and the UK but also Germany. I was surprised to learn, for example, that Germany has rates of tort litigation that are comparable to the US figures. Dnes says: 'the comparisons may be best described as showing England as having unusually low rates of tort litigation' (p. 172).

Dnes speculates on why the economic analysis of law is so well established in North America but remains undeveloped in the Commonwealth. He wonders whether this is partly attributable to the postgraduate framework of law training in North America, which produces legal academics more open to the insights of other subjects. He notes that the English feel 'that somehow the subject reflects a hard nosed American affection for the market economy' (p. 175), but hopes that the book will be of interest on both sides of the Atlantic because of its comparative theme.

Although North American scholars may have developed a pre-eminent learning in these areas, few of them are aware of how culture-bound some of that learning is. In my own field, corporate and securities law, it is astonishing how few comparative studies have noticed, let alone investigated, some illuminating differences. Consider the hot North American debate about the inevitability and efficiency of regulations such as those governing proxy solicitation, or company insolvency. US scholars have rarely looked across the Atlantic to a similar regime which seems untroubled by the absence of proxy solicitation rules, and where, until recently, the procedures and outcomes upon company insolvency were largely determined by antecedent contracts of a kind that some American scholars have only speculated about in 'thought experiments' as to what might happen if legislation had not intervened.

If, improbably, an economist were to ask me to recommend an introduction to law and economics, I would suggest Dnes's book rather than Richard Posner's *Economic Analysis of Law* (1973, 1992). I would be less confident suggesting it to a lawyer. The Preface says that lawyers and economists should be able to 'use the book without any prior knowledge of the other "parent" subject'; but Dnes may overestimate lawyers' willingness to grapple with economics jargon and to study graphical presentations and algebraic expressions. This is not to say that Dnes has overused them, or that Posner will not trouble some lawyers similarly. But Posner's examples seem to me to be more developed. Perhaps Posner, as a practising law teacher and a judge, is more conscious of the frailty of those drawn to the law when confronted with numbers and symbols.

Dnes or Posner? Either or both, as long as it is not neither. Lawyers must realise how feeble their learning is if they cannot cope with either.

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