

UNDERMINING PROPERTY RIGHTS: COASE AND BECKER

Gary North*

“Coase, get your cattle off my land.”

–Walter Block

In one sentence, Walter Block called into question Ron Coase’s central conclusion in his now-famous theorem, namely, that the original distribution of ownership would not affect the allocation of scarce resources in a free market, if there were no transaction costs.

COASE AND HIS THEOREM

In 1937, a young Ron Coase published an important study of the firm,¹ but for the next two decades, he published very little in professional scholarly journals.² Then, in 1960, like a bombshell, came his most famous work, “The Problem of Social Cost.”³ In it, he laid out what has since become known as the Coase theorem.

The theorem reaches its central conclusion by implicitly denying the economic efficiency of the judicial doctrine of strict liability. In order to deal with the real world, in which there is no such thing as a

*Founder of the Institute for Christian Economics.

¹Ronald H. Coase, “The Nature of the Firm,” *Economica* 4 (1937), pp. 386–405.

²A bibliography of Coase’s works appears in “On the Resignation of Ronald H. Coase,” *Journal of Law and Economics* 26 (April 1983). See also The Ronald Coase Institute, www.Coase.org. The bulk of his academic articles came after 1960.

³Ronald H. Coase, “The Problem of Social Cost,” *Journal of Law and Economics* 3 (1960), pp. 1–44.

costless transaction, Coase proposed a solution: in judicial cases where an owner challenges the invasion of his property by a non-owner, the judge should allocate access in terms of the highest efficiency use of the property, i.e., its highest social utility. This principle of law sacrifices the rights of private owners to a hypothetical public good in which rent-seeking invaders act in the name of the general public, and the courts have the legitimate authority to ratify their claims.

Coase's prose style allowed non-economists to read and understand. Lawyers especially grasped its crucial point: if you can persuade a judge or jury that it is in the general public's economic self-interest to allow your client to steal income from another person's property, then scientific economics teaches that you are helping to restore economic efficiency.

His clear presentation and the revolutionary nature of this doctrine has won Coase many important accolades. In 1991, he was awarded the Nobel Prize in Economics, and the Swedish Academy specifically singled out this article.⁴ As of 1996, "The Problem of Social Cost" was the most-cited law review article in history, with 1,741 citations. The runner-up had only 359.⁵

Coase first presented his theorem to members of the economics department of the University of Chicago at a private meeting. They initially challenged him on his then-revolutionary thesis, namely, that in the absence of transaction costs—a real-world impossibility, of course—the unhampered free market will distribute income in whatever way equates social utility with social cost, no matter which party possesses title to the income-producing property. With respect to the classic textbook example of welfare economics, Coase argued that in the case of a dispute between a railroad company, whose coal-fired engine emits sparks, and a farmer whose field may be set on fire by these sparks, private negotiations between the field's owner and the railroad company's executives will allocate the railroad's income and

⁴See www.nobel.se/economics/laureates/1991/press.html for the official press release by the Nobel committee. See also Tom Bethell, *The Noblest Triumph: Property and Prosperity through the Ages* (New York: St. Martin's Press, 1998), p. 315.

⁵Fred R. Shapiro, "The Most-Cited Law Review Articles Revisited," *Chicago-Kent Law Review* (1996), p. 751. See also "Chicago Journal," *The University of Chicago Magazine* (February 1997).

North – Undermining Property Rights: Coase and Becker

farmer's income in the way that maximizes social utility. His argument assumes no transaction costs.

At first, his listeners were unpersuaded, but as the evening wore on, Coase converted them, one by one: Milton Friedman, his brother-in-law Aaron Director (the editor who then decided to publish "The Problem of Social Cost"), and George Stigler.⁶ The Chicago economics department soon hired Coase away from the University of Virginia.⁷

Yet, not everyone in the economics profession lauded Coase's revolutionary idea. In 1974, at the famous South Royalton conference for Austrian economics, a young Walter Block called into question Coase's central conclusion when he quipped, "Coase, get your cattle off my land!" In one sentence, speaking in the name of property owners, Block identified the chief problem with Coase's theorem: its implicit rejection of private property rights. Block's statement hit the theorem on methodological, epistemological, and ethical grounds.

In 1977, Block wrote a brief essay refuting Coase's theorem.⁸ Like Coase, Block avoided the standard professional economic paraphernalia of graphs and equations, making his argument with words, logic, and examples. Unlike Coase's article, though, Block's article received almost no attention.⁹

⁶Bethell, *Noblest Triumph*, p. 316.

⁷The University of Virginia thereby became the world record-holder in departed future Nobel Prize winners in economics. Coase and James Buchanan both left Virginia before they won the prize. This shows a degree of negative academic entrepreneurship unmatched by any other economics department.

⁸Walter Block, "Coase and Demsetz on Private Property Rights," *Journal of Libertarian Studies* 1, no. 2 (1977), pp. 111–15.

⁹For another attack on the Coase theorem that has received almost no attention, see Gary North, *The Coase Theorem: A Study in Epistemology* (Tyler, Tex.: Institute for Christian Economics, 1992). A few weeks after Coase won the Nobel Prize, I sent a large box of copies of the book to the economics departments of about a dozen major universities. I asked the secretaries to put one in each faculty member's mailbox; I received only a single letter of thanks from a faculty member. The book was ignored by the profession, and I have never heard a word from Coase himself, who is still alive as I write this.

Neither my book nor Block's article (which my book cites) appears in the text or the 13-page bibliography in the 55-page, 1998 article by Steven

THE IMPACT OF THE COASE THEOREM

Chicago School economist-judge-legal theorist Richard Posner goes so far as to argue in his widely read textbook on law and economics that Coase's article and one by Guido Calabresi¹⁰ were instrumental in launching an entire academic discipline, law and economics, "the application of the theories and empirical methods of economics to the legal system across the boards."¹¹ The Coase theorem "established a framework for analyzing the assignment of property rights and liability in economic terms." As he wrote in 1981, "Until recently, then, utilitarianism held sway in legal theory, but overt economic analysis was rare. The position is now reversed."¹²

Coase's essay was perhaps the key one in the revival of academic economists' interest in the question of pollution and economic theory, as well as a crucially important contribution to a free market theory of property rights. It is by far the most important modern article on welfare economics.

