

# What Did Ronald Coase Know About the Law of Tort?

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## INTRODUCTION

It must be counted as a remarkable achievement even amongst the very many achievements which distinguished the career of the late Brian Simpson that he unarguably once came out best from a debate with Ronald Coase. In a 1996 article,<sup>1</sup> Simpson made some fundamental criticisms of the competence of Coase's handling of the law in *The Problem of Social Cost*,<sup>2</sup> particularly the law of nuisance in *Sturges v. Bridgman*<sup>3</sup> on which Coase had focused. A reply by Coase, though it of course made many good points, overall signally failed to deal with these criticisms,<sup>4</sup> indeed it served only an occasion for Simpson to somewhat forcibly reaffirm them,<sup>5</sup> and this failure was due to the very good reason that those criticisms were perfectly accurate. Though Coase never made any pretension to ability in legal scholarship,<sup>6</sup> and did not see *The Problem of Social Cost* as a contribution to such scholarship in any direct

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<sup>1</sup> A.W. Brian Simpson, *Coase v. Pigou Reexamined*, 25 JOURNAL OF LEGAL STUDIES 53 (1996), revised as *The Story of Sturges v Bridgman: The Resolution of Land Use Disputes Between Neighbours*, in PROPERTY STORIES 9 (Gerald Korngold & Andrew P. Morriss eds., 2004). Unless some other intention is specifically expressed, hereinafter references are to the revised version.

<sup>2</sup> Ronald H. Coase, *The Problem of Social Cost*, 3 JOURNAL OF LAW AND ECONOMICS 1 (1960), reprinted in THE FIRM, THE MARKET AND THE LAW 95 (1988). Hereinafter references are to the reprinted version.

<sup>3</sup> (1879) 11 Ch. D. 852 (Eng.). Argument at first instance in the Chancery Division of the High Court and the judgment delivered there by Lord Jessell M.R. is at 854-59. Argument in the Court of Appeal and the unanimous judgment of the Court delivered there by Thesiger L.J. is at 860- 66.

<sup>4</sup> Ronald. H. Coase, *Law and Economics and A. W. Brian Simpson*, 25 JOURNAL OF LEGAL STUDIES 103 (1996).

<sup>5</sup> A.W. Brian Simpson, *An Addendum*, 25 JOURNAL OF LEGAL STUDIES 99 (1996). See also infra note 145.

<sup>6</sup> Coase, *supra* note 4, at 105. In Ronald H. Coase, *Blackmail*, 74 VIRGINIA LAW REVIEW 655 (1988), Coase made a similar disavowal of competence in the law and then proceeded to make some extremely penetrating comments on the law relating to blackmail.

sense,<sup>7</sup> it obviously is more than a little embarrassing that the article which is the foundation of law and economics does not competently handle the law. The, as it were, theoretical rather than doctrinal contribution which Coase undoubtedly thought he had made “to the analysis of the law of nuisance” cannot be properly made out unless it is expressed in doctrinally competent terms.<sup>8</sup> Simpson was strongly and bitterly of the opinion that the significance of his criticisms had been very insufficiently appreciated, and in the book on which he was working at the time of his death in January 2011 he wrote of his article: “No serious response has yet been made to the arguments there presented; devotees of law and economics pretend the piece does not exist.”<sup>9</sup>

In this article we intend to put forward such a response. It will not dispute Simpson’s evaluation of Coase’s handling of *Sturges v Bridgman* as legal scholarship; indeed we will say something about Coase’s undergraduate legal studies that rather reinforces what, we repeat, were perfectly accurate criticisms. But our response nevertheless is an affirmation of the great value of Coase’s views because, whilst Coase handles the formal law badly, Simpson’s handling of the theoretical issues behind the law is far worse.<sup>10</sup> Simpson by no means criticised Coase’s legal scholarship in order just to make a point about the quality of that scholarship. He was profoundly averse to law and economics as he understood them and he used his criticisms of Coase’s legal scholarship as the springboard for a dismissal of

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<sup>7</sup> *Id.* at 104-105, quoting Ronald H. Coase, *Law and Economics at Chicago*, 36 JOURNAL OF LAW AND ECONOMICS, 239, 250-51 (1993).

<sup>8</sup> Coase, *supra* note 6, at 656.

<sup>9</sup> A.W. BRIAN SIMPSON, REFLECTIONS ON THE CONCEPT OF LAW 136 (2011). In a review of Simpson’s magisterial history of the impact of the establishment of the European Convention on the law of public order in the decolonising British Empire, one of the current authors did comment on Simpson’s criticism of Coase and Simpson certainly was aware of this: David Campbell, *Human Rights and the Critique of the Common Law*, 26 CARDOZO LAW REVIEW 791, 812-18 (2005) (reviewing A.W. BRIAN SIMPSON, HUMAN RIGHTS AND THE END OF EMPIRE (2001)).

<sup>10</sup> This was the gist of Coase’s reply to Simpson, but, with respect, we hope to make the argument out more convincingly than Coase himself did: Coase, *supra* note 4, at 105.

Coase's approach in general.<sup>11</sup> But, as is not unknown in criticisms of Coase's law and economics, Simpson showed such little understanding of Coase's approach that he essentially criticised positions the rejection of which is central to that approach. The principal aim of this article is to restate Coase's discussion of *Sturges v. Bridgman* so that its basic value survives Simpson's criticisms. It will emerge that the principal obstacles to this are not Coase's handling of the law, though these are not denied, but the difficulties inherent in the conception of private property that lay behind *Sturges v. Bridgman* and behind the law of private nuisance in general.

#### I. COASE'S USE OF *STURGES V BRIDGMAN*

In *The Federal Communications Commission*, the article on broadcasting policy of which *The Problem of Social Cost* famously is a generalising restatement, Coase used the nineteenth century land law case of *Sturges v. Bridgman* to illustrate the theoretical argument which underlay the policy proposal made in his first article and which was brought to the fore in his second.<sup>12</sup> *Sturges* is the first<sup>13</sup> of "four actual cases" which Coase used in section V of *The*

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<sup>11</sup> Simpson, *supra* note 1, at 24-29, mounts a particular defence of Pigou against Coase's criticisms of him. We put this to one side.

<sup>12</sup> R. H. Coase, *The Federal Communications Commission*, 2 JOURNAL OF LAW AND ECONOMICS 1, 26-27 (1959). Coase had referred to this discussion, without citation of the case, when setting up his argument in § II of *The Problem of Social Cost*.

<sup>13</sup> At the beginning of § V of *The Problem of Social Cost*, Coase, *supra* note 2, at 104, had briefly mentioned two cases as illustrations that "The harmful effects of the activities of a business can assume various forms."

One of these is an ancient case about the obstruction of the flow of wind to a windmill which we do not think can be precisely identified but which Coase knew from its discussion in the then current edition of a standard English work on land law: M. BOWLES, GALE ON EASEMENTS 237-39 (13th ed. 1959). This case had been discussed in *Gale* since its first edition: C. J. GALE AND T.D. WHATLEY, A TREATISE ON THE LAW OF EASEMENTS ??? (2010) (1839). On the but little known facts it is very difficult to reconcile this case with the modern law of easements of light and air, and Coase, *supra* note 2, at 121, later briefly notes that a modern case (discussed in *Gale* and in *Sturges v. Bridgman*, *supra* note 3, at 855, 857 (Ch.D.), 864 (C.A.)) does not follow it: *Webb v. Bird* (1863) 13 C.B.(n.s.) 841, 143 E.R. 332 (C.P. Eng). The ancient authorities are in fact now only of historical interest and are described as such in the current edition of *Gale*, their discussion having been eliminated since the 14th ed. of 1972: JONATHAN GAUNT AND THE HONOURABLE MR. JUSTICE MORGAN, GALE ON EASEMENTS para. 8.02 n.6 (19th ed. 2012). *Webb v. Bird* was itself variously commented upon, followed or distinguished in three of the four cases Coase sought to use to illustrate their common approach in section V.

*Problem of Social Cost* to “clarify” and “illustrate” his argument in that article thus far.<sup>14</sup> That argument had two components, each of which has proven to be enormously influential and now are so well known as to need only brief exposition here.

In sections I-II of *The Problem of Social Cost* Coase had set up the problem of the harmful incidental effects of economic action and had shown that these can be analysed as an instance of the general problem of allocating scarce resources between competing uses, and so amenable to neo-classical economic analysis. In the terms of the heading of section II, he had shown “The Reciprocal Nature of the Problem.” To, as is conventional, regard an activity such as the factory emission of smoke as a harm can be very misleading when seeking to formulate policy toward such an activity. Regarding an activity as a harm implies that it should be prevented. But prevention imposes the costs of preventive measures and of lost output, and complete prevention of this sort of harm is inconsistent with industrial production. To those who place a positive value on industrial production, prevention of such a harm cannot, then, be the aim of policy. The aim must be determining the optimal level of the activity, and whilst this may be said to be the determination of the optimal level of harm, for that the activity is, as it were, physically harmful is not in dispute in the analysis, such determination requires neutrality about causing the harm and suffering from it. On this basis, without further argument it is difficult to see why the level of an activity of this sort is should not be regarded as economic action the level of which should be determined by exchange.

In section III of *The Problem of Social Cost* headed “The Pricing System with Liability for Damage,” Coase had shown that, assuming zero transaction costs, bargaining

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This unsatisfactory thread of argument, if this is the right description, in *The Problem of the Social Cost* does demonstrate shortcomings which do directly follow from the deficiencies of Coase’s legal scholarship.

The other case concerns obstruction of the sunshine formerly benefitting the outdoor recreational areas of a hotel: *Fountainbleu Hotel Corp. v. Forty-Five Twenty Five Inc.*, 114 So. 2d 357 (Fla. App. 1959). Coase no doubt cited this only because it was a timely illustration, having been decided as he was drafting his article, but, largely because he cited it, it has become a much discussed case.

<sup>14</sup> Coase, *supra* note 2, at 104-105.

between the actor conventionally thought to be inflicting the harm and the actor conventionally thought to be its victim would determine the optimal level of the harm, which might be zero but could take any value depending on the outcome of the negotiations. That outcome is invariant regardless of the initial allocation of liability, and in section IV headed “The Pricing System with no Liability for Damage” Coase repeats the analysis on the basis of the opposite position. Taken together, these sections demonstrate the “Coase Theorem,” a term and, to a more considerable extent than Coase himself ever recognised,<sup>15</sup> a concept invented, not by Coase but by Stigler,<sup>16</sup> which has, as is now widely recognised and as we shall illustrate anew here, had a malign effect on the reception of *The Problem of Social Cost*.

In *Sturges v. Bridgman*, a plaintiff doctor was granted a perpetual prohibitory injunction against a confectioner’s use of machinery in neighbouring premises in such a way as caused noise and vibration which unreasonably interfered with the doctor’s use of his consulting room. Coase’s discussions of the case in *The Federal Communications Commission* and in section V of *The Problem of Social Cost* were similarly brief, in the latter case consisting of two long paragraphs occupying little more than two pages.<sup>17</sup> In fact it was briefer than that, for the actual account of the case was conveyed in the shorter first of the two paragraphs and amounts to no more than we have just conveyed, save that Coase ended the paragraph with an unattributed quotation from the judgment of the Court of Appeal to which we will return.<sup>18</sup>

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<sup>15</sup> Ronald H. Coase, *Notes on the Problem of Social Cost*, in *THE FIRM, THE MARKET AND THE LAW*, *supra* note 2, at 157 and Ronald H. Coase, *The Institutional Structure of Production*, in *ESSAYS ON ECONOMICS AND ECONOMISTS* 3, 10-11 (1994).

<sup>16</sup> GEORGE J. STIGLER, *THE THEORY OF PRICE* 113 (3rd ed. 1966).

<sup>17</sup> Coase, *supra* note 2, at 105-107.

<sup>18</sup> See text accompanying *infra* note 97.

Most of the discussion in the longer, second paragraph considered the bargaining possibilities which Coase thought were open to the parties. The doctor having been granted the injunction, the possibilities were identified by Coase in the following way:

The doctor would have been willing to waive his right and allow the machinery to continue in operation if the confectioner would have paid him a sum of money which was greater than the loss of income which he would suffer from having to move to a more costly or less convenient location, from having to curtail his activities at this location, or (and this was suggested as a possibility)<sup>19</sup> from having to build a wall which would deaden the noise and vibration. The confectioner would have been willing to do this if the amount he would have had to pay the doctor was less than the fall in income he would suffer if he had to change his mode of operation at this location, abandon his operation, or move his confectionery business to some other location.<sup>20</sup>

Coase argued that, if the injunction had been refused, then “The boot would have been on the other foot: the doctor would have had to pay the confectioner to induce him to stop using the machinery.”<sup>21</sup> But although the judgment would effect who has to initiate negotiations, the possibilities and the outcome would be the same.

