

PRIVATE-PROPERTY RIGHTS, ERRONEOUS INTERPRETATIONS, MORALITY, AND ECONOMICS: REPLY TO DEMSETZ

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Professor Harold Demsetz and I have been involved in an intellectual dispute which has taken place over several years. I can hardly have a better debating partner. He is easily amongst the half dozen or so most eminent economists who has not (yet) won the Nobel Prize in this discipline.¹ To say that his contributions to the theory of property rights, regulation, law and economics, to mention only a few of the areas on which he has focused his attention, are highly regarded within the profession would be a vast understatement. Most important of all to me, he is one of the very few eminent economists who has been willing to engage me in intellectual combat.²

In Block (1977a) I tried to make two points. First, positively, that the Coasean (1960) model³ depends upon the never-mentioned assumption that there were no

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¹If “pababile” denotes a cardinal eminent enough to be a candidate for pope, then “nobile” indicates an economist likely to win this honor. Demsetz is on any reasonable short list in this regard.

²In my view, it is highly desirable to contend against the most accomplished of the exponents of perspectives with which I disagree. Accordingly, I have taken issue with such luminaries as Akerloff (Block and Anderson 1995), Bork (Block 1994), Brozen (Block 1994), Coase (Block 1977a, 1995a, 1996a), Demsetz (Block 1977a, 1995a), Due (Block 1989), Epstein (Block and Gordon 1985), Freeman (Block 1996c), Harberger (Block 1997), Katz (Block 1998b), Kirzner (Block 1977b), Modigliani (Block 1995b), Musgrave (Block 1989, 1993), Nozick (Block 1980; Block and Gordon 1985), Posner (Block and Gordon 1985; Block 1994, 1996a), Rees (Block 1996b), Shoup (Block 1989), Stiglitz (Block 1989), and Stroup (Block 1990). Not counting Demsetz, none, apart from Tullock (1998), and Yeager (1988) have at least so far seen fit to accept my invitation to debate. For my responses to them see Block (1988a) and Block (1998).

³Other critiques of Coase along these lines include Rothbard (1990), Cordato (1989, 1992), Krecke (1997), and North (1990, 1992).

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psychic costs or benefits involved (e.g., all costs were real, known to all parties, and hence objective). For Coase, if there were two parties contending for a given property right, as long as transactions costs were zero, it did not matter which of them was awarded the right as far as the allocation of resources is concerned. For example, suppose a farmer places a value on smoke-free air at \$100, while it would cost the neighboring polluting factory owner \$75 to install a smoke prevention device. If the court gives the nod to the manufacturer, then the agriculturalist would bribe him into installing the scrubber, and would do so for a price somewhere in between these two values, say, \$90. There, each would earn a profit. The farmer would gain $\$100 - \$90 = \$10$, while the firm would benefit to the tune of $\$90 - \$75 = \$15$. On the other hand, if the judge found in favor of the farmer, he could and would insist on the clean air device. Of course the wealth positions of the planter and the corporation would be very different under the two legal regimes (in the first the farmer is out of pocket by \$90; in the second, the manufacturer must pay \$75) but in both cases the smoke prevention technology would be utilized, and resources would be allocated to farming in the same manner.

My objection to the foregoing was that it required the farmer to actually make a bribe (of \$90 in this numerical case). But suppose his crops were worth \$100 only in his own mind. That is, their market value was virtually zero, although the psychic income he derived from them was equal to the higher amount.⁴ Then, he could not finance the bribe, based on a value of the crops of \$100, as Coase implicitly assumed he could do.

I regard this as by far the less important of the two criticisms I was making against Coase. After all, to incorporate this point, all Coase would have needed was a footnote explaining the foregoing. Further, those who later trod in the path blazed by Coase, such as Demsetz and many others, were typically careful to guard against this oversight. I regarded this point, then, as a not unimportant footnote to the history of economic thought.⁵ I was, at least in my own mind, making a small but significant correction to an edifice which was then already well in the process of taking over the economics profession, and has long since almost completely done so.

