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# PRIVATE PROPERTY RIGHTS, ECONOMIC FREEDOM, AND PROFESSOR COASE: A CRITIQUE OF FRIEDMAN, MCCLOSKEY, MEDEMA, AND ZORN

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## I. INTRODUCTION

Private property rights are the basic building blocks of economic freedom. They are a necessary condition for a free society. Therefore, it behooves us to study, in some detail, precisely of what they consist. If we are unclear on this issue, the entire edifice of free enterprise can collapse, as does a house with a poor foundation.

Property rights have many enemies—socialists, environmentalists, feminists, communitarians, Marxists, specialists in black "studies," literary "studies," queer "studies," multiculturalists, sociologists, etc. These philosophies, although staunchly opposed to private property, have at least the virtue, from the point of view of the defenders of laissez faire, of being open and honest about their opposition and can therefore be criticized in a straightforward manner. That is, there is no question in anyone's mind, proponents or opponents of economic freedom alike, where scholarship emanating from these quarters

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stands on the issue of laissez faire capitalism.

The same cannot be said, unfortunately, for Ronald Coase and the large literature of "Law and Economics" engendered in his name. For while this free market oriented Nobel Prize winner is widely interpreted as a *defender* of markets, I shall argue that he should be considered one of the most rigorous *critics* of property rights, and because of this misconception, Coase is a major threat to economic freedom.

This appears to be a harsh and unexpected charge, in that the overwhelming majority of Coase's work is widely interpreted, and rightfully so, as being broadly supportive of the capitalist system. Certainly, this applies to his contribution to our knowledge of the firm[1] and to the economics of the radio spectrum[2] and advertising.[3] My critique of Coase is thus a limited one—it applies only[4] to his study of "social cost."[5] Yet it is not insignificant, because Coase's *The Problem of Social Cost* is tremendously influential and one of the most highly cited articles in all of economics.[6] It has inspired such writers as Posner, Demsetz, Landes, and Calibresi in the "Law and Economics" tradition. So let me be clear on the outset on what I am *not* saying. I do not hold that the entire corpus of Coase's work is contrary to or undermines private property rights and the free market system. Instead, my present criticism applies only to his analysis of social cost.

## II. COASEANISM

What is the essence of Coase's vision on social costs? For Coase, two possible states of the world exist—one in which there are very high transaction costs and the other characterized by low or zero transactions costs.[7] In the case of a dispute between two parties over property in the low-transactions-costs world, the judicial decision will have no effect on the ultimate allocation of resources, because

1. *See* Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

2. *See* Ronald H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959).

3. *See* Ronald H. Coase, *Advertising in Free Speech*, 6 J.L. STUD. 1 (1977).

4. Elsewhere, I have criticized his views on the lighthouse. *See* William Barnett, and Walter Block, "Coase and Van Zandt on Lighthouses" (unpublished manuscript, on file with authro) (criticizing Ronald H. Coase, *The Lighthouse in Economics*, 17 J.L. & ECON. 357 (1974)).

5. *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

6. *The Problem of Social Cost* has been even more heavily cited in law reviews. *See* STEPHEN G. MEDEMA, RONALD H. COASE 169 (1994).

7. *See* Coase, *supra* note 5.

whoever values them more will get the property. If the judge awards the property to the claimant who places a higher value on it, the claimant will retain it. If the judge awards the property to the party that places a lower value on it, he will sell it to the party that values it most (for a fee). Of course, the judge's decision does affect the relative wealth of the two parties, but he does not influence who will ultimately own the property.[8]

The outcome is different in a more realistic high-transactions-cost scenario. Here, by definition, the judge's ruling will stand. Property will not be able to be transmitted from one claimant to the other; the transaction costs of doing so will outweigh the possible benefits from trade made possible by the claimant's differing utility considerations.

In Coase's opinion, the goal of the judge is not to provide justice, but rather to maximize societal wealth, and this can best be attained by ruling in favor of the higher valued user who would have ended up owning the property in question under the assumptions of low transactions costs. In other words, the judicial role is not to act as a sort of central economic planner in cases of property disputes. The judge's role is not promote justice, but to rule in such a manner so as to maximize societal wealth, precisely the aim of the economic czar (or at least a czar with a benevolent disposition). As Coase states: "It is all a question of weighing up the gains that would accrue from eliminating these harmful effects against the gains that accrue from allowing them to continue."[9] According to Currie, "The modern Economics of Law derives from the view that in the light of transactions costs, legal decision-makers should assign rights in ways which maximize the value of society's output."[10] This public policy prescription has been put well by James Ryerson:

> When deciding truly novel cases, judges should not think of their task as preventing harm by honoring rights, but rather as

8. *But see* Walter Block, *Coase and Demsetz on Private Property Rights*, 1 J. LIBERTARIAN STUD. 111 (1977) [hereinafter Block, *Private Property*]. Demsetz responded to the criticisms. *See* Harold Demsetz, *Ethics and Efficiency in Property Rights Systems*, *in* TIME, UNCERTAINTY AND DISEQUILIBRIUM: EXPLORATIONS OF AUSTRIAN THEMES (Mario Rizzo ed., 1979). As a result, a debate ensured. *See* Walter Block, *Ethics, Efficiency, Coasian Property Rights and Psychic Income: A Reply to Demsetz*, 8 REV. AUSTRIAN ECON. 61 (1995) [hereinafter Block, *Ethics, Efficiency*]; Harold Demsetz, *Block's Erroneous Interpretations*, 10 REV. AUSTRIAN ECON. 101 (1997); Walter Block, *Private Property Rights, Erroneous Interpretations, Morality and Economics: Reply to Demsetz*, 3 Q.J. AUSTRIAN ECON., Spring 2000, at 63 [hereinafter Block, *Erroneous Interpretations*].

9. Coase, *supra* note 5, at 26.

10. Martin Currie, Book Review, 63 MANCHESTER SCH. ECON. & SOC. STUD. 109, 109 (1995) (reviewing MEDEMA, *supra* note 6).

> distributing rights and harms in the same way that a free market would have done. For instance, rather than making slippery arguments about which party to a property dispute has an abstract claim to the contested goods, a judge ought to determine which party would have acquired the right to the property by bargaining for it in a perfectly free market. When judges distribute rights in the way that an ideal market would, they, like the market, are maximizing total social wealth.[11]

Is Coase a libertarian? Not at all. Rather, he is more like a socialist. In Coase's view, proper law consists of figuring out what the free enterprise system would have done in the absence of transaction costs, and then imposing this result on people in the real high-transaction-costs world. Namely, like a socialist, he is attempting to impose his view of the good society on people. True, his vision is based on the result he thinks the free enterprise system would have rendered in the hypothetical zero transaction costs world, but this is beside the point. Imposition is imposition.

Several problems exist with Coase's view. For one thing, socialism is socialism, no matter what its genesis. If we have learned one thing from recent economic history, or should have learned from it, it is that socialism does not work.[12]

In what follows, I will defend the analytic framework I have thus far put forth. But I will not do so by resorting to the work of Coase, or his chief disciple Richard Posner, as I have already done.[13] Instead, I will criticize the research of several other followers and supporters of the master. But before entertaining criticism, we must first introduce the libertarian view of property rights.

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11. James Ryerson, *The Outrageous Pragmatism of Judge Richard Posner*, 10 LINGUA FRANCA 26, 29 (2000).

12. *See, e.g.*, Murray N. Rothbard, *How and How Not To Desocialize*, 6 REV. AUSTRIAN ECON. 65 (1992); Murray N. Rothbard, *The End of Socialism and the Calculation Debate Revisited*, 5 REV. AUSTRIAN ECON. 51 (1991); Ludwig von Mises, *Economic Calculation in the Socialist Commonwealth*, *in* COLLECTIVIST ECONOMIC PLANNING (F.A. Hayek ed., 1975) (1933) [hereinafter von Mises, *Economic Calculation*]; LUDWIG VON MISES, SOCIALISM: AN ECONOMIC AND SOCIOLOGICAL ANALYSIS (1951) [hereinafter VON MISES, SOCIALISM]; Hans-Hermann Hoppe, *De-Socialization in a United Germany*, 5 REV. AUSTRIAN ECON. 77 (1991); Hans-Hermann Hoppe, *Socialism: A Property or Knowledge Problem*, 9 REV. AUSTRIAN ECON. 143 (1996); Jeffrey M. Herbener, *The Role of Entrepreneurship in Desocialization*, 6 REV. AUSTRIAN ECON. 79 (1992); Morgan O. Reynolds, *The Impossibility of Socialist Economy, Or A Cat Cannot Swim the Atlantic Ocean*, Q.J. AUSTRIAN ECON., Summer 1998, at 29 (1998); William Keizer, *Two Forgotten Articles by Ludwig von Mises on the Rationality of Socialist Economic Calculation*, 1 REV. AUSTRIAN ECON. 109 (1987).

