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THE PARADOX OF COASE AS A DEFENDER OF FREE MARKETS

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Mention "free market advocate" or "defender of private property rights" and the name Ronald Coase is certain to be included in the top ten list of virtually all cognoscenti of such matters. Nor can it be denied that there are numerous good and sufficient reasons for this assessment. Nevertheless, it is the contention of the present paper that this characterization is unjustified with respect to his most famous publication on social costs. Here, in sharp contrast to most of his other work, we argue that Coase is better interpreted in the very opposite manner: as an intellectual enemy of free enterprise and capitalism.

Introduction

The Ronald Coase of *The Problem of Social Cost*[1] is viewed by virtually all economists as a staunch defender of free markets. Part of the reason for this might be the fact that in his other works he did indeed take this position. For example, not only did Coase claim that lighthouses *had* been privately run,[2] he was *happy* to pre-

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[1] Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) [hereinafter Coase, *Social Cost*].
[2] Ronald H. Coase, *The Lighthouse in Economics*, 17 J.L. & ECON. 357, 363–64 (1974).

sent it in this manner.[3] And this free enterprise perspective applies, too, to his analyses of radio frequencies[4] and his treatment of advertising,[5] to say nothing of his analysis of the post office.[6] Further, his work was a ringing endorsement of free speech.[7] But this notion that Coase in *The Problem of Social Cost* may be counted as a supporter of the market has not gone unchallenged. Critics of Coase on these grounds include Block,[8] Cordato,[9] Krecke,[10] North,[11] and Rothbard.[12] In the present paper, we challenge this mainstream Coase-as-free-enterpriser view by considering several cases in point.

In section I we explore why it is that the Coase theorem is often and mistakenly taken to be a pro-market argument; section II is devoted to making the case that Coase is worse than Pigou in terms of both adherence to free market principles and maximization of wealth; the theme of section III is to analyze the Coasean focus on transaction costs; we conclude in section IV with an analysis of the tort-liability crisis, the intellectual underpinnings of which his writings form a substantial part.

I. The Coase Theorem is often and mistakenly taken to be a pro-market argument

The Problem of Social Cost, the most cited economics article in history,[13] is famous for what has come to be called "The Coase Theorem." Why the Coase Theo-

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[3] *Id.* at 375–76; *but see* David E. Van Zandt, *The Lessons of the Lighthouse: 'Government' or 'Private' Provision of Goods*, 22 J. LEGAL STUD. 47 (1993) (responding to this claim); William Barnett II & Walter Block, Coase and Van Zandt on Lighthouses (2002) (unpublished manuscript, on file with the NYU Journal of Law & Liberty).

[4] *See generally* Ronald H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959); Ronald H. Coase, *Evaluation of Public Policy Relating to Radio and Television Broadcasting: Social and Economic Issues*, 41 LAND ECON. 161 (1965); Ronald H. Coase, *The Economics of Broadcasting and Government Policy*, 56 AM. ECON. REV. 440 (1966); Ronald H. Coase, *Payola in Radio and Television Broadcasting*, 22 J.L.& ECON. 269 (1979); Ronald H. Coase & Nicholas Jonson, *Should the Federal Communications Commission Be Abolished?*, *in* REGULATION, ECONOMICS, AND THE LAW 41 (Bernard H. Siegan ed., 1979).

[5] Ronald H. Coase, *Advertising in Free Speech*, 6 J. LEGAL STUD. 1 (1977).

[6] Ronald H. Coase, *The Postal Monopoly in Great Britain: An Historical Survey*, *in* ECONOMIC ESSAYS IN COMMEMORATION OF THE DUNDEE SCHOOL OF ECONOMICS, 1931-55 25 (J. K. Eastham ed. 1955); Ronald H. Coase, *The British Post Office and the Messenger Companies*, 4 J.L. & ECON. 12 (1961).

[7] Ronald H. Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384 (1974).

[8] Walter Block, *Coase and Demsetz on Private Property Rights*, 1 J. LIBERTARIAN STUD. 111 (1977) [hereinafter Block, *Coase and Demsetz*]; Walter Block, *Ethics, Efficiency, Coasean Property Rights and Psychic Income: A Reply to Harold Demsetz*, 8 REV. AUSTRIAN ECON. 61 (1995) [hereinafter Block, *Psychic Income*]; 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*]; Walter Block, *Private Property Rights, Erroneous Interpretations, Morality and Economics: Reply to Demsetz*, 3 Q.J. AUSTRIAN ECON. 63 (2000).

[9] ROY E. CORDATO, WELFARE ECONOMICS AND EXTERNALITIES IN AN OPEN-ENDED UNIVERSE: A MODERN AUSTRIAN PERSPECTIVE (1992); Roy E. Cordato, *Subjective Value, Time Passage, and the Economics of Harmful Effects*, 12 HAMLINE L. REV. 229 (1989); Roy E. Cordato, *Time Passage and the Economics of Coming to the Nuisance: Reassessing the Coasean Perspective*, 20 CAMPBELL L. REV. 273 (1997-1998).

[10] Elisabeth Krecke, *Law and the Market Order: An Austrian Critique of the Economic Analysis of Law*, 7 JOURNAL DES ECONOMISTES ET DES ETUDES HUMAINES 19 (1996).

[11] GARY NORTH, THE COASE THEOREM (1992).

[12] Murray N. Rothbard, *Law, Property Rights, and Air Pollution*, *in* ECONOMICS AND THE ENVIRONMENT: A RECONCILIATION 233 (Walter Block ed., 1990).

[13] Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 767 (1996).

rem is taken to be supportive of free markets is a riddle wrapped in an enigma folded into a paradox, with apologies to Winston Churchill.[14] It may be stated as follows: the initial assignment of the rights to a good or resource is irrelevant to the efficient use thereof, provided that the transactions costs are zero, or sufficiently low, and that there are no inhibiting wealth[15] effects.

Let us examine this concept. The fundamental idea is that if individual *A* values the rights to good or resource X more than anyone else, then if *A* were assigned the rights to *X* initially, no other individual would be willing to offer *A* enough for *A* to part with his rights to *X*, and therefore, *X* would be used in its most highly valued use as determined by *A*. That is, the efficient allocation, i.e., the allocation of *X* to its most highly valued use, will prevail. Alternatively, if some individual, *B*, other than *A* were assigned the rights to *X* initially, *A* would be willing to offer *B* more for the rights to *X* than anyone else would, and this offer will be sufficient to induce *B* to transfer voluntarily to *A* the rights to *X*. Therefore, in this case also, the efficient allocation of the rights to *X*, that is, the allocation thereof to *A*, who values *X* more than anyone else, will occur. There are, however, in this latter case where *B* is the initial rights owner, two potential flies in the ointment of efficient allocation. First, the transactions costs[16] involved in effecting the transfer of rights from *B* to *A* may exceed the expected gain in value from the shift, in which case the rights would not be conveyed from *B* to *A*. Second, although *A* might be willing to offer *B* sufficient inducement to effectuate the transfer, A may be unable to do so for lack of sufficient wealth. That is, *A* may be willing but unable,[17] in which case the rights would not migrate from *B* to *A*. Therefore, there are cases in which if the rights are not initially assigned to the one who values them most highly, they will *not* subsequently be transferred to him, in which cases there will be a continuing misallocation of goods/resources; i.e., they will be allocated to suboptimal uses, and there will be no way for these situations to be corrected through the voluntary actions of the individuals involved. An inefficient allocation of resources will prevail.