Coase, Pigou, and Robbins

Coase summarized the state of the welfare economics debate—it had long ceased to be debated very much—as of 1960. Cambridge University economist Arthur Pigou had formulated the debate over welfare economics in the early decades of the twentieth century, defending the graduated income tax on the basis of marginal utility theory. Pigou argued that the marginal value of the next unit of income is lower for a rich man than for a poor man, so social utility increases when the state coercively transfers income from the rich to the poor. His argument implicitly assumed that the subjective utilities of two people, and, indeed, whole classes, can be measured by a third person: the person who writes the tax code. Without the possi-

Medema and Richard O. Zerbe, Jr., "The Coase Theorem," in *Encyclopedia of Law and Economics*, <http://encyclo.findlaw.com/0730book.pdf>.

¹⁰Guido Calabresi, "Some Thoughts on Risk Distribution and the Law of Torts," *Yale Law Journal* 70 (1961), pp. 499 ff.

¹¹Richard A. Posner, *Economic Analysis of Law* (Boston: Little, Brown, 1986), p. 19.

¹²Richard A. Posner, *The Economics of Justice* (Cambridge, Mass.: Harvard University Press, 1983), p. 54.

North – Undermining Property Rights: Coase and Becker

bility of measuring interpersonal comparisons of subjective utility, there can be no scientifically valid welfare economics.

In a related discussion of welfare economics, Pigou established what was to become the traditional framework for pollution economics, a subset of welfare economics. This discussion was categorized under the general rubric of “externalities”: the imposition of a firm’s costs of operation on those who are not owners of the stream of future income generated by the production process. In other words, these victims are *external* to the firm or production unit, but not external to its costs of operation. Almost without exception, the economists’ discussion of externalities ended with a consideration of possible state measures that can reduce or eliminate these externalities. The conclusions reached by most economists, based on Pigou’s analysis in *The Economics of Welfare*,¹³ were as follows, Coase summarized: the producer of pollution (smoke, noise, etc.) should 1) pay damages to those injured, or 2) have a tax imposed on his production by the civil government, or 3) have his factory excluded from residential districts.¹⁴ Coase’s article broke with this tradition.

Here we come to one of the great ironies in the history of modern economic thought. Pigou, a dedicated socialist,¹⁵ came out in favor of defending the farmer’s property against the invading railroad which placed the farmer’s crops at risk. Coase, now the scion of the Chicago School, established his reputation by formally denying that the farmer is entitled to any such automatic legal protection. On the contrary, he argued, a civil court has the obligation to allocate damages between the farmer and the railroad in its quest to maximize the public’s social value. Each party damages the other, and the courts must allocate this damage. In Coase’s legal world, the farmer’s refusal to allow the railroad company to set fire to his crops is seen as imposing economic damage on the railroad company—damage which may be greater, in terms of reduced social utility, than the damage imposed on the farmer by the engine that spews out sparks.

Coase’s theorem undermines an ancient tradition of Western jurisprudence that goes back to the Mosaic law:

¹³A.C. Pigou, *The Economics of Welfare*, 4th ed. (London: Macmillan, 1932).

¹⁴Coase, “The Problem of Social Cost,” pp. 1–2.

¹⁵A.C. Pigou, *Socialism vs. Capitalism* (London: Macmillan, 1937).

If a man shall cause a field or vineyard to be eaten, and shall put in his beast, and shall feed in another man's field; of the best of his own field, and of the best of his own vineyard, shall he make restitution. If fire break out, and catch in thorns, so that the stacks of corn, or the standing corn, or the field, be consumed therewith; he that kindled the fire shall surely make restitution.¹⁶

The strict liability implied by this judicial principle of restitution for damages is foreign to the Coase theorem and the school of economic opinion that has successfully promoted it.

Aaron Levine summarizes Coase's theoretical breakthrough:

Assuming zero transaction costs and economic rationality, Coase, in his seminal work, demonstrated that the market mechanism is capable of eliminating negative externalities without the necessity of governmentally imposed liability rules.¹⁷

Furthermore, the theorem leads to the conclusion that "if transactions are costless, the initial assignment of a property right will not determine the ultimate use of the property."¹⁸ I might add that if pigs had properly designed wings, they could fly.

The problem here is simple: there are and always will be transaction costs.¹⁹ Or, I should say, this is one problem with the Coase theorem. The major problem is never confronted by Coase or his many defenders, namely, that his theorem imputes zero economic value—and therefore zero relevance—to the owner's sense of moral and legal right associated with a willful violation of his property. It also ignores the economic relevance of third parties' sense of moral outrage and helplessness when there is no predictable enforcement by the civil government of owners' legal immunities from invasion, even if done in the name of a "more efficient" social good or social goal.

This is why the Coase theorem is one of the most morally insidi-

¹⁶Exodus 22:5–6.

¹⁷Aaron Levin, *Free Enterprise and Jewish Law: Aspects of Jewish Business Ethics* (New York: Yeshiva University Press, 1980), p. 59.

¹⁸Posner, *Economic Analysis of Law*, p. 7.

¹⁹For a brief introduction to the question of transaction costs, see Oliver E. Williamson, "Transaction-Cost Economics: The Governance of Contractual Relations," *Journal of Law and Economics* 22 (October 1979), pp. 233–61.

North – Undermining Property Rights: Coase and Becker

ous pieces of academic nonsense ever to hit the economics profession. Worse, it has infected the thinking of a generation of very bright and very glib free-market economists and legal theorists, and has drastically compromised the academic case for liberty. It has imposed private costs on those of us who are attempting to make a case for free market economics. In this sense, Coase's theorem is a form of pollution. But, because it is intellectual pollution, those injured cannot take him to court and sue for damages. The best we can do is offer a pollution-control system: proof that his whole argument is specious.