The second point I tried to make (Block 1977a) was normative; that the Coasean system in and of itself is an immoral one in that it denigrates and undermines private-property rights, and that this applies as well to Demsetz's analysis, which carries on in the same tradition.⁶ Indeed, in some of my work since

⁴Operationally defined, this means that the farmer would not sell his holdings for less than \$100.

⁵Coase (1960) is the most highly cited journal article in the economics profession. Any correction of it, even a minor one, must therefore be considered of at least some note.

⁶Radin (1987, p. 1851) goes far further than I in ascribing moral categories to economic analysis. She states: "the characteristic rhetoric of economic analysis is morally wrong when it is put forward as the sole discourse of human life." For a critique of her views, see Block (1996).

that time, I have tried to hammer home this point.⁷ This, I regarded as by far my more important contribution.

In his reply to me, Demsetz (1979) covered all of these bases, and then some. I certainly cannot criticize his article for avoiding the issues. On the contrary, he broadened and deepened the debate, making all sorts of challenges to my position. In addition to taking issue with my positive point about psychic income oversights and immorality, he berated me with criticisms concerning competition and sports, "Austrian Pure Snow Trees,"⁸ ethics, God, religion and worship, tennis and noise pollution, homesteading, the ability of the free market to maximize utility ex ante, externalities, stability of property rights, free riders, offers of new products, rear-end collisions for cars (road socialism), the laundry vs. the factory, collision between a boat and a dock (water socialism), the last clear chance rule (railroad locomotive kills trespasser), judicial equity and overturning mistakes, "communal property rights," pedestrians asking for directions, paternalism, competition and monopoly, relativism, sociobiology, regulation, and the claim that after all is said and done, there are no real differences between us which concern freedom. Demsetz's was as thorough a critique as a debate junkie such as myself could wish.

I replied (1995a), answering each and every criticism of his. In his rejoinder, Demsetz (1997) disappointingly focuses mainly on one small subset of the debate, that concerning the first and relatively least important of the points I made in 1977a, related to psychic income. In this response, I shall once again comment on all the issues he raises.⁹

MORALITY

Demsetz (1997, p. 103) begins with a return visit to his analysis of the military draft. It would appear that he is still "stewing" over my (Block 1977a, p. 112) characterization of his position on this issue as "immoral"¹⁰ (reiterated in Block 1995a, p. 65).

On this several comments. First, Demsetz (1997, p. 102) has just finished announcing that my "ruminations on morals merits no response from" him. Why, then, on the very next page does he return to this very same subject? Let him either

⁷See Block (1995a, 1996a). See also Rothbard (1990), Cordato (1989, 1992a, 1992b, 1998), Krecke (1997), and North (1990, 1992).

⁸Calabresi and Melamed (1972, p. 1102, n. 29) also utilize Demsetz's Austrian Pure Snow Trees example.

⁹Demsetz (1997, pp. 101–02) complains of the fact that I (Block 1995a) took up too many pages, and allowed too long a time to elapse to reply to his article and was critical of mine (Block 1977a). I will not reply to these charges, since I think they have no place in a scholarly journal devoted to ideas.

¹⁰This part of the debate I am having with Demsetz is similar to one which has taken place between Posner and Kelman (1979, p. 688, n. 51) the latter of whom states: "As always, Posner poses as the tough rationalist fending off sissified moralists; his 'rationalism,' though is spotty, incomplete, and misleading. He thus manages to be both irrational and immoral, which may have been his aim in this little parody of Jonathan Swift's 'Modest Proposal.'"

eschew this topic altogether, or discuss it without reservations. When he makes inconsistent declarations on it, it is difficult to know how to proceed.

Second, I do indeed consider Demsetz's (1967, repeated in 1997, pp. 102–03) views on the military draft in isolation to be an instance of positive, not normative economics (Rothbard 1973a). Does this mean they cannot be immoral? Not a bit. Suppose a chemist tells the Nazis, "The best way to maximize the killing of Jews, per unit of resources spent, is to do xyz." This, as it stands, in isolation, is certainly a positive statement, in chemistry, and can only be considered amoral, neither moral nor immoral. But the uttering of this statement in that context is an act which may reasonably be deemed immoral.

