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## LECTURES

### THE IMPORTANCE OF BEING COMPARATIVE *M. Dale Palmer Professorship Inaugural Lecture*

DANIEL H. COLE\*

#### INTRODUCTION

My topic is the importance of comparative analysis—more specifically, the importance of comparative *legal* analysis and comparative *institutional* analysis for law students and legal scholars. These are really two distinct topics. All they have in common is the obvious point that they are both somehow “comparative.” Comparative *legal* analysis concerns the analysis of legal rules and policies across differing legal systems and cultures. Comparative *institutional* analysis concerns the analysis of alternative institutional approaches to resolving legal problems within a given system and culture. The benefit of combining these two distinct topics is that it enables me, in a single lecture, to touch on several of the otherwise disparate issues about which I write.

#### I. THE IMPORTANCE OF COMPARATIVE LEGAL ANALYSIS

Begin with the following counterintuitive proposition: *if* the primary goal of legal education is to prepare students to practice law in the United States, then the study of *other* legal systems is crucial because understanding *other* legal systems and cultures greatly enhances our understanding of our own. This is not a very controversial proposition; most people would probably assent to it, at least in theory. And yet, only small islands are set aside in the typical law school curriculum for the comparative study of law. Perhaps that’s enough. Or maybe there just is not time for more in a three-year law school course of study. However, students would become better attorneys, judges, policy-makers, and scholars if they had a fuller sense of the wealth of alternative rules, policies, and approaches to legal problem-solving.

Each student is, of course, exposed to *some* comparative legal analysis during

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\* M. Dale Palmer Professor of Law, Indiana University School of Law—Indianapolis. A.B., 1980, Occidental College; A.M., 1981, University of Chicago; J.D., 1986, Northwestern School of Law of Lewis & Clark College; J.S.M., 1991 and J.S.D., 1996, Stanford Law School. This Article is dedicated to Professors Hal Lauter, Mike Blumm, and Lawrence Friedman, each of whom has greatly influenced my life and career. Every scholar should be so fortunate as to have three such outstanding mentors. And I am most grateful to M. Dale and Kay Palmer for their tremendous generosity.

their law school careers. In the first-year curriculum, *American* common law rules are often compared and contrasted with *English* common law rules. Students may even be taught a few Latin phrases from *Roman* Law (though only to the extent that Roman Law is somehow relevant to the study of American common law).

Still, generally speaking, the first-year curriculum is quite narrow and provincial; it leads students—perhaps even some professors—to misperceive the nature and breadth of the law and legal institutions. It is my experience that most students, by the end of their first year, believe that common law adjudication is the norm, and other approaches to legal problem-solving are deviations from that norm.<sup>1</sup> By the *end* of their law school careers, students tend to believe that Constitutional Law means *American-style* constitutional law, so that any deviation from the American approach, such as the inclusion of positive rights in constitutions, is just that: deviant. They believe that the only means of effectively securing commercial transactions is through a mechanism similar, if not identical, to that codified in Article 9 of the Uniform Commercial Code (“UCC”). And they believe that all legal rules and institutions of any value come from America, England, Rome, or (somewhat less frequently) France.

This is not to demean American constitutional law, the UCC, or the great traditions of American, English, Roman, and French jurisprudence. Nor do I intend to assert a sort of radical legal relativism, according to which all legal rules, institutions, and systems have equal value. Clearly, they do not. Some are more valuable because they are theoretically more elegant or more simple. Others are more valuable because they seem to work better in the real world; that is, they work more justly, more effectively, or more efficiently. Many are *perceived* as more valuable than others because they appeal to certain of our ideological predispositions. Yet the general lack of comparative perspective in legal education and scholarship unquestionably results in a certain myopia.

Unfortunately, we legal scholars often are shortsighted. In particular, we have trouble seeing beyond the midsection of the North American continent and Western Europe as sources of law and legal history. Let me give a couple of examples, the first of which is relatively trivial.<sup>2</sup>

If I were to ask, where does the rule of habeas corpus come from? The obvious answer is, of course—England. But that is not accurate. Clause 39 of *Magna Carta* promised habeas corpus.<sup>3</sup> But that promise was not realized in

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1. This is apparently what Christopher Columbus Langdell intended, when he developed the curriculum we use today back in the late Nineteenth Century; Langdell did not consider legislation to constitute law. See JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 9-10 (1999).

2. Both examples are adapted from two previous works: Daniel H. Cole, *From Renaissance Poland to Poland's Renaissance*, 97 MICH. L. REV. 2062 (1999) [hereinafter Cole, *Renaissance Poland*]; Daniel H. Cole, *Poland's 1997 Constitution in Its Historical Context*, 1998 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 1 [hereinafter Cole, *Poland's Constitution*].

3. See *Magna Carta* (1215) (visited May 3, 2000), *reprinted and translated at* <<http://www.bl.uk/diglib/magna-carta/magna-carta-text.html>>.

England until Parliament enacted the first Habeas Corpus Act in 1679.<sup>4</sup> By that time, however, a million or more citizens of the Polish-Lithuanian Republic had already been benefitting from a habeas corpus rule for some 250 years.