From the beginning, Coase fully recognized the nature of the technical economic problem he had raised, namely, the impossibility of a world in which there are no transaction costs. (The moral issues related to property rights, he dismissed without a moment's public hesitation as irrelevant to economic analysis.) Therefore, he allows civil judges to intervene to settle disputes over lawful access to the fruits of property.

But there is a problem here: Coase cannot escape that nagging problem ignored by Pigou and all welfare economists, namely, the problem of interpersonal comparisons of subjective utility. Ever since 1932, when Lionel Robbins demonstrated the impossibility of making scientifically valid comparisons of interpersonal subjective utility,²⁰ the economics profession has been involved in a game of "let's pretend we can—or the judges can." Coase's case against Pigou rests on the implicit assertion that specialists, especially judges, can make such comparisons. He implicitly assumes that, somehow, social costs and social benefits can be equalized by judges, but only at the expense of ignoring the twin doctrines of strict liability and private ownership, i.e., the right to exclude. He never explains how judges can do this, nor does he deal with Robbins's classic refutation of Pigou's assumption regarding progressive taxation: the possibility of making scientifically valid interpersonal comparisons of subjective utility. Coase shares this assumption with Pigou.

Reciprocal Harm

Coase reformulated the terms of the debate over externalities.

²⁰Lionel Robbins, *The Nature and Significance of Economic Science*, 2nd ed. (London: Macmillan, 1935), pp. 138–41.

Journal of Libertarian Studies

The question is commonly thought of as one in which A inflicts harm on B and what has been decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm.²¹

To begin with, such reasoning is morally perverse, if it is accepted as a methodological standard governing economic analysis in all instances involving competing economic actions. It would be just as easy to say of kidnapping that any restrictions on kidnapping by the state harm the kidnapper, and that a lack of restrictions harms the victims. If we are going to build an economic system in terms of the supposedly “reciprocal nature of harm”—that each economic actor suffers harm when he is restricted from acting according to his immediate whim—then economics becomes positively wicked, not value-free, in its attempt to sort out just how much harm the courts will allow each party to impose on the other.

Coase offered the following example of reciprocal harm concerning cattle that stray onto another man’s property and destroy crops:

If it is inevitable that some cattle will stray, an increase in the supply of meat can only be obtained at the expense of a decrease in the supply of crops. The nature of the choice is clear: meat or crops?²²

This appears to be correct economic analysis, as far as it goes. It forces us to think about the problem in terms of what members of the society must give up, meat or crops. But his next sentence is the very heart of the problem, and he never shows how economists—or anyone else, for that matter—can, as scientists, make an economically rational (i.e., neutral) choice in the name of society: crops vs. meat. “What answer should be given is, of course, not clear until we know the value of what is obtained as well as the value of what is sacrificed to attain it.”²³

So value must be sacrificed. Economists need to ask several

²¹Coase, “The Problem of Social Cost,” p. 2.

²²Coase, “The Problem of Social Cost,” p. 2.

²³Coase, “The Problem of Social Cost,” p. 2.

North – Undermining Property Rights: Coase and Becker

questions: Value to whom? Society as a whole? The value to the cattle owner? The value to the farmer? Also, how can we make such estimates of economic value, since economic value is subjective? Questions of economic value are the main problems raised by his paper, yet he cannot answer them by means of the “scientific economics” he proclaims. No economist can. Peter Lewin has gone to the heart of the matter when he writes in a withering critique of Coase that:

costs are individual and private and cannot be “social.” The social-cost concept requires the summation of individual costs, which is impossible if costs are seen in utility terms. The notion of social cost as reflected by market prices (or even more problematically by hypothetical prices in the absence of a market for the item) has validity only in conditions so far removed from reality as to make its use as a general tool of policy analysis highly suspect. . . .

The foregoing suggests that any perception of efficiency at the social level is illusory. And the essential thread in all the objections to the efficiency concept, be it wealth effects, distortions, or technological changes, is the refusal by economists to make interpersonal comparisons of utility. Social cost falls to the ground precisely because individual evaluations of the sacrifice involved in choosing among options cannot be compared.²⁴

Since there are no “neutral, scientific” answers, Coase’s whole essay is an exercise in intellectual gymnastics, an illusion of scientific precision.²⁵ Nevertheless, it is considered a classic essay, a pioneering work which literally created a new approach in both economics and legal theory. What is revealing is that the economics profession as a whole has refused to face up to this problem.

²⁴Peter Lewin, “Pollution Externalities: Social Cost and Strict Liability,” *Cato Journal* 2 (Spring 1982), pp. 220, 222.

²⁵This same illusion of scientific precision is at the heart of virtually every professional journal in economics, every mathematical question, and every call for scientific policy-making issued by members of the economists’ guild. The day that an economist admits to himself that no economist can make interpersonal comparisons of subjective utility is the day that his public claims of economics’ objective, scientific precision make him a charlatan. The day before, he was simply ignorant.

PROPERTY RIGHTS

The meaning of “property rights” is this: individuals (or associations represented by individuals) possess a legal right to prevent others from stealing, invading, destroying, or otherwise interfering with their property. Owners therefore possess a *legal right to exclude others* from the use of specified property. The phrase “property rights” means that there is a legally enforceable “bundle of rights” that is associated with specific forms of property.