13. *See* Block, *Private Property*, *supra* note 8; Block, *Ethics, Efficiency*, *supra* note 8; Walter Block, *O.J.'s Defense: A Reductio ad absurdum of the Economics of Ronald Coase and Richard Posner*, 3 EUR. J.L. & ECON. 265 (1996) [hereinafter Block, *O.J.'s Defense*].

## III. LIBERTARIANISM

In the libertarian view, man, a self-owner, comes to the ownership of private property through homesteading. The first one to "mix his labor with the land" (in the terminology of John Locke) becomes the owner of it.[14] He can then legitimately transfer it to another person through any voluntary means, such as barter, trade, sale, gift, or gambling.[15] The function of a legal system, when there are disputes as to who is the proper owner of a property, is to render a judgment not in accordance with whose ownership will maximize societal wealth, but with who is the rightful owner. As a result of this system, justice in property titles can be traced back to original homesteading and any legitimate title transfer. Because possession is nine-tenths of the law, the burden of proof is placed upon he who would overturn extant property titles.

How would an issue of pollution be resolved in the libertarian non-Coasean world? Suppose that B, a homeowner, was settled upon his property when A, a chemical plant, set up shop next door. If A's pollution seeps out onto B's property, A is guilty of a trespass. He should be made to cease and desist, with an injunction granted to B by the court against A, plus an award for damages.

But suppose A was there first, sets up a chemical plant on one acre, and pollutes the entire square mile surrounding this property. Subsequently, B moves into this one square mile area and complains that A is polluting him, B. In this case, A has homesteaded the one acre of land on which his plant sits, plus the right to pollute in the entire square mile. B is "coming to the nuisance" and deserves only the back of the hand from the judge.[16]

With this brief introduction, we are now ready to consider the Coasean philosophy from the perspective of several of its adherents.

## IV. FRIEDMAN

In the view of David Friedman, Coase richly deserved his Nobel Prize in Economics because of his work in social costs, precisely the

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14. *See* JOHN LOCKE, SECOND TREATISE ON GOVERNMENT 123 (David Boaz ed., Free Press 1997) (1690) ("Whatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property.").

15. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 151-53 (1974). Nozick calls this just title transfer.

16. *See* Jerry Harmon Motors, Inc. v. Farmers Union Grain Terminal Ass'n, 337 N.W.2d 427, 431 (N.D. 1983) (discussing the "coming to the nuisance" doctrine).

one I have called into question:

> His contribution to economics has largely consisted of thinking through certain questions more carefully and correctly than anyone else, and in the process demonstrating that answers accepted by virtually the entire profession were false. One side effects [sic] of his work was a new field of economics: economic analysis of law, the attempt to use economic theory to understand legal systems.[17]

Friedman's point of departure is Coase's critique of Pigou on the issue of externalities. In the Pigovian view, when a steel mill pollutes sulfur dioxide that causes bad smells, sore throats, and corrosion on people down wind, something must be done about this to make the manufacturer more of a good citizen. Pigou advocated a system of pollution taxes that would internalize the externality.[18] That is, a penalty for pollution, per ton of pollutants, would give incentives to the perpetrators to reduce their level of incidence.[19]

But Friedman rejects this reasonable if imperfect[20] notion of penalizing polluters on the ground that it is inefficient. He states:

> Suppose that, in a particular case, the pollution does $100,000 a year worth of damage and can be eliminated at a cost of only $80,000 per year (from here on, all costs are per year). Further assume that the cost of shifting all the land down wind to a new use unaffected by the pollution—growing timber instead of renting out summer resorts, say—is only $50,000. If we impose an emission fee of a hundred thousand dollars per year, the steel mill stops polluting and the damage is eliminated—at a cost of $80,000.

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17. David Friedman, *The Swedes Get It Right*, *at* http://www.daviddfriedman.com/Libertarian/The_Swedes.html (last visited Mar. 7, 2003).

18. *See* ARTHUR C. PIGOU, THE ECONOMICS OF WELFARE 192-94 (4th ed. 1932). The libertarian system, in contrast, interprets pollution as a trespass and relies upon lawsuits to solve the problem. *See* Murray N. Rothbard, *Law, Property Rights, and Air Pollution*, in ECONOMICS AND THE ENVIRONMENT: A RECONCILIATION 233 (Walter Block ed., 1990); Robert W. McGee & Walter Block, *Pollution Trading Permits as a Form of Market Socialism, and the Search for a Real Market Solution to Environmental Pollution*, 6 FORDHAM ENVTL. L.J. 51 (1994).

19. In contrast, libertarian law would justify prohibitions and injunctions.

20. Imperfect because the state already has far too much money available to it. *See* JAMES GWARTNEY ET AL., ECONOMIC FREEDOM OF THE WORLD 1975-1995, at 236-39 (1996); Robert Higgs, *Eighteen Problematic Propositions in the Analysis of the Growth of Government*, 5 REV. AUSTRIAN ECON. 3 (1991); Hans-Hermann Hoppe, *F.A. Hayek on Government and Social Evolution: A Critique*, 7 REV. AUSTRIAN ECON. 67 (1994); David Osterfeld, *Social Utility and Government Transfers of Wealth: An Austrian Perspective*, 2 REV. AUSTRIAN ECON. 79 (1988). The government cannot, in any event, be trusted to target taxes to reduce pollution, because it does not have the correct incentives—for example, in the case of taxes on business profits and losses, the government has an automatic reward and penalty system if it does not achieve "optimal" taxes. *See* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1969); MURRAY N. ROTHBARD, POWER AND MARKET: GOVERNMENT AND THE ECONOMY (1970).

> If we impose no emission fee the mill keeps polluting, the owners of the land stop advertising for tenants and plant trees instead, and the problem is again solved—at a cost of $50,000. In this case the result without Pigouvian taxes is efficient—the problem is eliminated at the lowest possible cost—and the result with Pigouvian taxes in [sic] inefficient.[21]

There is a problem with this program—the court has no comparative advantage in discerning the value of land in either various uses or the amount of harm created by various trespasses. These illustrative numbers are just that, illustrative. And yet, numbers are necessary for the entire analysis. Friedman concedes that "[i]n some real world cases it may be difficult to measure what the damage is,"[22] but this does not even begin to touch upon the parlous nature of the case. A major problem is that costs are subjective, not objective. They are the next best opportunity foregone whenever any choice is made. [23] As such, costs are part of the mental apparatus of the economic actor and not available, even in principle, to outside observers such as the judge upon whom Friedman relies so heavily. Friedman is not above utilizing this consideration in his condemnation of Pigou,[24] but he does not apply the same criticism, it would appear, to his discussion of Coase.

How would the law code based upon libertarian private property rights handle this problem?[25] Simple. If the victim can prove that the perpetrator of the invasive soot particles had not first homesteaded these rights and that the chemicals caused damage, not only would he be entitled to remuneration, but he would also be given an injunction that would solve his problem. True, with the precarious state of our industry of environmental forensics, this might be very difficult to establish. But our abilities in this regard have been truncated, even annihilated, by the fact that our courts have long refused to entertain environmental lawsuits.[26] Had the actual law of the land followed the

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21. Friedman, *supra* note 17. *See also* DAVID FRIEDMAN, THE MACHINERY OF FREEDOM: GUIDE TO A RADICAL CAPITALISM (2d ed. 1989).

22. Friedman, *supra* note 17.

23. *See* LONDON SCHOOL OF ECONOMICS, ESSAYS ON COST (1981) (James M. Buchanan & G.F. Thirlby eds., Weidenfeld & Nicholson 1973); JAMES M. BUCHANAN, COST AND CHOICE: AN INQUIRY INTO ECONOMIC THEORY (Liberty Fund 1999) (1969); LUDWIG VON MISES, HUMAN ACTION (Yale University Press 1966) (1949); MURRAY N. ROTHBARD, MAN, ECONOMY AND STATE (Nash Publishing 1970) (1962).

24. Friedman, *supra* note 17 ("Pigou's solution is correct only if the agency making the rules already knows which party is the lower cost avoider.").

25. *See* Rothbard, *supra* note 18.

26. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1780-1860, at 75-79 (1977).

libertarian prescription, there is every reason to believe that we would have an environmental forensics industry equal to the task.