In 1433, King Jagiello of Poland issued the Privilege of Jedlna, which proclaimed “we will not imprison anyone except if convicted by law.”<sup>5</sup> This Privilege applied only to the nobility until 1791, when it was extended to townspeople.<sup>6</sup> Even before then, however, it provided broader coverage than many subsequently enacted habeas corpus laws from other countries, because the Polish-Lithuanian nobility constituted an unusually large percentage of the total population—somewhere between seven and fourteen percent.<sup>7</sup> And, in the fifteenth and sixteenth centuries, Poland-Lithuania was Europe’s largest country by geography and third largest by population.<sup>8</sup> Yet, you will not read a historical treatment of habeas corpus written by an English or American legal scholar that even mentions the Polish-Lithuanian Republic.

To take a more current and more significant example, consider the recent *return* to constitutionalism in Central and Eastern Europe. I say “return” to constitutionalism because at least some Central and East European countries had long histories of constitutionalism prior to the imposition of communism after World War II. Unfortunately, many of the American constitutional law “experts” who sought to educate and advise post-communist governments about constitutional democracy apparently were unaware of this. Many of them displayed a woeful ignorance of the histories and cultures of the countries they were advising. They acted as if historical, cultural, and institutional circumstances could make no difference in the design and implementation of constitutions. Adding injury to insult, many of them charged high fees for sharing their wisdom with the supposed constitutional neophytes that they were advising.<sup>9</sup>

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4. Actually, the 1679 Habeas Corpus Act codified developments that had been taking place in the common law courts since the beginning of the seventeenth century. Before the seventeenth century, however, the purpose of the writ in England was to secure the presence of individuals for trial. See William F. Duker, *The English Origins of the Writ of Habeas Corpus: A Peculiar Path to Fame*, 53 N.Y.U. L. REV. 983 (1978).

5. Wenceslas J. Wagner, *Justice for All: Polish Democracy in the Renaissance Period in Historical Perspective*, in *THE POLISH RENAISSANCE IN ITS EUROPEAN CONTEXT* 127, 133 (Samuel Fiszman ed., 1988) (quoting King Jagiello).

6. See Cole, *Renaissance Poland*, *supra* note 2, at 2069 n.29.

7. See *id.* at 2068.

8. At its largest extent, the Polish-Lithuanian Republic was approximately twice the size of France and slightly larger than European Muscovy, but its population of 11 million was somewhat smaller than France’s or Muscovy’s. See 1 NORMAN DAVIES, *GOD’S PLAYGROUND: A HISTORY OF POLAND* 24 (1982).

9. According to published reports, one law professor from New Jersey reportedly charged \$1500 a day for his advice (which is not to say that his advice was not worth the fee). See Susanne Sternhal, *Lawyers Live the Spirit ‘87 Revolution in E. Europe*, WASH. TIMES, July 4, 1991, at E1, available in LEXIS, News Library, Arcnws File.

Even prominent American jurists, such as Richard Posner and Cass Sunstein, proffered constitutional advice to the new Central and Eastern European democracies, even though they knew almost nothing about those countries' histories and cultures. Their advice was well-meaning and free of charge, but it proved to be misguided because it ignored historical, cultural, and institutional circumstances.

Judge Posner urged the newly liberated countries of Central and Eastern Europe to focus on constitutionalizing certain negative rights of universal significance, such as rights of private property, because those rights are relatively inexpensive to enforce and have relatively high social value.<sup>10</sup> Other, "more expensive" and less socially valuable rights, such as rights that protect against wrongful incarceration, he recommended, should be temporarily disregarded (or only minimally protected) until they could be better afforded.<sup>11</sup>

Judge Posner's economism about the rights of criminal defendants was never likely to receive a warm reception in a country like Poland, where habeas corpus protections had been a feature of indigenous constitutional history for more than half a millennium,<sup>12</sup> and where, under communism, the rate of incarceration was as high as 580 out of 100,000 inhabitants—three times higher than the rate of incarceration in the United States.<sup>13</sup> During the period of Martial Law (1981-83), "Tens of thousands of innocent citizens were arrested without charge. Some 10,000 were detained in forty-nine internment camps. There were reports of beatings and deaths."<sup>14</sup> Given this history, it was simply unthinkable that Poland's post-communist constitution might not include strong protections against wrongful incarceration. In Judge Posner's terms, the "costs" of *not* including such protections—in terms of constitutional legitimacy—would have been enormous.

Professor Sunstein similarly warned the new East European democracies against the dangers of constitutionalizing certain kinds of so-called "positive" rights—rights to have the government do something for you.<sup>15</sup> He thought it might be disastrous to combine traditional negative rights, such as freedom of

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10. See Richard A. Posner, *The Costs of Rights: Implications for Central and Eastern Europe—and for the United States*, 32 TULSA L.J. 1 *passim* (1996).

11. *Id.*

12. See *supra* notes 5-8 and accompanying text.

13. See MARIA ŁOŚ, COMMUNIST IDEOLOGY, LAW AND CRIME 126 (1988).

14. NORMAN DAVIES, HEART OF EUROPE: A SHORT HISTORY OF POLAND 23-24 (1984). In 1990, I attended a talk by a Polish journalist, who was explaining the conditions of her imprisonment as a Solidarity activist during the period of Martial Law (1981-83). I was seated next to my friend, the Polish sociologist Piotr Gliški, who whispered into my ear, "I don't understand what the big deal is; everyone I know was in jail then." Even my wife, Izabela Kowalewska-Cole, who was a high school student at the time, was dragged out of her class, interrogated at police headquarters, and threatened with jail because some of her cousins were active in the then-outlawed Solidarity movement.