Coase’s essay undermines the very concept of private property rights. He offers a detailed, carefully constructed argument concerning the marginal gains to the cattleman vs. the marginal losses to the farmer from a roaming steer. What the essay demonstrates, assuming that the psychological costs to the farmer of the cattleman’s violation of his property rights are never taken into consideration, is this: excluding transaction costs and information costs,²⁶ as well as assuming perfect competition (omniscience), the gain or loss to society is the same, whether the cattleman compensates the farmer for the value of the lost crops, should the cattle be left to roam, or the farmer compensates the cattleman for the higher costs of meat production, if the cattle are kept away from the farmer’s crops (higher feed costs, costs of fencing, etc.). Again, assuming “conditions of perfect competition,” Coase concludes:

Whether the cattle-raiser pays the farmer to leave the land uncultivated or himself rents the land by paying the land-owner an amount slightly greater than the farmer would pay (if the farmer was himself renting the land), the final result would be the same and would maximize the value of production.²⁷

Given his initial, unrealistic, hypothetical assumptions about free goods—transaction costs, information costs, and perfect competition—this conclusion initially appears to be correct, assuming two things: (1) farmers have no commitment to a sense of justice concerning their

²⁶“ . . . when the damaging business has to pay for all damage caused *and* the pricing system works smoothly (strictly this means that the operation of the pricing system is without cost).” Coase, “The Problem of Social Cost,” p. 2, emphasis in original.

²⁷Coase, “The Problem of Social Cost,” p. 6.

North – Undermining Property Rights: Coase and Becker

property rights, and (2) members of society do not and will not suffer any additional economic losses after the civil government sets a precedent by refusing to make cattle owners responsible for the damage their animals cause. Both assumptions are implicit in Coase's thesis, and both are highly unlikely.

Coase states clearly what he thinks the economic problem is: "The economic problem in all cases of harmful effects is how to maximise the value of production."²⁸ Furthermore, he is no fool. Later in the essay, Coase drops his essay's initial assumption of zero transaction costs, perfect competition, and zero information costs. Because, in real life, there are transaction costs to settle disputes, there is therefore a role for civil government in settling costly disputes.²⁹ "All solutions have costs," including solutions imposed by the civil government.³⁰ But one underlying presupposition distorts all of Coase's analysis—a presupposition which is all too common (and unstated) in Chicago School economic analysis: the legitimacy of leaving aside issues of right and wrong, of justice, of equity.

Of course, if market transactions were costless, all that matters (questions of equity apart) is that the rights of the various parties should be well-defined and the results of legal actions easy to forecast.³¹

Problem: How can we discuss "the rights of the various parties" if we leave aside questions of equity—questions of right and wrong? In short, how can we discuss "rights" apart from what is *right*?

There would be a sense of outrage among the victims of the polluting factory if there were no enforceable liability rules. The initial reaction of one of the victims, if he knows that the civil law does not protect his ownership rights automatically, may be to blow up the factory or murder its owner. The multiplication of acts of violence would be assured under such a non-liability legal order. The issue of economic efficiency therefore cannot be separated from the issue of judicial equity. This is what Chicago School economists and legal theorists never show any signs of having understood.

²⁸Coase, "The Problem of Social Cost," p. 15.

²⁹Coase, "The Problem of Social Cost," pp. 15–19.

³⁰Coase, "The Problem of Social Cost," p. 18.

³¹Coase, "The Problem of Social Cost," p. 19.

When righteous men are thwarted in their cause by seekers of local “efficiency” who care nothing about the ethics of the solution, there will be serious social consequences. To discuss the efficiency of any given transaction without also discussing the equity of it is to begin to deliver the society into the hands of socialist revolutionaries. Or, to put it in language more familiar to Chicago School economists, penalizing righteousness in the name of economic efficiency is not a zero-cost decision.

THE “RIGHT TO INFLICT DAMAGE”

Coase considers an example taken from Pigou’s *Economics of Welfare*. Suppose that it would pay a railroad firm to run a train faster than normal, thereby throwing off more sparks. (The example applies to railroads before the era of diesel engines, but it is still valid as an example.) Suppose also that the sparks set a fire that burns a farmer’s crop. Pigou said that the railroad company should reimburse the farmer for the loss of his crops by paying him the crop’s market value. This, it should be pointed out, is also what Exodus 22:6 says.

Coase denies Pigou’s conclusion. “The conclusion that it is desirable that the railway should be made liable for the damage it causes is wrong.”³² Why? Because the economic gains to the total economy, as revealed by the value of the crops lost vs. the cost of installing spark-arresters on the engine, or the losses to the railroad company if the train was not run at all, might be greater by allowing the train to emit sparks.

The judge should consider the monetary value of the burned crops in relation to the cost of installing a spark-arrester or the monetary losses to the company of running the train more slowly, and then make a decision as to what each party owes the other. In other words, he must consider the value of total production. “This question can be resolved by considering what would happen to the value of total production if it were decided to exempt the railway from liability from fire-damage.”³³ Coase argues that it might be better for society in general if the farmer’s property rights are ignored, leaving him free to pay the railroad company sufficient money to install the spark-arrester. After all, the value of the crop may be greater than the cost of the

³²Coase, “The Problem of Social Cost,” p. 32.

³³Coase, “The Problem of Social Cost,” p. 33.

spark-arrester.³⁴

What if the farmer had worked for years to build up the soil or build his family's dream home? People are sometimes "irrationally" committed to a piece of real estate: "This land is mine!" A spark-emitting train is now threatening his home's existence, the work of his hands, and his dream or vision. Is he entitled to no legal protection? Isn't the railway *always* liable for damages? Furthermore, if the court decides that the railway is liable—and Coase denies that the court should automatically decide that it is—is the man's shattered dream worth only monetary compensation for the market value of his crops? Maybe he resents the fact that the railway is reducing to mere dollars his right to safety from fire. Shouldn't the engines be fitted with spark retarders, by law? After all, this is not an accidental, occasional incident; this is a daily threat of fire that is a statistically probable event because of the technology involved in running the trains. In short, what about the psychic costs to the victim? Coase's analysis completely ignores this fundamental issue.³⁵ Coase denies the concept of a single victim: both parties are victims, in his view, for both suffer damages because of the other's action.

“Coase, Get Your Cattle Off My Land!”