The Coase theorem in a nutshell: the pro-market part of his findings is that property rights allow negotiators to take advantage of "particular circumstances of time and place"[18] in ways not available to regulators (even if one justifies private

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[14] Churchill actually said: "I cannot forecast to you the action of Russia. It is a riddle, wrapped in a mystery, inside an enigma." BARTLETT'S FAMILIAR QUOTATIONS, 745 (Justin Kaplan ed., 2002).

[15] Block, *Coase and Demsetz, supra* note 8, at 112 (criticizing Coase's failure to make this assumption about wealth).

[16] Transactions costs are those involved in effectuating the transfer of rights: the costs of search, bargaining, and enforcement of contracts.

[17] In discussing demand in a first course in economics it is explained to students that for an offer to buy to count as part of the demand for a good or resource, the potential buyer must be "willing *and* able" to deliver that which he offers. Certainly, an offer by the present authors to pay $1,000,000,000 for, say, Z, would not constitute part of the demand for Z, as we do not have $1,000,000,000.

[18] FRIEDRICH A. HAYEK, *The Use of Knowledge in Society, in* INDIVIDUALISM AND ECONOMIC ORDER 77, 80 (1948).

property on a natural rights basis, it is nice to know that it makes us wealthier as well). But this is only true in the zero-transaction cost world.

A. Why is the Coase theorem assumed to promote free markets?

Mainstream/standard/orthodox/neoclassical economics worships at the shrine of efficiency. Free markets are thought to be desirable because, and to the extent that, they yield efficient results, rather than because they are free. Because most of the attention given to the Coase theorem has assumed situations in which zero/low transaction costs are the norm,[19] and because the theorem maintains that in such situations free markets yield efficient allocations of rights, the Coase theorem is thought to promote free markets. That is, because the ultimate social desideratum is efficiency, and the Coase theorem maintains that free markets yield efficient results in situations assumed to constitute the vast majority of cases, the Coase theorem is widely seen as a bulwark of freedom/free markets/free enterprise.

But there are difficulties with this position. First, free markets are desirable precisely because, and to the extent that, they are free. That is, they are beneficial, of necessity, no matter what their assumed efficiency.[20]

Second, the assumption that the vast majority of cases do not involve excessively high transactions costs (and/or wealth constraints), even if true, is not controlling. The reason is that, because efficiency is seen as the overriding goal, one implication of the Coase theorem is that in such cases disputes over rights should be resolved in favor of the one who values them most highly. That is, government should intervene to settle such disputes *and* should do so by transferring them from the original owner to a new owner because the latter values them more highly, even though he was not able to manifest this presumed higher valuation in the market because of the excessively high transactions costs and/or because he was constrained by a lack of wealth.[21]

Third, even if small in number, many of these cases are important to the wider society, and they are always vital to the parties involved.

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[19] *See* Block, *Coase and Demsetz*, *supra* note 8 (discussing the fact that the issue, and cases, of "insufficient wealth" are rarely considered).

[20] *See* Murray N. Rothbard, *The Myth of Efficiency*, *in* TIME, UNCERTAINTY, AND DISEQUILIBRIUM 90 (Mario J. Rizzo ed., 1979); Block, *Psychic Income*, *supra* note 8, at 74-76.

[21] Although the theorem itself does not address the issue of the transfer of wealth that accompanies such a transfer of rights, being concerned only with the efficient allocation of rights, such effects are referred to as "distribution" effects and thought to be irrelevant. That is, "society's" total wealth is maximized by the transfer of rights; that the distribution of wealth among the members of society is altered is irrelevant to the theorem, and, implicitly, is not considered important to "society;" of course, it is very important to the individuals involved. Moreover, even when the transfer of wealth is considered and thought worthy of compensation, the approach is to have some disinterested neutral, independent, objective, impartial, unbiased, third-party decide upon the appropriate compensation to the party who has lost his rights. Obviously, such compensation will fall short of the value of the rights to that party, else he would have voluntarily transferred them.

Fourth, as all costs are subjective, there is no way to determine if they are excessive; i.e., no way to determine if they are the sole reason that a transaction that otherwise would have been consummated was not. And, even if we only consider the objective expenses (i.e., those measured in monetary terms), it is virtually impossible for third parties to put an accurate figure on such expenses.

Fifth, situations in which governmental courts are asked to decide disputes over rights and might apply the Coase theorem do not really involve the initial assignment of rights. Rather, one of the parties owns the rights and the other party wants to acquire them either for no payment at all or for a fee below market levels. To transfer rights from one party to another in such cases is not to promote free markets, but rather just the opposite. In such cases, the job of the court is to declare who the owner is, not to make an "initial" assignment of ownership.

Sixth, transactions costs are real costs in that they involve the use of resources to effectuate transfers. Because they are real costs they should be taken into account in determining whether the benefits of a transaction exceed the costs.

Seventh, high transactions costs cannot be avoided by transferring the decision from the market to the courts, as the very use of governmental courts to resolve disputes over rights to resources itself involves the use of resources, which is properly understood as a form of transactions costs. And, as with virtually everything government does, we can expect its courts to be inefficient; thus, using courts *increases* transactions costs.

Eighth, the wealth constraint is invalid because of the existence of credit. If *A* really values *X* more than *B* does, but *A* has not the wherewithal to induce *B* to part with *X*, *A* can resort to credit and borrow the money. And, it will not do to say that credit markets are less than "perfectly competitive," and consequently *A* might not be able to borrow the necessary funds. The use of credit markets involves real costs, also. And, of course, "perfect competition" is a fantasy with no counterpart in the real world. It is easy for *A* to say, "transfer the rights to *X* to me because I value them more than *B*, but unfortunately I have not the funds to induce *B* to transfer the rights; moreover, I would be willing to borrow the funds but I, a creditworthy specimen, am unable to do so because of imperfections in the credit markets." However, *A* pays no cost for exaggerating the amount he is willing to borrow and pay to *B*, knowing he will not be called on to so do as no potential lender will provide him the funds; and, for the same reason, he can exaggerate, at no cost to himself, the rate of interest he would be willing to pay to borrow the funds.