15. Cass Sunstein, *Against Positive Rights: Why Social and Economic Rights Don't Belong in the New Constitutions of Post-Communist Europe*, E. EUR. CONST. REV., Winter 1993, at 35.

religion and the right of free speech, with positive rights, such as the right to free health care or the right to a healthful environment.<sup>16</sup> In contrast to Judge Posner, however, Professor Sunstein's primary concerns were legal and political rather than economic. He noted that socio-economic rights are notoriously difficult to enforce, and their lack of enforceability could demoralize society, possibly jeopardizing the perceived legitimacy of an entire constitution.<sup>17</sup> The failure to adequately implement and enforce positive rights could thus devalue supposedly more important negative rights. So, he counseled post-communist countries to focus on establishing firm liberal rights.<sup>18</sup>

As a matter of theory, I have few qualms about Professor Sunstein's advice. But one does not have to disagree with the merits of his advice to recognize that it had little chance of being followed in the countries he was advising for reasons that have to do with history, culture, and existing institutions, all of which his analysis neglected.

First, consider what the Central and Eastern European countries were trying to accomplish after the fall of communism. Most of them wanted, more than anything else, to become, once again, a part of Europe. Specifically, they wanted to join the European Union (EU). The Central and East European governments recognized, of course, that several existing EU member countries already had constitutions that combined positive and negative rights.<sup>19</sup> On the other hand, *American* constitutional law "experts" were warning them against that practice. What were they to do, follow the European examples or the Americans' advice? Not surprisingly, they emulated the European examples because that was a more likely route to obtaining their ultimate goal: inclusion in European legal and economic institutions.

It was not just the allure of Europe, however, that influenced constitution-making in the new democracies of Central and Eastern Europe. They also had their own, individual histories, cultures, and values to consider. Each post-communist country was always going to adopt a constitution reflecting those factors. And it was quite right that they should do so, even from a Posnerian economic perspective, for a constitution that ignored domestic history, culture, and values would likely prove more expensive in the long run because its legitimacy would always be suspect.<sup>20</sup> Most importantly, *none* of the post-

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16. *See id.*

17. *See id.* at 37.

18. *See id.* at 35-36.

19. Spain's 1992 Constitution, for example, guarantees the right to free education (art. 27(4)), the right to social security and unemployment compensation (art. 41), and the right to decent housing (art. 47). The Spanish Constitution is reprinted and translated at <[http://www.uni-wuerzburg.de/law/sp00000\\_.html](http://www.uni-wuerzburg.de/law/sp00000_.html)> (visited May 10, 2000). The Dutch Constitution of 1989 makes similar promises to its citizens concerning work (art. 19), health care (art. 22), welfare (art. 20), and education (art. 23), among others. The Dutch Constitution is reprinted and translated at <[http://www.uni-wuerzburg.de/law/nl00000\\_.html](http://www.uni-wuerzburg.de/law/nl00000_.html)> (visited May 10, 2000).

20. *See* Lee J. Alston, *Empirical Work in Institutional Economics: An Overview*, in *EMPIRICAL STUDIES IN INSTITUTIONAL CHANGE* 25, 25 (Lee J. Alston et al. eds., 1996) (noting the

communist countries was “starting . . . from scratch” in constitution-making as U.S. Supreme Court Justice Sandra Day O’Connor asserted in a 1995 speech.<sup>21</sup>

Consider the constitution that Poland finally adopted in 1997.<sup>22</sup> Not surprisingly, it appears to be a fairly typical modern European constitution. Yet it remains firmly rooted in Poland’s indigenous history of constitutionalism. It contains all of the basic negative rights that Judge Posner and Professor Sunstein recommend, but not just because those rights were recommended by elite American law professors and judges. Notions such as freedom of speech, religious liberty, and protection of private property rights are hardly recent imports into Polish constitutional theory.

Poland first constitutionalized religious liberty in the 1573 Warsaw Confederation:

Because there is not a small dissension in our country in the matter of the Christian religion, we should like to prevent any harmful sedition that could develop among the people for this reason. What we see in other kingdoms, we promise to all on our behalf and for our successors, for eternity, under the oath, faith, honor, and our conscience, that no matter who the dissidents from the [Catholic] religion are, we shall preserve peace among us, and not shed blood for difference in religion or in Church observance. We shall not penalize ourselves for this reason by confiscation of landed estates, by punishment of honor, by imprisonment or exile. We also promise not to help in any way the authorities or officers in such a procedure. We all shall be obliged to oppose the shedding of blood, even if anyone would want to do this for a good reason, under the pretext of a decree or of any court procedure. . . .<sup>23</sup>

According to the historian James Miller, the Warsaw Confederation was the first document in world history to constitutionalize religious toleration (although Poland has often failed to live up to it).<sup>24</sup>

Strict private property rights protections were also part of Poland’s pre-communist constitutional history. Poland’s 1791 constitution—the world’s second written constitution and Europe’s first—contained the following elaborate provision concerning property rights:

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path-dependent nature of institutional change, with specific reference to Eastern Europe).

21. See Mack Reed, *Justice Urges Courts to Set Example Abroad; Judiciary: O’Connor, at Reagan Library, Says System Ought to Be Model for Emerging Democracies*, L.A. TIMES (Ventura County Edition), Aug. 30, 1995, at B1, available in LEXIS, News Library, Arcnws File.