What about the farmer who sees the cattleman move in next door? Or the cattleman who sees the shepherd move in next door? If the other man's animals come roaming into his garden or pasture, isn't the victim entitled to compensation? What if the "accident" of wandering animals is not really an accident, but a regular way of do-

³⁴Clearly, the damage inflicted on the crops planted close to the tracks by numerous farmers could be high. The costs would be high to organize the farmers together in order to contribute money to finance the installation of the spark arrester. Each farmer would tend to wait for the others to put up the money. Each would become a "free rider" in the transaction, paying nothing but benefiting from the spark arrester. The payment to the railroad firm probably would not be made apart from intervention by the civil government to compel all farmers who are benefited by the spark arrester to pay their proportional share. The civil government must eventually decide who pays whom: the railroad firm paying damages to the farmers, or the farmers paying "protection money" to the railroad company.

³⁵This is Block's main criticism in "Coase and Demsetz on Private Property Rights."

ing business? Shouldn't the offender be required to put a fence around the wandering beasts? Why should the injured party be required by the court to share the costs of fencing? Are the victim's property rights of undisturbed ownership not to receive predictable compensation? If the victim prefers that his neighbor put up a fence in lieu of compensation, on what basis should the courts decide otherwise? What I am arguing, in short, is that the victimized property owner has the right to announce, "Coase, get your cattle off my land!"

My land: there is greater value to me in my right to enjoy my land undisturbed than Coase's reductionist economic analysis indicates. To count the market price of the crops that the cattle trampled, and then to compare that with the price of the meat that someone will put on his table, is to reduce the value of a man's right of undisturbed ownership to zero. Coase's concept of social cost ignores one of the most valuable assets offered to men by a free market social order: the right of an owner to determine who will and who will not have legal access to his property, and on what terms. To think that monetary compensation for damaged goods at a market price is all that matters to an owner is ridiculous. Rothbard is correct:

There are many problems with this theory. First, income and wealth are important *to the parties involved*, although they might not be to uninvolved economists. It makes a great deal of difference to both of them who has to pay whom. Second, this thesis works only if we deliberately ignore psychological factors. Costs are not only monetary. The farmer might well have an attachment to the orchard far beyond monetary damage. . . . But then the supposed indifference totally breaks down.³⁶

Even more important, there must also be compensation for the general loss of security that is necessarily involved in every willful violation of another man's property rights. To argue, as Coase does, that as far as society is concerned, it is economically irrelevant to the total economic value accruing to society whether the victim (farmer) builds the fence at his expense or the cattleman (violator) does at his expense is to place zero price on the rights of ownership. When free market economists place zero economic value on the rights of private

³⁶Murray N. Rothbard, "Law, Property Rights, and Air Pollution," *Cato Journal* 2 (Spring 1982), p. 58.

North – Undermining Property Rights: Coase and Becker

ownership, they have given away the case for the free market. This is precisely what Coase and the many academic “economics of law” specialists have done. They have preferred the illusion of value-free economics to the ideal of private property—our legal right to exclude others from using our property.

Theft as a Factor of Production

Coase explicitly argues that the ability to cause economic injury is a factor of production. Therefore, the State’s decision to deny a non-owner the legal right to invade another person’s property supposedly imposes a social cost: society’s loss of a factor of production. In Coase’s view, such a rigid exclusion against the invasion of private property is not costless. We might call this the Don Corleone theory of property rights: the right to make a person an offer he cannot refuse. Coase writes:

If factors of production are thought of as rights, it becomes easier to understand that the right to do something which has a harmful effect (such as the creation of smoke, noise, smells, etc.) is also a factor of production. Just as we may use a piece of land in such a way as to prevent someone else from crossing it, or parking his car, or building his house upon it, so we may use it in such a way as to deny him a view or quiet or unpolluted air. The cost of exercising a right (of using a factor of production) is always the loss which is suffered elsewhere in consequence of the exercise of that right—the inability to cross land, to park a car, to build a house, to enjoy a view, to have peace and quiet or to breathe clean air.³⁷

I offer a rival assessment of social costs and benefits. The legal right of owners to exclude others from invading their property is *the* crucial factor of capitalist production. This is the production factor of personal confidence that I will be able to retain the fruits of my labor, my land, and my capital assets. When the legal system denies this predictable protection to owners, the free market is steadily eroded by invaders.

Coase wants us to “have regard for the total effect” of such uses of our so-called capital, namely, the right to pollute the environ-

³⁷Coase, “The Problem of Social Cost,” p. 44.

ment.³⁸ But “total costs” are precisely what he has deliberately chosen to ignore: the right to determine whether or not another person can invade my privacy, wake me up at 2:00 A.M., set fire to my crops, send his cattle to eat in my fields, or, ultimately, sell tickets to people to peek through my window at 3:00 A.M. The economic value of my right to say “Keep your cattle off my land!”—and my right to receive full restitution for the violation of this right—is ignored by Coase and all those economists who take seriously his economic analysis of social costs. He offers economic analysis of the right to inflict damage, but he ignores any economic analysis of the right to deny the damage-producer his so-called right. More than this, Coase explicitly denies the right of property owners to have their property defended by predictable law, for he says that any consideration of the right to demand compensation depends on “circumstances.”³⁹ If the right of collecting compensation is not predictable, then the right of private property loses its status as a right.

By elevating the “right to inflict damage” to the same level as the right to demand compensation for a violation of a property right, Coase has effectively compromised the latter right by making a potential right out of the ability to inflict damage. The application of Coase’s argument would destroy property rights by attempting to extend the status of property right to a man’s ability to damage his neighbor’s property. Nowhere in his article does Coase discuss the economic costs to society of compromising the injured party’s right to demand and receive by law either (1) support for his exclusion of the invader, or (2) economic restitution from the invader. Coase does not even seem to understand the implications of his own argument. Most astounding of all, his arguments have been taken seriously by economists who see themselves as defenders of the free-market order.

BECKER ON CRIME AND PUNISHMENT: SUB-OPTIMAL ANALYSIS

The year after Coase won the Nobel Prize, Gary Becker won it. Becker had made a name for himself by applying Coase’s theorem to crime and punishment. We see in his analysis the same sort of “add it up” reasoning in a subdivision of law and economics: crime and pun-

³⁸Coase, “The Problem of Social Cost,” p. 44.