The Coase theorem is used to provide intellectual cover for a party who wishes to come into possession of another individual's rights without acquiring them through a freely bargained exchange. It constitutes no less than an attempt to use the power of the state to acquire such property without having to pay the fair

market value, or, perhaps, anything, to the owner. The rationale involved in this scam is that certain real costs—the transactions costs involved in the market process, the cost of credit (which is effectively infinite for uncreditworthy borrowers) and the (transactions) costs involved in the use of the courts—are in some sense artificial and unnecessary to effectuate exchanges and therefore should be ignored.

II. Why Coase Is Worse Than Pigou

A.C. Pigou held that activities creating positive externalities should be subsidized and those generating negative externalities should be taxed. For market supporters, Coase's analysis has generally been seen as an advance over Pigou's. However, Pigou's only deviation from the philosophy of property rights is that he advocated subsidies (for what he considered positive externalities) and taxes (for what he considered negative externalities). Apart from that, Pigou did not distinguish himself in any manner from those who support private property rights. In sharp contrast, in our view it is no exaggeration to say that for Coase there really is no such *thing* as private property rights. This will sound exceedingly surreal, given the view of the economics profession to the contrary, but it is our contention that Pigou had a stronger sense of property rights than Coase!

For Coase, property is only assigned by judges, in the same way a basketball coach assigns Smith to guard Jones. Whoever can use the property under dispute[22] "best" at the moment gets it, but if circumstances change, it will be reassigned. But what are the efficiency effects of insecure property rights?

One need not adopt a natural rights view of private property to see the flaw in Coase's argument. The mere existence of people holding such views highlights the problem. As long as there are people who maintain that no gain in "efficiency" measured in whatever sense is sufficient to compensate for rights violations (if you can't excuse killing someone because it will make you rich, you also can't excuse it because it will make you very, very rich), the Coase theorem solution is unworkable. Coase has no argument that enables him to isolate the preferences of these people as some inadmissible category of preference amidst the world of other, valid preferences. A Coasean[23] might attempt to "sterilize" Coasean analysis by limiting it to monetary payments as a proxy for efficiency, but this argument begs the

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[22] Nor should one think that the title to very little property would be disputed in a full Coasean world. For once the word gets out that property under contention goes not to he who can establish historical ownership, but rather to the person who can best claim that in the future his ownership of it is most likely to maximize GDP, then all bets are off. *Every* piece of hitherto private property would be open to continual disputation.

[23] *See generally* Harold Demsetz, *Block's Erroneous Interpretations*, 10 REV. AUSTRIAN ECON. 101 (1997); Harold Demsetz, *Ethics and Efficiency in Property Rights Systems*, *in* TIME, UNCERTAINTY AND DISEQUILIBRIUM 97 (Mario J. Rizzo, ed. 1979); Harold Demsetz, *Some Aspects of Property Rights*, 9 J.L. & ECON. 61 (1966); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV., 347 (1967); *but see generally* Block, *Coase and Demsetz*, *supra* note 8; Block, *Erroneous Interpretations*, *supra* note 8; Block, *Psychic Income*, *supra* note 8.

question: the ability to make monetary payments depends very much on how the property rights arrangements are or are not altered by legal decree in the first place.

The puzzle: given the fact that Pigou saw himself as an interventionist economist battling a generally pro-market profession and that Coase saw himself as a pro-market economist battling an anti-market profession, how did Coase wind up developing the more anti-market position?

III. Transactions Costs

Why do Coase's pro-market inclinations dramatically attenuate when it comes to solving the problem of externalities? It is our contention that, at least in part, the attenuation is due to Coase's mistaken view that transaction costs are something external to the market process, rather than an integral part of it.

Coase's approach, in which transaction costs should be eliminated by fiat if possible, implies a world where before the market process begins agents already know everything necessary about all transactions in which they might engage. The market process itself is merely one among several possible means of attempting to achieve a "socially optimal" allocation of resources, rather than the only means of approaching such a goal.

We want to point out that there is nothing inherently wrong in an analysis that isolates transactions costs as a particular aspect of economic activity—just as can be done for marketing costs, sales costs, labor costs, land costs, or, indeed, office supply costs.

A problem arises only when such categories of costs are viewed as somehow external to actual market transactions, so that we could eliminate one category of costs—clearly a benefit—and nevertheless retain the full benefit of a working market.

As Coase sees it, the potential for governmental improvements of market outcomes arises in the case of "high" transaction costs. If, somehow, it is determined that it is merely transaction costs preventing some exchange from occurring, the rules of private property may be suspended and property rights re-shuffled until the "right" outcome, the one that would arise in a world of zero transaction costs, is achieved.

However, contrary to this view, a market transaction is an attempt on the part of both parties to improve some unsatisfactory aspect of their current circumstances. If the parties agree to an exchange, it is because they both anticipate that their circumstances after the exchange will be superior to those that would have come to pass had they not exchanged. The cost of the resulting exchange, for either participant, is the value of the most valuable opportunity he sacrificed in order to

make the trade. As such, the costs entailed by any action are whatever[24] the participants perceive the costs to be.[25]

Furthermore, the costs of convincing other actors to respond as hoped to one's actions are intrinsic to human action itself. As Oakeshott put it: "Doing...is action in search of a wished-for response from other agents which it may not receive.... And conduct thus recognized is...a transaction between agents in terms of the postulate persuasion."[26]

An offer to buy (or sell) is a performance intended to elicit a response to sell (or buy) on the part of another actor. The performance is an essential part of the market process, since the essence and efficacy of the market springs from the voluntary nature of market transactions. A transaction that would have occurred except for high transaction costs is simply a case in which one or both parties did not persuade the other that the transaction was worthwhile. If a potential party to a transaction is holding out for better terms, it is because he is not yet persuaded that his best course of action is to make a deal at the terms so far offered.

Let us consider a hypothetical case in which organic dairy farmers persuade the legislature that organic milk is much better for "the people" than is non-organic milk. The organic farmers may even be correct in assuming that all consumers would purchase organic milk, if only they fully understood its benefits. However, the organic lobbyists point out, the public is not properly informed of the wonderfulness of such milk. If only the organic dairy farmers had the marketing wherewithal of the non-organic producers, they would have achieved market dominance long ago. But since the legislature is now convinced of the benefits of the organic product, such marketing costs are, the lobbyists contend, an unnecessary expense: it is more "socially efficient" simply to mandate that only the superior, organic milk be sold.