22. POL. CONST. of 1997, 1997 DZIENNIK USTAW (“Journal of Laws”) [hereinafter DZ.U.] No. 78, item 483, reprinted in *English translation in 1997 ST. LOUIS-WARSAW TRANSATLANTIC L.J.* 5.

23. The 1573 Warsaw Confederation is reprinted and translated in BASIC SOURCES RELATED TO THE HISTORY OF EASTERN AND CENTRAL EUROPE 45 (W.W. Soroka ed., 1966) (unpublished).

24. See James Miller, *The Sixteenth-Century Roots of the Polish Democratic Tradition*, in POLISH DEMOCRATIC THOUGHT 21 (M.B. Biskupski & J.S. Pula eds., 1990).

[W]e preserve and guarantee to every individual thereof [the nobility] personal liberty and security of territorial and moveable property, as they were formerly enjoyed; nor shall we even suffer the least encroachment on either by the supreme national power (on which the present form of government is established), under any pretext whatsoever, contrary to private rights, either in part, or in the whole; consequently we regard the preservation of personal security and property, as by law ascertained, to be a tie of society, and the very essence of civil liberty, which ought to be considered and respected for ever.<sup>25</sup>

This was a stronger but less broad guarantee of private property than any found in the U.S. Constitution. It was stronger because Poland's 1791 constitution recognized no right of Eminent Domain; but it was less broad because it only guaranteed the property rights of the nobility.

In addition to the traditional, liberal rights that are a common inheritance of both American and Polish constitutional history, Poland's 1997 constitution also includes several positive or socio-economic rights—the kind of rights that Judge Posner and Professor Sunstein deplore—such as the right to a safe workplace,<sup>26</sup> the right to equal access to health care,<sup>27</sup> the right to free public education,<sup>28</sup> and the right to a healthful environment.<sup>29</sup> It is important to note, however, that many of these “positive” rights also have precursors in Poland's indigenous constitutional history—and not just in its infamous communist constitution of 1952.<sup>30</sup> Poland's liberal-democratic constitution of 1921, for example, guaranteed the right to unemployment and sickness benefits, and the right to a state-funded education.<sup>31</sup>

This is not an argument in favor of including positive rights in constitutions.<sup>32</sup> The point is just that in order to understand Poland's new

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25. POL. CONST. of 1791, art. II, *reprinted in* BICENTENNIAL OF THE POLISH THIRD OF MAY CONSTITUTION 1791-1991, at 7-8 (1991).

26. *See* POL. CONST. of 1997, 1997 Dz.U. art. 66.

27. *See id.* art. 68.

28. *See id.* at 70.

29. *See id.* at 74.

30. POL. CONST. (1952), 1952 Dz.U. No. 33, item 232.

31. *See* POL. CONST. (1921), 1921 Dz.U. No. 44, item 267.

32. It is worth noting, in this context, that Poland's 1997 constitution contains an innovative provision that may ameliorate, to some extent, concerns over the inclusion of positive rights in constitutions. Article 8(2) provides: “The provisions of the Constitution shall apply directly, unless the Constitution provides otherwise.” This provision effectively bifurcated Poland's constitution. Those rights—predominantly negative—that are capable of self-execution are self-executing. Other rights—predominantly positive—that require affirmative state action are explicitly made subject to legislative determination. So, with respect to civil rights and liberties, Poland has not one but two net constitutions: one, a traditional, self-executing bill of rights American-style; the other, a contemporary (European-style) collection of socio-economic entitlements, which are not directly enforceable. For a more detailed discussion of this provision, see Cole, *Poland's Constitution*,

constitution one must have a sense of Poland's indigenous constitutional history. And the same is surely true for every other country in the world. History matters; so do institutions. Constitutional rules and other legal rules do not arise and evolve in social vacuums. In order to understand the law, one must understand the social and historical context.

This is, of course, more easily said than done. It is a relatively simple matter to read the words of another country's constitution (especially after they have been translated into English); it is not so easy, however, to understand those words as the people of that country understand them. And that, I suspect, is why most scholars do not engage in comparative socio-legal analysis. It is easier to assume that institutions, history, and culture do not matter than to learn enough about them for purposes of sound comparative legal analysis. But, if the goal is truly to *compare* and understand legal systems, including our own, the effort has to be made.

## II. THE IMPORTANCE OF COMPARATIVE INSTITUTIONAL ANALYSIS

To this point, my focus has been on the performance of legal rules and policies *across* countries and cultures. I now turn to comparative *institutional* analysis, which focuses on resolving legal or social problems *within* a single country or culture through alternative institutional arrangements.

Let me begin the discussion on an appropriately negative note. According to the Nobel laureate Ronald Coase,<sup>33</sup> there are always at least three alternative mechanisms for organizing social relations (including economic activities): markets, firms, and governments. Coase observes that all of these mechanisms are "more or less failures."<sup>34</sup> Markets fail, firms fail, and governments fail. Consequently, there is no universal, first-best institutional solution to every perceived social and legal problem regardless of context. We inhabit a second-best world, in which our goal must be to structure social and economic interactions by those institutions and organizations which, in the circumstances, are least likely to fail, or are likely to fail the least.

This raises the important question of what constitutes "failure" (or success for that matter). I follow most economists (and utilitarians in general) in defining "failure" as the inability to maximize social welfare. The main reason markets, firms, and governments all fail, according to New Institutionalists, is the high cost of market transacting, intra-firm trading, and government regulation.<sup>35</sup> If our goal is to maximize social welfare, we need to focus on minimizing those costs—generically known as transaction costs—which include the costs of gathering information, negotiating, formalizing, policing, and enforcing

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*supra* note 2, at 35-36.