In essence, Coase used *Sturges v. Bridgman* to clarify and illustrate what have come to be known as the efficiency and the invariance components of the Coase Theorem. Whether the confectioner or the doctor had to start the negotiations, “The solution of the problem depends essentially on whether the continued use of the machinery adds more to the confectioner’s income than it subtracts from the doctor’s.”<sup>22</sup> In this account, the courts did not stipulate outcome. The courts’ statement of the initial legal position provided the framework in which the parties chose the outcome:

the immediate question faced by the courts is *not* what shall be done by whom *but* who has the legal right to do what. It is always possible by transactions on the

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<sup>19</sup> Simpson, *supra* note 1, at 31 rightly argues that this is not so. The passage in the report to which Coase presumably refers was part of the report of the confectioner’s evidence at trial which was aimed at showing that the way the claimant had built his consulting room had in part caused the dispute, as, indeed, it appears was the case: *Sturges v. Bridgman*, *supra* note 3, at 854.

<sup>20</sup>Coase, *supra* note 2, at 106.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

market to modify the initial legal delimitation of rights. And, of course, if such market transactions are costless, such a rearrangement of rights will always take place if it will lead to an increase in the value of production.<sup>23</sup>

The fundamental reason why these views have attracted such attention is that it shows that the “correct” outcome is the one chosen by the parties in a Pareto optimal partial equilibrium, and this outcome can rightly and usefully be described as perfectly efficient in the way that it gives effect to voluntary choice.<sup>24</sup> The Coase Theorem has all the attractions of Pareto optimality though it applies to situations previously thought categorically to be outside of the Pareto domain. What is more, the efficiency of the outcome seems to be spontaneous in the further strong sense that it is invariant regardless of whether the confectioner or the doctor has to start the bargaining: “With costless market transactions, the decision of the courts concerning liability for damage would be without effect on the allocation of resources.”<sup>25</sup> The bargaining which Coase describes in his account of the case is essentially that in the now famous hypothetical example he had used in sections III-IV of *The Problem of Social Cost*: “The basic conditions are exactly the same in this case as they were in the example of the cattle which destroyed crops.”<sup>26</sup> In this way *Sturges v. Bridgman* was to serve, as we have seen Coase maintain, as an “actual” case illustrative of his argument.<sup>27</sup>

In the remainder of his longer, second paragraph, Coase turned to an analysis of the thinking of the judges in *Sturges v. Bridgman*: “It was of course the view of the judges that

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<sup>23</sup> *Id.* at 114.

<sup>24</sup> There can be no doubt that, in expressing himself in terms of, as in the passage just quoted, “an increase in the value of production”, Coase invited misunderstanding of the sense in which he conceived of efficiency. Buchanan was right to criticise the “objectivism” of way he put his argument: James M. Buchanan, *Cost, Choice and Catallaxy: An Evaluation of Two Related But Divergent Virginia Paradigms*, in *THE ORIGINS OF LAW AND ECONOMICS* 156, 158 (Francesco Parisi & Charles K. Rowley eds. 2005). This point, which has had very important consequences for the development of law and economics, is so complicated and significant that it cannot be discussed here as it requires treatment in a separate article..

<sup>25</sup> *Id.* at 106.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 105.

they were affecting the working of the economic system – and in a desirable direction.”<sup>28</sup> This is an entirely different line of thought and, with respect, Coase provided an occasion for much of the subsequent confusion by failing to set this out in a new paragraph starting with the sentence just quoted. We shall discuss this at length below,<sup>29</sup> but first let us consider Simpson’s criticisms of Coase’s account of the case as we have described it so far.

## II. SIMPSON’S CRITICISM OF COASE’S ACCOUNT OF *STURGES V. BRIDGMAN*

Simpson argued that Coase’s account of *Sturges v. Bridgman* was highly inaccurate and, as legal history, wholly unacceptable. As Simpson is right and as our concern here is not so much with legal history as with the theoretical issues of law and economics that Simpson raised, we will be very brief.

Though neither in the passage of *The Problem of Social Cost* we have just discussed nor in *The Federal Communications Commission* does Coase describe *Sturges v. Bridgman* as a case of private nuisance, he does do so later in *The Problem of Social Cost* and elsewhere,<sup>30</sup> and he undoubtedly saw it as such a case, being aware that nuisance is a core private law doctrine regulating interference with another’s enjoyment of their land and so dealing with the problem of competing uses he sought to address. In this sense, as we have noted, Coase saw *The Problem of Social Cost* as contributing to the “to the analysis of the law of nuisance.”<sup>31</sup> But the actual case of *Sturges v. Bridgman* wholly contradicts Coase’s arguments for both “The Reciprocal Nature of the Problem” and the Coase Theorem.

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<sup>28</sup> *Id.* at 106-107.

<sup>29</sup> See text accompanying *infra* note ???.

<sup>30</sup> Coase, *supra* note 2, at 113 n.13 and Ronald H. Coase, *Alfred Marshall’s Mother and Father*, in *ESSAYS ON ECONOMICS AND ECONOMISTS*, *supra* note **Error! Bookmark not defined.**, at 119, 121 n.11.

<sup>31</sup> Coase, *supra* note 6, at 656.

What Coase saw as the reciprocal aspect of the case is completely dealt with in the first sentence of Jessell M.R.'s judgment at first instance: "I think this is a clear case for the Plaintiff. There is really no dispute as to this being a nuisance; in fact, the evidence is all one way."<sup>32</sup> That is all that is said there, and in the Court of Appeal nothing much is said in addition: "It has been proved that ... a noise was caused which seriously inconvenienced the Plaintiff in the use of his consulting-room ... which ... would constitute an actionable nuisance."<sup>33</sup> As Simpson in essence points out,<sup>34</sup> there is simply nothing in the *ratio* of the case that justifies Coase claiming that it is evidence of a judicial perception of the reciprocal nature of the problem. Quite the opposite, in fact. Though the language of harm is not used at all, the noise and vibration was indeed seen as a harm which should be prevented.<sup>35</sup> No sense that the doctor's use of his consulting room (and his wish to be free of noise and vibration in order to do so) was only a competing use not in any way intrinsically superior to the confectioner's use of his machinery (and his wish to cause noise and vibration in order to do so) forms part of the *ratio* at all.

Nor anything like the Coase Theorem play any part in deciding the outcome of the case. The case actually was argued and decided on the basis of it raising a flat clash of unqualified property rights. As (once the facts were proved)<sup>36</sup> the decision that the confectioner was causing a nuisance was reached instantly, *Sturges v. Bridgman* as argued is barely a nuisance case at all, though we shall see it does involve, and has come to be authority for, an important

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<sup>32</sup> *Sturges v. Bridgman*, *supra* note 3, at 854-55.

<sup>33</sup> *Id.* at 864.

<sup>34</sup> Simpson, *supra* note 1, at 35: "There were no suggestions that Dr. Sturges' activities were causing any problem for Mr. Bridgman." However, Simpson, *id.* at 29, also insists that "The case certainly illustrates the reciprocal nature of the problem of social cost", and we shall return to this, indeed explaining how Simpson can take up both of these positions is an important aim of this article.; *see* text accompanying *infra* note 144.

<sup>35</sup> Simpson, *id.* at 20, mentions the doctrinal issues of causation that could possibly arise here but discussion of these, about which Coase no doubt was been ignorant, would be unproductive.

<sup>36</sup> Using court documents lodged in the Public Records Office, Simpson, *supra* note 1, at 14-15 valuably sets these facts out in greater detail than the report of the case itself.

implication of the basic principle of the law of nuisance. It effectively being decided at the outset that the noise and vibration was a nuisance, “The only serious point” in the actual argument was whether “the Defendant was entitled ... to ... commit a nuisance” because he, “had acquired a right to impose the inconvenience [that otherwise] would constitute an actionable nuisance.”<sup>37</sup>

Two in substance identical arguments, one at statute and one at common law, that the confectioner had acquired such a right by prescription were actually considered in the case.<sup>38</sup> At the time of *Sturges v. Bridgman*, acquisition by prescription had been made subject to The Prescription Act 1832,<sup>39</sup> which is still in force. Though it seems that the Act was meant to supersede common law prescription, shortcomings in its drafting meant that it signally failed to do so,<sup>40</sup> and the legal fiction of “the doctrine of lost modern grant” remained, and continues to remain, part of the English law.<sup>41</sup> Both the statutory and common law arguments were possible because the confectioner had long used the machinery in the way of which the doctor complained in the case, and we shall return to this important fact.<sup>42</sup> But, for reasons of space, we shall not explain why both of these arguments failed,<sup>43</sup> save as to say that they

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<sup>37</sup> *Sturges v. Bridgman*, *supra* note 3, at 859 (Ch. D.), 862 (C.A.).

<sup>38</sup> *Id.* at 855 (Ch. D.), 863 (C.A.).

<sup>39</sup> 2 and 4 Will. 4 c. 71.

<sup>40</sup> Simpson’s own account of these shortcomings is as clear as the subject permits and it concludes that “The Act is a classic example of an incompetent attempt to reform the law”: A.W.B. SIMPSON, *A HISTORY OF THE LAND LAW* 269 (2d ed. 1986).

<sup>41</sup> Of this situation, Lord Neuberger, then the Master of the Rolls and now President of the UK Supreme Court, said in *London Tara Hotel v. Kensington Close Hotel Ltd.* [2011] EWCA Civ 1356, 2 All E.R. 554, para. [20] (C.A. Eng.): “The law [of] long use has been bedevilled with artificial doctrines developed over many centuries, and ... has been complicated rather than assisted by the notoriously ill-drafted Prescription Act 1832, whose survival on the statute book for over 175 years provides some support for the adage that only the good die young.”

<sup>42</sup> See text accompanying *infra* note ???.

<sup>43</sup> Incidentally to the discussion of another of the four cases he uses for illustrative purposes in section IV, Coase, *supra* note 2, at 113 n.13 does essentially capture the main reason the lost grant argument failed in *Sturges v. Bridgman*. Simpson himself, *supra* note 1, at 35, really adds nothing to what Coase says in this footnote, on which he does not comment. A full explanation of the position, and of the similar position under the Act, would not be justified here.

were again considered as part of the definition of what would be, as defined, unqualified property rights.

Simpson's account of the way the case was understood by the parties to it and by the judges who heard it is right to place the assertion of mutually exclusive unqualified property rights at the heart of the matter, and this undoubtedly shows that Coase's account of the case is, as legal history, just wrong:

From a legal point of view the ... question to settle was whether Mr. Bridgman was, as he claimed, entitled to continue his noisy activities, through having, over the years, acquired a right to do so ... It was more or less conceded that unless Mr. Bridgman could show that he had acquired such a right he had invaded the rights of the doctor. The judge ruled that no such right had been acquired ... and Dr. Sturges got his injunction. Plainly, the issue in the case, as seen by Sir George Jessell, had nothing to do with the question 'whether the continued use of the machinery adds more to the confectioner's income than it subtracts from the doctor's' In the legal scheme of things that was not a matter which had to be decided, or indeed had any relevance to the outcome ... The case was then taken on appeal, and the main issue ventilated was the same – had Mr. Bridgman acquired the right to make the noise? The judges thought he had not ... the particular decision pays not the least attention to the two conflicting forms of land use ... the judicial opinions in the case, like the affidavits on which they are based, make not the least attempt to investigate the economic or social value of the activities of either confectioner or daughter.<sup>44</sup>

In our opinion, nothing that Coase said in his reply to Simpson alters this,<sup>45</sup> but to the extent that the main themes of that reply seem to have been a separation of the professional competences of economists and lawyers<sup>46</sup> and a refusal to defend the positions specifically set out in *The Problem of Social Cost*<sup>47</sup> which we regard as eccentric abnegations of his achievement, Coase hardly seemed to wish to effect such an alteration. Nevertheless, the first answer we would give to the question which forms the title of this article is, on the evidence of Coase's treatment of *Sturges v. Bridgman* as we have discussed it so far, almost nothing.

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<sup>44</sup> *Id.* at 35-37.

<sup>45</sup> Coase, *supra* note 4 at 109.

<sup>46</sup> *Id.* at 103 epigraph, quoting *George J. Stigler, Does Economics Have a Useful Past?* 1 HISTORY OF POLITICAL ECONOMY 217, 219 (1969).

<sup>47</sup> Coase, *supra* note 4, at 118.