There is another reason, apart from mere efficiency, why Friedman rejects the model of punishing the perpetrator. In his heart of hearts, he does not recognize the very concept of perpetration of property rights violations. He recognizes full well that "[m]oving the victims may not be a very plausible solution in the case of air pollution." [27] When discussing his example of airport noise, Friedman states:

> One solution is to reduce the noise. Another is to soundproof the houses. A third is to use the land near airports for noisy factories instead of housing. There is no particular reason to think that one of those solutions is always the best. Nor is it entirely clear whether the 'victim' is the landowner who finds it difficult to sleep in his new house with jets going by overhead or the airline forced by a court or a regulatory agency to adopt expensive sound control measures in order to protect the sleep of people who chose to build their new houses in what used to be wheat fields—directly under the airport's flight path.[28]

And his implicit solution? Allow judges to determine which alternative maximizes wealth for all concerned. Another problem with this, apart from the subjectivity of costs, is the fact that interpersonal comparisons of utility are not possible.[29] That is, not only is it impossible for judges to know anything about the utility placed on property by the two contending parties, it is even more impossible for the judge to compare them.[30]

How would the problem of airport noise be addressed under the libertarian legal code? Again, it all depends upon who got there first.

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27. Friedman, *supra* note 17.

28. *Id.*

29. *See, e.g.*, MURRAY N. ROTHBARD, THE LOGIC OF ACTION II: APPLICATIONS AND CRITICISM FROM THE AUSTRIAN SCHOOL 88 (1997).

30. What of the possible rejoinder that the judge need not ascertain utilities nor compare them interpersonally, but instead only need know the market value of the property in question and then compare this between plaintiff and defendant? This will not work because it is not the case that there are two goods where the market values of each are easy to obtain. Rather, there is only one good that two parties are claiming and the judge is called upon to determine which party *values* it more. If this is not a paradigm case of necessarily interpersonal comparisons of utility, then nothing is. In any case, an argument based upon market prices would come with particular ill grace from a quarter which is intent upon substituting arbitrary judge-made rule for markets (based upon homesteading and private property rights) in the first place. The Coasean judge is a *substitute* for a market determination, not part and parcel of it. If all property titles were to be determined by Coasean judges—and they would, once people caught on to the fact that property rights are not cast in concrete, but rather depend on the value estimations of Coasean judges—then there would be no market prices for Coasean judges to rely upon in the first place. Thus, this objection argues in a circle.

If the airport was there before the homeowners, then it homesteaded the noise rights. Any subsequent homeowners must put up with the airplane emissions or invest in their own soundproofing. On the other hand, if the housing development was there first, then the airline must fly quiet planes or not at all—if it cannot purchase their property on a voluntary basis. Contrary to Friedman, it is indeed very clear who is the aggressor and who is the victim. The invader is clearly the late arriving airport who violates the homeowners' quiet enjoyment of the the homeowners' property or else the late arriving homeowner who attempts to interfere with the lawful use of airport property with frivolous lawsuits.

Friedman's second example in his case for mutual determination instead of invasion is based on Coase's analysis of *Sturgis v Bridgeman*.[31] Friedman states:

> The owner of one of two adjoining tracts of land has a factory, which he has been running for twenty years with no complaints from his neighbors. The purchaser of the other tract builds a recording studio on the side of his property immediately adjacent to the factory. The factory, while not especially noisy, is too noisy for something located two feet from the wall of a recording studio. So the owner of the studio demands that the factory shut down, or else pay damages equal to the full value of the studio.[32]

Who is in the right, here? The very question does not arise, indeed, *cannot* arise for either Friedman or Coase. Rather, the question translates into whose favor should the judge rule, and the answer is that the decision should be made to maximize wealth. Again, the jurist is called upon to make a determination for which no knowledge can be adduced, adding an unsupportable burden of uncertainty to the law.

I conclude that Friedman's two examples of mutual determination[33] instead of invasion fail. But this conclusion does not go far enough as it leaves open the possibility that other examples might do better than the two he puts forth. This is not the case. Rather, Friedman's view (based on Coase) is an attack on the very foundations of private property. To see this, all we need do is entertain a *reductio ad absurdum*.

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31. *See* Coase, *supra* note 5, at 8-10 (discussing Sturgis v. Bridgeman, 11 Ch. D. 852 (1879)).

32. Friedman, *supra* note 17.

33. *See* Coase, *supra* note 5, at 2 (discusssing the "reciprocal nature of the [externality] problem.").

If there are no criminal perpetrators or victims in disputes over property, how can rape be analyzed? For the ordinary pre-Coasean or libertarian judge, matters are simple. The rapist attacks the victim and that is the end of the matter as far as assigning blame is concerned. But for Friedman, "a legal rule that arbitrarily assigns blame to one of the parties"[34] is at best capricious. A correct judicial determination "only gives the right result if that party happens to be the one who can avoid the problem at the lower cost."[35] Now, of course, Friedman might argue that in the typical case, it is far less costly for the rapist to ignore his cravings than for the victim to succumb. But this is not necessarily so. We can easily imagine a situation where the rapist is in dire straights, having been, say, away at sea for months without benefit of female companionship, and the women is, say, a lady of the evening, or a person with such low self-esteem that even in her own estimation her likes and dislikes matter far less than those of others.[36] Here, the logical implication of Friedman and Coase presumably is that the woman, in withholding her favors, is actually the aggressor and must be found guilty by a court of law because she is the least cost avoider, and similarly, that the rapist was only taking that which is properly his if wealth is to be maximized. When put in this way, the Chicago Law and Economics tradition is hardly worthy of serious consideration.[37]

In Friedman's view, not only is the Coase model capable of dealing with externalities, it is also crucial in explaining property rights:

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34. Friedman, *supra* note 17.

35. *Id.*

36. Needless to say, I am only positing this situation with tongue in cheek. In actual point of fact, my claim is that no one can know any such thing about the rapist and his victim. But Friedman and Coase claim such insight. Well, then, let them deal with the scenario as depicted in the text.

37. Friedman also buys into the notion of market failure. He states, "When we observe externality problems (or other forms of market failure) in the real world . . . ." Friedman, *supra* note 17. Let it be stated, loud and clear, there are *no* market failures to be found in the real world. Consider the case where one person invades the person or property of another, either by outright trespass or the trespass of smoke particles (pollution). Here, the perpetrator has physically harmed the victim, and the victim has no recourse at law. But this is a case where the *state* has failed in its self-proclaimed duty to protect private property rights. Law is typically a monopoly of government. If the victim has no recourse at law, it is because it is not forthcoming from the state. This, then, is a "failure," but it is government failure, not a market failure. Then there are external economies. Here, one person benefits another, but cannot, in law, bill the latter for this largesse. This is not a "failure" of any kind, let alone a "market failure." Rather, it is part and parcel of civilized living, where we all help each other out in a myriad of ways. Rothbard states of this situation: "A and B often benefit, it is held, if they can force C into doing something. . . . [A]ny argument proclaiming the right and goodness of, say, three neighbors, who yearn to form a string quartet, forcing a forth neighbor at bayonet point to learn and play the viola, is hardly deserving of sober comment." ROTHBARD, *supra* note 29, at 178.

> [T]the law should define property in such a way as to minimize the costs associated with the sorts of incompatible uses we have been discussing—factories and recording studios, or steel mills and resorts. The first step in doing so is to try to define rights in such a way that, if right A is of most value to someone who also holds right B, they come in the same bundle. The right to decide what happens two feet above a piece of land is of most value to the person who also holds the right to use the land itself, so it is sensible to include both of them in the bundle of rights we call 'ownership of land.' On the other hand, the right to decide who flies a mile above a piece of land is of no special value to the owner of the land, hence there is no good reason to include it in that bundle.[38]

This is a weak foundation for an entire corpus of law. Not that the Chicago School and libertarianism do not see eye to eye on this particular issue. That is, we reach identical conclusions on rights to airspace, respectively, two feet and one mile above land. Yes, the airline should own the latter, and the farmer or householder the former. But the reasoning of the libertarian legal philosophy is very different. For the libertarian, it is not a matter of comparing the incomparably different evaluations people place on goods and services. Rather, the considerations are far more objective. The landowner, typically, has not homesteaded airways in the sky but has made use of the airspace immediately contiguous to and above his land, while the very opposite situation exists for the airlines. There is no difficulty in this relatively easy case.