33. Coase received the Nobel Prize in Economic Science in 1991.

34. Ronald H. Coase, *The Regulated Industries: Discussion*, 54 AMER. ECON. REV. 194, 195 (1964).

35. See, e.g., Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960), reprinted in RONALD H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 95, 114-19 (1988).



agreements or rules.<sup>36</sup>

Coase suggests that society should prefer an institutional and organizational arrangement that, in the specific case, entails the lowest transaction costs because that institutional and organizational arrangement is most likely to maximize social welfare.<sup>37</sup> Along with a few other economists who have managed to claw their way out of the dreamworld of neoclassical economic theory, Coase recognizes that transaction costs, though often minimized by the market, are sometimes minimized by firms and sometimes, though perhaps less frequently, minimized by government action (whether judicial action or legislative/regulatory action).<sup>38</sup>

For most non-economists, this is not a surprising conclusion; indeed, it is intuitive. But it is revolutionary in economic theory in a couple of distinct ways. First, it lays to rest a fundamental conclusion-*cum*-assumption of the neoclassical world view (and, by association, the Chicago School of Law and Economics): that the market is invariably the most efficient mechanism for allocating entitlements. Second, it challenges a fundamental premise of applied welfare economics: that government intervention is always an appropriate response to market failure. Under Coase's theory, because governments fail too, there is no reason to believe *ex ante* that government intervention to correct some market failure will necessarily solve more problems than it creates.<sup>39</sup> As a normative matter, if government intervention, in some case, *could* efficiently and effectively correct the market failure, then that government intervention *ought* to take place. But if it would cause more problems than it would solve, then, on the whole, society would be better off living with the market failure.<sup>40</sup>

Other economists and legal scholars have built upon Coase's foundation in a couple of different but interwoven ways. Neil Komesar, a law professor at the University of Wisconsin, focuses on questions of *organizational* choice for resolving legal problems or attaining social goals.<sup>41</sup> As a law professor, he is mainly interested in alternative forms of government action: when should a problem be resolved, or a goal be attained, by legislative action as opposed to judicial decision?

Aside from the organizational choices that Komesar and his followers study,

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36. See *id.* at 114; see also EIRIK G. FURUBOTN & RUDOLF RICHTER, INSTITUTIONS AND ECONOMIC THEORY: THE CONTRIBUTION OF THE NEW INSTITUTIONAL ECONOMICS 44-45 (1998). Transaction costs have been estimated to constitute more than one-half of U.S. gross national product in 1970. John Joseph Wallis & Douglass C. North, *Measuring the Transaction Sector in the American Economy, 1870-1970*, in LONG-TERM FACTORS IN AMERICAN ECONOMIC GROWTH 95, 120 (S.L. Engerman & R.E. Gallman eds., 1986).

37. See COASE, *supra* note 35, at 156.

38. See *id.* at 115-18.

39. See *id.* at 118.

40. See *id.* It should go without saying that governments do not act only to correct market failures, but for purposes of this discussion, I assume that they do.

41. See NEIL KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

there are also a variety of distinctly *institutional* choices, where institutions are defined as “the rules of the game;” that is, the rules that structure social relations.<sup>42</sup> These rules may be in the form of explicit laws and procedures or informal social norms of behavior. Within the realm of formal law, different legal *policies* may constitute alternative institutional means of achieving a given social goal.

In environmental policy, for example, we can choose from among several different mechanisms, each of which constitutes a distinct institutional approach and entails different organizational choices. Thus, the choice between imposing an outright ban on some polluting activity, regulating it, taxing it, or not controlling it at all, constitutes an *institutional* choice, requiring comparative analysis of the different policy options—their relative effectiveness, costs, and benefits—under inherently changeable circumstances. This kind of comparative institutional analysis, focusing on alternative “rules of the game,” is closely associated with the work of another Nobel laureate, Douglass North.<sup>43</sup>

So much for the theory. Here is a concrete context for understanding how the theory works, using two examples from environmental protection: one illustrating Neil Komesar’s comparative study of legal organizations and another illustrating Douglass North’s comparative study of legal rules as social institutions.

Much of Professor Komesar’s work is concerned with the question: which organization is better equipped to more efficiently and effectively deal with a certain issue, the courts, through common-law adjudication, or Congress, through legislation and subsidiary regulation? Applying this question to environmental protection, generally: which organization tends to be best for resolving environmental problems?

Before we can begin to answer that question, we need to define another term. What constitutes the “best”? Most economists would answer that the “best” mechanism is the most “efficient”—that mechanism that could achieve society’s goal at the least overall cost or highest net benefit.<sup>44</sup> Legal scholars, too, would likely be concerned with efficiency, though not exclusively; they would more likely define the “best” by some combination of efficiency, fairness, and effectiveness. Unfortunately, many of the disagreements between scholars on issues such as environmental protection boil down to disagreements about the definition of the goal, or what constitutes the “best.” I don’t want to get caught up in those debates, which I consider to be unresolvable. Instead, my goal is simply to explain, using Professor Komesar’s framework, why statutory law has generally come to dominate common law for dealing with environmental problems in the past thirty years. The answer, simply put, is that statutory

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42. DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 3 (1990).

43. *Id.* North received the Nobel Prize in Economic Science jointly with Robert Fogel in 1993.