However, if a consumer is not informed about the wonders of organic milk and therefore chooses to buy milk containing antibiotics and so on, then it must be shown that he really is not informed. For the consumer to change his mind and voluntarily buy organic milk, someone must undertake the cost of educating him as to its advantages. It is only by actually informing him of the benefits and then seeing what he decides that his real preferences are revealed.[27]

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[24] Jeffrey M. Herbener, *The Pareto Rule and Welfare Economics*, 10 REV. OF AUSTRIAN ECON. 79, 81 (1997) ("The price for the existing stock of each consumer good reflects, but is not and cannot be equal to, the subjective value of its marginal unit...").

[25] JAMES M. BUCHANAN, COST AND CHOICE: AN INQUIRY IN ECONOMIC THEORY vii (1969).

[26] MICHAEL OAKESHOTT, ON HUMAN CONDUCT 45–46 (1975).

[27] 1 MURRAY N. ROTHBARD, THE LOGIC OF ACTION: METHOD, MONEY, AND THE AUSTRIAN SCHOOL 212 (1997).

It is absurd to pretend that the cost of persuasion doesn't exist and then claim that by forcing everyone to buy organic milk, one has reduced costs. In fact, those costs have simply been imposed upon the unwilling buyers of the organic milk. Since costs are subjective, the costs of being forced to buy a product are whatever the buyer perceives them to be. Under the fiat organic milk regime, many buyers will pay a higher price for this product, without perceiving any compensatory benefit.

Mises recognized that persuasion is an integral part of the market process:

> The way in which many contemporary writers deal with various problems--for instance, advertising and marketing--is manifestly a relapse into the crude errors which should have disappeared long ago.... The consumer is not omniscient. He does not know where he can obtain at the cheapest price what he is looking for. Very often he does not even know what kind of commodity or service is suitable to remove most efficaciously the particular uneasiness he wants to remove.... A businessman expends money for advertising if and as far as he expects that the increase in sales resulting will increase the total net proceeds. In this regard there is no difference between the costs of advertising and all other costs of production. An attempt has been made to distinguish between production costs and sales costs. An increase in production costs, it has been said, increases supply, while an increase in sales costs (advertising costs included) increases demand. This is a mistake. All costs of production are expended with the intention of increasing demand.[28]

Anthony de Jasay makes a similar point about "exclusivity," which is also often regarded as a special, avoidable cost: "Nothing is 'excludable' without further ado; for nothing can be sold without the seller incurring costs to exclude from access those who would not pay the price. Exclusion cost is no more avoidable in a good destined to be sold than is the cost of production or transport. Everything is excludable at some cost...."[29]

We might make our case by paraphrasing de Jasay: nothing is exchangeable without further ado; for nothing can be sold without the seller incurring costs in persuading buyers to purchase his wares.

Transaction costs are, in other words, simply another cost of production. In fact, they are a special case of marketing costs, where the marketing effort is being directed not at a broad group of targeted consumers, but at particular, known parties with whom one hopes to transact. If transaction costs are high, it is a sign that

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[28] LUDWIG VON MISES, HUMAN ACTION 141, 320, 322–23 (1949).
[29] Anthony de Jasay, *Hayek: Some Missing Pieces*, 9 REV. AUSTRIAN ECON. 107, 112 (1996).

at least one of the parties to a potential transaction has not been persuaded that the transaction, on the terms offered, is in his best interest.[30]

High transaction costs are not, as is sometimes contended, chiefly the result of having to deal with a large number of parties at once. The buyer of commodity wheat does not face high transaction costs, despite possibly having to deal with numerous sellers, because there is little disagreement over how to price the wheat. In such a commodity market, all of the sellers can simply consult The Wall Street Journal and discover at what price wheat was recently being sold. When a polluter faces high transactions costs in negotiating with many property owners for an easement that will allow him to emit soot onto their land, the high transactions costs occur precisely because each of the property owners may have his own, perhaps radically divergent, perception of the value of soot-free property.

A case involving such property-rights issues comes before a Coasean judge only when at least one of the potential parties to a transaction has not succeeded in persuading at least one of the other potential parties that a deal on the terms offered is worth his while. In deciding who has the relevant property rights in such a case, the opinion of the judge is just one possible valuation of a contentious situation. By altering property rights to line up with what he sees as the efficient solution, the Coasean judge is not reducing costs, but is instead imposing them upon whomever he decides the costs ought to be imposed.

It would only be in a world where everyone already knew all of the advantages and disadvantages of every possible transaction that the persuasive performances necessary to elicit voluntary exchanges would be redundant. It is through this process of mutual persuasion that actors both disclose and discover their preferences. There is no conceivable mechanism, absent such a process, by which welfare-maximizing exchange ratios could be discovered.[31]

IV. The Liability Crisis

That we are in the midst of a liability crisis is easy to document. The tobacco awards, and the case of the woman who successfully sued McDonalds for selling her hot coffee (which she placed in between her legs while driving) are but tips of the veritable iceberg in this regard. Some of these cases are so counter to common sense that they have been made into jokes.

But what, pray tell, do these liability cases have to do with the Coase theorem? Say what you will about the latter, it cannot fairly be claimed that it is either intrinsically funny, nor, yet, that there is any obvious connection between it and the

[30] Of course, state intervention may create transaction costs that truly are external to the market process. For instance, many of the transaction costs involved in acquiring a mortgage are the result of regulatory requirements, rather than being intrinsic to the transaction itself.

[31] *See generally* ROTHBARD, *supra* note 27.

spate of liability cases mentioned above. In order to see the connection, we shall have to dig deeper.

Let us begin by reviewing Coase once again. Its essential point is that there are two states of the world, the real one, and an ideal one where there are no transactions costs. In the ideal world, says Coase, it does not matter (at least for wealth considerations), when there is property under dispute, which party is awarded it. A bargaining session will ensue after the judge makes any determination, and the commodity will end up in the hands of the person for whom it has the greatest value. In the real world, with high transactions costs, we cannot rely upon any such "market"[32] process. This being the case, it is now the duty of the magistrate to decide in whose hands the good would have ended up were we in the ideal world (i.e., who "values"[33] it more) and then to make the award on this basis.[34] That is, when property is under dispute, the Coasean rule is to judge in favor of the person whose ownership will maximize total societal wealth (which inevitably opens up horrendous problems of interpersonal comparisons of utility). One might well ask with Epstein: "[w]hat possible benefits from the rearrangement could outweigh the costs of a compulsory reassignment of property rights?"[35]

But wait, there's more. Another implication of this analysis involves liability suits. Now the ordinary libertarian (i.e., non-Coasean) normative analysis of liability is to rule in favor of the party who is least responsible for the accident in question. The concepts of "blame" and "cause" and "contract" and "fraud" and "justice" figure heavily into this analysis. For example, it is crystal clear that after decades of clearly labeling their product as "dangerous to health,"[36] the cigarette companies, in justice, would have no responsibility whatsoever to those adults who willingly took on this risk. In a free society, the only way that tobacco firms would be responsible for cancer or emphysema contracted by smokers would be if the seller *compelled at gunpoint* such behavior. As for the woman who situated hot coffee between her legs, to require the vendor to pay for her injuries reeks to the high heavens of injustice. This was *her* foolish action, not that of McDonalds. Spilling coffee on oneself is the responsibility of the spiller, not the seller. One might as well

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[32] Quotation marks are supplied to indicate we do not at all regard this Coasean scenario as related to free markets. That is, free markets are based upon property rights, which are, in turn, dependant upon homesteading and voluntary trade, not upon judges' decisions, save as they go to issues of homesteading and/or voluntary exchange. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 171–72 (1974).