Simpson's criticism of Coase's handling of *Sturges v. Bridgman* formed the basis of an argument that the Coase Theorem did not, could not, and should not form the basis of deciding nuisance cases:

the Coase Theorem ... that in the absence of transaction costs the allocation of resources reached by negotiation and bargain, assuming economic rationality, would be unaffected by the rule as to civil legal liability ... stated in the discussion of *Sturges v. Bridgman* ... is of course a purely theoretical view as to what would happen in a world which does not exist ... one of the problems over positing never-never worlds is that we are commonly not told what other features they share with the real world ... Presumably there have to be ... assumptions made about the Coasean world ... for example ... psychological assumptions about human behaviour ... for apparently in the Coasean world individuals are inspired by the profit motive ... Be that as it may Coase relates his thinking to the real world by arguing, surely correctly, that in a case such as *Sturges v. Bridgman* the parties might have reached an economically satisfactory position, or one that seemed to them to be economically satisfactory, by making a bargain, a point which is clear enough without any need for the theory expressed in the Coase Theorem and quite independent of it. Presumably the reason they did not do so, *pace* Coase, was either the impediment of transaction costs, or the fact that one of them did not behave with economic rationality, or because of differing expectations as to the probable outcome of the litigation ... Although we do not know the details it would be quite astonishing ... if the doctor and the confectioner approached the matter by supposing that 'The solution of the problem depends essentially on whether the continued use of the machinery adds more to the confectioner's income than it subtracts from the doctor's' ... Coasean cost benefit analysis bears no relationship at all to how neighbours behave in real life situations ... It may be that in some imagined world some such analysis would take place, but lawyers are concerned with the real world. Law involves practical reason. It is unclear to me what lawyers can learn from an imagined world ... The reason why a market transaction ... is usually not possible in such situations is that the parties are not willing to place their rights in the market. Once this is understood, it becomes offensive not to respect their unwillingness ... Hence solving a conflict of this character in a particular case does not entail attempting to reach an economically efficient solution ... Nor does it mean agreeing to a market transaction whose paradigm is a sale ... How ought cases like *Sturges v. Bridgman* be handled by courts? ... the whole idea of an ideally efficient solution is itself, from a practical point of view, vacuous ... whatever the theoretical utility of the ideal conception of economic efficiency may be, it is devoid of empirical or practical significance. It is the crock of gold at the end of a rainbow ... That could not be a new and better way to decide nuisance cases.<sup>48</sup>

There were, in our opinion, three main points to this criticism: the Coase Theorem is "purely theoretical," deciding nuisance cases "does not," as a matter of positive law, "entail

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<sup>48</sup> *Id.* at 18, 19, 31, 32, 33, 40.

attempting to reach an economically efficient solution,” and, as a matter normative law and economics, solving nuisance cases by means of Coasean bargaining would be “offensive.” The first, but only the first, thing that must be said is that no-one has pressed the point about the purely theoretical nature of the Coase Theorem more than Coase himself, and in what follows we will explore the implications of this. So completely did Simpson, as Coase alleged in his reply, misunderstand Coase’s theoretical views that he nevertheless rested his positive and normative arguments upon criticism of the Coase Theorem, with the result that those arguments are much inferior to positive and normative arguments about the law of nuisance derived from Coase himself. In this sense, the answer to the question that forms the title of this article is: yes, a very great deal, far more, in fact, than one of the greatest post-war academic lawyers. But before turning to how this paradoxical state of affairs could arise, we would like to say a little more about the nature of Coase’s legal historical mistakes in his discussion of *Sturges v. Bridgman*.

### III. AN EXPLANATION OF COASE’S ACCOUNT OF *STURGES V. BRIDGMAN*

An evaluation of Simpson’s criticisms can helpfully begin by asking why Coase relied on *Sturges v. Bridgman* to the extent he did in *The Federal Communications Commission* and *The Problem of Social Cost*. Though we have made no detailed inquiry into this,<sup>49</sup> *Sturges v. Bridgman* would seem to have been regarded as a significant case when it was heard. We assume this played some part in its being placed on the list of the Master of the Rolls, Sir George Jessell, one of the High Court judgments given by the Master of the Rolls in the brief period between the passage of the Judicature Acts and the Master of the Rolls’s caseload

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<sup>49</sup> Though, as we have seen and as we shall discuss later, Simpson uncovers material of considerable interest (and, characteristically of him, considerable amusement value) about the pleadings in case. He may have gone too far when he claimed (Simpson, *supra* note 1, at 10) that he had provided “a very full account” of the case, for he did not really undertake a searching “legal archaeological” inquiry of the sort that has become so identified with him that it is widely called “doing a Simpson.” But though his focus was never on *Sturges v. Bridgman* but on Coase.

becoming entirely appellate.<sup>50</sup> It was thought sufficiently important to be reported, not only in *The Law Reports*, but in four other series of reports<sup>51</sup> and in *The Times* of London.<sup>52</sup> As Simpson tells us,<sup>53</sup> it was also noted in one of the professional journals of the medical profession.<sup>54</sup> But Coase, we have no doubt, did not properly know and would not have been concerned about the actual contemporary or historical legal significance of the case and we strongly suspect that he came to it, as so many practising and academic lawyers, not to speak of economists, often do, because he saw it cited in a textbook as authority for a legal proposition he thought interesting.

*Sturges v Bridgman* is still routinely cited in English secondary authorities in connection with a number of propositions in land law and the law of nuisance,<sup>55</sup> and Thesiger L.J.'s observation that "what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey"<sup>56</sup> is now so widely recognised as almost to have attained within the Commonwealth the status of a legal maxim. Though again we have made no detailed inquiry into the matter, *Sturges v. Bridgman* undoubtedly had attained something like this status by

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<sup>50</sup> The creation and operation of the modern Chancery Division under the Juicature Acts is described by Professor Polden in XI THE OXFORD HISTORY OF THE LAWS OF ENGLAND pt.3, ch.X (2010).

<sup>51</sup> 43 J.P. 716 (1879), 48 L.J. Ch. 785 (1879), 28 W.R. 200 (1879) and 41 L.T. 219 (1879).

<sup>52</sup> Anon., *Sturges v. Bridgman*, THE TIMES, 4 June 1878 at 4 (Ch.D).

<sup>53</sup> Simpson, *supra* note 1, at 11 n.7.

<sup>54</sup> Anon., *Quiet Consulting Room*, THE MEDICAL TIMES AND GAZETTE, 20 July 1878 at ???.

<sup>55</sup> It is cited 5 times in *Halsbury's* statement of the law of nuisance: HALSBURY'S LAWS OF ENGLAND vol. 28, paras. 110, 125, 193, 198, 231 (5th ed. 2008ff.). It is also cited in the statement of the law of commons, *id.* at vol. 13, para. 472, in connection with the doctrine of lost modern grant.

<sup>56</sup> *Sturges v. Bridgman*, *supra* note 3, at 865. This was a hypothetical example unrelated to the actual case, for, although Wigmore Street and Wimpole Street are both now part of a very expensive professional use and residential neighbourhood, they were then quite different from Belgrave Square (though Wigmore Street more so than Wimpole Street) and, to a smaller degree, they remain so as Belgravia, the area around Belgrave Square (the Square itself now being largely occupied by foreign embassies) must be one of the most expensive residential neighbourhoods in the world,. The disappearance of industrial use from Bermondsey makes the hypothetical comparison now inapt. In terms of contemporary New York City, the closest comparison to that which Thesiger L.J. sought to make would be between Park Avenue and Gowanus.

1929,<sup>57</sup> the year in which Coase began his undergraduate studies for a B.Com. (Bachelor of Commerce) degree at the London School of Economics.<sup>58</sup> As we had previously surmised but as Coase has himself said,<sup>59</sup> he was led to nuisance cases such as *Sturges v. Bridgman* in the course of these studies. We have consulted the LSE Calendars for the years 1929-30 which contain the syllabuses and reading lists for the subjects which Coase took in his degree,<sup>60</sup> which may be identified from his Academic Record which we have also consulted. As one of the authors, who has a first-hand knowledge of the successors to Coase's degree, entirely expected, the Calendars lead one to think that Coase would not have made any detailed study of the law of tort but would have studied it to the extent necessary to come to terms with commercial subjects, especially regarding negligence in connection with what would now be called employment law and compensation for industrial injury.<sup>61</sup> But this was not at all a profound extent in regard of tort in general and, in respect of nuisance, Coase's studies no doubt were rudimentary.

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<sup>57</sup> *Sturges v. Bridgman* was cited ??? times in the *Halsbury* in use when Coase was an undergraduate: LAWS OF ENGLAND vol. ???, paras. ??? (1st edn 1907-17). It would be tedious and of very limited value to list here all the references to *Sturges v. Bridgman* in important English torts textbooks at the time of Coase's studies. Of the three such textbooks which Coase cited in *The Problem of Social Cost*, *supra* note 2, at 121 n.17, only *Salmond* had been written when Coase was an undergraduate. *Sturges v. Bridgman* is cited four times in both the edition Coase may then have read and in the current edition, which is badly out of date: W.T.S. STALLYBRASS, SALMOND ON THE LAW OF TORTS 258, 261, 264, 268 (7th ed. 1928) and R.F.V. HEUSTON AND R.A. BUCKLEY, SALMOND AND HEUSTON ON THE LAW OF TORTS 58, 61 n.84, 70 n.64, 75-76 (21st ed. 1996).

<sup>58</sup> Ronald H. Coase, *Ronald H. Coase*, in LIVES OF THE LAUREATES 189, 192 (William Breit & Barry T. Hirsch eds., 5th ed. 2009).

<sup>59</sup> Ronald H. Coase, 17th Annual Coase Lecture in Honour of the Centennial of the University of Chicago Law School (April 1, 2003), available at <http://www.youtube.com/watch?v=yqT6koFnEwA&feature=youtu.be>

<sup>60</sup> We have also consulted the Calendar for 1931-32, the year in which, but the for award of the Scholarship which allowed him to undertake the travel in the United States which had such an effect on the thinking that led to *The Nature of the Firm*, Coase would have undertaken further studies that would have led to the award of a different degree with more legal content and, in Coase's own view, *supra* note 58, at 192, would "undoubtedly" have led to his becoming a lawyer.

<sup>61</sup> The result of Coase's studies in these specific areas, parallel in significance but rather better on the law, is the treatment of "the directions of an entrepreneur" in Ronald H. Coase, *The Nature of the Firm*, in THE FIRM, THE MARKET AND THE LAW 33, 39.

Coase evidently learned how to find at least some cases in the law reports during his undergraduate studies,<sup>62</sup> and he did actually consult the reports of *Sturges v. Bridgman* and the other cases discussed in section V (and, as we shall see, also in section VII) of *The Problem of Social Cost*,<sup>63</sup> but he will have done so effectively as an autodidact in law, and those cases, including *Sturges*, are difficult cases. As we have said, Coase made no pretension to ability in legal scholarship and, to be frank, his discussion of *Sturges v Bridgman* shows that he was wise not to do so. We nevertheless cannot but feel that Simpson has been extremely uncharitable about all this. To purport to actually discuss legal cases in detail in an article of the nature of *The Problem of Social Cost* as Coase did was a very remarkable, indeed an extraordinary and brave, thing for an economist to do in 1960. More importantly than leaving oneself open to possible exposure of error by lawyers, one certainly courted flat incomprehension or rejection by economists, and this is really what overwhelmingly happened to Coase for more than two decades after his article was published.

The story of the way that Coase's defence of *The Federal Communications Commission* before some of the Faculty of the Department of Economics at Chicago and the consequent writing of *The Problem of Social Cost* led to his appointment at Chicago and to his editorship of *The Journal of Law and Economics* is too well known to need repeating here.<sup>64</sup> But this important instance of Coase persuading an initially sceptical audience of economists is an exception that proves a rule. Much more typical of the reception of *The Problem of Social Cost* was Arrow and Scitovsky's decision not to include it in pt. III, on

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<sup>62</sup> Coase, *supra* note 58, at 200. It may have been misleading for Coase to claim to have obtained a "familiarity" with the law reports as a result of his studies, but, of course, this is all relative, and by any standard other than the lawyer's own, he did have such a familiarity. The sometimes daunting difficulties of searching the various reports have, of course, largely been eliminated in these days of computerised research, but *Sturges v Bridgman* would have been an easy case to find by the old technique of going to a library shelf.

<sup>63</sup> *Id.*, at 201.

<sup>64</sup> Edmund W. Kitch ed., *The Fire of Truth: A Remembrance of Law and Economics at Chicago 1932-70*, 26 THE JOURNAL OF LAW AND ECONOMICS 163, 219-22 (1983).