When we consider ownership of the human body, things unravel even further for the Coase and Friedman position. The Chicago view on control over persons undoubtedly would be that we each own the bodies we inhabit. Using the airline example above as analogy, the Chicago view would presumably be that I am a lot closer to my arm than you are, and similarly you are a lot closer to the one attached to you than I am, and thus we should each control our own arms. However, once we bring forth the case of the needy rapist and the woman with little self-esteem, the coherence of the so-called "Law and Economics" approach begins to evaporate. It is entirely possible to concoct a scenario where wealth will be maximized if I control all four arms instead of each us controlling our own two. In this case, the reductio would be that I am the proper owner of your arms, whether you like it or not.

From the libertarian perspective, a Chicagoesque defense of private

38. Friedman, *supra* note 17.

property rights is problematic. It is no exaggeration to claim that property rights, as such, are non-existent in the Coasean system. Take any of Friedman's examples—the airport versus the homeowner, the recording studio versus the factory, the steel mill polluter versus the pollutees, to say nothing of the rapist versus the rape victim or my ownership of your arms. Cast your mind back on the numerical examples furnished by Friedman based on those offered by Coase. The determination of property rights depends, intimately, on those numerical examples. Let them be transposed, and the Coasean judge must reverse his finding. These numbers, in turn, are based upon relative prices. But relative prices have a nasty habit of changing. That is, at time period one, a plaintiff sues the defendant and wins. At time period two, under a very different set of prices but with the same set of issues, the judge takes the completely opposite tack. The point is, under such a system *there can be no such thing as property rights*! Friedman appears to acquiesce in this sentiment when he states that "[t]here is no general legal rule that will always assign [property] to the right [person],"[39] but he doesn't seem to realize how devastating this is for legal philosophy.

Without any fixed horizons, such as that provided by the libertarian theory of homesteading of original property and appropriate title transfer, we are at sea without a rudder. We have to make things up as we go along.[40] The only thing we can know for sure is that under such a legal regime, the wages of members of the so-called Law and Economics School will rise,[41] as they will have a bit of an inside track in predicting what a Coasean-oriented judge is likely to do.[42]

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39. *Id.*

40. *See* Nahid Aslanbeigui & Steven G. Medema, *Beyond the Dark Clouds: Pigou and Coase on Social Cost*, 30 HIST. OF POL. ECON. 601 620 (1998):

> [T]he determination of the appropriate mechanisms for dealing with externalities . . . can only be done through a case-by-case balancing of the benefits and costs associated with various alternatives. And, from an economic perspective, the goal in choosing between them should be to maximize the value of output.

*Id.* at 620.

41. I have no evidence that this consideration motivates Coase and his followers.

42. This appears to contradict the statement made in the text that there are no principles. If a finding can be predicted, then this would appear to imply that there *are* underlying principles. The reconciliation is simple—it is a matter of local equilibria versus universal ones. All Coaseans typically think alike. They arbitrarily assign an equal weight to the utility of all people. They use present market prices as indications of value (in contrast, we know that, given consumer and producer surplus, market prices are only indications of minimal value). It takes no genius to figure out where the Coasean judge is likely to come out on a specific issue. But underneath this predictability is a core of irrationality and arbitrariness. We simply have no justification for using market prices to solve our inability to make interpersonal comparisons of utility.

## V. McCLOSKEY

Not only is McCloskey a supporter of Coase, she might well be characterized as a "super" supporter. This is because she takes the position that only she and a handful of colleagues really know the true Coase; all other would-be devotees do not fully understand the master and hence cannot even be characterized as apostles. States McCloskey: "Something like a dozen people in the world understand that the 'Coase' theorem is not the Coase theorem. (I'll [McCloskey] adopt the convention of putting quotation marks around the non-Coasean 'Coase' theorem.) One of this select group is Ronald Coase himself, so I suspect we blessed few are right."[43]

What, then, is the fake "Coase" theorem and which is the true Coase theorem? The former has to do with the zero or very low transaction cost world. It states, as we have seen, that under an assumption of low transaction costs "the allocation of resources is independent of the initial assignment of property rights."[44] This is because no matter what the decision of the judge, the person who values the property more will either keep it if he is awarded it, or buy it if he is not.[45] The latter, in contrast, has to do with the assumption of significant transaction costs. States McCloskey: "Coase's actual point, the core of Coasean economics, was to note what happens in the many important cases in which transaction costs can*not* be neglected. If the situation *does* have high transaction costs, then it *does* matter where the liability for pollution is placed."[46]

A few comments about this. First, it is exceedingly unlikely that only a "corporal's guard" of economists understand this distinction. The profession for the most part understands that while the zero transactions cost model is of theoretical interest (e.g., akin to "perfect competition"), the high transaction cost assumption is actually far

43. Deirdre McCloskey, *Other Things Equal: The So-Called Coase Theorem*, 24 E. ECON. J. 367, 368 (1998) [hereinafter McCloskey, *Other Things Equal*]. In an earlier work McCloskey averred that there were only two economists who fully understood Coase's contribution: she and Coase. *See* Donald N. McCloskey, *The Lawyerly Rhetoric of Coase's* The Nature of the Firm, 18 J. CORP. L. 425, 428 n.17 (1993). Five years later, this number had risen to a dozen. McCloskey, *Other Things Equal, supra*, at 368. Is this part of the learning curve for McCloskey, or has she become more mellow with the passage of time?

44. McCloskey, *Other Things Equal, supra* note 43, at 367 (quoting WILLIAM F. SHUGHART ET AL., MODERN MANAGERIAL ECONOMICS: MANAGERIAL THEORY FOR BUSINESS DECISIONS 577 (1994)).

45. McCloskey accepts this point, but regards it as an unimportant truism. As mentioned in footnote 8, I have called this opinion into question. *See* Block, *Private Property, supra* note 8.

46. McCloskey, *Other Things Equal, supra* note 43, at 368.

more important for understanding the real world.[47]

Second, if there is any corporal's guard floating around, it is not the one cited by McCloskey. Rather, it consists of fewer than a half-dozen economists who have rejected, in McCloskey's terms, both the "Coase" theorem and the Coase theorem. I refer to those who have criticized both versions, but particularly the second one, without the quote marks, the one favored by McCloskey, as nothing less than a socialist attempt to undermine the institution of private property rights.[48] That is because, in short, when the judge's decision "does matter," scholars in the Chicago tradition are calling for the judge to make himself into a socialist central planner.[49] Let me put this into other words. According to McCloskey, there are only a few economists in the entire profession who really understand Coase; e.g., that his true contribution has to do with the real world, the one of high transaction costs. This seems to be an erroneous claim, in that there are thousands of economists, many of whom have grasped this important distinction. Certainly, I stress this to my own students, as do my colleagues who teach this material. No. If there are only a "few economists" who must be distinguished from the entire profession in terms of Coasean analysis, it is *not* those who, according to

47. Since reading this claim of McCloskey's, I have taken an informal survey of the profession. Those who in my opinion qualify as making this distinction certainly include David D. Friedman, Steven G. Medema, Nahid Aslangeigui, and Thomas McCraw. *See* MEDEMA, *supra* note 6, at 208-10; Aslangeigui & Medema, *supra* note 40, at 604; Thomas McCraw, *Lives of the Great Economists*, 55 J. ECON. HIST. 683, 690-91 (1995) (book review); Steven G. Medema, *Wandering the Road from Pluralism to Posner: the Transformation of Law and Economics in the Twentieth Century*, *in* FROM INTERWAR PLURALISM TO POSTWAR NEOCLASSICISM: ANNUAL SUPPLEMENT TO VOLUME 30 OF HISTORY OF POLITICAL ECONOMY 202, 214 (Mary S. Morgan & Malcolm Rutherford eds., Supp. 1998) [hereinafter Medema, *Transformation of Law and Economics*]; Friedman, *supra* note 17. Another economist, Martin Currie, goes so far as to claim "[t]hat Coase was never really interested in what is often called a 'Coasean world' of zero transaction costs is now widely recognized, albeit somewhat belatedly." Currie, *supra* note 10, at 109. We have already reached the dozen mark. Are there really no others? What about Currie's claim of wide recognition?

48. *See* GARY NORTH, THE COASE THEOREM: A STUDY IN ECONOMIC EPISTEMOLOGY (1992); Block, *Ethics Efficiency*, *supra* note 8; Block, *O.J.'s Defense*, *supra* note 13, at 265; *A Reductio Ad Absurdem of the Economics of Coase and Posner*, 3 EUR. J.L. & ECON. 265 (1996); Block, *Erroneous Interpretations*, *supra* note 8; Roy E. Cordato, *Subjective Value, Time Passage, and the Economics of Harmful Effects*, HAMLINE L. REV. 229 (1989); Elizabeth Krecke, *Law and Market Order: An Austrian Critique of the Economic Analysis of Law*, *in* COMMENTARIES ON LAW AND ECONOMICS: 1997 YEARBOOK 86 (Robert W. McGee ed., 1998); Rothbard, *supra* note 18, at 233. *See also* Walter Block et al., *The Paradox of Coase as a Defender of Free Markets* (unpublished manuscript in author's possession).