44. See, e.g., Cento G. Veljanovski, *The Economic Approach to Law: A Critical Introduction*, 7 BRIT. J.L. & SOC. 158, 168-69 (1980).

regulation has been a more efficient *and* effective mechanism than common law adjudication.

Here is a stylized illustration. Assume an air pollutant—let's call it smox—is known to cause harm to human health and the environment. Smox is a byproduct of many industrial activities, so it's pervasive. Virtually every medium-sized city in the country has several sources of smox emissions. Plants that emit smox, in order to be good neighbors, build tall smokestacks to place their smox emissions high into the prevailing winds, which carry them far away from the source. This avoids creating local air pollution problems. The winds carry the smox emissions hundreds of miles away. No one has any idea where the smox emissions from any given source ultimately fall from the sky. But where and when they do, the smox emissions cause health and environmental problems.

Automobiles are another major source of smox emissions. Every single car emits a very small amount of smox—too little by itself to cause any harm. But tens of thousands of cars within a thirty mile or so radius can cumulatively produce enough smox to create a local public-health threat.

One day, several residents of Indianapolis are working in their gardens, when they begin to suffer acute respiratory problems and are hospitalized—some for a few hours, others for several days. The doctors determine the cause of their respiratory problems was smox inhalation.

Assuming for the sake of the argument that this *is* a social problem—indeed, a market failure—requiring *some* government solution,<sup>45</sup> what is the best approach? Statutory regulation of smox emissions or common-law adjudication of claims arising from smox damage?

The common law approach suffers from several inherent problems. First, what is the cause of action? Does the common law provide some mechanism by which victims can sue to recover their hospital bills and lost wages? Well, assuming all of the gardeners in our hypothetical were property owners, they could sue for nuisance. But as a practical matter, they may encounter great difficulties in pursuing a nuisance claim. First and foremost, they have to be able to identify some defendant to sue, which means they have to identify the source or sources of the smox emissions that caused the harm to them. We know that it was not a local factory because their high smokestacks ensure that *their* smox emissions fall far outside of the local area. We might suspect that the source of the smox emissions was local automobile traffic, but then, whom do you sue? Can you sue every single motorist in the city of Indianapolis? And what if the smox that caused the harm *didn't* come from cars? You have to locate some source or sources, perhaps hundreds of miles away, and prove that *their* smox emissions *caused* the harm. Even if that were possible (which it often is not), it would be a very costly proposition. It might not be so bad if all those who were

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45. This is a crucial assumption because, in some cases at least, the costs of correcting the market failure by any governmental action would exceed the benefits to be gained. See COASE, *supra* note 35, at 118. A truly thorough comparative institutional analysis would have to include an assessment of the “no action” alternative.

harm by smog were willing to chip in to cover the expenses associated with proving the claim. But how likely is that?<sup>46</sup>

Let us suppose for the moment that they *could* prove their claim and prevail in court. Suppose they identified a plant in a small town in Ohio as the source of the particular smog emissions that harmed them. But that plant, it turns out, is the town's only significant employer, so that closing it down would have major repercussions on employment and the overall economy of that town and the surrounding region. However, the plant cannot afford either to abate its smog emissions or pay compensation for the harm caused. So any remedy would likely put the plant out of business. Is a common-law court institutionally well-suited to acquire the information and make the kind of *policy* judgments necessary to render a sound *public policy* decision in this case?

I have highlighted just a few of the many problems associated with a common-law solution to this kind of environmental issue, where large distances and time lags exacerbate causation-proof problems, large numbers of parties make efficient bargaining and negotiation unlikely, and the social repercussions of any solution extend beyond the nominal parties to the dispute. In other words, the transaction costs associated with common-law resolution of the smog problem are enormously high.

It is precisely because common-law remedies are perceived to be relatively inefficient mechanisms for resolving environmental problems that the field of Environmental Law has been dominated by statutory regulation over the past three decades. By the 1970s, there was a sense that pro-active regulation of pollution would be more effective, and possibly more efficient, than the case-by-case adjudication of individual common-law claims brought after the fact of harm, especially considering the sizeable causation-proof and other problems inherent to common-law adjudication.<sup>47</sup> The implication was that the transaction costs of dealing with environmental problems through statutory and regulatory means would be lower than the transaction costs of using the common law as the exclusive mechanism for correcting environmental market-failures. No one conducted a transaction-cost analysis to support this supposition. Few, if any, were so naive as to believe that political and administrative processes would be *inexpensive*. But, over the years, the regulatory approach has proven to be relatively efficient and effective at correcting environmental market failures.

A few relevant statistics bear this out. Between 1970 and 1990, the U.S.

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46. This question raises the issues of "hold-outs" and "free-riders," two forms of "strategic behavior" familiar to economists engaged in transaction cost analysis. On these forms of strategic behavior, see Peter S. Menell & Richard B. Stewart, ENVIRONMENTAL LAW AND POLICY 60-63 (1994).