I do not consider Demsetz's statement, even the uttering of it, as immoral, in isolation. This is because it merely discusses internalization of externalities and resource allocation. However, when coupled with the Coasean analysis, which, remember, forms the background of the debate between Demsetz and myself,¹¹ it is very hard to resist this conclusion.

What does Coase have to say in this context? He states (1960, p. 2):

The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how shall 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.

In other words, let us suppose, a man is about to rape a woman. The common, traditional view, the one we are asked by Coase to reject, is, How can we restrain the male party of the first part from inflicting himself on the female party of the second part against her will? But this is "wrong." Forcible sex is not a unidirectional harm, from the raper to the rapee, contrary to the unsophisticated view. Rather, it is "reciprocal." To avoid the harm to the woman by stopping the man would be to harm him.

Given very low transactions costs, moreover, it does not matter one whit for the allocation of resources or the so-called maximization of wealth¹² whether rape is legal; that is, for Coase, and presumably Demsetz and other law and economics advocates, it is a matter of total indifference whether the man should be allowed to rape the woman or not. For whoever values this more, the man (to force sex upon the woman) or the woman (to resist), will either bribe or be bribed so as to achieve optimal results, as we have seen in the previous example of air pollution concerning the farmer and the polluting factory owner.

Under the assumption of high transactions costs, in contrast, it is solely an empirical matter whether rape should be proscribed by law. Under "ordinary"

¹¹That is, since Demsetz announces himself as willing to defend Coase, he is perforce stuck with the latter's views.

¹²The only issues of importance for the Coase–Demsetz law and economics worldview.

circumstances, the legislature should indeed outlaw rape. This is, presumably, because the woman typically values resistance more than the man gains from forced sex. However, if the woman is promiscuous or a prostitute, and the man has been without sex for years (say, he was imprisoned or on a long sea voyage) and thus is greatly desirous of engaging in this activity, it is he who will value intercourse more than she will rate non-interference. He will presumably end up utilizing her "services" in this regard in the zero transactions costs world. But we are now assuming high transactions costs. And here, according to Coase, it is the duty of the judge to award the rights of a case to the person who, under low transactions costs, would have bribed the other into acceding to his wishes. States Coase (1960, p. 19):

the situation is quite different when market transactions are so costly as to make it difficult to change the arrangement of rights established by the law. In such cases, the courts directly influence economic activity. It would therefore seem desirable that the courts should understand the economic consequences of their decisions and should, insofar as this is possible without creating too much uncertainty about the legal position itself, take these consequences into account when making their decisions." (Emphasis added).

This really will not do. Allowing judges such wide discretion is highly problematic because this will render personal and property rights highly uncertain.¹³ Further, Coase is making¹⁴ the normative claim that under conditions of positive transactions costs whether rape should be legal or not should depend on judicial determination as to the costs and benefits involved in a given specific instance. But the judges simply have no way of knowing which the worse harms are; therefore, any attempt on their part to interpersonally compare utilities in this way is ultimately arbitrary (Mises 1966; Rothbard 1962; Buchanan 1969; Buchanan and Thirlby 1981). Indeed, to champion a philosophy of rights with such implications bespeaks a certain moral opacity.

Let us now return to Demsetz's analysis of the military draft.¹⁵ To repeat, when considered in isolation, a case can perhaps be made that his remarks are amoral, not immoral. But when we add to this the Coasean context, this conclusion becomes difficult to maintain. For now Demsetz must be interpreted as taking the position not only that in a zero-costs world the same people will end up in the army whether we utilize a "buy them in" (voluntary military) or a "let them buy their way

¹³This need not necessarily violate such rights, for, according to the Coase–Demsetz model, the judges could make the correct (e.g., just) finding. For another egregious example of Coaseans and insecure personal and property rights, see Wittman (1980). I owe this citation to Larry White.

¹⁴Strictly speaking, he makes no such claim, at least explicitly. Rather, I am making it for him, in an attempt at a *reductio ad absurdum*. My criticism is not that Coase (1960) favors legalizing rape (under the assumptions made in the text). Rather, it is that his views logically imply this position. The laws of logic compel him to either give up the views expressed in that article or embrace its implications, and embrace the views on rape I attribute to him in the text.