49. Albeit of the unique, not to say weird, type of central planner that attempts to predict the future course of action on the market, and then coercively mandate that this be made so.

McCloskey, fully understand Coase. Rather, this small group of dismal scientists are the ones who, fully comprehending Coase in both manifestations distinguished by McCloskey, nevertheless *reject* Coase's analytic framework.[50]

McCloskey follows Coase in denying that there can be invasions, or trespasses, or intrusions onto the person or property of anyone. Rather, all is mutual determination. She states: "'[W]hoever is generating the externality' is not a meaningful notion."[51] By "externality," McCloskey is obviously referring to negative externalities, and not those of a pecuniary nature either, but rather physical ones.[52] What this means is that not only is it false to claim that people can invade each other, but that it is actually meaningless to make such a claim. And why is this? McCloskey answers with an example concerning noise pollution around airports:

> [We] usually think of the airplane as *the* cause. But wait. Suppose that there were no ears close to the airport. (Or that ears were easily protected from the noise.) In that case the noise would be harmless, and it would be silly to curb it. So the presence of ears is just as much a 'cause' as the vibrations of the planes' motors.[53]

Note that McCloskey places quotation marks around the word "cause." For her, as we have seen, this indicates an illegitimacy of the concept in question. Thus, in the airport noise problem, there is no causal agent. Rather, both are responsible.

I will tell you what, Professor McCloskey. I will box your ears with my fist, and then you can tell me that your ear is just as much a causal agent of this collision as is my fist. This is dangerous nonsense.[54] Of course, I could not box McCloskey's ears if she did not have any of these appendages or if they were not geographically available for a punch. Yet given their presence, it is utterly misleading and pernicious to deny that I was the cause of the assault and battery and she the victim. The only way to make sense of this position is to assume that somehow I am the proper owner of McCloskey's ears (say, I have previously purchased them, or the right, at least, to box

50. These economists are listed *supra* note 48.

51. McCloskey, *Other Things Equal, supra* note 43, at 369.

52. In negative externalities, or external diseconomies, A harms B in a way that the law refuses to punish. In external pecuniary diseconomies, A harms by through financial considerations; e.g., he under prices him, and attracts customers away from him. In external physical diseconomies, A engages in actual physical abuse of B or his property, i.e. pollution.

53. McCloskey, *Other Things Equal, supra* note 43, at 370.

54. But not meaningless. We know exactly where McCloskey is coming from.

them whenever I feel like it). And this is precisely the answer to the noise pollution paradox.

The point is, "the presence of ears is just as much a 'cause' as the vibrations of the planes' motors" only if it is completely unknown, before the fact, who is the owner of the noise rights. The same applies to the ear boxing case. We must say that "the presence of ears is just as much a 'cause' as the fist throwing," but we would only do so if we were completely agnostic as to the question of who owned the ears and the fist. Yet we are not. We have a perfectly good theory to tell us who owns which ears and which fists. It is called the homesteading theory. That is, ever since I was a small child I homesteaded, e.g., used or mixed my labor with both my ears and fists and so did McCloskey, respectively. We all know that my boxing of her ears was an affront, a physical outrage upon her person, because we know who owns precisely what in this case. But the same obtains with regard to the ears versus the noisy planes. If the airport was in operation before the advent of the homeowners and their ears, then it is the *ears* that are the aggressor if they or their owners complain about the noise. And if the homeowners were there first, then it is indeed the noisy airplanes that take on this evil role. The same principle underlies both cases, and, in logic, they must each be treated in the same manner.

One last point. According to McCloskey, "Coase is forever saying that this or that proposal for a public policy entails knowing things that no economist can in fact know."[55] True, too true. But the same criticism applies to Coase's own favorite nostrum, that the judge should award property in the real world of positive transaction costs to whomever would have ended up owning them in the never-never land of zero transaction costs.[56] That is, the judge should award the property to the person who values it more. Not only judges, but even more exalted economists, do not know these values and *cannot* know them.

## VI. MEDEMA

When it comes to Coase's famous theorem, it is no exaggeration to say that Steven Medema is a complete devotee. Medima has written a plethora of articles explaining, defending, and justifying the Coase

55. McCloskey, *Other Things Equal, supra* note 43, at 370.

56. See, I can tell the difference between the Coase theorem and the "Coase" theorem. Do I get to join McCloskey's elect dozen?

theorem and attacking its critics.[57]

Medema has offered the following numerical example in an attempt to show the superiority of Coasean economics over that of a more traditional or libertarian variety:

> [C]onsider a factory, in an isolated location, that dumps chemical waste into a river. Suppose that land downstream is subsequently developed by farmers who use the water from the river to irrigate their crops. Finding that the chemicals in the river cause substantial damage to their crops ($1 million per year) the farmers file suit, asking that the factory be forced to compensate them for the crop damage. Under the traditional common-law rule of "coming to the nuisance," the factory would be allowed to continue its dumping in the river. However, suppose that the factory could install filtering devices that would eliminate the chemical pollution at a cost of $0.5 million per year. The economic approach would suggest that the factory should be forced to compensate the farmers for the damage, in which case the factory would choose to install the filters, since the cost of doing so would be less than the cost of paying the damages. In this case, the traditional common-law rule leads to an inefficient outcome, since it does not generate the least-cost response to the nuisance dispute.[58]

There are several difficulties with this example. First, a note on nomenclature. How does it come to be that Coase's approach is "the economic approach"? Would it not be more seemly not to imply that all economists, perforce, must agree with Coase? Could not some more neutral language be employed to characterize one's own position?

Second, under these conditions, the farmers would scarcely "come

57. *See, e.g.*, Richard O. Zerbe, Jr. & Steven G. Medema, *Ronald Coase, the British Tradition, and the Future of Economic Method*, *in* COASIAN ECONOMICS: LAW AND ECONOMICS AND THE NEW INSTITUTIONAL ECONOMICS 209 (Steven G. Medema ed., 1997); Steven G. Medema & Warren J. Samuels, *Ronald Coase and Coasean Economics: Some Questions, Conjectures and Implications*, *in* THE ECONOMY AS A PROCESS OF VALUATION 72 (1997); MEDEMA, *supra* note 6; Medema, *Transformation of Law and Economics*, *supra* note 47; Aslanbeigui & Medema, supra note 40. Unfortunately, Medema has never considered any of the criticisms of Coase launched by the writers mentioned *supra* note 47. According to Deborah Spencer, in ECONOMICS AND LAW: FROM POSNER TO POST-MODERNISM by Nicholas Mercuro and Steven G. Medema, the authors discuss "five approaches [to law and economics], includ[ing]: Chicago School Law and Economics, Public Choice Theory, Institutional Law and Economics, Neoinstitutional Law and Economics, and Critical Legal Studies." Deborah Spencer, Book Review, 33 J. ECON. ISSUES 1045, 1045 (1999) (reviewing NICHOLAS MERCURO & STEVEN G. MEDEMA, *Economics and the Law: From Posner to Post-Modernism* (1997)). They do not discuss the libertarian or Austrian (e.g., the one that takes seriously subjective and alternative costs, and the impermissibility of interpersonal comparisons of utility) school of law and economics.

58. Medema, *Transformation of Law and Economics*, *supra* note 47, at 212-13.

to the nuisance." If traditional—instead of Coasean—judges determine the merits of the farmers' lawsuit, they would know that it would be thrown out as frivolous. After all, by stipulation, the chemical company was there first. Therefore, it had, in effect, homesteaded the rights to dump waste in the river.

Third, the river itself, at least in a libertarian society, would be privately owned.[59] Consequently, there would be no question of such trespassing as dumping wastes into a privately-owned river without the owner's permission. The owner would sell water services to downriver farmers. He would do so given that what they paid him (up to $1 million) would exceed the reduction in rent from the chemical plant (up to $0.5 million) that the owner would bear if he insisted on the filtering devices.

Fourth, there is simply no warrant for accepting as gospel Medema's illustrative numbers. They are concocted out of whole cloth. Medema implicitly assumes that a judge is capable of generating these himself. Yet, if costs are subjective, the judge cannot.