“Social and Private Costs and Benefits.” of the essays on welfare economics they collected in 1969 as volume XII of the American Economic Association’s Series of Republished Articles in Economics. “Unfortunately,” Arrow and Scitovsky told us, Coase’s article “with its many legal examples, was too long for inclusion here.”<sup>65</sup> We ourselves think that Coase took an enormously bold step in giving reported cases such prominence in *The Problem of Social Cost*, for which Simpson does not give him any credit, and, amazing to say, for which we do not think he has since generally received sufficient credit. The enormous credit he has received for work in the vein of *The Problem of Social Cost*<sup>66</sup> has largely been for advocating the Coase Theorem as a guide to practical policy, something he did not do nor wish to do, and there is more than a little to his repeated complaints that his “point of view has not in general commanded assent, nor has my argument, for the most part, been understood.”<sup>67</sup>

The extensive discussion [of *The Problem of Social Cost*] in the journals has concentrated almost entirely on the ‘Coase Theorem’, a proposition about the world of zero transaction costs. This response, though disappointing, is understandable. The world of zero transaction costs, to which the Coase Theorem applies, is the world of modern economic analysis, and economists feel quite comfortable handling the intellectual problems it poses, remote from the real world though they may be ... if I am right, current economic analysis is incapable of handling many of the problems to which it purports to give answers ... discussion of the Coase Theorem is ... but a preliminary to the development of an analytical system capable of tackling the problems posed by the real world of positive transaction costs.<sup>68</sup>

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<sup>65</sup> READINGS IN WELFARE ECONOMICS 184 (Kenneth J. Arrow & Tibor Scitovsky eds. 1969).

<sup>66</sup> The way *The Nature of the Firm* has influenced discussion of industrial organisation has much more commonly been based on an essentially accurate interpretation of Coase’s actual argument in that article. It is, however, a puzzle that Coase did not comment on the way that the “agency theory” of the firm, to which economists he admired made major contributions, completely contradicts his views.

<sup>67</sup> Ronald H. Coase, *The Firm, the Market and the Law*, in COASE, THE FIRM, THE MARKET AND THE LAW 1, *supra* note 2, at 1.

<sup>68</sup> *Id.* at 15.

In sum, though “The world of zero transaction costs has often been described as a Coasean world[.] Nothing could be further from the truth. It is the world of modern economic theory, one which I was hoping to persuade economists to leave”:<sup>69</sup>

Most economists, lawyers and social theorists still hold to Simpson’s representative position still think that Coase believed that the Coase Theorem *could* be a guide to practical policy. That Coase gave some sanction for this in the way he himself treated cases such as *Sturges v. Bridgman* in *The Problem of Social Cost* does not absolve those who remain invincibly ignorant, but we shall now try to overall assess the extent to which Coase gave them a warrant to do so.

#### IV. THE THEORETICAL SHORTCOMING AND THE THEORETICAL VALUE OF COASE’S ACCOUNT

##### A. *Where Coase Went Quite Wrong*

It can hardly be denied that *The Problem of Social Cost* is a poorly organised article and we wish to argue here that this poor organisation has played a considerable part in the widespread misunderstanding of its argument. It will be recalled that *Sturges v Bridgman* was one of four actual cases discussed in section V in order to “clarify” and “illustrate” the previous argument which had set up what has come to be known as the Coase Theorem. But however laudable Coase’s wish to relate this theoretical argument to actual cases, to bring these cases in at this point was a very bad mistake. For, because they are actual cases, the last thing one could say about them is that they illustrate what would happen at zero transaction costs. For the very reason that *Sturges v. Bridgman* was an actual case, its actual facts were, and were bound to be, a very poor illustration indeed of the Coase Theorem. As Simpson put

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<sup>69</sup> Coase, *supra* note **Error! Bookmark not defined.**, at 174. We have taken quotations from materials potentially available to Simpson in 1996. Coase’s later rejections of the Coase Theorem were often even more strongly stated, *e.g.*, in a 2012 interview he said: “I never liked ‘the Coase Theorem’ ... I don’t like it because it’s a proposition about a system in which there were no transaction costs. It’s a system which couldn’t exist. And therefore it’s quite unimaginable”: Interview by Russ Roberts, *EconTalk* (May 8 2012), *available at* [http://www.econtalk.org/archives/2012/05/coase\\_on\\_extern.html](http://www.econtalk.org/archives/2012/05/coase_on_extern.html)

it: “if we turn from economic theory to the mundane world of legal decision, as exemplified in the story of *Sturges v. Bridgman* [then] the issue in the case, as seen by Sir George Jessell, had nothing to do with the question ‘whether the continued use of the machinery adds more to the confectioner’s income than it subtracts from the doctor’s’.”<sup>70</sup> Coase, it must be said, principally got around this difficulty by not discussing the actual issue which forms the *ratio* of the reported case at all.<sup>71</sup>

Ironically, *Sturges v. Bridgman* was, in fact, an early case heard in the English civil courts reformed under the Judicature Acts in response to public disgust at the delay, error and expense of the legal process so memorably condemned by Dickens in *Bleak House*. But nevertheless, as Simpson repeatedly insisted, litigation such as *Sturges* was “very expensive,”<sup>72</sup> and “Given the costs of litigation,”<sup>73</sup> to use such a process to illustrate the Pareto optimum established at general competitive equilibrium was most ill-advised and bound to mislead. One cannot but level at Coase’s use of *Sturges* (and the other cases in section V) the criticism he himself famously levelled at those economists who had used the lighthouse as an illustration of the argument for public goods: the illustration serves only “to provide ‘corroborative detail, intended to give artistic verisimilitude to an otherwise bald and unconvincing narrative’.”<sup>74</sup>

Coase began section VI, headed, “The Cost of Market Transactions Taken into Account,” by saying that “The argument has proceeded up to this point on the assumption (explicit in sections III and IV and tacit in section V) that there were no costs involved in

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<sup>70</sup> Simpson, *supra* note 1, at 29, 35.

<sup>71</sup> See, however, *infra* note ???.

<sup>72</sup> *Id.* at 19 n.25.

<sup>73</sup> *Id.* at 30, 31.

<sup>74</sup> Ronald H. Coase, *The Lighthouse in Economics*, in COASE, THE FIRM, THE MARKET AND THE LAW 187, *supra* note 2, at 211.

carrying out market transactions. This is of course a very unrealistic assumption.”<sup>75</sup> Section VI then proceeded on the basis of positive transaction costs, when, as we shall see, “The same approach which, with zero transaction costs, demonstrates that the allocation of resources remains the same whatever the legal position, also shows that, with positive transaction costs, the law plays a crucial role in determining how resources are used.”<sup>76</sup> In section VII, headed “The Legal Delimitation of Rights and the Economic Problem,” Coase sought to show how, when transactions costs were positive, decisions were reached in a number of actual cases, and we shall argue that he was theoretically right about this. The opportunity surely was there to contrast how cases would have been decided at zero transaction costs in section V (illustrative of sections III-IV) with how they were decided when transaction costs were positive in section VII (illustrative of section VI).

But of the four cases discussed in section V, he returns only to *Sturges v. Bridgman* in section VII,<sup>77</sup> and the contrast does not at all emerge between its treatment there (when transaction costs are zero) and in section V (when transaction costs are positive). This was for two very good reasons. First, as we have examined it so far, the account Coase gave of the case in section V was entirely made up, although any fair reading would take what Coase said to be an account of what actually happened. Secondly, when did Coase turn to the actual decision in *Sturges v. Bridgman* in section V, at the end of the longer, second paragraph of his discussion of the case, he anticipated what he should have said, but only very briefly and unsatisfactorily did say, in section VI, when that material simply does not belong in section V. Coase no doubt was right to complain of the very pronounced focus on sections III and IV, and corollary neglect of “other aspects of the analysis,” in commentary on *The Problem of*

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<sup>75</sup> Coase. *supra* note 2, at 114.

<sup>76</sup> Coase, *supra* note **Error! Bookmark not defined.**, at 178.

<sup>77</sup> Coase, *supra* note 2, at 122-23.

*Social Cost*,<sup>78</sup> but it must be said he invited it. What he did was path-breaking, but it was also very confusing. We hope now to dispel this confusion.

### *B. Where Coase was Very Right*

If, as Simpson was right to claim, the parties in *Sturges v. Bridgman* and the judges hearing the case understood it as a case of a clash of incompatible unqualified property rights, then one is obliged to ask why and how that clash was resolved in the doctor's favour. As we have seen, the principal legal question actually addressed in the case was, it being immediately taken the confectioner was causing a nuisance, whether he had acquired a prescriptive right to cause this nuisance, and it was decided that, despite the confectioner having long used the machinery in the way of which the doctor complained, he had not. Continuing to put the common law and statute of prescription to one side, we want to address the vital question which surely arises for the understanding of the case and for understanding the doctrinal and theoretical issues in the law of nuisance which underpin it: why was the confectioner believed to be committing a nuisance?

To the layperson and to students first coming to the case, the very peculiar feature of *Sturges v. Bridgman* is that, though the confectioner was liable, it was the doctor who, in the view of the layperson and the neophyte, caused the nuisance. The confectioner (and his Father) had carried out the same business on the same premises for more than 60 years and had been using the machinery in the way of which the doctor complained for 26 years prior to the litigation.<sup>79</sup> It was only when in 1873, 5 years before the matter reached the Chancery

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<sup>78</sup> Coase, *supra* note 67, at 13.

<sup>79</sup> *Sturges v. Bridgman*, *supra* note 3, at 853-54 (Ch. D.). Simpson, *supra* note 1 at 11, 13-14, very helpfully gave the previously unknown concrete details of a related aspect of the case of which academic torts lawyers had been only generally aware, that Dr. Sturges only began to lease the premises in 1865, and lived and conducted his profession there without any problem until he built the consulting room eight years after moving in.

Division, that the doctor built the consulting room, one of the walls of which was a party-wall with the confectioner, that the nuisance arose.<sup>80</sup> The wall was built to normal standards, but being a party-wall it very effectively transmitted the noise and vibration. It is, one of the authors can attest from long experience, difficult to explain to students how the doctor was able to, as they initially see it, cause the problem and yet the confectioner be held liable for the nuisance.

*Sturges v. Bridgman* is now mainly known as authority for the paradoxical proposition that a plaintiff can “come to a nuisance.” This possibility arises from the nature of the modern law of private nuisance. That law does not prevent “interference” with the enjoyment of land. It prevents “unreasonable” interference with such enjoyment. This, of course, makes determining whether the interference, and the use that gives rise to the interference, is reasonable or unreasonable central to the tort. The modern law of nuisance is, not a matter of unqualified property rights, but is, as one of the current authors has put it elsewhere, wholly contingent.<sup>81</sup> The legal history of the emergence of the modern law of nuisance has convincingly been described, particularly by Professors Brenner and McLaren,<sup>82</sup> as a process by which distance was taken from the maxim *sic utere tuo ut alienum non laedas*,<sup>83</sup> under

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<sup>80</sup> *Id.* at 855 (Ch. D.).

<sup>81</sup> David Campbell, *Of Coase and Corn: A (Sort of) Defence of the Law of Private Nuisance*, 63 MODERN LAW REVIEW 197, 203 (2000).

<sup>82</sup> Joel Franklin Brenner, *Nuisance Law and the Industrial Revolution*, 3 JOURNAL OF LEGAL STUDIES 403 (1974) and John P.S. McLaren, *Nuisance Law and the Industrial Revolution: Some Lessons from Social History* 3 OXFORD JOURNAL OF LEGAL STUDIES 155 (1983). A recent very valuable contribution has been made by NOGA MORAG-LEVINE, CHASING THE WIND ch.3 (2009). A line of criticism of this argument has recently been reviewed and added to by Ben Pontin, *The Common Law Clean Up of the ‘Workshop of the World’: More Realism About Nuisance Law’s Historic Environmental Achievements*, 40 JOURNAL OF LAW AND SOCIETY 173 (2013). Pontin, *id.* at 174 nn. 4, 5, cites A.W. Brian Simpson, *Victorian Judges and the Problem of Social Cost: Tipping v. St. Helen’s Smelting Company (1865)*, in LEADING CASES IN THE COMMON LAW 163 (1995) as a contribution to this argument. Simpson’s treatment of this famous case is discussed *infra* text accompanying note 111.

<sup>83</sup> BROOM’S LEGAL MAXIMS 238 (10th ed. 1939): “enjoy your own property so as not to injure that of another person.”

which the defendant was subject to strict, if not absolute,<sup>84</sup> liability for any interference. Liability depends on “what is reasonable [use] according to the ordinary usages of mankind living in ... a particular society”<sup>85</sup> and “is a matter of balancing the conflicting interests of the two neighbours”.<sup>86</sup> Under “the rule of give and take,”<sup>87</sup> occupiers must accept as much interference with each other’s enjoyment as is reasonable in the neighbourhood in question.