¹⁵Regarding the "buy him in vs let him buy his way out of the military" example, Demsetz seems to be on the same wavelength as Calabresi and Melamed (1972, p. 1099).

out" (draft system), but that in a positive transactions costs world the judges are justified in making such a determination based on their own subjective assessments of the costs and benefits involved. Once we have reached this point, we have subtly exceeded the realm of the merely positive; we have entered the realm of the normative. Further, we are by logical implication now seriously contemplating legalizing rape, slavery, and even murder.¹⁶ If this is not immoral, it is hard to know exactly what is.¹⁷

INCOME EFFECTS

I could, were I so minded, end this reply right here. I could, reasonably, refuse to respond to Demsetz's arguments about income effects, psychic income, and indifference curve analysis on the ground that he had already raised these issues in Demsetz (1979, pp. 98–100), and that I had answered them in Block (1995a, pp. 65–74). But I am not one to apply a tourniquet to this process; any criticism of me by Demsetz "merits a response from me." If Demsetz wishes to revisit this issue, I am happy to oblige him.

As I see matters, there are two issues floating around, confusing matters between Demsetz and myself. Let me at least initially call one of them the *ex ante* income effect, and the other the *ex post* income effect, for want of any better terminology.

Consider the latter first. The *ex post* income effect concerns the fact that "an alteration in income distribution generally implies a change in resource allocation, simply because the two parties before the court spend their incomes differently" (Demsetz, 1997, p. 104). This author then continues: "Coase should have no need to make this point explicit." Let me make something as clear as I possibly can: I am in total agreement with Demsetz on this point. I fully agree that this obvious point need not be belabored to an audience of professional economists. I teach it to my introductory classes, and I have no doubt that Demsetz does the same. Indeed, I wonder at Demsetz's patience with me. If I thought him guilty of so elementary a mistake, I am not sure I would have dealt with him as cordially as he has treated me.

However, contrary to him, I never disputed this insight. I plead total innocence as far as disputing this elementary buildingblock of economics, or criticizing Coase

¹⁶In Block (1996a) I show that the law and economics model of Coase, Demsetz, and Posner can be used to defend O.J. Simpson's murder of his wife (whether or not he actually committed this crime).

¹⁷Radin (1987, p. 1865) in my view very properly criticizes Calabresi and Melamed (1972, p. 1112) as follows: "On a deeper level, the argument disturbingly suggests that the inalienability rule against slavery would not be justified if the rule were inefficient. If enough (third parties) liked slavery, so that the prohibition would be a cost rather than a benefit to them, slavery would be efficient and therefore (at least according to this argument) acceptable." Although in this case the critique was applied to Calabresi and Melamed, it from my perspective could have applied to any member of the Chicago Law and Economics School, Coase and Demsetz certainly included.

for not making it explicit. I note that Demsetz (1997) nowhere cites or quotes me making any such error.¹⁸ Yet he does attribute it to me, and “absorbs” no fewer than two pages of *The Review of Austrian Economics* in setting me straight on this issue.

The “ex ante income effect” is very different. It is, strictly speaking, no income effect at all. Rather, it involves our old friend, the psychic income charge I leveled at Coase (Block 1977a, 1995a). I reiterate my criticism: the Coase model claims that, under the assumption of zero transactions costs, it does not matter whether the court awards the property right to the polluter or pollutee¹⁹; resources will be allocated in exactly the same manner in either case. In terms of our previous discussion, either the smoke prevention device will be installed, or it will not, and the judge’s decision is irrelevant to that determination.²⁰ My claim is that in order for this Coase model to work, the loser must be able to bribe the winner into changing his behavior; that Coase never specified this proviso; that Demsetz did, but continues to denounce me for demanding of Coase that he spell out in needless detail the specifics of what I am now calling the “ex post income effect.” In other words, it is Demsetz who is confusing these two concepts. Of course Coase need not have explicitly mentioned the “ex post income effect.” There is no need. I entirely agree with Demsetz on this. But Coase (1960) did not come to grips with the “ex ante income effect;” that is, his psychic income oversight. And no amount of Demsetz’s lambasting of me about the “ex post income effect” can change this fact.