Fifth, Medema's conclusion that "the traditional common-law rule leads to an inefficient outcome, since it does not generate the least-cost response to the nuisance dispute"[60] only holds true in the immediate short run, but not necessarily over the long run. We have to realize that judicial decisions of this sort render all property rights less secure. If we can so cavalierly jettison "coming to the nuisance," a bedrock of civilized society, for just a momentary gain, there will be all sorts of dire implications for Chicagoites' beloved principle of wealth maximization. People with acute hearing will locate themselves near airports and factories. With a sympathetic Coasean judge on the bench, who knows? Maybe one of them will actually determine that it would be cheaper and easier for those who have homesteaded these relevant noise rights (e.g. the airport) either to install soundproofing equipment or to make financial payments to these plaintiffs in search of a deep pocket.

Sixth, suppose that a few months after the factory-farmers case has been decided, relative prices change so that chemical filters no longer cost $0.5 million but instead cost $1.5 million.[61] This change would

59. *See* Walter Block, *Institutions, Property Rights and Externalities: The Case of Water Quality*, *in* AGRICULTURE AND WATER QUALITY: PROCEEDINGS OF AN INTERDISCIPLINARY SYMPOSIUM 191 (Murray H. Miller et al. eds., 1992).

60. Medema, *Transformation of Law and Economics*, *supra* note 47, at 213.

61. I say this for the sake of argument. My view is that such numbers are highly

mean that a new lawsuit would be brought, and if a Coasean judge were determining the outcome, the result would be reversed.[62] If so, there would be extra costs without end, because relative prices are continually changing in any economy earmarked by even a modicum of reality, something in which Coaseans, inexplicably, take pride. Medema approvingly cites two other followers and defenders of Coase, Alchian and Demsetz[63], as follows: "the more uncertainly is diminished, [the more it] tends to promote a more efficient allocation of resources."[64] But one would have thought that, given the weakness of his position in this regard, this was a topic from which he would have steered clear.

Medema also claims some sort of affinity between Coasean economics and markets:

> If rights over scarce resources are allocated through the market for all manner of goods, why would the same not apply to rights over pollution, the ability to breach contracts, tortious harms, and so on? To a mind-set that finds market allocation most congenial, the Coase theorem opened up a vast new scope for the operation of markets . . . . The implications of this insight were straightforward and quickly seized upon: (1) Let the market work in allocating rights; (2) facilitate the working of the market by removing legal impediments to its operation; and (3) when (1) and (2) are not possible, assign rights or design legal rules to mimic the outcome of a competitive market, the outcome that would have obtained in any event had there not been impediments to the market's operation.[65]

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problematic.

62. Actually, we have to take this claim with a grain of salt, because Coasean law resembles a crapshoot more than anything. With flesh-and-blood judges called upon to replace private property rights with their own subjective opinions as to costs and benefits, anything can happen.

63. For the Demsetz-Block debate on this issue, see footnote 8, *supra*.

64. Medema, *Transformation of Law and Economics*, *supra* note 47, at 211.

65. Medema, *Transformation of Law and Economics*, *supra* note 47, at 221. Medema makes much of the Chicago approach to antitrust and the market-oriented nature of the Chicago approach generally. *Id.* at 209-10. Yet, there is not a single economist associated with the Chicago School who has called for the complete and total elimination of this pernicious law. In sharp contrast, this is not at all true of the Austrian School. *The Microsoft Corporation in Collision with Antitrust Law*, 26 J. SOC. POL. ECON. STUD. NO. 1, at 287-302; DOMINICK T. ARMENTANO, ANTITRUST AND MONOPOLY: THE MYTHS OF ANTITRUST (1972); DOMINICK T. ARMENTANO, ANTITRUST AND MONOPOLY: ANATOMY OF A POLICY FAILURE (1982); DOMINICK T. ARMENTANO, THE CATO INSTITUTE, ANTITRUST POLICY: THE CASE FOR REPEAL (1991); DONALD ARMSTRONG, THE FRASER INSTITUTE, COMPETITION VERSUS MONOPOLY: COMBINES POLICY IN PERSPECTIVE (1982); WALTER BLOCK, THE FRASER INSTITUTE, AMENDING THE COMBINES INVESTIGATION ACT (1982); Walter Block, *Austrian Monopoly Theory - a Critique*, 1 J. LIBERTARIAN STUD. 271 (1977); Jack High, *Bork's Paradox: Static versus Dynamic Efficiency in Antitrust Analysis*, 3 CONTEMP. POL. ISSUES 21, 21-34 (1984); MURRAY N.

Apart from (2), removing governmental interferences with markets, there are problems here. For one thing, it is a total confusion to call for the market to allocate rights, at least from Medema's point of view.[66] The market is the concatenation of all voluntary trades in a society; these interactions are accomplished on the *basis* of property rights. When these rights are in dispute, it is typically the government that determines wherein they lie. Thus, when I trade you my pen for your shoelace, this is part and parcel of the market. When we have a dispute as to who is the rightful owner of these objects, voluntary trade, by definition, is insufficient to determine justice in such a matter.[67]

Also, to "mimic" a market is not at all the same as to *have* a market. Indeed, a case could easily be made that they are opposites. After all, this was the burden of the market socialists.[68] They, too, saw

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ROTHBARD, MAN, ECONOMY AND STATE (1970); William Shugart II, *Don't Revise the Clayton Act, Scrap It!*, 6 CATO J. 925 (1987). For a critique of tradeable emissions rights, see Martin Anderson, *George Bush, Environmentalist*, CHRISTIAN SCIENCE MONITOR, Jan. 4, 1989, at 19. *See also* McGee & Block, *supra* note 18; Rothbard, *supra* note 18.

66. Not even from a pure libertarian perspective can the market allocate rights. There have been—and are to be sure—examples of private law enforcement. *See* RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW 216-37 (1998); Bruce L. Benson, *Enforcement of Private Property Rights in Primitive Societies: Law Without Government*, 9 J. LIBERTARIAN STUD. 1 (1989); Bruce L. Benson, *Customary Law With Private Means of Resolving Disputes and Dispensing Justice: A Description of a Modern System of Law and Order Without State Coercion*, 9 J. LIBERTARIAN STUD. 25 (1990); Hans-Hermann Hoppe, *The Private Production of Defense*, 14 J. LIBERTARIAN STUD. 27 (1998); Murray N. Rothbard, *The Anatomy of the State*, 1 RAMPART J. 1, 20-21 (1965); MURRAY N. ROTHBARD, FOR A NEW LIBERTY 219-52 (1973); MURRAY N. ROTHBARD, THE ETHICS OF LIBERTY (1982); Edward Stringham, *Market Chosen Law*, 14 J. LIBERTARIAN STUD. 53 (1998); Patrick Tinsley, *Private Police: A Note*, 14 J. LIBERTARIAN STUD. 95 (1998); WILLIAM C. WOOLDRIDGE, UNCLE SAM, THE MONOPOLY MAN 94-127 (1970). But, in this view, rights are based upon homesteading, not arbitrary court decisions.

67. I abstract, as the Chicagoites certainly do, from the possibility of private courts and police.

68. *See* Abba P. Lerner, *Economic Theory and Socialist Economy*, 2 REV. ECON. STUD. 51 (1934); ABBA P. LERNER, THE ECONOMICS OF CONTROL (MacMillan 1994) (1943); Oscar Lange, *On the Economic Theory of Socialism*, 4 REV. OF ECON. STUD. 123 (1936); OSCAR LANGE & FRED M. TAYLOR, ON THE ECONOMIC THEORY OF SOCIALISM (Benjamin E. Lippincott ed. 1938). *But see* von Mises, *Economic Calculation*, *supra* note 12; VON MISES, SOCIALISM, *supra* note 12. Medema gives a rather positive review of Christman's socialist and egalitarian attack on property rights. *See* Steven G. Medema, Book Review, 33 J. ECON. LITERATURE 1387, 1388 (1995) (reviewing JOHN CHRISTMAN, THE MYTH OF PROPERTY (1994)). Christman characterizes as a "myth . . . [the idea] that there is such a thing as less versus more government interference with property rights," and harks to what Medema calls the "fundamental indeterminacy of the concept of property." *Id.* at 1387-88. He does not, however, go so far as to embrace Proudhon's notion that "property is theft." This, I suppose, would be too determinate for him. Medema further buttresses his socialist credentials by claiming, under the heading of "*We Are All Planners Now*," "there is no a priori distinction between government planning and the market nor between government planning and corporate planning." Steven G. Medema, *Coase, Costs, and Coordination*, 30 J. ECON. ISSUES 571, 575 (1996) [hereinafter

all sorts of market imperfections and market "failures." The results of real, live markets were anathema to them. They, too, wished to "mimic" what they thought would be the results of markets unsullied by these inadequacies.[69] Medema has placed the Chicagoites in very strange company indeed.[70]

Medema and Aslanbeigui also see the supposed reciprocal nature of property rights violations as the core of the Coasean system:

> While, for example, the polluter's activity harms the victim, reducing that harm imposes costs (or harm) on the polluter. The real question to be decided is, Should A be allowed to harm B or should B be allowed to harm A? The guiding rule *should* be to avoid the more serious harm.[71]

Medema and Aslanbeigui go so far as to claim that in cases of this sort "the very idea of causation is a misnomer, because both parties cause the damage."[72]

What are the drawbacks of this position? First, it conflates normative and positive economics. How else are to we interpret the "should" in the previous quote? There is simply no way these authors can legitimately draw a normative "should" from a set of positive premises.