The principal reason given for why nuisance liability has come to be decided on a give and take basis rather than by adherence to the *sic utere* maxim is that the latter would hinder or even prevent economic growth. The spirit of the “reasonable use” at the core of the English law of private nuisance is as it was expressed in 1858 in *Hole v Barlow*:

It is not everybody whose enjoyment of life and property is rendered uncomfortable by the carrying on of an offensive or noxious trade in the neighbourhood that can bring an action. If that were so ... the ... great manufacturing towns of England would be full of persons bringing actions for nuisances arising from the carrying on of noxious or offensive trades in their vicinity, to the great injury of the manufacturing and social interests of the community.<sup>88</sup>

By broadly regarding industrial pollution as reasonable interference, the law of private nuisance made, it is argued, industrialisation possible.

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<sup>84</sup> Almost everything one does on one’s own land can be shown (by the standards of the physical sciences) to “interfere” with neighbouring land, but the *sic utere* rule did not, of course, turn on these standards. The law of nuisance has always in part distinguished reasonable and unreasonable interference by regarding some interference as *de minimis* or, perhaps part of the same idea, so much an inevitable, and practically unremediable, part of social co-existence as to be *damnum sine injuria*. This is the background to the difficulty of Coase’s reference to the ancient windmill case, which seems to turn on obstruction of the general flow of wind.

<sup>85</sup> *Sedleigh-Denfield v O’Callaghan* [1940] A.C. 880, 903 (H.L. Eng.).

<sup>86</sup> *Miller v. Jackson* [1977] Q.B. 966, 981 (C.A. Eng.)

<sup>87</sup> *Bamford v. Turnley* (1862) 3 B. & S. 66, 84; 122 E.R. 27, 33 (Ex.Ch. Eng.).

<sup>88</sup> (1858) 4 C.B.(n.s.) 334, 335; 140 E.R. 1113, 1114 (C.P. Eng.). As in *Sturges v. Bridgman*, Belgrave Square is given as a hypothetical example of a neighbourhood where industrial unarguably would be a nuisance. See also *A.G. v. Doughty* (1752) 2 Ves. Sen. 453; 28 E.R. 290 (Ch. Eng.). Coase cites *Doughty* in a note to section VII (Coase, *supra* note 2 at 121 n.18) and gives as a U.S comparison the obscurely reported but nevertheless well-known *dictum* of Musmanno J. in *Versailles Borough v. McKeesport Coal & Coke Co.*, 83 Pittsb. Leg. J. 379, 385 (1935): “Without smoke, Pittsburgh would have remained a very pretty village.” Finding for the defendant smoke emitter, Musmanno J. consoled the plaintiffs with the observation that “it is probable that upon reflection they will, in spite of the annoyance which they suffer, still conclude that, after all, one’s bread is more important than landscape or clear skies.”

*Sturges v. Bridgman* illustrates the contingent nature of private nuisance particularly well. In what had been a manufacturing neighbourhood but was at the time of the case an “improving” neighbourhood becoming dominated by professional practices and concomitant residential use,<sup>89</sup> noise and vibration such as was being caused by the confectioner was a nuisance. If that noise and vibration had been caused in a neighbourhood dominated by manufacturing use and thought to have no other prospect, it would not have been a nuisance. This is the gist of the famous *dictum* we have already quoted that “what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey.”<sup>90</sup> The particular difficulty arises, however, that neighbourhoods do not remain of the same character. A court faced with possible changing use must in effect decide which use is most valuable in order to decide which use gives rise to a nuisance.

Though, as we have said, there is no actual discussion of why the confectioner’s use was regarded as a nuisance, the Belgrave Square hypothetical example sheds light on why this was so readily taken to be the case. Thesiger L.J. considered the confectioner’s argument that if the refusal to find that the confectioner’s use gave rise to a prescriptive right:

were carried out to its logical consequences, it would result in the most serious practical inconveniences, for a man might go - say into the midst of the tanneries of *Bermondsey*, or into any other locality devoted to a particular trade or manufacture of a noisy or unsavoury character, and, by building a private residence upon a vacant piece of land, put a stop to such trade or manufacture altogether. The case also is put of a blacksmith’s forge built away from all habitations, but to which, in course of time, habitations approach.<sup>91</sup>

To this Thesiger L.J. responded:

We do not think that either of these hypothetical cases presents any real difficulty. As regards the first, it may be answered that whether anything is a nuisance or not is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances what would be a nuisance in

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<sup>89</sup> Simpson, *supra* note 1 at 12-13 again provides instructive detail about this process of improvement that previously tort scholars knew only in a general sense.

<sup>90</sup> *Sturges v. Bridgman*, *supra* note 3, at 865.

<sup>91</sup> *Id.*

*Belgrave Square* would not necessarily be so in *Bermondsey*; and where a locality is devoted to a particular trade or manufacture carried on by the traders or manufacturers in a particular and established manner not constituting a public nuisance, Judges and juries would be justified in finding, and may be trusted to find, that the trade or manufacture so carried on in that locality is not a private or actionable wrong. As regards the blacksmith's forge, that is really an *idem per idem* case with the present. It would be on the one hand in a very high degree unreasonable and undesirable that there should be a right of action for acts which are not in the present condition of the adjoining land, and possibly never will be any annoyance or inconvenience to either its owner or occupier; and it would be on the other hand in an equally degree unjust, and, from a public point of view, inexpedient that the use and value of the adjoining land should, for all time and under all circumstances, be restricted and diminished by reason of the continuance of acts incapable of physical interruption, and which the law gives no power to prevent. The smith in the case supposed might protect himself by taking a sufficient curtilage to ensure what he does from being at any time an annoyance to his neighbour, but the neighbour himself would be powerless in the matter. Individual cases of hardship may occur in the strict carrying out of the principle upon which we found our judgment, but the negation of the principle would lead even more to individual hardship, and would at the same time produce a prejudicial effect upon the development of land for residential purposes.<sup>92</sup>

When it is a question of a private resident moving into a neighbourhood it is believed will remain industrial, there is no nuisance. When it is a question of a blacksmith seeking to continue as a smith in an area thought to have prospects of becoming residential, there is a nuisance. When it is a question of a doctor moving into an industrial neighbourhood thought to have prospects of becoming one of professional use, there is a nuisance. To these possibilities considered in *Sturges v. Bridgman* we should add the paradigm case that lies behind these other cases, of the industrial polluter beginning production in a neighbourhood where formerly there was none but where industrial use is thought to be the future. The industrial use and the interference by pollution is found to be reasonable. It seems to us perfectly sensible for Coase to call this “planning and zoning by the judiciary”,<sup>93</sup> and we take

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<sup>92</sup> *Id.* Jessell M.R. had considered this example below, *id.* at 858-59, and his view was that the blacksmith should not be allowed effectively to prevent residential development when land “which is useless as a barren moor ... becomes available for building land by reason of the growth of a neighbouring town” because this would be to say “that the owner has lost the right to this barren moor, which has now become worth perhaps hundreds of thousands of pounds, by being unable to build upon it by reason of this noisy business?”

<sup>93</sup> Coase, *supra* note 2, at 123; quoting CHARLES M. HAAR, LAND-USE PLANNING: A CASEBOOK ON THE USE, MISUSE AND RE-USE OF URBAN LAND 95 (1959) (now 4th ed. 1986, ???).

it to be a measure of Simpson's failure to grasp the fundamental issue that he scornfully criticises Coase for doing so.<sup>94</sup>

In *The Problem of Social Cost*, Coase refers to the passage from the Court of Appeal's judgment we have just quoted as evidence that "the judges were thinking of the economic consequences of alternative decisions." One must read this in the context of the general observation Coase makes that, though it "would be of great interest" to do so, he had "not been able" to make "A thorough examination of the presuppositions of the courts in trying such cases," but that nevertheless his " cursory study" had shown "that the courts have often recognised the economic implications of their decisions," albeit that they "do not always refer very clearly to the economic problems posed by the cases brought before them."<sup>95</sup> Read in this context, then his view of the nuisance aspect of *Sturges v. Bridgman* is wonderfully penetrating. It is, in our opinion, not merely the best but the only basis of an explanation of the give and take basis of the modern law of nuisance in general: "a comparison between the utility and harm produced is an element in deciding whether a harmful effect should be considered a nuisance ... the courts, in cases relating to nuisance, are, in effect, making a decision on the economic problem and how resources are to be deployed." That this explanation needs to be restated in terms more conversant with the legal doctrines of nuisance seems almost a carping criticism when set next to the fact, a remarkable achievement by anyone, not merely one who made no pretence to competence in legal scholarship, that it *can* be set out in such a way.<sup>96</sup>

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<sup>94</sup> Simpson, *supra* note 1, at ???.

<sup>95</sup> Coase, *supra* note 2, at 119-20, 123.

<sup>96</sup> It is very instructive to compare the doctrinally superficial but theoretically profound discussion of the requirement that a nuisance be "substantial" in *The Problem of Social Cost* with the almost simultaneous, but independently arrived at, doctrinally impeccable discussion of that argument in Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE LAW JOURNAL 499, 534-40 (1961).

It will be recalled that in our earlier discussion of the Coase's treatment of *Sturges v. Bridgman* in section V of *The Problem of Social Cost* we mentioned that Coase ended the first paragraph of that analysis, which purports to be of the actual argument in the case but is not, with an unattributed quotation from the Court of Appeal's judgment.<sup>97</sup> It is the concluding sentence of the long quotation just given:

Individual cases of hardship may occur in the strict carrying out of the principle upon which we found our judgment, but the negation of the principle would lead even more to individual hardship, and would at the same time produce a prejudicial effect upon the development of land for residential purposes.<sup>98</sup>

It will also be recalled that we also ended our discussion of Coase's analysis in section V before the end of its second paragraph, at the start of a passage we now quote in full

It was of course the view of the judges that they were affecting the working of the economic system - and in a desirable direction. Any other decision would have had 'a prejudicial effect upon the development of land for residential purposes,' an argument which was elaborated by examining the example of a forge operating on a barren moor, which was later developed for residual purposes. The judges' view that they were settling how the land was to be used would be true only in the case in which the costs of carrying out the necessary market transactions exceeded the gain which might be achieved by any rearrangement of rights. And it would be desirable to preserve the areas (Wimpole Street or the moor) for residential or professional use (by giving non-industrial users the right to stop the noise, vibration, smoke, etc., by injunction) only if the value of the additional residential facilities obtained was greater than the value of cakes or iron lost. But of this the judges seem to have been unaware.<sup>99</sup>

As an analysis of the actual arguments which were, or might have been, made in the case, this is completely inaccurate. It had no business being made part of an account of *Sturges v. Bridgman*. It had no business appearing in section V at all because it is worse than useless as an illustration of the Coase Theorem. But as an analysis of the background thinking

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<sup>97</sup> See text accompanying *supra* note 18.

<sup>98</sup> *Id.* Jessell M.R. had considered this example below, *id.* at 858-59, and his view was that the blacksmith should not be allowed effectively to prevent residential development when land "which is useless as a barren moor ... becomes available for building land by reason of the growth of a neighbouring town" because this would be to say "that the owner has lost the right to this barren moor, which has now become worth perhaps hundreds of thousands of pounds, by being unable to build upon it by reason of this noisy business?"

<sup>99</sup> Coase, *supra* note 2, at 106-107.

that led to the courts that heard the case to believe that the nuisance issue (which to the layperson and the neophyte is a particularly vexed one) was so straightforward that it needed no more than a gestural discussion, it is seminal.

Simpson, as we have seen, accepts none of this and we have argued that there are three main points to the criticism which leads him to refuse to do so: the Coase Theorem is “purely theoretical,” deciding nuisance cases “does not,” as a matter of positive law and economics, “entail attempting to reach an economically efficient solution,” and, as a matter of normative law and economics, solving nuisance cases by means of Coasean bargaining would be “offensive.” Let us turn to each of these in turn.