Demsetz (1997, p. 106) does not see matters in exactly this way. Instead, he avers:

The substantive issue has to do with whether or not the assignment of right ownership will alter the mix of output when “bargaining transactions . . . are costless [and] changes in the distribution of wealth . . . can be ignored.” Coase and I [with a proviso about “free riders”] say no; Block says yes.²¹

¹⁸When it suits his purpose, he directly quotes me; see Demsetz (1997, pp. 103, 107). Surely, he would have furnished a verbatim quote from me to this effect if he indeed had evidence of so elementary a mistake on my part.

¹⁹Or the rapist and the rape victim.

²⁰It is of course not irrelevant to the wealth positions of the two contending parties. The court’s decision will determine in which direction the bribe must flow, and hence will indeed impact their relative wealth positions.

²¹Demsetz (1997, p. 106, n. 9) gives Demsetz (1979, p. 98) as the source of this quotation. Yet, in Block (1995a, p. 66, n. 9), I stated “Despite numerous efforts, I have been unable to uncover the source of this quotation.” This is yet another example of “ships passing by night.” I call into question Demsetz’s sources. In his reply, does he provide a citation? He does not. It is one thing to be guilty of a failure to give a source for a direct quotation, one time, in Demsetz (1979). But to repeat a mistake (Demsetz 1997), after having had it pointed out, formally, as an error (Block 1995a) is more than just passing curious. As well, Demsetz (1979, p. 105) directly quotes Rothbard without benefit of a citation. I objected to this (Block 1995a, p. 91, n. 31) shoddy scholarship (“It is somewhat difficult to discern whether Demsetz is quoting Rothbard accurately, and in context. This is because Demsetz, again, fails to cite his source. Efforts on the

The problem I have with this way of putting the matter is that it conflates what I have been calling the *ex ante* and the *ex post* income effects. But Demsetz (1997, p. 106) is having none of this. In his view I am guilty of “renaming income effects as psychic effects.”

I don't accept this, but I note that at least we are now communicating. We have finally achieved real disagreement, instead of talking past each other. Why do I reject Demsetz's characterization? It is because for there to be an income effect, a real income effect, there must be an income effect of something. For example, the classical case would be a normal or inferior good. Income rises, and then if consumption of a given good rises by an equal or greater percentage rate, we have a normal good. For an inferior good, consumption actually falls. It is easy to reconcile an income effect defined in this manner with what I have been calling the “*ex post* income effect.” They are, indeed, the very same thing. But what I have been calling the “*ex ante* income effect” is an entirely different matter. Here, there is no income which rises (or falls). Rather, there is a lack of an ability of the farmer, in our case, to bribe the polluter into installing a smoke prevention device. The farmer, that is, lacks wealth or income. His poverty situation does not change; it is constant.

Demsetz (1997, p. 107) maintains that my “last phrase ‘because he (the farmer) simply does not have such funds available to him’ sounds like an income effect to me” (material in brackets inserted). Well, it doesn't sound like an income effect to me. An income effect must of necessity be an effect of something; it must be the result on something such as a consumer purchase, something else, namely an income change. To put this into the indifference curve²² terminology that Demsetz can appreciate, an income effect is the effect on purchases of a parallel shift of the budget line. It is clear that there would be an income effect of this sort in what we have been calling the *ex post* income effect. But no such thing occurs, can occur, with regard to the problem of psychic income I have raised against Coase.

But wait; not so fast. For it appears that Demsetz (1997 p. 108) has fully anticipated me: “the gardener's²³ budget constraint is different under the two possible court decisions, and that is what I portray in the indifference curve figure to which Block refers.”

I agree that the income effect requires a parallel shifting budget line, and that, certainly, the difference between winning and losing the court case will translate part of the present author to trace down this citation again proved to be of no avail”), but Demsetz (1997) does not take advantage in his reply of the opportunity to make good his oversight of 1979, despite my specifically calling this to his attention. Doesn't Demsetz read what he is ostensibly criticizing?

²²Austrians of course reject the entire notion as not being compatible with human action. On this see Mises (1966), Rothbard (1962), and Block (1995a, n. 12).