³⁹Coase, “The Problem of Social Cost,” p. 21.

North – Undermining Property Rights: Coase and Becker

ishment. Ever since Becker's pioneering article in 1968,⁴⁰ Chicago School economists have been analyzing crime and law enforcement in terms of a model that minimizes social losses from crime. This model treats social costs and optimal social solutions as if such concepts had scientific validity in a world of subjectivist economic analysis. According to Chicago School economist William Landes:

Optimal policies are defined as those that minimize the social loss from crime. That loss depends upon the net damage to victims; the resource costs of discovering, apprehending, and convicting offenders; and the costs of punishment itself. These components of the loss, in turn, depend upon the number of criminal offenders, the probability of apprehending and convicting offenders, the size and form of punishments, the potential legal incomes of offenders, and several other variables. The optimal supply of criminal offenses—in essence, the amount of crime—is then determined by selecting values for the probability of conviction, the penalty, and other variables determined by society that minimize the social loss from crime. Within this framework, theorems are derived that relate the optimal probability of conviction, the optimal punishments, and the optimal supply of criminal offenses to such factors as the size of the damages from various types of crimes, changes in the overall costs of apprehending and convicting offenders, and differences in the relative responsiveness of offenders to conviction probabilities and to penalties.⁴¹

This all sounds so scientific, but it is spurious if economics does not allow the interpersonal comparison of subjective utilities or the aggregating of interpersonal utilities, which it doesn't. But sophisticated, intellectually rigorous analyses such as these certainly increase the likelihood of academic tenure and personal career advancement—an employment guarantee that some people regard as less than socially

⁴⁰Gary S. Becker, "Crime and Punishment: An Economic Approach," *Journal of Political Economy* 76, no. 2 (March–April 1968), pp. 169–217, reprinted in *Essays in the Economics of Crime and Punishment*, ed. Gary S. Becker and William M. Landes (New York: National Bureau of Economic Research, 1974). Subsequent citations are from the book.

⁴¹William M. Landes, preface to *Essays in the Economics of Crime and Punishment*, p. xiv. Each of the five authors who contributed the book's six essays was, at the time, a professor at the University of Chicago.

optimal.⁴²

Becker's Breakthrough

Becker insists that his approach to crime and punishment does not “assume perfect knowledge, lightning-fast calculation, or any of the other caricatures of economic theory.”⁴³ Dr. Becker is self-deceived; this is exactly what is assumed in all discussions of socially optimum decision-making. This so-called caricature is, in fact, the heart, mind, and soul of modern economics as an academic discipline. Without it, there could be no mathematics or equations in economic analysis, and without mathematics, one rarely gets articles printed in the prestigious scholarly economics journals.⁴⁴ Certainly, his essay is made nearly unreadable by page after page of equations, as are many of his other essays.

Becker insists that “This essay concentrates almost entirely on determining optimal policies to combat illegal behavior and pays little attention to actual policies.”⁴⁵ In this regard, the essay is representative of virtually the whole field of law and economics. When it comes to suggesting what should be done about crime, Becker prefers equations and equilibrium assumptions to the concept of personal responsibility. He and his colleagues refuse to honor Charles Baird’s warning: “Since all costs and benefits are subjective, no government can accurately identify, much less establish, the optimum quantity of anything.”⁴⁶

⁴²See, e.g., Robert A. Nisbet, “The Permanent Professors: A Modest Proposal,” *Public Interest* (Fall 1965).

⁴³Becker, “Crime and Punishment,” p. 9.

⁴⁴John Kenneth Galbraith, *Economics Peace and Laughter* (New York: New American Library, 1972), ch. 2.

⁴⁵Becker, “Crime and Punishment,” pp. 44–45.

⁴⁶Charles W. Baird, “The Philosophy and Ideology of Pollution Regulation,” *Cato Journal* 2 (Spring 1982), p. 303. Admit this, and 90 percent of what gets published in the professional academic journals would have to be rejected by the editors. This explains why a career economist such as Isaac Ehrlich would write a section headed “Optimal Participation in Illegitimate Market Activities: A One-Period Uncertainty Model.” See Isaac Ehrlich, “Participation in Illegitimate Activities: An Economic Analysis,” in *Essays in the Economics of Crime and Punishment*.

North – Undermining Property Rights: Coase and Becker

Judges must fly as blind as Becker: “A wise use of fines requires knowledge of marginal gains and harm and of marginal apprehension and conviction costs; admittedly, such knowledge is not easily attained.⁴⁷ *Not easily attained!* In terms of the logic of subjective economics, such knowledge cannot be attained at all. Economists cannot make scientific interpersonal comparisons of subjective utility or disutility. Chicago School economists may shudder at the thought of restructuring civil sanctions to make civil law conform more closely to the biblical principle of strict liability and restitution, but, at least so far, they have nothing to offer in its place except endless self-deception regarding the scientific possibility of discovering socially optimal levels of crime and punishment.⁴⁸

That Becker’s essay does not even consider the possibility of restitution payments by criminals to their victims, but instead focuses on the social benefits of fines paid to the State, indicates how far from common sense these scientific economists are. What mainly disturbs Becker is that with imprisonment, “some of the payment ‘by’ offenders would not be received by the rest of society, and a net social loss would result.”⁴⁹ He is so concerned with questions of “net social loss” that he neglects the crucial question of the net *personal* loss suffered by the victim.⁵⁰ The word “restitution” does not appear in the index

⁴⁷Becker, “Crime and Punishment,” p. 28.

⁴⁸Consider the essay by Nobel Prize-winning University of Chicago economist George Stigler, “The Optimum Enforcement of Laws,” in *Essays in the Economics of Crime and Punishment*, pp. 55–67.

⁴⁹Becker, “Crime and Punishment,” pp. 24–25.

⁵⁰He says that criminal law should deal only with crimes in which victims cannot be compensated. “Thus, an action would be ‘criminal’ precisely because it results in uncompensated ‘harm’ to others.” Becker, “Crime and Punishment,” p. 33.