[33] Note that this is valuation in the abstract as opposed to valuation by revealed preference; i.e., it de facto assumes that transactions costs are not real costs. Moreover, it ignores the fact that non-market transactions costs are involved when courts are involved; i.e., the court process uses resources to transfer rights just as markets do. And, in many cases the transactions costs involved in using the court process is probably much greater than those involved in using markets. The only reason courts are used in such cases is that one of the parties does not like the outcome that would be reached by voluntary actions; i.e., the market process.

[34] *See* Coase, *Social Cost*, *supra* note 1, at 15–18.

[35] Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).

[36] That they were *forced* to do this by government is unjustified on the basis of *caveat emptor*; but this issue is in any case outside of our present purview.

sue the company that sells Drano or rat poison if a customer swallows either of these products.

But Coase would have none of this. Not for him any consideration of blame or personal responsibility. Instead, he relies on the concept of "least cost avoider." That is, in liability cases, the Coasean judge is called upon to favor the party who can, at least cost, avoid the accident.[37]

There is a parallel between disputes over property and liability for Coase. In both cases this author eschews the ordinary concerns of law[38] and instead resorts to wealth maximization. In the former case, he favors the party whose ownership of the good in question maximizes wealth. In the latter case, again so as to increase material goods, he tips the scales of justice in the direction of whoever can at least cost avoid the accident.

Let us apply this insight to the cases we have been mentioning. Who has more knowledge of the health effects of tobacco? The cigarette companies, or any one individual smoker, or even all customers put together? To ask this question is to answer it. Obviously, the firms in this industry have been able to amass information about their own product that would put in the dark any efforts on the part of consumers to match it. They have a comparative advantage in generating such information. So who, then, is in a better position to deal with these threats? Who is the least cost avoider in this situation? Obviously, the industry. Hence, in a Coasean world, they, not the purchaser, must be held liable.

Let us now consider a possible objection to this claim: "In a Coasean world, the cigarette companies would be liable only if their cost of insuring their "victims" were less than the victims' cost to insure or if their cost to avoid (perhaps by screening potential purchasers for susceptibility to smoking related health problems and not selling to susceptible people—they might have to require monitored, on-premises use to avoid illegal transfer *or* by not selling at all, i.e., going out of business) were less than their customers' cost to avoid or insure. It is a safe assumption that the cost to insure for either would be prohibitive. Therefore, on Coasean grounds, the least cost avoider should be held liable. In fact, given all the publicity for at least the last half century (even in the 1940s children called cigarettes "coffin nails,"[39] and Tex Williams had a song "Smoke! Smoke! Smoke! (That Cigarette)"

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[37] It is important to consider how "least cost avoider" differs from "least responsible." It is possible to define the least cost avoider as the more responsible party and the higher cost avoider as the less responsible one. This is where the idea of causality enters, and with it strict liability. *See generally* Epstein, *supra* note 35. We must also consider the concept of least cost insurer. That is, according to Coasean analysis, the responsible party should be either the least cost avoider or the least cost insurer, depending upon which cost is lower. If it is cheaper for the least cost avoider to avoid than for the least cost insurer to insure, then for Coase the least cost avoider should be liable; however, if it is cheaper for the least cost insurer to insure than for the least cost avoider to avoid, than the least cost insurer should be liable.

[38] That is, blame, cause, contract, fraud, and justice.

[39] *See* Weapons of War: Flamethrowers (January 7, 2002),

with the same message)[40] it is not clear that the tobacco companies would have been held liable if Coase's principles had been properly applied. That is, given the virtual impossibility of being unaware of the health hazards of smoking, it seems that the smokers had the least cost of prevention—all they had to do was stop, or not begin in the first place. Both are relatively easy: witness the number of people who have never smoked and the number who have quit, relative to the number who start and do not stop.

The problem with this objection, from our perspective, is that it makes the Coasean theory far too coherent. In our view, there is a thread of incomprehensibility running through this theorem that belies the possibility of any such clear determination, as posited by the objection to our thesis. This is because the Coase theorem relies on the comparison of costs between different people, and this is an inherently subjective issue.

Interpersonal comparisons are tendentious, unscientific, and invalid. Thus, it always possible for two Coasean analysts, while both remaining true to the underlying principles of this framework, to reach opposite conclusions. Consider, again, the cigarette case. Our critic claims that, given the widespread knowledge of the dangers of smoking tobacco, that its purveyors would not be found liable. It cannot be denied that this is a plausible interpretation of how a Coasean might look at the matter. On the other hand, it is *also* possible to maintain, again within the Coasean framework, the very opposite: that this knowledge did not permeate as fully as possible,[41] that even to the extent that it did, still, the vast amount of information garnered by professionals in the industry would put to shame whatever limited knowledge consumers might manage to garner, that there was a lot of "noise" in the system, e.g., customers being confused by advertising for this product, etc.

A similar perspective applies to the hot coffee case. Ask yourself, gentle reader, not who is *responsible* for this scalding; instead, thrust yourself into the Coasean world, and query, who is the least cost avoider of accidents of this sort? Who knows more about, who can at less cost generate information concerning, hot coffee: a gigantic corporation which brews veritable swimming pools full of this beverage every day, or some little old lady who drinks it once in a while? Again, to ask this question is to answer it: the indictment of McDonalds is implicit once we look at the world through Coasean lenses. Or, at least, this is *one* conclusion that could be reached in this manner. But again, it is possible to disagree, utilizing Coasean "insights." The cost to avoid is not solely dependent on the information costs. In this case, the woman knew that hot coffee can scald; therefore, her avoidance cost

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www.firstworldwar.com/weaponry/flamethrowers.htm.

[40] *See Tex Williams, 68, Country Music Star Who Acted in Films*, N.Y. TIMES, Oct. 13, 1985, at A52.

was the postponement of drinking it until she had completed her trip. McDonald's cost was to make a less desirable (e.g., cooler) product for their millions of daily tea and coffee drinking, non-idiot, customers. Here, then, is the case for arguing that even in a Coasean world, McDonalds should have prevailed in the lawsuit.