²³In Block (1977a, 1995a) I called the “farmer” a “gardener,” and endowed him with only one flowerpot to indicate that he would not have the wherewithal with which to bribe the polluter.

into just this phenomenon. However, my criticism of Coase focused on just one of these states of affairs, the one where the farmer lost the case. I maintained, and I still maintain, that if we focus on just this situation, there can be no income effect; and that, moreover, there is no need to compare the two situations (which, I readily admit, would generate an income effect), since I, in criticizing Coase, focused on only the one.

Let us, indeed, as Demsetz (1997, p. 107) several times asks, focus on the last phrase of his quotation from me (Block 1977a, p. 71). It reads "because he simply does not have such funds available to him." To put this into other terminology, this statement depicts a stock, not a flow. I am here concentrating on a moment in time, and on a specific assumption: that the impecunious farmer (e.g., gardener) has just lost his lawsuit. Can he, or can he not, bribe the polluter, as is required by Coase if his zero transactions model is to be valid? If he cannot, then Coase's rendition of the situation is incomplete, as I have charged in 1977a and again in 1995a. The point is, I am not here engaging in a comparative static analysis; in contrast, I am instead focusing on merely one situation, one posed by Coase. What is my warrant for doing this? It is because Coase is making two separate assertions, each independent of the other, not merely one, as implied by Demsetz.

What are the two? First, there is the claim that if the farmer wins the lawsuit, the polluter will have to install the smoke prevention device at a cost to him of \$75, in our numerical example. Fine and dandy, I have no quarrel with this at all. Second, there is the claim that if the farmer loses the case, he will be able to bribe the manufacturer into installing the scrubber. This is the only claim of Coase concerning psychic income with which I took and still take issue. My point was (in 1977a, 1995a) and still is that this one situation requires that the farmer have the money to make the financial offer, and that if he does not, it cannot take place. Since I am concentrating on this single solitary situation, because Coase opens himself up to being interpreted as making this one claim apart from any other he also making, it is totally illegitimate for Demsetz to translate this into a two-stage model, so that he is can concoct out of the whole cloth a change in income, from which he can then generate an income effect. Demsetz (1997, p. 109) accuses me of "changing the name of the income effect to that of psychic effect." I reply that there is no income effect in my criticism of Coase (despite the fact that there certainly is one in Demsetz's critique of me). I take issue with Coase in only one of his two scenarios: the one where the farmer loses his lawsuit. That Demsetz can create out of this a two-stage model replete with an income effect is testimonial merely to his creativity, and inability to come to grips with my analysis of Coase. It is of course always possible to generate an income effect, merely by imagining two separate scenarios where income differs, and then tracing an income effect between them. I can even see why (perhaps) Demsetz was led into this error. After all, Coase does talk about two scenarios, not merely one (e.g., the one where the farmer loses, and the one where he wins) and this of course opens the door for a Demsetzian "income effect." But I stress that it is a completely gratuitous income effect in this case, since

Coase made two entirely separate claims, not merely one. That is, he claimed that win or lose, his zero-transaction-cost scenario would result in the smoke prevention device being installed, given our illustrative numbers.²⁴ Making two separate claims, Coase is responsible for defending both, each on its own, if need be. I attacked only one of them; Coase must defend it, in complete isolation from the other. There being only one scenario in contention between myself and Coase, Demsetz, riding to Coase's rescue, cannot rely on both scenarios, and generate an "income effect" from or between them.

But Demsetz's position is even worse than this. For, suppose I concede to him, merely out of the goodness of my heart, that there are really two scenarios (where the farmer has a different income under each), and that therefore an income effect may indeed be generated. It still does not follow, as Demsetz appears to believe it does, that I am guilty of conflating this income effect with my psychic income critique. On the contrary, under these stipulated conditions, there would be two things occurring: one would be my psychic income critique, and another would be Demsetz's income effect. But the validity of the latter would to no degree imply the invalidity of the former. That is, just because Demsetz's income effect is valid, this does not disprove my psychic income critique of Coase.

CONCLUSION

Since, according to Demsetz (1997, p. 101) this will be the last exchange in our debate, I would like to conclude by putting my argument into a broader context.

As I see matters, private-property rights are of crucial importance to civilization.²⁵ They are what distinguishes us from the barbarians. To the extent we give in to the enemies of property rights,²⁶ we reduce ourselves.