I have some questions. First, if someone can serve a prison term or pay a fine to the State, why can’t he compensate the victims instead? Second, why does Becker refuse to discuss the overwhelming majority of crimes in which there are identifiable victims, preferring instead to fill up pages with equations? Is he conveniently defining away the problem of crime and punishment for the vast majority of crimes? Third, why does he feel it necessary to put quotation marks around *criminal* and *harm*? Is it because such languages smacks too much of objective moral norms?

of *Essays in the Economics of Crime and Punishment*.⁵¹

Two decades later, Becker was still humming the same old tune: deterrence, not vengeance; fines, not restitution to victims. He still has discovered no objective answer to the problem he raises: making the punishment fit the crime. “Obviously, it is hard to estimate damages for many company crimes and even harder to determine the probability of conviction.”⁵² Hard? By the standards of subjective value theory, it is impossible. But to admit this, Becker would have to remove his equations. Then what?

The Social Benefits of Criminal Behavior

A unique component of the Becker thesis on criminal behavior is that society’s concern, in prohibiting criminal behavior, ought to be the reduction of net social cost. This is a very important qualification. Paul Rubin has seen where Becker is going with this:

Becker essentially argued that criminals are about like anyone else—that is, they rationally maximize their own self-interest (utility) subject to the constraints (prices, incomes) that they face in the marketplace and elsewhere. Thus the decision to become a criminal is in principle no different from the decision to become a bricklayer or a carpenter, or, indeed, an economist. The individual considers the net costs and benefits of each alternative and makes his decision on this basis. If we then want to explain changes in criminal behavior over time or space, we examine changes in these constraints.⁵³

In calculating the net cost to society of any criminal act, Becker insists that we must count as a positive benefit the gains made by the criminal by committing the crime. “The net cost or damage to society

⁵¹The book has approximately 170 pages of equations or parts of equations in its 273 pages, with most of the remainder devoted to charts, graphs, statistical regression analysis, brief bibliographies, and the five-and-a-half page index.

For an equally arcane academic treatment, see David J. Pyle, *The Economics of Crime and Law Enforcement* (New York: St. Martin’s Press, 1983).

⁵²Gary Becker, “Make the Punishment fit the Corporate Crime,” *Business Week* (March 13, 1989).

⁵³Paul H. Rubin, “The Economics of Crime,” in *The Economics of Crime*, ed. Ralph Andreato and John J. Siegfried (New York: Wiley, 1980), p. 15.

North – Undermining Property Rights: Coase and Becker

is simply the difference between the harm and gain,” he writes.⁵⁴ How can he say this? Because of his thesis—the one which undergirds this whole subdivision of economics—that criminal behavior is no different from any other profit-seeking behavior. Ethics has no role to play in distinguishing crime from other profit-seeking activities.

The approach taken here follows the economists’ usual analysis of choice and assumes that a person commits an offense if the expected utility to him exceeds the utility he could get by using his time and other resources at other activities. Some persons become “criminals,” therefore, not because their basic motivation differs from that of other persons, but because their benefits and costs differ.⁵⁵

First, notice that Becker puts the word *criminals* in quotation marks, indicating his fear of making an ethical judgment in a scholarly journal. Second, he hesitates to follow what economists sometimes call the pure logic of choice.⁵⁶ He says that *some* persons become criminals “because their benefits and costs differ” from law-abiding persons. Why not use cost-benefit analysis to explain the actions of *all* criminals? Why limit it to only *some*? Why bother to distinguish the non-economic motives of criminals from those of non-criminals? The logic of his argument is that non-economic motives and personal tastes are irrelevant for economic analysis; only costs and benefits are relevant for making predictions regarding people’s economic behavior.⁵⁷ Why not follow the logic of the argument? Why not conclude in print that there is no theoretically valid economic difference between profit-seeking activities and criminal acts; there are only differences in net social utility? But he does not go this far. It is almost as if some last remaining trace of common sense and moral values has kept Becker from pursuing the logic of his position. One follower has not been so reticent:

An individual decision to commit a crime (or not to commit a crime) is simply an application of the economist’s theory of choice. If the benefits of the illegal action

⁵⁴Becker, “Crime and Punishment,” p. 6.

⁵⁵Becker, “Crime and Punishment,” p. 9.

⁵⁶On the pure logic of choice, see F.A. Hayek, “Economics and Knowledge,” *Economica* 4 (1937).

⁵⁷Rubin, “The Economics of Crime,” p. 15.

exceed the costs, the crime is committed, and it is not if costs exceed benefits. Offenders are not pictured as “sick” or “irrational,” but merely as engaging in activities that yield the most satisfaction, given their available alternatives.⁵⁸

Becker was too timid to pursue his remarkable thesis very far, so let me show you where it leads by considering murder’s net social cost or net social benefit. Becker writes that “the cost of murder is measured by the loss of earnings of victims and excludes, among other things, the value placed by society on life itself.”⁵⁹ But this is insufficiently rigorous by the standards of Chicago School economics. He forgot that the victim’s ability to earn a living also involves costs. The producer must eat, use public facilities of various kinds, and be a life-long absorber of resources. So, what Becker really meant to say is that the cost of murder is the net loss—discounted by the prevailing rate of long-term interest, of course⁶⁰—of the late victim’s lifetime earning potential, *minus* net lifetime expenditures (also discounted).

This raises a key question: What if the dead victim had been sick, dying, mentally retarded, or in some other way is a net absorber of society’s scarce economic resources? Must we not conclude that the murderer has in fact increased the net wealth of society? Remember Becker’s rule: “society’s” estimation of net social costs or benefits “excludes, among other things, the value placed by society on life itself.” On what economic grounds could a legislator oppose the concept of selective murder, with criminal indictments to be handed down in specific cases only after a retrospective evaluation (by some committee or other) of net costs and benefits?⁶¹ Who is to say? After all, as

⁵⁸Morgan O. Reynolds, “The Economics of Criminal Activity,” in *The Economics of Crime*, p. 34.