### *C. The Coase Theorem is “Purely Theoretical”*

It is helpful here to juxtapose two passages which we have quoted above expressing Simpson’s principal criticism of the Coase Theorem and Coase’s own views about that Theorem:

the Coase Theorem ... is of course a purely theoretical view as to what would happen in a world which does not exist ... Coasean cost benefit analysis bears no relationship at all to how neighbours behave in real life situations ... It may be that in some imagined world some such analysis would take place, but lawyers are concerned with the real world. Law involves practical reason. It is unclear to me what lawyers can learn from an imagined world ... the whole idea of an ideally efficient solution is itself, from a practical point of view, vacuous ... whatever the theoretical utility of the ideal conception of economic efficiency may be, it is devoid of empirical or practical significance. It is the crock of gold at the end of a rainbow.<sup>100</sup>

The extensive discussion [of *The Problem of Social Cost*] in the journals has concentrated almost entirely on the ‘Coase Theorem’, a proposition about the world of zero transaction costs. This response, though disappointing, is understandable. The world of zero transaction costs, to which the Coase Theorem applies, is the world of modern economic analysis, and economists feel quite comfortable handling the intellectual problems it poses, remote from the real world though they may be ... if I am right, current economic analysis is incapable of handling many of the problems to which it purports to give answers discussion

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<sup>100</sup> Simpson, *supra* note 1 at 18, 32, 40.

of the Coase Theorem is ... but a preliminary to the development of an analytical system capable of tackling the problems posed by the real world of positive transaction costs.<sup>101</sup>

When Simpson published his article in 1996, a vast literature on *The Problem of Social Cost*, to which Coase himself had made a number of contributions, had already emerged, and we think Coase was entitled to point to this and to complain that Simpson seemed not to have read much of that literature, particularly Coase's own contributions to it, with attention.<sup>102</sup> An important argument in that literature is that the Coase Theorem is purely theoretical and of no direct value in the formulation of policy. Although a belief that Coase thought that the Coase Theorem could have such a value still dominates especially the economic literature, a better interpretation – led by Medema in economic history<sup>103</sup> and Schlag in law<sup>104</sup> but to which Coase himself was the main contributor - which shows that Coase himself did not believe this was already powerfully established by 1996.<sup>105</sup> Simpson seems to have had some inkling that his criticisms of Coase were not entirely accurate.<sup>106</sup> But a complete lack of sympathy with “economic rationality” prevented him from seeing that Coase is, if not the most profound, then the most successful critic of neo-classical economics, and to continually attribute to Coase positions it was the entire purpose of *The Problem of Social Cost* to reject. The issues of theoretical interest in the interpretation of Coase now lie elsewhere,<sup>107</sup> and there is no need to show that Simpson profoundly misunderstands Coase's theoretical views. But let us take

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<sup>101</sup> Coase, *supra* note 67 **Error! Bookmark not defined.**, at 15.

<sup>102</sup> Coase, *supra* note 4 at 105.

<sup>103</sup> Medema's first contribution was Steven G. Medema, *The Myth of Two Coases: What Coase Is Really Saying*, 28 JOURNAL OF ECONOMIC ISSUES 208 (1994).

<sup>104</sup> Schlag's first contribution was Pierre Schlag, *An Appreciative Comment on Coase's The Problem of Social Cost: A View from the Left*, 1986 WISCONSIN LAW REVIEW 919.

<sup>105</sup> David Campbell, *On What is Valuable in Law and Economics*, 8 OTAGO LAW REVIEW 489, 498-505 (1996)

<sup>106</sup> Simpson, *supra* note 1, at ???.

<sup>107</sup> David Campbell and Mathias Klaes, *The Principle of Institutional Direction: Coase's Regulatory Critique of Intervention*, 29 CAMBRIDGE JOURNAL OF ECONOMICS 263, 277 (2005).

up those parts of his misunderstanding that have a direct bearing on the law of nuisance as it is and as it could be.

*D. Solving Nuisance Cases “Does Not Entail Attempting to Reach an Economically Efficient Solution”*

We have argued above that Coase was right to maintain that some notion of economic efficiency does lie behind decision-making in nuisance cases. As we have seen, Simpson flatly denied this, and, as a matter of legal history, he claimed that: “After some controversy it came to be settled in mid-nineteenth century common law that this basic principle was not to be displaced by the public interest in economic development.”<sup>108</sup> Making this claim involved him taking a very different line than the works of legal history which argued that the modern law of nuisance is based on its distance from the *sic utere* rule to which we have previously referred, and he did so, not so much in the article we are discussing, but in a chapter of his *Leading Cases in the Common Law*, written at about the same time<sup>109</sup> and he cited in support of his argument in the article we are discussing.<sup>110</sup> This chapter examined a very important Victorian nuisance case which Simpson claimed resolved the conflict between the *sic utere* and the give and take principles in favour of the former: *St. Helen’s Smelting Co. v. Tipping*.<sup>111</sup> Simpson’s outstanding eminence as a legal historian and the fact that he is but recently deceased make one reluctant to say, as we are obliged to do, that his doing this involved misinterpreting both *Tipping*, which actually was part of the process of

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<sup>108</sup> Simpson, *supra* note 1, at 38.

<sup>109</sup> Simpson, *supra* note 82. In a 2001 edition of *Leading Cases* the preface and the publishing record of which leads one to think it is simply a reprint of the 1995 edition, a reference to the article we are discussing was added: A.W. BRIAN SIMPSON, LEADING CASES IN THE COMMON LAW 194 n.126 (reprint 2001).

<sup>110</sup> Simpson, *supra* note 1, at 38.

<sup>111</sup> (1865) XI H.L. Cas. 642; 11 E.R. 1483 (H.L. Eng.).

abandonment of the *sic utere* rule, and of one of the important works of legal history we have mentioned.

In *Tipping* a private landowner obtained an injunction against a neighbouring copper smelting works and ultimately forced the works to close. Very noxious emissions, principally from a chimney less than half a mile from the landowner's property, were found to have damaged trees and other cultivated plants on the property. But *Tipping* turned on a distinction which was drawn between "material injury to the property," such as the visible damage done to the trees and plants, and more general "inconvenience and interference with one's enjoyment,"<sup>112</sup> and it has been continually distinguished on this basis in subsequent nuisance cases. This distinction is, of course, ultimately unsustainable and irrelevant to the basic issue anyway, but its significance is that it effectively condoned industrial pollution of a general sort. In the terms Simpson used in the article we are discussing, *Tipping* is a landmark case in the erosion of protection from "less tangible interference" that he thought was the very function of the law of nuisance.<sup>113</sup> Simpson unintentionally actually provided formerly unknown evidence of this when he told us that, after being forced to close, "the company moved its operations ... some three miles away, from where it could continue to pollute the [plaintiff's] estate, albeit much less severely."<sup>114</sup> Having shown that the landowner, an extremely rich and eccentrically determined person, had been prepared to spend simply enormous effort and expense on winning the action he brought, Simpson does not explain his acceptance of what must have been as intolerable to him an interference in his strict rights,

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<sup>112</sup> *Id.* at 650; 1486.

<sup>113</sup> Simpson, *supra* note 1, at 38.

<sup>114</sup> Simpson, *supra* note 82, at 191.

were those rights strict.<sup>115</sup> The only explanation is that private nuisance are not strict but are contingent in the way we have claimed.

The account of *Tipping* we have just given condenses that of Brenner and McLaren.<sup>116</sup> These works are cited in Simpson's chapter on *Tipping* but not discussed in any detail.<sup>117</sup> He does, however, sum up McLaren's work, in praise of which is fulsome,<sup>118</sup> thus: "J.P.S. McLaren, in a notable study ... has shown how the common law of nuisance played a relatively unimportant part in controlling pollution, not primarily because of its doctrinal form, but because other social and institutional factors diminished its utility."<sup>119</sup> By these factors Simpson means the transaction costs of legal action and the unequal distribution of the capacity to absorb those costs consequent upon inequality of wealth, which obviously are important. But this is not what McLaren was principally concerned about, and it is unfortunately barely necessary to comment on the accuracy of Simpson's interpretation of an article the crux of which is that:

In essence, what the courts, and especially the House of Lords in *St Helen's Smelting Co. v. Tipping*, did was to take the traditional maxim of *sic utere tuo ut alienum non laedas*, which prior to the nineteenth century had always worked in favour of hallowed residential and agricultural uses of land, and to redefine it, giving it a more relative quality which allowed for sympathetic discussion of the economic context and social utility of industrial activity.<sup>120</sup>

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<sup>115</sup> *Id.* Simpson also tells us that the plaintiff did not even try to obtain an injunction, which was the only remedy he would have thought adequate, against another smelting works, , but offers only what seems to be a very insufficient reason for this.

<sup>116</sup> Brenner, *supra* note 82, at 212-25 and McLaren, *supra* note 82, at 156-58.

<sup>117</sup> Simpson, *supra* note 82, at 172 n.35.

<sup>118</sup> In the first version of the article we are discussing he describes this article as "a classic": Simpson, *Coase v. Pigou Reexamined*, *supra* note 1, at 82.

<sup>119</sup> Simpson, *supra* note 82, at 193.

<sup>120</sup> McLaren, *supra* note 82, at 157. In his article which we are discussing, Simpson, *supra* note 1, at 10 n.3, 12 n.3, 19 n.25 refers to McLaren three times, on the first and third occasions in connection with points not in dispute here but on the second to make a claim about McLaren's argument that we suspect involves the misinterpretation which we have identified.

Brenner's conclusion about *Tipping*, *supra* note 82, at 413-14, was effectively the same as McLaren's: *St. Helen's* made actions in respect of discomfort virtually impossible in the industrial Midlands and in [similar] regions such as Swansea and Cardiff. This is not to say that a successful action in respect of discomfort caused by an industrial nuisance was no longer conceivable in an industrial

It is, in truth, impossible to deny that use of the language of “economics” is not uncommonly to be found in the judgments in the leading nineteenth century nuisance cases, including *Sturges v. Bridgman* and *St. Helen’s Smelting Co. v. Tipping*, in much the jumbled way that Coase claimed, and, having, as we have seen, told us that “the common law rejected the idea of permitting the economically efficient level of pollution,” Simpson then said:

However, the judges, and no doubt juries, in determining what is to count as an actionable nuisance, which is bound to involve questions of degree, have always accepted the idea that some level of mutual tolerance and adjustment between landowners is necessary if life is to go on, given the fact that effects of land use are bound to cross boundaries, and no doubt a rough and ready economic calculus has been significant at the margins. To this weak extent the reciprocal nature of problems of conflicting land use has been accepted by the oracles of the law, and no doubt also by juries. But in so far as economic considerations have been taken into consideration this does not mean a rigorous system of analysis has replaced a less rigorous legal analysis; economic arguments, in so far as they feature in legal decisions, have been impressionistic only.<sup>121</sup>

If one acknowledges that all important cases are “at the margins,” which is why they are important, and that Coase made no claim whatsoever about the rigour of the courts’ approach, quite the opposite in fact, this is, in our opinion, an effective agreement with Coase’s position.

Simpson’s criticism of Coase turns on their differing conceptions of property rights and their role in economic and legal reasoning, and to this we now turn.

#### *E. Solving Nuisance Cases by Means of Coasean Bargaining Would Be “Offensive”*

Simpson was rightly of the belief that his criticism of Coase raised issues about the nature of the fundamental freedoms to be enjoyed in liberal democratic society. It will be recalled that he rejected the idea he attributed to Coase that the aim in nuisance cases should be to “reach an economically efficient solution” because “parties are not willing to place their rights in the

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town, but the discomfort would have had to be direct, immediate, and obviously physical as in trespass. An eye put out by a cinder would have done, but not severe personal discomfort.

<sup>121</sup> Simpson, *supra* note 1, at 38.

market” and it would be “offensive not to respect their unwillingness.” The offensiveness arises from the value of the institution of private property, the core of which believed to be captured in Blackstone’s conceptualisation of property as “that sole and despotic dominion [to] one man ... over ... external things of the world, in total exclusion of the right of any other individual in the universe.”<sup>122</sup> Having quoted the relevant passage of *The Commentaries*,<sup>123</sup> Simpson said:

Despotic dominion is what the right of private property is all about, and it includes a right to behave in ways which make no contribution to the national wealth. If I own a Renoir or a Picasso I may refuse every offer to purchase it and do so since I have decided to burn it ... [in nuisance cases] notions of economic or social value are wholly irrelevant. They must be in a capitalist system which respects the right of private property, for it is not the business of the courts to substitute their despotic dominion to that of the litigants ... It does not in the least follow that in particular cases property rights should be allocated to those who will produce the most wealth ... the law allows gifts to be made to the feckless and improvident, and testamentary dispositions too. Nincompoops may inherit, and contracts of sale are in no way affected by the fact that the purchaser is a shopaholic who has not the least use for the goods he purchases.<sup>124</sup>

The point is, as the editors who reprinted Simpson’s article put it, that “Professor Simpson questions the use of *efficiency* as a guiding star for decisions and instead supports the *freedom* of owners to do what they like with their property, free of ... social engineering by courts.”<sup>125</sup> This paper is written because we are in complete agreement with Simpson about this freedom. But it is this very freedom that informs Coase’s views, and these views far better articulate what is involved in economically and legally institutionalising that freedom than do Simpson’s own.

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<sup>122</sup> BLACKSTONE, II COMMENTARIES ON THE LAWS OF ENGLAND \*2.

<sup>123</sup> Simpson, *supra* note 1, at 34-35.

<sup>124</sup> *Id.* at 35, 37, 39.