47. See, e.g., Joel Franklin Brenner, *Nuisance Law and the Industrial Revolution*, 3 J. LEGAL STUD. 403 (1974); James Krier, *Environmental Litigation and the Burden of Proof*, in LAW AND THE ENVIRONMENT 105 (Malcolm F. Baldwin & James K. Page, Jr. eds., 1970). On the evolution of environmental law from judicially-enforced torts to complex regulatory system, see, for example, Arnold W. Reitze, Jr., *The Legislative History of U.S. Air Pollution Control*, 36 HOUS. L. REV. 679 (1999).

population grew by eighteen percent, gross national product quadrupled (in constant dollars), electricity production almost doubled, the number of automobiles in use increased by more than sixty-four percent, and total vehicle miles driven increased by seventy percent.<sup>48</sup> Despite all this growth, emissions and ambient concentration levels of *all* major air pollutants fell steadily and impressively. Between 1981 and 1990, for example, emissions of all “criteria” air pollutants fell by an average of twenty-four percent, and ambient concentration levels declined by an average of 22.6%.<sup>49</sup> The air became cleaner everywhere in the country, including in those cities with the nation’s worst air pollution problems.

In Los Angeles, between 1970 and 1990, the automobile population tripled. Meanwhile, ozone emissions in L.A., which come predominantly from cars, declined by forty percent.<sup>50</sup> Today, L.A., which still has one the country’s worst smog problems,<sup>51</sup> violates the federal smog standard less than one percent of the time.<sup>52</sup> It is clear that statutory/regulatory air pollution control has been a major success—perhaps one of the greatest successes of the welfare state. But at what cost?

Actually, the question should be, *at what benefit?*, because the Clean Air Act has, by all accounts, produced sizeable and growing net benefits for society. Indeed, the accumulated net benefits of the Act from 1970 to 1990 are conservatively estimated to exceed four *trillion* dollars.<sup>53</sup> That amounts to more than two-thirds of 1990 U.S. gross domestic product (\$5.8 trillion).<sup>54</sup> On the EPA’s *mean* estimate of net benefits of \$13.7 trillion, the Clean Air Act, between

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48. See COUNCIL ON ENVTL. QUALITY, EXECUTIVE OFFICE OF THE PRESIDENT, ENVTL. QUALITY: THE TWENTIETH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY TOGETHER WITH THE PRESIDENT’S MESSAGE TO CONGRESS 9, 426 tbl. 1, 429 tbl. 5, 446 tbl. 17, & 452 tbl. 25 (1990).

49. See *id.* at 320-22 tbl. 39 & 323 tbl. 40.

50. See GREGG EASTERBROOK, A MOMENT ON THE EARTH: THE COMING AGE OF ENVIRONMENTAL OPTIMISM 182 (1995).

51. Houston recently supplanted L.A. as the city with the nation’s worst smog problem, but not because Houston’s emissions have increased; Los Angeles has simply reduced its emissions more than Houston has. See Marla Cone, *L.A. Breathes Easier as It Hands Off Smog Title; Air: Southland Pollution Fails to Reach Alert Level for First Time in 50 Years, and Houston Is New Ozone King*, L.A. TIMES, Oct. 13, 1999, at A1, available in 1999 WL 26185402. Favorable weather conditions in Los Angeles, and unfavorable weather conditions in Houston, may also have played a role. See *id.*

52. See Jerry Taylor, *Clearing the Air on Urban Smog*, WASH. TIMES, May 19, 1992, at F4, available in 1992 WL 8129129.

53. See U.S. ENVIRONMENTAL PROTECTION AGENCY, THE BENEFITS AND COSTS OF THE CLEAN AIR ACT, 1970-1990 ES-9 (1997).

54. GDP figures are from the U.S. Dept. of Commerce, Bureau of Economic Analysis, National Income and Product Accounts, Gross Domestic Product in Current Dollars (visited May 8, 2000) <<http://www.bea.doc.gov/bea/dn/gdplev.htm>>

1970 and 1990, saved more than two years worth of gross national product.<sup>55</sup> By that measure (and others), we can confidently conclude that the correction of market inefficiencies by statutory air pollution control laws has enhanced social welfare.<sup>56</sup>

This is not to claim that statutes are inevitably more effective and efficient than common law remedies. Surely that is not the case. Even within the field of environmental protection, there are situations in which common law adjudication is a more efficient means for resolving issues than statutory regulation (particularly in cases involving small numbers of parties and entailing few spillover effects). My purpose is merely to illustrate the explanatory value of the kind of comparative institutional analysis that Neil Komesar advocates.<sup>57</sup>

Finally, I want to illustrate the explanatory value of the kind of comparative institutional analysis that Douglass North promotes in a context that brings us full-circle back to Poland. It is an interesting quirk of history that Poland was ahead of much of the rest of the world in designing its environmental laws. I call it an "interesting quirk" because Poland, by the end of the communist era, happened to be one of the most heavily polluted countries in the world.<sup>58</sup> How could it be that such a heavily polluted country was so advanced in designing environmental laws? It just goes to show, as Roscoe Pound noted in 1910, that the law on the books is one thing; the law in action is another.<sup>59</sup>

On paper, Poland's 1980 Environmental Protection and Development Act was impressive.<sup>60</sup> Were it enacted today, many economists and policy analysts would likely hail it as a model of the so-called "New Environmental Law," which is distinguished from the *old* environmental law by its reliance on incentive-based mechanisms, such as effluent taxes, rather than traditional command-and-control regulations.<sup>61</sup> Poland's 1980 Act was one of the first environmental statutes in the world to rely primarily on a tax-based approach to pollution control. Instead of ordering all polluters to install a certain kind of technology to reduce their emissions, the Polish government allowed polluters to emit

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55. See U.S. ENVIRONMENTAL PROTECTION AGENCY, *supra* note 53, at ES-9.