Second, Medema himself is fully aware of the fact that costs are subjective and thus not available to judges in their attempt to centrally plan the economy. Medema cites Coase to the effect that "the cost of using the machine is the highest receipts that could be obtained by the employment of the machine in some alternative use."[73] But if the essence of costs is foregone opportunities, and these are subjective[74]

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Medema, *Coase, Costs, and Coordination*]. *But see* F.A. HAYEK, NEW STUDIES IN PHILOSOPHY, POLITICS, ECONOMICS AND THE HISTORY OF IDEAS 232-36 (1978). And why is this? Because, according to Medema, "[t]he workings of markets and firms . . . are bound up in and determined by law—that is, by government planning." Medema, *Coase, Costs, and Coordination*, *supra*, at 576. Evidently, for Medema, law and government are indistinguishable. Hence, there could be no law in a stateless society and there can be no such thing as a lawless government. One wonders what he would think of Nazi or Communist states, or those of Idi Amin or Robert Mugabe.

69. For another advocate of mimicking markets, see RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 230-32 (3d. 1986).

70. Well, perhaps not so strange. A case could be made out that Chicagoite nostrums such as school vouchers, flexible exchange rates (between fiat currencies, as opposed to market derived money) and tradable emissions rights are nothing but attempts to plan the economy through market socialism.

71. Aslanbeigui & Medema, *supra* note 40, at 601, 603 (citing Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 19 (1960)) (emphasis added).

72. *Id.* at 613 (citing Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 19 (1960)).

73. MEDEMA, *supra* note 6, at 55.

74. *See, e.g.*, BUCHANAN, COST AND CHOICE, *supra* note 23.

and knowable only to the economic actor himself, how can judges ever "maximize the value of society's output"? What becomes of Coase's "cost-benefit analysis"? Medema vouchsafes us no answer.

Third, to characterize causation as a "misnomer" is to toss it out of the legal realm. But where, oh where would we be in legal analysis without this concept? The ramifications of this aspect of the "Law and Economics" movement are monumental and appalling. Defendants' counsel would have a field day: "What, my client is charged with XYZ? It is impossible to attribute this to him in the absence of the doctrine of causation. If there is no such thing as cause and effect, if it is a veritable 'misnomer,' then you might as well hold guilty the judge, or myself, or the prosecuting attorney for the crime of which my client is accused." Without causation, there cannot be guilt; without even the possibility of guilt, it is no exaggeration to say that there can be no such thing as law.

Fourth, even Medema and Aslanbeigui have a difficult time fully maintaining their view that "Coase is right in holding that Pigou takes a one sided view of the situation, as he assumes one party to have imposed incidental costs . . . on another."[75] For when it comes to describing the situation in a different context, these authors utilize the phrase "injuring party."[76] But if there is no cause and effect, no perpetrator and victim, no guilty and innocent persons, then there can be no "injuring party." Rather it follows that there can only be two parties on an equal moral plane, *each* of which injures the other.[77]

Fifth, there is that little matter of rank injustice. To "avoid the more serious harm" is to answer questions of ownership rights on the basis of wealth maximization. That is, it is not to give the property "bundle" in question to the rightful owner, but rather to the person who, if given the property, will most likely maximize wealth. Suppose there are two men each claiming ownership over a piece of cloth.[78] Nothing whatsoever is known about these two, other than that they are both indeed competing claimants for this property. If we interpret Coase and Medema correctly, then they would advocate giving it to the richer of the two. Why? It cannot be denied that *ceteris paribus*, to put wealth into the hands of a rich man will more likely increase its expected value than to give it to a poor man. And

75. Aslanbeigui & Medema, *supra* note 40, at 614.
76. *Id.*
77. *See id.*
78. This is the scenario depicted in the Talmudic tractate, *Baba Metzia*.

since their avowed goal is wealth maximization, not justice,[79] there is little doubt that this is the way in which they would judge. Why does the phrase "perversion of justice" spring to mind in this context? Certainly, in the libertarian view, the wealth of plaintiff and defendant in a lawsuit would be entirely irrelevant.

One can perhaps agree with Medema and Aslanbeigui that "[t]he Pigouvian approach represents a misunderstanding of the problem."[80] But this is not because Pigou "portrays one party to the externality as *the* cause of the harm and prescribes governmental corrective remedies to restrain the actions of that party."[81] Rather it is because the solutions proposed by Pigou—taxes, subsidies, and government micro management of the economy—are misdirected. If the externality is a physical invasion by A of the property rights of B, a trespass of smoke particles as it were from A to B, one for which there is at present no remedy in law, then surely the appropriate amelioration is to change the law so that there is a cause of action available to the plaintiff. Anderson states in this regard:

> Fortunately, there is a simple effective approach available—long appreciated but underused. An approach based solidly on . . . private property rights.
>
> At its root all pollution is garbage disposal in one form or another. The essence of the problem is that our laws and the administration of justice have not kept up with the refuse produced by the exploding growth of industry, technology and science.
>
> If you took a bag of garbage and dropped it on your neighbor's lawn, we all know what would happen. Your neighbor would call the police, and you would soon find out that the disposal of your garbage is your responsibility, and that it must be done in a way that does not violate anyone else's property rights.
>
> But if you took that same bag of garbage and burned it in a backyard incinerator, letting the sooty ash drift over the neighborhood, the problem gets more complicated. The violation of property rights is clear, but protecting them is more difficult. And when the garbage is invisible to the naked eye, as much air and water pollution is, the problem often seems insurmountable.
>
> We have tried many remedies in the past. We have tried to dissuade polluters with fines, with government programs whereby

79. Probably, too, a "misnomer," although I have not yet unearthed any direct citation to this effect.

80. Aslanbeigui & Medema, *supra* note 40, at 603

81. *Id.*

> all pay to clean up the garbage produced by the few, with a myriad of detailed regulations to control the degree of pollution. Now some even seriously propose that we should have economic incentives, to charge polluters a fee for polluting—and the more they pollute the more they pay. But that is just like taxing burglars as an economic incentive to deter people from stealing your property, and just as unconscionable.
>
> The only effective way to eliminate serious pollution is to treat it exactly for what it is—garbage. Just as one does not have the right to drop a bag of garbage on his neighbor's lawn, so does one not have the right to place any garbage in the air or the water or the earth, if it in any way violates the property rights of others.
>
> What we need are tougher clearer environmental laws that are enforced—not with economic incentives but with jail terms.
>
> What the strict application of the idea of private property rights will do is to increase the cost of garbage disposal. That increased cost will be reflected in a higher cost for the products and services that resulted from the process that produced the garbage. And that is how it should be. Much of the cost of disposing of waste material is already incorporated in the price of the goods and services produced. All of it should be. Then only those who benefit from the garbage made will pay for its disposal.[82]

It is difficult to credit the claim of Medema and Aslanbeigui to the effect that "Coase exhibits a decided lack of confidence in the ability of government to get things right."[83] To the contrary, Coase has a profound, not to say obsequious respect for the intellectual and moral power of at least one institution of government—the courts—and their ability not to uphold property rights, but to engage in interpersonal comparisons of utility.

## VII. ZORN

David Zorn provides a rejoinder to many of my arguments.[84] He claims that I have "accused Coase unfairly and inaccurately of holding positions which he does not hold."[85] What are the specifics? To wit, that Coase's paper is only about "nuisance and externality."[86] Zorn continues: "There is not a bloody nose or a murder in the entire

82. Anderson, *supra* note 65.

83. Aslanbeigui & Medema, *supra* note 40, at 619.

84. *See* David J. Zorn, *Defending Coase Against False Charges: A Comment on Block*, 3 EUR. J. L. & ECON. 287 (1996); Block, *O.J.'s Defense*, *supra* note 13.