<sup>125</sup> Gerald Korngold and Andrew P. Morriss, *Introduction*, in Morris & Korngold eds, *supra* note 1, 1, at 3-4. Simpson makes a very similar but in some respects superior argument in his chapter on *Tipping*, and there contrasts “economic analysis” to an “ethical” “concern” with the protection of property rights: Simpson, *supra* note 82, at 175.

Simpson does not, in fact, believe in despotic dominion, for the very good reason that no-one can possibly believe in it.<sup>126</sup> At the level at which we need to engage with the issue, the point may be simply made. Even if we allow that one's private property in a Picasso may enable one to burn it, one cannot burn it by throwing it on a fire that a neighbour has started to dispose of rubbish on her land, or burn it on one's own land in such a way that would unreasonably interfere with the neighbour's enjoyment of her land. One could go on. Social life necessarily imposes limits on despotic dominion. Simpson is, of course, perfectly well aware of this, and he spoke of the law of nuisance as a law which "intervenes when either party engages in activities which significantly abridge the freedom of their neighbour."<sup>127</sup> But he did not recognise that the issue is not social coexistence as such but the way that the law of nuisance institutionalises freedom of ownership in such a way that, far from being absolute or even strict, it is contingent, broadly giving a social engineering priority to economic growth over the *sic utere* rule. The very freedom that Simpson sought to protect is the freedom that it is of the nature of the positive of law of private nuisance not to protect.

The fundamental theoretical point on which Simpson's argument turned is its failure to come to terms with the distinction between property rules and liability rules which may well be the most important conceptual innovation made within law and economics other than

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<sup>126</sup> Blackstone did conceive of private property as an "absolute" right, and opposed such rights to "relative" rights which "result from, and are posterior to the formation of states and societies:" BLACKSTONE, *supra* note 122, at I, \*124. But, putting to one side the background understanding of natural and positive law which gives the distinction its full meaning, it is unsustainable as a distinction within the positive law of private property, and that law is always relative, even in Blackstone's own treatment of it. When first placing property on the list of absolute rights, *id.* at I, \*138, he defines it as the "free use, enjoyment, and disposal of all his acquisitions without any control or diminution, *save only by the laws of the land* [emphasis added]." Blackstone's treatment, whilst of the first importance in a legal sense, is not of great help in addressing the difficult theoretical issues. *See ???*.

<sup>127</sup> Simpson, *supra* note 1, at 37.

Coase's own contribution to the conceptualisation of the transaction cost.<sup>128</sup> Of the relevance of this distinction Simpson said:

Valuable though the distinction is, confusion can be caused here by contrasting entitlements protected by property rules from entitlements protected by liability rules, or property *rights* with liability *rules*. The statement of a property right is the statement of an entitlement which the law protects; in a sense it is a statement of an ideal ... The enthusiasm or intensity of protection varies, so that in relation to personal property, much of which is fungible, orders for specific restitution are commonly not available. [With rights in land, specific recovery in cases of dispossession is available partly because it is more practicable, and partly because land is not treated as fungible.] To view this as a legal recognition that people can take other people's property so long as they pay for it seems to me to be profoundly mistaken. In the world we live in, which is partly structured by law, that is not the understanding. To do so will usually, but not always, constitute a criminal offence.<sup>129</sup>

Simpson's use of the word "take" when he said that "people can take other people's property so long as they pay for it" elides the basis of the distinction between property rules and liability rules. The distinction is not between economic goods which can and cannot be bought but between two different ways of determining the value at which the sale takes place.<sup>130</sup> Goods legally institutionalised by property rules may be bought only at a value subjectively determined by their private owner. Goods legally institutionalised by liability rules may be bought at a value objectively determined by the state.<sup>131</sup> A party therefore may buy a good institutionalised by a property rule only if she secures the voluntary agreement of the owner to the sale by offering what the owner believes is an acceptable price. That it is possible to take property by paying for it in this way is market exchange, though the word

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<sup>128</sup> Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARVARD LAW REVIEW 1089 (1972)

<sup>129</sup> Simpson, *supra* note 1, at 37.

<sup>130</sup> As we have just put it, this is in a sense misleadingly, but we will continue to speak in this way as the simplification involved is valuable and unobjectionable once one is clear one is making it. Simpson, *id.*, rightly says that goods are a bundle of legal rules, including property and liability rules. He does not seem to be aware that Calabresi & Melamed, *supra* note 128, at 1093 make the same point. The problem is that, as all the institutions of modern society including private property rest on a constitutional framework provided by the state means that ultimately there are no property rules, but nevertheless the concept retains its value.

<sup>131</sup> *Id.* at 1092.

“take” is inapt to describe a process based on voluntary agreement. On the other hand, a party may buy a good institutionalised by a liability rule without the voluntary agreement of the owner by imposing what the state determines is the correct price. The obvious example is eminent domain, but regulated pricing of all types (including the regulation of terms which go to the adequacy of consideration) imposes a price on sales between private parties. The word “take” is, to various degrees, apt to describe this process.

One who respects the sense of freedom involved in despotic dominion that Simpson endorses will find liability rules *prima facie* objectionable, but, of course, social engineering cases can be made out for them based on the public interest, and Simpson was, in fact, himself highly sympathetic to eminent domain.<sup>132</sup> His strongly expressed views to this effect completely contradict the views expressed in the paper we are discussing and in his chapter on *Tipping*, but we will put this to one side.<sup>133</sup> But if one starts with an idea that private property in land should involve ownership on the *sic utere* basis which most closely approximates to despotic dominion, what is completely unacceptable about the positive law of private nuisance is, not that it places a value on allowing reasonable interference, but that it institutionalises a liability rule under which the value of the interference is determined by the courts and that value is often zero. If a nuisance is found but a perpetual prohibitory injunction is denied and compensatory damages awarded, the court determines the value of

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<sup>132</sup> AWB SIMPSON, *VICTORIAN LAW AND THE INDUSTRIAL SPIRIT* (1995). This lecture is a criticism of the refusal to establish a doctrine of abuse of rights in the law of England and Wales following *The Mayor, Alderman and Burgesses of the Borough of Bradford v. Pickles* [1895] A.C. 587 (H.L. Eng.). What Simpson (as it happens wrongly) describes as Pickles’ attempt to exercise his despotic dominion over water percolating through his land to the frustration of the City of Bradford which wished to tap the water is excoriated, and in the course of this Coase is once again criticised for putting forward “some ideal theoretical world” in which “everyone behaves with economic rationality”: Simpson, *id.* at ???. One of the current authors has discussed Simpson’s lecture elsewhere: David Campbell, *Gathering the Water: Abuse of Rights after the Recognition of Government Failure*, 7*THE JOURNAL JURISPRUDENCE* 487 (2010).

<sup>133</sup> Taken separately, both Simpson’s defence of despotic dominion and his rejection of it are very interesting. Taken together, they amount to no more than a representative but uninteresting aversion to what Simpson understands to be the “economic” motivation of action.

the interference. If interference is shown but it is found to be reasonable so that there is no nuisance, the court is allowing that interference at zero cost.<sup>134</sup>

If the law of nuisance were to approximate to the institutionalisation of a property rule, then nuisance would have to be based on strict liability for interference rather than the give and take principle, and the remedy would have to be a perpetual prohibitory injunction.<sup>135</sup> This would be to grant a chose in action to the owner of the affected land and a neighbour whose use would lead to interference would have to buy off the injunction at a price which the owner voluntarily agreed. This obviously would be something like the hypothetical situation Coase examined in section III of *The Problem of Social Cost*: “The Pricing System with Liability for Damage.” If it was made similarly clear that no nuisance would be found (it is hard to conceive of the legal design of the necessary right), then this would be like the section IV hypothetical situation: “The Pricing System with No Liability for Damage.” It certainly would be far more like these situations than the positive law of private nuisance.

The problems with either of Coase’s hypothetical situations are manifest.<sup>136</sup> Once it is realised that the injunction can be bought off, it is not that “The Pricing System with Liability for Damage” would simply prevent industrialisation. It is that, *prima facie*, the transaction costs of negotiating the permissions to interfere necessary to, for example, allow industrial smoke pollution would be impossibly high. The result of liability for damage would, then, amount to much the same thing as simple prevention:

Once the cost of carrying out market transactions are taken into account, it is clear that ... a rearrangement of rights will only be undertaken when the increase in the value of production consequent upon the rearrangement is greater than the costs which would be involved in bringing it about. When it is less, the granting

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<sup>134</sup> One of the current authors has reviewed the range of possibilities in DONALD HARRIS ET AL., REMEDIES IN CONTRACT AND TORT 513-18 (2nd ed. 2002).

<sup>135</sup> Richard A. Epstein, *Nuisance Law, Corrective Justice and Its Utilitarian Constraints*, 8 JOURNAL OF LEGAL STUDIES 49 (1979).

<sup>136</sup> Though in the paper we are discussing Simpson, *supra* note 1, at ???, is so insistent on despotic dominion that he simply denies the force of these objections. We put this to one side.

of an injunction (or the knowledge that it would be granted) or the liability to pay damages may result in an activity being discontinued (or may prevent its being started) which would be undertaken if market transactions were costless. In these conditions, the initial delimitation of legal rights does have an effect on the efficiency with which the economic system operates.<sup>137</sup>

It would be much the same in the situation of “The Pricing System with No Liability for Damage,” except, of course, that *prima facie* the transaction costs of negotiation would mean that no substantial limits would be placed on interference caused by industrial use. But as the basis of the discussion in sections III and IV is that transaction costs are assumed to be zero, it inevitably follows that the optimal level of interference is established, whether or not there initially is liability, as a logical consequence of this assumption.<sup>138</sup>

The point is that, far from assuming this assumption did apply, Coase thought it would never apply, and in section VI turned his attention to the situation when “The Cost of Market Transactions [is] Taken into Account”. We believe it is now possible to precisely identify the reason his argument in *The Problem of Social Cost* encouraged confusion about that argument. Prior to section VI, Coase had discussed the issues on the assumption of zero transaction costs in section III and IV and in section V he illustrated this by reference to actual cases such as *Sturges v. Bridgman*. It must be said that his accounts of those case are, as we have shown in respect of *Sturges*, profoundly inaccurate, and this was necessarily the case because the assumption of zero transaction costs cannot possibly apply to actual cases. Coase’s way of illustrating his argument in section V is exceedingly unfortunate.

In section VII Coase engaged with these cases again after having, in section VI, dropped the assumption of zero transaction costs. The consequence of dropping this assumption is that the market may not yield the optimum outcome:

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<sup>137</sup> Coase, *supra* note 2, at 115.

<sup>138</sup> Though Coase himself for a while engaged with it, we put to one side the problem whether the holdup problem can be conceived as a consequence of transaction costs or a property of economic action regardless of transaction costs.

the assumption of zero transaction costs ... is, of course, a very unrealistic assumption [The operations necessary] In order to carry out a market transaction ... are often extremely costly, sufficiently costly at any rate to prevent many transactions that would be carried out in a world in which the pricing system worked without cost ... One arrangement of rights may bring about a greater value of production than any other. But the costs of reaching [this] result by altering and combining rights through the market may be so great that this optimal arrangement of rights may be so great that this optimal arrangement of rights, and the greater value of production it would bring, may never be achieved.<sup>139</sup>

In section VI this led Coase to consider the alternative governance structures of the firm and the state and, most importantly, to set up the principle of determining policy for the empirical world as “one of choosing the appropriate social arrangement.”<sup>140</sup> Before turning to the significance of this, we must note that when in section VII Coase again turned to actual cases, including *Sturges v. Bridgman*, now assuming that transaction costs are positive, his argument was that the decisions in those cases show that “the courts directly influence economic activity”<sup>141</sup> when they reach judgments aware, if “not always ... very clearly,”<sup>142</sup> of the reciprocal nature of the problem:

In a world in which there are costs of rearranging the rights established by the legal system, the courts, in cases relating to nuisance, are, in effect, making a decision on the economic problem and determining how resources are to be employed ... the courts are conscious of this and they often make ... a comparison between what would be gained and what would be lost by preventing actions which have harmful effects.<sup>143</sup>

Rather than facilitate the bargaining by which the parties determine the outcome, the courts stipulate the outcome. This is an essentially accurate account of what goes on in nuisance cases. But this does not prevent the way Coase handled the point being extremely misleading in terms of the argument he sought to advance. Despite the apparent realism of

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<sup>139</sup> *Id.* at 114-15.

<sup>140</sup> *Id.* at 118. There also is, Coase says here, the “further alternative, which is to do nothing at all.”

<sup>141</sup> *Id.* at 119.

<sup>142</sup> *Id.* at 123.