We are now ready to apply to other examples our hard earned insights into the Coasean world-view. We shall do so in the form of commentaries about a spate of liability cases now making the rounds of the internet. Here are seven case studies,[42] each followed, below, by commentary of the present authors.

1. "January 2000: Kathleen Robertson of Austin Texas was awarded $780,000 by a jury of her peers after breaking her ankle tripping over a toddler who was running amuck inside a furniture store. The owners of the store were understandably surprised at the verdict, considering the misbehaving tyke was Ms. Robertson's son."

Coasean comment: The big bad rich furniture store can surely more easily and cheaply figure out a way to rein in rampaging toddlers than can a single distraught mother.[43] Shouldn't they have had a kiddie romper room, so that mothers can shop in peace? For those worried about blameworthiness, the fact that this vendor did *not* offer such a feature ought to be sufficient to condemn them.

On the other hand, to wear our alternative Coasean hat, the very opposite conclusion is *also* compatible with this philosophy. Namely, who apart from the *mother* of a particular child can know him better, more easily, more cheaply? Surely, the parents of toddlers have far more, better and less expensive information about them than any random furniture store.

Libertarian comment: In this case, one sees how Coaseanism leads easily to central planning and business regulation. Information disparities and costs of avoiding accidents are completely irrelevant. The inescapable point is that the mother lost control of her own child, and the law should not allow her to make others pay for this difficulty. Had the mischievous tot been responsible for any damage to the furniture, ordinary justice would require that the mother reimburse the store for that as well.

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[41] In the real world, if not the one occupied by mainstream economists, the perfectly competitive assumption of full and complete information on the part of all participants does *not* obtain. *See* FRIEDRICH A. HAYEK, *The Use of Knowledge in Society*, *in* INDIVIDUALISM AND ECONOMIC ORDER 77, 80 (1948).

[42] This material came to the lead author via the internet; we have not been able to authenticate the veracity of any of these stories. Given this failure of ours, it is best to consider these stories as hypothetical.

[43] This contention might also (or better) be argued on the basis of lower cost to insure.

2. "June 1998: A 19 year old Carl Truman of Los Angeles won $74,000 and medical expenses when his neighbor ran his hand over with a Honda Accord. Mr. Truman apparently didn't notice someone was at the wheel of the car whose hubcap he was trying to steal."

Coasean comment: Who knows more about Honda vehicles? Carl Truman, a relatively "innocent" thief,[44] his victim neighbor from whom the aforesaid person was trying to steal a hubcap, or the Honda Corporation? Need we even ask? Surely it is the latter who knows, or who *should know* more about this automobile, its characteristics, its ability to smash hands, etc., than anyone else. What *other* theory, beside that of Coase, apart from sheer lunacy suddenly gripping judges, is sufficient to explain this travesty of justice.

Libertarian comment: Vehicular knowledge is beside what should be the legal point. The real issue, obvious to anyone not hailing from the planet Mungo, is that the thief should be forced to pay not only for his own medical expenses, but also for his attempted theft.

What is the linkage between least cost information gatherer and least cost avoider? It is simple. In cases such as this one, where information is crucial, there is a high correlation, not to say an identity, at least assuming ceteris paribus conditions, between information gathering and the avoiding of an accident of this sort. Do not be deterred from appreciating this insight on the ground that there is "a lesser cost of avoiding something than not committing a crime."[45] Of course it is true that to not commit the crime in the first place would be in some sense to minimize costs, at least if we are looking at matters from the victim's point of view. Truman, presumably, would not have been willing to place his hand in danger of being rolled on; he did not appreciate the fact that his neighbor, the Honda owner, was in the process of driving his vehicle.

However, this is irrelevant, strictly speaking, to the point we are making. That is, we are stipulating that the crime would be undertaken, and confining ourselves to asking who is the least cost avoider of the damage of the crime, the corporation, or the criminal? We are positing, in an attempt to be true to the Coase theorem, that the former has far more information available to it than the latter, and would thus be held liable on the part of Coase inspired judge or jury. Perhaps the Honda Corporation should have installed an electronic device that would warn hubcap thieves of the fact that their victim's automobile was about to move. This might only have cost a few pennies, when spread out over all the vehicles manufactured by this company; it might have saved thousands of criminals from having their appendages mashed in mid crime. We see here how the Coase theorem can lead to "coddling the criminal."

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[44] See what happens when one eschews morality yet wishes to discuss theft?
[45] These words were offered to us by a student editor from this Journal.

3. "October 1998: A Terrence Dickson of Bristol Pennsylvania was exiting a house he finished robbing by way of the garage. He was not able to get the garage door to go up, the automatic door opener was malfunctioning. He couldn't reenter the house because the door connecting the house and garage locked when he pulled it shut. The family was on vacation, so Mr. Dickson found himself locked in the garage for eight days. He existed on a case of Pepsi he found, and large bag of dry dog food. This upset Mr. Dickson, so he sued the home owner's insurance claiming the situation caused him undue mental anguish. The jury agreed to the tune of half a million dollars and change."

Coasean comment: Let us construct a hierarchy of blame, based on the Coasean insights related to least cost avoiding of accidents in this case. Obviously, at the top of the heap is the firm that manufactured this malfunctioning automatic door opener. They likely have the deepest pockets, and the most information about their operation, and so should be hit with the biggest penalty. Thus we can see that the jury missed a bet in not attacking those at the top of this particular food chain. Second, is of course the insurance company; second, only to the manufacturer[46] in terms of knowledge about, and therefore responsibility for, the good operation of this implement. Third would be the homeowner, whose duty it is to keep this machinery functioning, so that criminals will not be inconvenienced. A thousand pardons; so that people with even less knowledge about the workings of the garage door, e.g., visitors and guests, will not be victimized. In the absence of the manufacturer and insurer,[47] it is the homeowner who should have been made to pay, and pay heavily, for the horrible conditions the "criminal"[48] was forced to endure.

Libertarian comment: Deep pocket searches are obviously anathema to justice. The criminal[49] should not only be made to do time for his robbery, he ought to pay for the dog food he ate, the Pepsi he drank, and for a week's rent for occupying that garage. And not just at market prices either. He ought to pay at least double[50] since these were seizures, not purchases.

What is the linkage between least cost information gatherer and least cost avoider in the present case? In theory, or in general, the two always point in the same direction. This is because information gathering is but a part of avoiding problems, or accidents. That is, one way to avoid a difficulty is to make oneself more knowledgeable about a given situation. However, these two phenomena, information gathering and problem avoiding, need not be identical in any given case.

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[46] We are now assuming equally deep pockets on the part of both miscreants.

[47] Assuming in effect that both these worthies were visited with the bankruptcy they so richly deserve.