⁵⁹Becker, “Crime and Punishment,” p. 6.

⁶⁰See Posner’s discussion in *Economic Analysis of Law*, pp. 170–81.

⁶¹Becker also fails to mention the value of life to the late victim, which seems a bit odd given the fact that Becker also pioneered a subdivision in the economics profession called Human Capital. See Gary S. Becker, *Human Capital* (New York: National Bureau of Economic Research, 1964). Fortunately, Richard Posner has attempted to rectify this gaping hole in Becker’s analysis. He tries to make an objective estimation of the economic value of life to the victim, which he concludes is nearly infinite. He uses a hypothetical example of rising economic payment that someone would demand

North – Undermining Property Rights: Coase and Becker

he says, “Reasonable men will often differ on the amount of damages or benefits caused by different activities.”⁶²

If all this begins to sound like the work of a madman, it is only because it is the work of a technically skilled University of Chicago economist who follows the logic of his position.⁶³ Bear in mind that Becker’s essay on crime is regarded by his peers as a classic in the field, comparable to (and written with the same presuppositions as) Coase’s essay on social cost. European economist Henri Lapage called Becker’s work truly revolutionary, writing that “Gary Becker is classed among the greatest living American economists.”⁶⁴

Pin-Stickers and Their Victims

Becker has returned us to the age-old question of the pin-sticker and his victim.⁶⁵ If a person enjoys sticking pins into other people, and if other people resent this, what should society do? Should psychologists attempt to construct a measuring device to record the joy of the pin-sticker and then compare it to the pain of his victim? Should judges base their decision of whether to identify this act as a crime in terms of the pin-sticker’s pleasure minus his victim’s pain—“net social utility”?

Becker wants to consider only people’s perceived costs and benefits, risks and rewards, *net*. The logic of Becker’s position seems to

that would induce him to get involved in death-producing activities: the more likely death becomes, the higher the pay demanded. If death is sure, the price demanded will approach infinity. (Why, then, do men volunteer for suicide missions in wartime?) This is his surrogate for making a subjective posthumous estimation of life’s monetary value to the late victim. See Posner, *Economic Analysis of Law*, pp. 182–86. He draws no important conclusions from this analysis, however, and does not include it in his book’s index under “death” (for which there is no entry) or under the entries for “murder.”

⁶²Becker, “Crime and Punishment,” p. 45.

⁶³For a brief, intelligent, and methodologically rigorous response to Becker, see G. Warren Nutter, “On Economism,” *Journal of Law and Economics* 22 (October 1979), pp. 263–68.

⁶⁴Henri Lapage, “The Gary Becker Revolution,” in *Tomorrow, Capitalism: The Economics of Economic Freedom* (La Salle, Ill.: Open Court, 1982), p. 161.

⁶⁵Gary North, *Dominion Covenant: Genesis*, 2nd ed. (Tyler, Tex.: Institute for Christian Economics 1987), pp. 44–45.

infer the right of a criminal to inflict damage as heavy as murder so long as he can demonstrate in court through cost-benefit analysis that the particular murder produced net social utility. Coase, writing eight years earlier, was more judicious in his conclusions. He wanted only to assert the right *at some price* of an individual to inflict on other people less permanent forms of damage than murder.

THE SOCIAL COSTS OF THE COASE THEOREM

While there may be an essay by a professional economist that has inflicted more damage on the case for economic freedom than Coase's "Problem of Social Cost," and there may be a scholarly essay that has polluted the moral environment of market choice more than Coase's, I cannot imagine what that essay might be. Becker's 1968 essay, "Crime and Punishment: an Economic Approach," comes close, but it is really only an application of Coase's approach to law.

Coase can argue that his right to inflict such moral damage is merely a factor of academic production. No doubt this essay advanced his academic reputation after 1960. But for every benefit there is a cost: it surely has inflicted and will continue to inflict damage on human freedom, for it assailed the moral case for private property as no article "within the camp" ever had. It created an intellectually and morally bogus concept of the supposed social economic efficiency of production costs that remain the same irrespective of any initial distribution of ownership. With that seemingly scientific and academically irresistible conclusion, Coase seduced some of the brightest economists and legal theorists of the next generation. Without a moral case for private property, private property will not survive the attacks, political and intellectual, of its ever-present, ever-enviuous enemies.

Coase's essay is regarded by many economists, as well as legal theorists, as a classic. It is a classic all right—a classic exercise in rarified and misleading sophistry. Yet, it is taken very seriously by Chicago School economists who have developed the subdiscipline, "the economics of property rights." It was taken seriously by the committee that awarded him the Nobel Prize in economics in 1991. Sometimes even very bright economists can come up with outrageous hypotheses, and the public adopts these "logical discoveries" at its peril. Coase's essay is regarded by academic economists—at least non-Keynesian and non-mathematical economists—as a landmark essay. What it is, on the contrary, is a land mine essay. It blows off both

North – Undermining Property Rights: Coase and Becker

legs of any defender of the free market who inadvertently attempts to stand on it, thereby leaving him, morally speaking, without a leg to stand on. This is a very high personal transaction cost.

Any society that adopts the Coase theorem as its standard of justice must turn over to the courts the right to undermine private ownership. By defining damages as mutual—the fire-setter and his victim—the Coase theorem undermines the very concept of justice by destroying the concept of *victim*. The property owner loses his right to exclude invaders from appropriating some or all of the value of his asset. The Coase theorem turns over to the courts the right to assess damages in the name of the people. When enforced, it encourages property owners to take into their own hands the defense of their right to exclude.

When a man says “Get your cattle off my land” to someone whose cattle really are on his land, a society that seeks peace, including the reduced transaction costs that peace promotes, would be wise to instruct its judges to direct the cattle owner to round up his cattle and take them home. Economists, who generally own neither farms nor cattle, and who rarely are armed, would be wise to assess the potential damages, including high transaction costs, that are fostered by a court system that ignores this fundamental principle of justice.

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