<sup>143</sup> *Id.* at 133.

section V, the bargaining Coase describes in *The Problem of Social Cost* is the bargaining at zero transaction cost that in sections III and IV effectively sets up the Coase Theorem. Sections VI and VIII then allowed positive transaction costs, and bargaining played no further part in Coase's argument! When transaction costs are positive, Coase, in section VI, considered alternative governance structures to common law decision-making, and also, in section VII, considered decision-making by the courts rather than decision-making by the parties, which almost completely disappears from his article. The presence of transaction costs, which of course prevents theoretical Pareto optimality, led Coase to drop bargaining as a plausible governance structure, with the consequence that, incredible to say in light of the interpretation of the article, there is no "Coasean bargaining" in *The Problem of Social Cost*!

This was not, of course, Coase's intention, and it is a particularly difficult point of interpretation because the article on *The Federal Communications Commission* of which, as we have seen, *The Problem of Social Cost* was a generalising restatement, is a paradigmatic policy argument for Coasean bargaining, proposing what would now be called a quasi-market in broadcasting frequencies then thought of their nature to be public goods. But in that restatement, no positive proposals for bargaining when transaction costs are positive, or for the design of a legal framework for bargaining, are made. Coase describes what did happen in actual nuisance cases, but what happened, though it was a development at common law, was as much as statutory developments Coase discusses, an intervention in order to stipulate an outcome. Simpson is right to point this out,<sup>144</sup> and it is very difficult to overstate the amount of confusion Coase's argument has caused here.

For what it is worth, it is our belief that, in the nineteenth century circumstances - broadly the unprecedented possibilities of improvement brought by industrialisation; the

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<sup>144</sup> Simpson, *supra* note 1, at 21.

inequality of wealth, an important part of which was overwhelmingly unequal distribution of the capacity of bring legal action; and most importantly the vestigial regulatory capacity of the state – nuisance had to be developed on a give and take basis, even though it therefore was made essentially irrelevant to the determination of the optimal level of pollution, and indeed was made central to its general, uncosted permission. But in light of the growth of the very extensive and far-reaching system of planning permission and control,<sup>145</sup> private nuisance should now be placed on a *sic utere* basis. By strengthening despotic dominion, this reform would provide those with the requisite interest in property with far greater power to oppose or charge for interference than they now normally enjoy, and the public planning system would always offer a possible check on the exercise of that power.<sup>146</sup> And, indeed, a growing consciousness of government failure in respect of the regulation of pollution has led to the exploration of the value of nuisance as “the environmental tort.”<sup>147</sup> The expansion of the use of nuisance in this way could have a very positive effect on the ability of the private citizen to directly participate in the regulation of interference and thereby on the relationship of the private and public systems of regulation of interference. We do not pretend to have done more than mount a *prima facie* case for this immense reform; perhaps not even that. We

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<sup>145</sup> After discussing nuisance at common law, *id.* at 126-32, Coase turned to the nineteenth century growth of statutory control of interference in section VII, and returned to the theme in section VIII as part of his explicit criticism of Pigou: *id.* at 135-41. He there raises the now very famous railway sparks example, his treatment of which is, choosing our word carefully, excoriated by Simpson, *supra* note 1, at ??? (the treatment is longer in Simpson, *supra* note 82, at ???). Coase’s own response to this criticism, *supra* note 4, at ???, was largely unavailing, and Simpson’s further contribution, *supra* note 5, at ???, is highly critical of what he said. Nevertheless, Coase was, in our opinion, essentially right about the railways sparks example. It is all very similar to the position over private nuisance which we are examining here, and a full discussion would require a treatment at similar length to that discussion. The core of such a treatment may be found in P.S. Atiyah, *Liability for Railway Nuisance in the English Common Law: A Historical Footnote*, 23 JOURNAL OF LAW AND ECONOMICS 191 (1980).

The particular, as it were, value added to Brenner’s and McLaren’s histories of nuisance by MORAG-LEVINE, *supra* note 82, is its more extensive discussion of the growth of the statutory regime in parallel with the common law regime, which was significantly different in the U.K. and the U.S..

<sup>146</sup> HARRIS ET AL., *supra* note 134, at 416-513.

<sup>147</sup> Campbell, *supra* note 81 discusses this literature in the context of proposing a nuisance scheme for the introduction of genetically modified crops into the U.K.

put it forward to indicate what we believe is latent in Coase's own argument in *The Problem of Social Cost* in order to clarify that argument.

Coase missed a crucial trick by not actually going into the possibilities of Coasean bargaining in *The Problem of Social Cost*. For, bringing to light stimulating material by delving into the background of *Sturges v. Bridgman* in the way that was so characteristic of his work, Simpson showed, in a way that certainly was no part of his intention, that Coasean bargaining did take place in that case, and, with respect, Coase really should have taken this up. Simpson described the extensive negotiation that did, in fact, take place in *Sturges v. Bridgman*, and, indeed, he said that negotiation in "the case certainly illustrates the reciprocal nature of the problem of social cost."<sup>148</sup>:

In fact Dr. Sturges did try negotiation, first complaining personally and then, in the Spring of 1876, through his solicitor. The precise form of these negotiations is unrecorded, but from what Mr. Bridgman said in reply we may guess that there was some suggestion that he might arrange to use his mortars at times when the consulting room was not in use ... In his affidavit Mr. Bridgman, as if he had read Coase, indeed made the point that the problem was a reciprocal one, and he took the line that it was all the fault of Dr. Sturges [by building the consulting room when he, Mr. Bridgman, had operated his machinery for many years previously.] In response to Dr. Sturges' complaint he had done what he could to confine the use of the mortars to times which did not trouble the doctor ... He could do no more if he was to run his business. So it was that little was achieved in the negotiations, and the dispute came to litigation ... Negotiation will normally precede litigation in nuisance cases of this kind. The story which emerges from the affidavits is a very everyday account of a dispute between neighbours, here both engaged in commercial activity, with an attempt to work out things amicably.<sup>149</sup>

One has to ask what has happened to the "offensive" use of bargaining to resolve problems of competing use? In the end, Simpson's criticism of Coase turns on a rejection of "economic rationality", and this rejection ultimately is not focused on "rationality"<sup>150</sup> but on

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<sup>148</sup> Simpson, *supra* note 1, at 29.

<sup>149</sup> *Id.* at 30-31.

<sup>150</sup> As part of his defence of Pigou, Simpson, *id.* at ???, attributed hyper-rationalist views to Coase which Coase certainly did not possess and which actually constitute something of a criticism of Pigou, though we cannot go into this here.

“economic”. Simpson rejected the very idea that a market transaction should play a role in resolving disputes over competing uses. We have already quoted Simpson’s argument that “The reason why a market transaction in the sense of a purchase and sale of rights is ... not possible in ... situations [like *Sturges v. Bridgman*] is that the parties are not willing to place their rights on the market”. This is an example of a general quality of social life:

Life would be quite intolerable if individuals did not in general respect social limits to the market ... Engaging in market transactions is just one form of human activity, and without such boundaries life would dissolve into unstructured chaos, in which it would be impossible to distinguish [a sale from]<sup>151</sup> going shopping, from going out to dinner, or from going mountain climbing, or from going fishing with a friend. In the situation which confronted the doctor and the confectioner an offer of money by Dr. Sturges to help over any costs involved in moving or insulating the mortars might well have been socially acceptable, and would not, except to a certain type of economist anxious to assimilate all human action to market transactions, be thought of as a sale but rather as a contribution to the cost of action from which he would be the principal beneficiary and from which he otherwise would be unjustly enriched. Anything more than such an offer would surely have bordered on the offensive.<sup>152</sup>

As it happens, Simpson unknowingly scored a hit here as, in the limited comments he made on the nature of economic action, Coase did seem to commit himself to Becker’s extreme economic imperialism,<sup>153</sup> from which Becker himself has now retreated. But does he score a hit on anything in Coase’s argument in *The Problem of Social Cost*? He undoubtedly is right that as a matter of legal history Dr. Sturges and Mr. Bridgman (nor those who heard their case) did not look on the issues in clear, economic terms. But if so, they would have been left with a clash of opposed uses. As Simpson says:

No doubt Mr. Bridgman thought he had a perfect right to go on using his mortars as he and his father had done in years past, and you do not pay people for a right you believe you already possess ... And no doubt Dr. Sturges ... thought he had a right to peace and quiet in his home, so that he could see his patients ... and again you do not offer to pay people money for what is yours already ... In short I

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<sup>151</sup> We have added “a sale from” as something seems to be missing in Simpson’s sentence, which did not appear in the original journal article.

<sup>152</sup> *Id.* at 33.

<sup>153</sup> Coase, *The Firm, the Market and the Law*, *supra* note 67, at ???. For a criticism see Campbell, *supra* note 105, at ???.

doubt if either of the two men questioned for one moment the right of the other to continue to pursue their business on their property.<sup>154</sup>

But to the extent this was their thinking, then their thinking was nonsense. They could not both have the right to their use. That they themselves entered into negotiations showed that their thinking also involved some perception of the reciprocal nature of the problem. That when their negotiations failed the courts that heard the matter thought it uncontroversial that Dr. Sturges could move to the nuisance is completely inexplicable unless they also had some such perception. Simpson admits this! Of course, this perception was very unclear, but Coase never claimed more than this! Though we hope we have made it clear how far Simpson is correct about the legal history, Coase is correct at a far more fundamental level. He does not rest at the level of the parties' self-understanding but shows the limits of that understanding. he also shows the limits of the positive law, and offers us the possibility of rethinking that law so as to make it capable of dealing far more adequately with problems of competing use.

If we are to utilise Coase's insight, we have to accept the hard facts on which it is based. The problem is a reciprocal one. Giving up a polluting use does have costs. Determination of the best possible policy does require us to respect "economic" considerations. Brian Simpson was of a generation whose instinct was to regard self-consciousness of resource constraint was an unworthy concession to "the market." A moment's reflection on influential political movements which would set us the goal of preventing pollution, or do not think the natural environment is a fit subject for economic policy, show that his attitude remains significant.

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<sup>154</sup> Simpson, *supra* note 1, at 32.

V. CONCLUSION: WHY DID COASE NOT ADVOCATE COASEAN BARGAINING IN THE PROBLEM  
OF SOCIAL COST?

We have tried to show where Coase's argument in *The Problem of Social Cost* is deficient, not in its substance, for we have not touched on the points where we do think that argument is deficient in substance, but in its presentation of what we believe is substantially correct and, indeed, of seminal importance: the reciprocal nature of the problem of competing uses and that the legal framework within which that problem is handled is of the first importance in determining the optimality, or otherwise, of the result of that handling. The deficiencies we have identified are that Coase's first use of actual cases such as *Sturges v. Bridgman* in section V was completely historically inaccurate and was a very misleading illustration of the purely theoretical argument which we now know as the Coase Theorem. Coase's overall point was to show that arguments about what would happen at zero transaction costs was irrelevant to determining policy and economists should stop making such arguments. Recourse to seemingly realistic illustrations drawn from actual cases was bound to cause confusion. But this is in fact of less importance than that, when he returned to those actual cases in section VII, having abandoned the assumption of zero transaction costs, he did not explore the possibilities of what we would now call Coasean bargaining when transaction costs were positive. Instead he considered alternatives to such bargaining: the firm, the state and cases decided by courts which stipulated outcomes. Courts making decisions in this way are not providing a framework for the parties to make decisions but are intervening just as much as a government pursuing the statutory regulation of nuisance. There is, in the end, too much government and not nearly enough voluntary exchange in *The Problem of Social Cost*. It is essential to acknowledge the shortcomings of Coase's presentation of his argument in order to grasp the underlying enormous strength of that argument. The influence of the Coase Theorem on the reception of *The Problem of Social Cost* shows that article to have been, in

one sense, undeniably a failure. But, of course, one has to keep a sense of proportion, and humility, about this, and surely anyone who has ever written on these issues can only aspire to a failure like Coase's.

In sum, Simpson's criticism of Coase is perfectly correct in regard of the legal history of *Sturges v. Bridgman*, but as regards the theory of law and economics, his criticism is in all important respects mistaken. That the Coase Theorem is purely a theoretical device is something which it can be said it was, for reasons Simpson does not understand, Coase's main aim to insist. The law of private nuisance does not provide a framework for Coasean bargaining, but this is because it is, not a system of unqualified property rights, but a liability rule generally qualifying those rights in the claimed public interest. Coase, to be sure, was himself confused on all these points, and this confusion coloured the argument of *The Problem of Social Cost* and so the reception of that argument. Nevertheless, Coase's position on the theoretical issues which emerge from his discussion of *Sturges v. Bridgman* is the most profound contribution to the analysis of those issues in, not merely law and economics, but post-war economics or law *tout court*.