[48] We use quotation marks to indicate that while we concede he acted improperly, there were others with far more culpability than his, at least from the Coasean perspective.

[49] No quotation marks. For the libertarian, criminals are people who steal legitimately owned private property, and that is not an oxymoron.

[50] For the libertarian thesis that proper libertarian punishment consists of "two teeth for a tooth" plus expenses and compensation for fright see MURRAY N. ROTHBARD, THE ETHICS OF LIBERTY 94 (1982); Walter Block, *Market Inalienability Once Again: Reply to Radin*, 22 T. JEFFERSON L. REV. 37, 75 (1999).

For example, in the present context, *ex post* all the information in the world about the absence of the family, the malfunction of the garage door, the absence of good food, etc., would not have saved Dickson his week-long ordeal of being trapped in the garage with only dog food to eat. Of course, had this criminal known of the special circumstances surrounding this particular home ex ante or in advance, he would not have broken, entered, and attempted to rob it.

4. "October 1999: Jerry Williams of Little Rock Arkansas was awarded $14,500 and medical expenses after being bitten on the buttocks by his next door neighbor's beagle. The beagle was on a chain in it's owner's fenced in yard, as was Mr. Williams. The award was less than sought after because the jury felt the dog may have been provoked by Mr. Williams who, at the time, was shooting it repeatedly with a pellet gun."

Coasean comment: We are here faced with a plethora of actors, this time human and non human, and, in order to apply the Coasean "insights" to the case, must again construct a hierarchy of blame, responsibility, least cost avoiding and information. Between Mr. Williams, the trespasser, and his neighbor, the trespassee, who had more knowledge about the behavior of the dog? Obviously, the latter. Therefore, it was incumbent upon *him*, not Mr. Williams, to ensure safe conditions on the yard for any and sundry who might choose to while away their hours there. The cruelty toward the animal, while perhaps regrettable, is not pertinent. If the dog were not left unattended in the first place, by the reckless neighbor, the incident would not have occurred.

Libertarian comment: This is nonsense on stilts. The so-called "Mr." Williams ought to be made to pay the penalty for animal cruelty (to another person's property) and trespass. The jurors who made this award ought to be sent back to their home planet, Mungo. The judge who allowed it to stand ought to be disbarred. The reasoning behind this declaration is the ordinary commonsensical notion that people ought to be forced to compensate others for their misdeeds, and not be allowed to make them come to their rescue.

But there is more to be said in terms of indictment for the dog owner. Not only was it cheaper for him to gather information about the dog, he was the animal's owner, after all, the pet keeper was also the least cost avoider of the biting of the trespasser. Take the first point first. The trespasser was a complete stranger to the dog. He knew virtually nothing of its predilection to bite. It would have taken him weeks or even months of costly study, necessarily from afar, to ascertain these facts about the animal. The owner, in contrast could gather such information far more cheaply. For him, it was in effect a "joint product"; while he was feeding it, petting it, etc., he could cheaply acquire information as to its character. The second point is even more clear. All the pet owner need have done to obviate the biting would have been to post a large sign, saying something to the effect of: "Warning! Vicious Dog!" At this point, the Coasean "analysis" might well do an about-face

and declare that with this sign in evidence, it would now be cheaper for the trespasser to avoid the yard. But we make this claim subject to correction. For, suppose that the trespasser could not read. Then, maybe, in some sort of escalation, the Coasean judge would insist not only upon a written warning, but a picture of a vicious dog in the act of biting as well. This indicates the essential arbitrariness of the Coasean system, not to mention its inherent injustice. Blaming the homeowner for not posting a warning sign for criminals, indeed. Should armed homeowners also have to poster their property so that would-be burglars might take care and only attempt to burgle homes of those unprepared to defend life and property? Does not such a move de facto shift burdens to others? Should the unprotected homeowner who has been burgled be able to sue for damages the armed homeowner who diverted the burglar by notifying of his willingness to defend with firearms life and property? Such are possible consequences of Coase.

5. "May 2000: A Philadelphia restaurant was ordered to pay Amber Carson of Lancaster Pennsylvania $113,500 after she slipped on a spilled soft drink and broke her coccyx. The beverage was on the floor because Ms. Carson threw it at her boyfriend 30 seconds earlier during an argument."

Coasean comment: One might think that the Coasean would say, who better to know the dangers of a spilled drink than the restaurant proprietor? But in this context, the Coasean might well disagree with the ruling. He could argue that as a general principle restaurateurs are indeed lower cost avoiders than patrons, but in this particular case (the woman threw the drink herself, only a half minute had elapsed) placing blame on Miss Carson would actually enhance the GDP.

Libertarian comment: Finally, there is agreement with the Coasean conclusion, but certainly not with the reasoning. Miss Carson should not only be held responsible for her own medical bills, but should be made to pay for cleaning of the mess she made on the floor. This is because she was a victim of her own prior action. In ordinary parlance, she "brought it upon herself." To allow her to foist the costs of her own folly on to someone else would be the height of injustice (a word that Coase has never been to known to so much as utter).

Here for the first time in any of these cases we see a sharper distinction between a least cost information gatherer and a least cost avoider. Again we confront a demonstration of the essential arbitrariness of the Coasean system. Given that the slip on the floor occurred a mere 30 seconds after the drink was tossed by Miss Carson, it might be thought that she could register this information about the resultant wet floor sooner, more easily, and more cheaply than the restaurant owner. On the other hand, she might have been inebriated, and not able to register things of that sort at *any* price. It may seem a bit harsh to hold the eatery responsible for the accident which the "lady" in question caused, but in making any such judgment we must contemplate not only information gathering costs, but also those of cost avoidance. Perhaps the bistro should have sold its drinks only in closed containers;

it, after all, knew of the clientele it was likely to attract, or at least *should* have known this. On the other hand (and there is always an other hand with analyzing issues a la Coase), perhaps GDP per capita would be maximized if women such as Miss Carson were punished, not rewarded, for their outlandish behavior. One possibility is that people of this sort would benefit from behavior modification given appropriate rewards and penalties. Another is that the average quality of the genetic pool would rise (and with it GDP per capita) if people of this sort did not contribute as much to the make up of the next generation (we assume here that the more cases of this sort she wins, the more able she will be to do so). It is difficult to say; that is, it is a complex matter to apply Coaseanism, since it admits of much subjectivity.

6. "December 1997: Kara Walton of Claymont, Delaware successfully sued the owner of a night club in a neighboring city when she fell from the bathroom window to the floor and knocked out her two front teeth. This occurred while Ms. Walton was trying to sneak through the window in the lady's room to avoid paying the $3.50 cover charge. She was awarded $12,000 and dental expenses."