85. Zorn, *supra* note 84, at 287.

86. *Id.*

lot. No cases of malice (that is, intent to cause harm) are introduced at all. Yet those are the examples to which Block inappropriately applies Coase's analysis."[87]

Evidently Zorn is not fully acquainted with the mode of argument called *reductio ad absurdum*. Just because Coase does not discuss murder or assault and battery does not preclude me, as his critic, from attempting to apply his insights to such matters. If someone argues that we should prohibit addictive drugs (such as heroin or cocaine), I am not precluded from arguing this would imply that a substance with comparable effects (e.g. alcohol) should be banned and also pointing out that that was once tried and widely pronounced a failure. This is the case even if the advocate of laws against drugs never once mentioned wine, beer, or liquor.

Suppose I were to argue that according to the logic of antitrust put forth by Janet Reno and Joel Klein of the so-called Department of "Justice," they ought to be trying Tiger Woods as a monopolist and attempting to "break him up." That is, they could insist that he be forced to putt while standing on one leg and drive left handed. The Zorns of the world would object that Reno and Klein never said any such thing and have no plans to do to Tiger Woods what they have done to Bill Gates. And yet, as in any *reductios ad absurdum*, the power of the riposte stems from using the precise "logic" of the claimant against him. *Of course* advocates of antitrust never suggest that this be applied to individuals. But why not? If the logic of their argument is correct, it should be applied to *any* relevant case.

A union pickets a manufacturer, and threatens with physical violence any "scabs" who attempt to cross the picket line. This is objected to on the grounds that while a man may divorce his wife, he has no right to surround her house and offer to beat up any man she would like to date. *Of course* those who argue for tyranny of the sort practiced by organized labor never intended that the logic of their case be applied to divorce between spouses. But the power of the *reductio ad absurdum* lies precisely in its ability to force down the throats of those who advocate the use of force against innocents (whether "scabs" or would be suitors of the divorced wife, it makes no difference whatsoever) a seemingly less defensible example. . .

Someone advocates raising the minimum wage level from its present $6.15 to $7.00. The critic employs the *reductio ad absurdum* argument stating that if it will really help poorly paid workers to

87. *Id.* at 288.

compel employers to raise wages from $6.15 to $7.00, why be such a wimp? Why not advocate an increase from $6.15 to $7,000.00 per hour. Now, everyone knows that the latter would instantaneously spell the death knell of pretty much *any* employment. Can the advocate of raising the minimum wage level from $6.15 to $7.00 hide behind the objection that he never favored the radical increase, only the moderate one? He cannot. He is hoist by his own petard. He is forced by the laws of logic to acknowledge that the critic is only "seeing" (as in poker) his moderate wage enhancement, but "raising" (again, as in poker) him to an altogether higher level. But the logic of the objection is impeccable. It is using the identical argument of the proponent of the small increase to show its flaws.

It is the same with employing the *reductio* against Coase. *Of course* Coase never mentions, let alone contemplates, using his own internal logic to any cases other than the ones he himself employs. But it is a *weakness* of the Coasean system that it cannot be utilized to analyze cases undreamed of in his philosophy.

What my examples and those used by Coase have in common is that they all depict disputes over property rights.[88] It is an easy enough stretch for a lawsuit over property rights in pollution to one of the ownership of someone's nose. From there to murder (a dispute over ownership of someone's body) is but another tiny step. Maliciousness is irrelevant to our considerations. It is purely a matter of property rights, whether in persons or physical objects it matters not.

Coase considered myriad cases concerning polluters and pollutees; farmers who owned straying cows versus those who were growing the grains they ate, and doctors who objected to noisy factories because they wanted quiet. In each and every one of these cases there was a dispute over the property rights in question. Coase had a principle for determining judicial opinions in all of them (where positive transactions costs made it impossible to rearrange titles after the fact)—give the property to the person who could thereby most likely maximize societal wealth.

Right now, I hereby call into question the ownership of the nose that happens to sit on Zorn's face.[89] The old fashioned non-Coasean judge would throw out this lawsuit as frivolous. But the jurist in thrall

88. *Compare* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 1-44 (1960), *with* Block, *O.J.'s Defense*, *supra* note 13, at 265-86.

89. To call it Zorn's nose would be to prejudice my lawsuit.

to the Coasean analysis would, perforce, have to determine what I am likely to do with the protuberance on Zorn's face, how he will deal with it in future, and then ask, "Under which decision will total wealth be most increased?" Conceivably, at least under certain conditions I could easily manufacture, the nod for this piece of fleshy property would have to be given to me. For example, I am a medical scientist and need this protoplasm for an experiment, which might likely cure some disease. In contrast, Zorn works for the U.S. Food and Drug Administration, and they, on net balance, reduce GDP, at least compared to a privatized industry dedicated to safeguarding society in this manner. His nose, then, is used ultimately for purposes of *reducing* wealth and should be turned over to me forthwith. This, of course, is but another attempted *reductio*. Just because Coase never once mentioned Zorn's nose does not mean I am precluded from doing so.[90]

In like manner, I fully agree with Zorn that Coase never "expresses the opinion that there should be no property rights prior to considerations of wealth maximization."[91] But I never claimed he did. Rather, I maintain that this is a logical *implication* of his views. For if wealth maximization is the criterion to be used in the real world of positive transactions cost in cases of disputed property rights and *all* property rights can in principle be impugned by an imaginative plaintiff,[92] then it ineluctably follows that for Coase there *are* no property rights prior to, or apart from, wealth maximization, the criteria for which continually change.

Zorn errs, too, regarding his claim that "Block writes as though Coase is responsible for judges ruling in ways that are inconsistent with the Lockean philosophy, as though this were another example of the corrupting influence of the Chicago school."[93] He denies this on the ground that judges were making decisions of this sort long before Coase. First of all, I do indeed hold Coase and pretty much the entire Chicago-oriented law and economic philosophical school responsible for a deterioration of law in general, and a denigration of private property rights in particular. Ronald Coase, after all, won the Nobel Prize in economics; surely, great attention to his arguments is paid not

90. A minor point. Zorn accuses me of errors in my "notes Section." Zorn, *supra* note 84, at 288. Unfortunately, he does no supply any specifics, so it is difficult to determine the veracity of this claim.

91. Zorn, *supra* note 84, at 288.

92. If I can coherently demand ownership of what was hitherto Zorn's nose, there is no claim of this sort that cannot be made.

93. Zorn, *supra* note 84, at 288.

only within the economics and legal professions, but also in society as a whole. As well, his many colleagues and followers, chief amongst them Posner, are eminent practitioners on their own. It would be difficult not to blame this intellectual behemoth for the changes in the legal and economics professions they have wrought.[94]

Of course, it would be a bit much to hold these scholars responsible for decisions made before they began to publish. But what of the recent spate of lawsuits against cigarette companies? Even on the assumption that tobacco use causes cancer, holding firms in this industry responsible for death and illness cannot be reconciled with the libertarian vision of law, for the tobacco companies never forced anyone to smoke. These plaintiffs did this of their own volition, and thus have no case in traditional law. Coasean law, however, is entirely a different matter—focus is placed not on liability but on the supposition that tobacco companies can more efficiently stem disease if they are found guilty. There is no "smoking gun" relating Chicago law and economics to the product liability fiasco of recent years, but the former serves as an intellectual basis for the latter.[95]

One last point: Zorn cites Coase to the effect that the courts should follow his advice "in so far as it is possible without creating too much uncertainty about the legal position itself."[96] This I regard as a feeble attempt to obviate one of the basic stumbling flaws in his system. The very idea of making judicial awards not on the basis of property rights and justice, but rather in an attempt to "mimic the market" or "maximize wealth" is itself intrinsically productive of radical uncertainty. You simply cannot have the one without the other. When traditional libertarian law is jettisoned along with its basis in property rights (cause and effect, coming to the nuisance, etc.), it is impossible to retain any vestige of certainty about the legal system. The law is whatever the subjective value determinations of judges say it is. There are no longer any hard and fast rules. After having perpetrated that sort of system, to then backtrack and ask that not too much uncertainty be created is only to express a pious but meaningless

94. One example is the whole recent course of product liability laws, which does not look for cause and effect, but rather least cost avoiders. *See* Walter Block et al., The Paradox of Coase as a Defender of Free Markets (unpublished manuscript, on file with author). An elaboration of this point, however, would take us beyond the scope of the present paper.

95. Political jurisdictions, like the state of New York, are now suing gun manufacturers for drive by shootings under this perversion of the law. Can automobile makers be far behind with regard to traffic fatalities?

96. Zorn, *supra* note 84, at 289 (quoting Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 19 (1960)).

hope. It is to punch someone in the nose, but then wish that it did no harm.