Yet private property rights have always been under furious attack, and continue to be so. Even though the threat of actual communism seems to have receded, at least for the moment, our universities, newsrooms, and pulpits are still riddled with Marxists. And this is to say nothing of the feminists, the black "studies" professors, the multiculturalists, the postmodernists, and other knots on the tree of knowledge.

These movements are all virulent opponents of private-property rights. But at least they have the decency to come to do intellectual battle while flying the colors of

²⁴If our numbers were reversed, then, of course, the SPD would not be installed, no matter who won the case. For example, if the farmer continued to value his crops at \$100, but the cost for the SPD is now \$150, he would simply refuse to pay for the SPD, and the farmer (even ignoring psychic income, as did Coase) would not pay the polluter \$150 to save himself merely \$100. On the other hand, if the farmer won, the polluter would again refuse to introduce the environmental amenity, and the farmer, again, would lack the motivation to bribe him to do so.

²⁵Our most important private-property right, of course, is that over our own persons. So "human rights" are a subset of property rights. On this see Rothbard (1970, 1973a, 1973b, 1982, 1990) and Hoppe (1989, 1993).

²⁶Bethell (1998) supports property rights, but his argument is tarnished by its failure to reject Coasianism. See on this Block (1999a).

central planning, socialism, economic regulation, government power and dirigisme. It is different with the advocates of the law and economics philosophy, such as Coase (1960), Demsetz (1966), and Posner (1986), to mention only three of its many leading lights. Their doctrines are every bit as much of a threat to private property as these others, perhaps even more, but they enter the public square disguised as, of all things, defenders of markets, economic freedom and private property. Their views are thus far more dangerous, and difficult to oppose. As well, their arguments are very much more sophisticated than those of the Marxists, feminists, etc.

This can perhaps be seen in the fact that the latter groups are something of a joke for the community of scholars sympathetic to free enterprise. But the very opposite is true for law and economics. Scholars associated with this perspective command leadership positions of such organizations as the Mont Pèlerin Society and the Philadelphia Society and their journals are among the most prestigious in the economics profession.²⁷ In the present debate the only issue Demsetz (1979, 1997) is willing to seriously contemplate concerns psychic income. But this is the veritable tip of the iceberg; it is almost irrelevant in this broader context; it is merely a technical mistake of the Coasean Law and Economics program. The real threat to our liberties is from that system of analysis itself which Demsetz refuses to defend against Austrian criticisms.²⁸

In rereading these words, they sound a bit hysterical even to me, so well entrenched in the arenas of law and economics is the Chicago School. Nevertheless, I insist, they are literally true. This is because for the Coaseans, there really is no such thing as private-property rights; rights, that is, which defend their owner against all comers. Rather, any time there is a dispute over them, they are to be awarded not necessarily to their owners, but, rather, to the parties for whom, in the minds of the judges, ownership will create the greatest amount of wealth for the entire society. How else are we to interpret the Law and Economics School?

If there is one thing that describes private-property rights it is the word "rigid." That is, in any disagreement over land or other possessions, they are to be awarded to their owners, according to this doctrine. Coase (1960, p. 38) however, has a very different perspective: "the ordinary law of nuisance would seem likely to give economically more satisfactory results than adopting a rigid rule" (emphasis added). I am not here discussing more controversial issues such as applying eminent domain laws to land necessary for national defense; say, property overlooking a harbor city in the eighteenth century. Rather, for Coase, a typical issue

²⁷The academic discipline most supportive of the institutions of capitalism.

²⁸Medema (1994a, 1994b, 1994c, 1994d, 1995a, 1995b, 1995c, 1996a, 1996b, 1996c, 1996d, 1997a, 1997b, 1997c, 1997d, 1998, 1999), Medema and Zerbe (1997, 1999), Medema and Samuels (1997a, 1997b), and Medema and Aslanbeigui (1998) have created practically a cottage industry out of defending Coase against criticisms. Unfortunately, he has not yet found the time to respond to any of the Austrian critiques, such as Block (1977a, 1995a, 1996a), Rothbard (1990), Cordato (1989, 1992, 1998), Krecke (1997), and North (1990, 1992).

concerns a confectioner whose machinery makes noise versus a neighboring doctor who wants quiet for his stethoscope²⁹; or an altercation over the responsibility for wandering rabbits. States Coase in this regard (1960, p. 38):

The objection to the rule in Boulston's case is that, under it, the harbinger or rabbits can never be liable. It fixes the rule of liability at one pole: and this is as undesirable, from an economic point of view, as fixing the rule at the other pole and making the harbinger of rabbits always liable.