Coasean comment: In the ordinary course of events, the night club owner would be more aware of the dangers emanating from his own property than would any of his patrons. The owner in question should have exhibited more care in the present case than he did since it would have been cheaper for him to have done so, than for the customer. The fact that she was in the process of attempting to steal services from him is of no moment, since theft is a normative concept, and the Coaseans are concerned only with positive economic analysis.

Libertarian comment: This is yet another case where the Coaseans diverge markedly not only from the libertarian, but also from the ordinary man in the street. To actually pay a thief damages, instead of penalizing her for theft, is not only non-pragmatic (it exacerbates stealing) but also reeks to the heavens with injustice.

Let us now address the distinction between least cost information gathering and accident avoiding in this case.

Normal people would know full well that it is dangerous to climb out of nightclub bathroom windows, particularly when they have had one too many to drink. Of course, considerations of this sort do not readily apply to people who are prime candidates for winning Darwin Awards, such as Miss Walton. So much for information gathering. How about accident avoiding? What should the owner of the emporium have done? Close off all bathroom windows? But there are other windows, out through which people intent upon theft of service can climb. Close off all windows? This might exacerbate deaths from fire. Post signs at all windows stating the danger of attempting to climb out of them? If so, there will be numerous such signs needed to be posted. For example, harking back to an example already

discussed in this section, there will have to be postings warning of slipping on wet floors, after one has thrown a drink at someone else that has landed on the ground. The trouble with this is that with so many signs, no one will read any of them.

7. "And just so you know that cooler heads do occasionally prevail: Kenmore Inc., the makers of Dorothy Johnson's microwave, were found not liable for the death of Mrs. Johnson's poodle after she gave it a bath and attempted to dry it by putting the poor creature in her microwave for, 'just a few minutes, on low.' The case was quickly dismissed."

Coasean comment: The logic of the Coasean position forces him to demur from this reasonable legal assessment. For the microwave manufacturers surely know more about their product than those who buy them at retail. Kenmore, to be sure, cannot be expected to have predicted that particular abuse of its product. But their retailers could have done more to obviate such misuse.

Libertarian comment: There is nothing "crazier" about Mrs. Johnson's actions regarding her poodle than there is in putting hot coffee between your legs in a moving automobile, and expecting someone else to pay for the negative results of that activity. Mrs. Johnson is no more unreasonable than smokers who sue tobacco companies. The "logic" of these cases, in a negative way to be sure, is impeccable. Once allow these other travesties of injustice into the tent, and there is no stopping point. For the Coasean, Mrs. Johnson must be compensated.

What are the informational and cost avoiding elements in the case of Mrs. Johnson's poodle? Obviously, the microwave manufacturer knows far more about its own product than any one customer. One point for the plaintiff, as far as Coase is concerned. But who can more easily avoid poodle cooking, and other such tragedies? One is tempted to say that the Mrs. Johnsons of the world are uneducable. Statements in the instructions for the oven might not help; who knows if she can read. And if she can, she is probably incapable of translating that information into action. Should salesmen be instructed to warn buyers of roasting their dogs? The idea seems ludicrous. By a process of elimination we arrive at Kenmore, Inc. Perhaps they ought to subject their potential customers to an IQ test?

It might be argued that a fundamental flaw of the present section is that the Coase theorem is explicitly intended to deal with property rules and ignores distributional issues. Nevertheless, in this section of the paper we attempt to apply this theorem to liability rules, which may be interpreted as concerned with distributional issues. We concede at the outset that the Coase of *The Problem of Social Cost* nowhere mentions tort or liability rules and discusses distribution only in passing. Some might object to this entire section, then, on the ground that Coase did not intend (nor does his article support a reading of) his piece to make an argument sufficiently general to cover liability rules.

To do so would be to dismiss our argument too quickly. For we are criticizing Coase on a reductio ad absurdum basis. Thus, it matters not one whit whether Coase discussed a particular issue or not. All that is important for the relevance of this section is that the Coase theorem has *implications* for torts, or liability rules, or whatever. Coase does not deal with murder or rape either, and yet his theory may be properly castigated if it can be shown that it supports such clearly illegitimate activities.[51] Let us try another even more simple example to illustrate this crucial point. Someone claims the earth is flat. One reductio ad absurdum is, "Let's drive a boat over the edge of the earth." Another consists of demonstrating that the span of a bridge with girders far apart from one another are not perfectly parallel to each other. Rather, each is perpendicular or orthogonal to the earth where it is placed. The tops of the spans are further away from each other than the bases. The flat earther cannot object to these lines of argument on the ground that he never mentioned, nor did he even contemplate, boats or bridges. He who asserts a position must defend *all* logical implications of it, and cannot hide behind the fact that he did not himself consider them.

Conclusion

It cannot be denied that there is no smoking gun to be found in the writings of Coase. He nowhere gives his explicit imprimatur to the lunatic decisions we have been considering. But there is a direct implicit, or logical connection between: 1) a refusal to consider the concept of justice[52] and a reliance on wealth maximization and its manifestation regarding liability, least cost avoidance of, or insurance against, accidents; and 2) this spate of lunatic court decisions we have been discussing.

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[51] *See* Block, *O.J.'s Defense*, *supra* note 8, at 265.

[52] One searches in vain for even a *mention* of this concept in all in *The Problem of Social Cost*. This would be unremarkable, and unexceptionable, in an essay on positive economics. But whatever the Coase theorem is, and it is many things, it is by no means limited to that concern; rather, it also involves itself not only in what the law *is* (positive law), but also in what the law *should be*! Surely it is an anomaly that "justice" should not be so much as even *mentioned* in a tractate devoted to what the law should be.

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FURTHER THOUGHTS ON THE PRIVILEGES OR IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT

Richard A. Epstein*

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[1]

In a previous issue of the N.Y.U. Journal of Law & Liberty,[2] I offered an interpretation of the Supreme Court's decision in the *Slaughter-House Cases*[3] that both strengthened and weakened a defense of the Supreme Court's decision in *Lochner v. New York*.[4] *Lochner*'s momentous decision struck down, by a 5-to-4 vote, a statute that imposed a maximum ten hour work day on certain types of bakers. My argument, in a nutshell, was that a careful reading of Section 1 of the Fourteenth Amendment exhibited a two-tier structure in the creation of new rights against the state. That structure gave a systematic advantage to citizens over noncitizens. That point is widely overlooked, even though citizenship still resonates today as an im-

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[1] U.S. CONST. amend. XIV, § 1.

[2] Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J.L. & LIBERTY 334 (2005) [hereinafter Epstein, *Citizens and Persons*].

[3] 83 U.S. 36 (1872). For a short critique of the decision, see DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 342-51 (1985). For another examination, see WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT 155-64 (1988).

[4] 198 U.S. 45 (1905).