56. See J. CLARENCE DAVIES & JAN MAZUREK, POLLUTION CONTROL IN THE UNITED STATES: EVALUATING THE SYSTEM 278 (1998) ("Taken as a whole, the benefits of the Clean Air Act seem clearly to outweigh the costs."); Alec Zacaroli, *Air Pollution: Economist Blasts EPA Cost/Benefit Report for Clean Air Act; Others Support Agency*, BNA NAT'L ENV'T DAILY, Dec. 16, 1998, available in LEXIS, BNA Nat'l Env't'l Daily File (citing economist Paul Portney for the proposition that, on any analysis, the benefits of the Clean Air Act would outweigh its costs).

57. Professor Komesar would not necessarily concur, however, in my analysis of comparative advantages of a statutory/regulatory approach to environmental protection.

58. See DANIEL H. COLE, INSTITUTING ENVIRONMENTAL PROTECTION: FROM RED TO GREEN IN POLAND 11 (1998).

59. See Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

60. *Ustawa z dnia 31 stycznia 1980 r. o ochronie i kształtowaniu środowiska* (Law of 31 Jan. 1980 on protection and development of the environment), 1980 Dz.U. No. 3, item 6.

61. See generally Daniel P. Selmi, *Experimentation and the "New" Environmental Law*, 27 LOY. L.A. L. REV. 1061 (1994).

however much they wanted, but taxed them for each unit of emissions at a price that was set to make it economically worthwhile for them to pollute less.<sup>62</sup> Additionally, Poland taxed far more polluting activities, and at much higher rates, than many subsequently enacted tax schemes in other countries.<sup>63</sup>

Effluent taxes are considered a progressive form of pollution control because they are, in theory, more efficient than traditional command-and-control measures (where the government simply orders all polluters to install a certain kind of pollution-control device). The tax-based approach reduces *compliance* costs and, it is usually assumed, the *total* costs of pollution control.<sup>64</sup>

The general presumption—favoring effluent taxes over command-and-control—often holds, but it is not invariably true. A great deal depends on the institutional and technological circumstances,<sup>65</sup> as Poland's experiences demonstrate.

Poland's 1980 Environmental Protection Act was conceived in an institutional vacuum. The government was trying to control pollution with prices (in the form of taxes) within an economic system in which prices were essentially meaningless (bearing no consistent relation to value) and irrelevant to producers, who were subject to endemic soft budget constraints; polluters were so heavily subsidized by the central government (which owned and controlled them), that pollution taxes (no matter how high) had no real effect on their profitability. Under those circumstances, a tax-based approach to pollution control could not have been effective, and was not effective in fact.<sup>66</sup>

Simply put, market mechanisms, such as effluent taxes, require efficiently functioning market institutions to be effective. The institutional framework clearly matters for determining the "best" legal-policy approach to achieving a given social goal or resolving a given legal problem.

This story has important implications, even after the fall of communism, because many places in the world continue to be plagued by inefficient or non-existent market institutions, which, as a practical matter, greatly restricts the

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62. See 1980 Dz.U. No. 3, item 6, art. 86. The initial tax rates (fees) were set in *Rozporządzenie Rady Ministrów z dnia 30 września 1980 r. w sprawie opłat za gospodarcze korzystanie ze środowiska i wprowadzanie w nim zmian* (Regulation of 30 Sept. 1980 concerning fees for the economic use and alteration of the environment), 1980 Dz.U. No. 24, item 93.

63. See COLE, *supra* note 58, at 70-71 (comparing environmental taxes in Poland and a variety of other countries in the 1980s, and concluding that no other country "imposed as many charges, covering as many resources and pollution sources, as People's Poland").

64. On the theory of environmental taxes, see, for example, J.B. OPSCHOOR & HANS B. VOS, *ECONOMIC INSTRUMENTS FOR ENVIRONMENTAL PROTECTION* (1989). The assumption that lower compliance costs entail lower total costs is fallacious, however. See generally Daniel H. Cole & Peter Z. Grossman, *When Is Command-and-Control Efficient? Institutions, Technology, and the Comparative Efficiency of Alternative Regulatory Regimes for Environmental Protection*, 1999 WIS. L. REV. 887.

65. See *id.*

66. See COLE, *supra* note 58, at 71, 146-53.

utility of market-based approaches to regulation.<sup>67</sup> Yet, many American legal scholars and policy analysts, who ignore institutional and technological constraints, continue to recommend market-based approaches in virtually *all* circumstances.<sup>68</sup> Their advice, if followed, could well lead, in many cases, to *more* rather than less pollution.<sup>69</sup>

The ultimate lesson from this Coasian tale of comparative institutional analysis is that solutions to perceived social problems must take into account real-world technological and institutional constraints, constraints that can determine the comparative efficiency and effectiveness of alternative approaches to social and legal problems.

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67. See Cole & Grossman, *supra* note 64, at 906.

68. See, e.g., Richard B. Stewart, *Models for Environmental Regulation: Central Planning Versus Market-Based Approaches*, 19 B.C. ENVTL. AFF. L. REV. 547 (1992) (neglecting institutional and technological constraints in recommending that former Soviet Bloc countries immediately adopt market mechanisms for environmental protection, rather than command-and-control instruments).

69. Consider, for example, the institution of a tradeable permitting system in a country without advanced emissions monitoring technologies. If regulators cannot monitor point-source emissions to ensure compliance with emissions quotas, what incentive would rational, profit-maximizing firms have to comply with their quota limits?