In other words, to put this in property-rights language, there are no property rights involved. The law of trespass will sometimes be applied (that is, one pole) and sometimes the law of trespass will be totally ignored (the other pole). Applying this logic to ownership over persons, we can then treat murder, rape, and slavery in the same manner (Block 1996a). Sometimes these acts should be prohibited by law; at other times, not. Flexibility, not rigidity, is the watchword.

Let me end with one last example. Coase (1960, p. 2) offers it as his opinion that harm is reciprocal, and that to stop A from harming B is to harm A. What to do? "The problem is to avoid the more serious harm."

As I write these words the government has just settled its lawsuit with the tobacco companies. I don't place the full (intellectual) blame for this on Coase and his Law and Economics movement, but surely this raid on the tobacco firms is at least consistent with their views. How so? Avoiding the more serious harm is logically equivalent to placing responsibility on the least cost avoider of harm. Well, who is the least cost avoider of the harm of cigarettes: the ultimate consumer or the producing firm? For the Austrian this is an unanswerable question, given the invalidity of interpersonal comparisons of utility (Mises 1966; Rothbard 1962; Buchanan 1969; Buchanan and Thirlby 1981). But the Chicago School does not allow such niceties to stop it from its self appointed rounds. For them, there is no question: what with economies of scale, the division of labor, etc., unavailable to consumers, the corporations (e.g., big tobacco, guns) are the least cost avoiders; hence, the justification of the lawsuits against them.

Following the tobacco example are cities now in the process of suing gun manufacturers for the harm created by these products. This, too, can be understood in Coasean terms. For, surely, at least in the minds of Coasean oriented judges, the producers of guns can at lower cost than consumers decrease the attendant harms. This, it will be appreciated, will increase "wealth."³⁰ This legal regime is sometimes objected to on the grounds that those responsible for the harm done by guns are the consumers, not the producers. But this objection completely misconstrues the Law and Economics model.³¹ Not for it to focus on so

²⁹Coase (1960, pp. 8–11), where he discusses *Sturgis v. Bridgeman* (11 chap D. 852[1879]).

³⁰The quote marks indicate that no such determination can be made without resort to illegitimate interpersonal comparisons of utility.

³¹The same applies to the point that if gun manufacturers are responsible, then so are the suppliers to them of metal, lead, springs for trigger mechanisms, etc. And this is to say nothing of

philosophical a concept as responsibility; in this way lies reliance on private property rights, to be avoided at all costs. On the contrary, the Coaseans rely on a pure monetary calculation. And here, at least in their view, the producers can at lower costs than the consumers obviate harm created by guns.

I am not saying that the Law and Economics movement explicitly calls for a state attack on cigarettes or guns.³² (Does anyone doubt that auto manufactures will one day be added to this list?) I do not claim that Coase is directly responsible for our product liability fiasco in general. I am aware of no “smoking gun” in this regard. However, it cannot be denied that this branch of the Chicago School supplies the intellectual underpinnings of these attacks on the institution of private property. Demsetz could have replied to these more substantive critiques of his and Coase’s position. Instead, he dismissed them (Demsetz 1997, p. 102) as “mere ruminations on morals” and chose to confine himself to very narrow technical issues. Too bad.

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the people who transported these weapons, nor of those who built the trucks and the roadways which facilitated these transfers into the hands of consumers.

³²A Chicagoan, Lott (1998) has found evidence of a positive (e.g., defensive) role for guns. This is irrelevant to the point I am making. My claim is that if the Coaseans stick to their principles, focus solely on the fact that guns (also) have negative side effects, and ask who is in a better position to alleviate these harms, producers or consumers, they will tend to cast their baleful eyes on the former.

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