

O.J's Defense: A Reductio Ad Absurdum of the Economics of Ronald Coase and Richard Posner

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Abstract

A reductio ad absurdum takes the principles of a doctrine, applies them exactly as their creators did only to an entirely different subject and with horrendous results, and thus shows what absurd conclusions are logically compatible with the original thesis. The entire article applies the tenets of the Chicago law and economics tradition, as adumbrated by two of its most distinguished practitioners, Coase and Posner. It shows that on the basis of this canon a case can be made out for freeing O.J. Simpson- even if he did indeed kill his wife. The article is an attempt to show that the libertarian reliance on personal and private property rights is a much more robust thesis than the Chicago precept of wealth maximization.

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Even though the O.J. Simpson case has been decided, it is still much in the news. (1) Pundits, commentators, journalists, and editorialists, are still weighing it with discussion and analysis. There is no reason for the economics profession alone to remain silent on this highly charged issue when so many others have entered the fray.

Even after the trial, opinions about the case fall into two main categories: (1) O.J. Simpson did stab his former wife, Nicole Brown Simpson, and her companion Ronald Goldman and should he punished for his act, and (2) he is innocent and should therefore be freed. (2) Fortunately, with the tools of modern economic analysis, especially Coasian and Posnerian insights, we can have our cake and eat it too: we can defend the position that even if O.J. Simpson is guilty of the acts with which he is charged, he should still be set free. (3)

The Coasian System

According to the analytic framework developed by Coase (1960), there are two states of the world. The First state, for the most part an imaginary one, is characterized by zero transactions costs. This means that one can easily and cheaply find people with whom a bargain can be struck and that no one erects artificial barriers to commercial transactions (there are no holdouts, no opportunistic behavior, and so on). States Coase (1960, p.15): "In order to carry out a market transaction it is necessary to discover who it is that one

Wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up the contract, to undertake the inspection needed to make sure that that the terms of the contract are being observed, and so on."

The second state, an all too real one, is earmarked by positive or very high transactions costs- higher, by presumption, than any possible gains that could be made by trade. Under these conditions, it is difficult or impossible to rearrange titles to property, particularly when there are numerous buyers or sellers potentially involved.

It is Coase's opinion that there should be no property rights established prior to consideration of wealth maximization. (4) Instead, the proper function of property rights is to maximize wealth (5) therefore they should be defined so as to bring about this goal. Happily, for Coase, it does not matter how property rights disputes are settled in a zero-transactions-cost world. It is his belief (1960, p.10) that "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". This is apart from considerations of equity or wealth transfer. Regardless of whether the judge makes an award to the person who can best maximize the value of the property, this event will occur in any case by means of market transactions. As Coase says in this regard (1960, p. 5): "such an agreement would not affect the allocation of resources but would merely alter the distribution of income and wealth as between the cattle-raiser and the farmer."

But this, too, is a weakness of the Coasian system. For it is indeed a matter of importance for the contending parties, and therefore for society as a whole, how the "mere" dispute over wealth is settled. And Coase gives us no guidance as to how that issue can be justly settled.

Under the positive (prohibitively high) transaction costs assumption, the judge's decision is crucial. Given that there is now no possibility for the rearrangement of resources through side payments, whatever the judge determines will in fact prevail.

For example, suppose that sparks from a railroad can cause damage to a farmer's crops to the extent of \$60, while the cost of obviating this destruction, a smoke prevention device (SPD), costs \$75. Should the court find the railroad innocent of causing this damage and force the farmer to bear the losses? Or should the court declare that the railroad has engaged in an illegitimate border crossing or property rights violation, find in favor of the Farmer, and compel the railroad to install the SPD?

For the old-fashioned judge, unschooled in the niceties of Coasianism, the case is an open-and-shut one. The railroad trespassed on the farmer's property. (6) It should be made to stop. If the only way the railroad can continue in business without violating the farmer's right is with a smoke prevention device, it should have to pay for this. After all, if property rights are not respected, society can crumble. (7)

But according to Coasian philosophy, matters are very different. Property rights do not exist in a vacuum apart from wealth maximization. Nor is it true that the railroad is the aggressor and the farmer the victim. On the contrary, both parties have contributed to the alteration; if either of them were to disappear or to cease and desist, the problem would end. Blame is entirely inappropriate in such a case. If the railroad stop setting off sparks on the farmer's crops, there would be no incident to be resolved. But it is equally true, if perhaps somewhat less obvious, that if the farmer stopped his operations (so close to the railroad) it would be ended as well.

This is Coase's doctrine of reciprocity. In his view (Coase, 1960, p. 2). "We are dealing with a problem of a reciprocal nature. To avoid the harm to B we inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm."

Who caused the smoke nuisance? The answer seems fairly clear. The smoke nuisance was caused both by the man who built the wall and by the man who lit the fires. Given the fires, there would have been no smoke nuisance without the wall; given the wall, there would have been no smoke nuisance without the fires. Eliminate the wall or the fires and the smoke nuisance would disappear. On the marginal principle it is clear that both were responsible and both should be forced to include the loss of amenity due to the smoke as a cost in deciding whether to continue the activity which gave rise to the smoke.

In the case of the cattle and the crops, it is true that there would be no crop damage without the cattle. It is equally true that there would be no crop damage without the crops. The doctor's work would not have been disturbed if the confectioner had not worked his machinery: but the machinery would have disturbed no one if the doctor had not set up his consulting room in that

particular place ♦ If we are to discuss the problem in terms of causation, both parties cause the damage. If we are to attain an optimum allocation of resources, it is therefore desirable that both parties should take the harmful effect (the nuisance) into account in deciding their course of action. (1960, p. 13).

Instead of determining property rights based on the old-fashioned notion of who was there first (homesteading), Coase determines then on wealth maximization. Moreover, it is clear that wealth can be maximized only if the railroad is allowed to prevail. If the farmer wins, he will force the railroad to spend \$75 in order to save only \$60, a clear loss of \$15. On the other hand, if the railroad is given carte blanche. It will save its \$75; true, it will continue to impose cost of \$60 on the farmer, much to his dismay, but at least social welfare will be maximized. (8) After all, if one business entity owned both the railroad and the farm, it would continue railroad operation; it would be counterproductive to stop it, thereby saving \$60 but at the cost of \$75.

Zero transactions costs

All this, of course, occurs in the world of prohibitively high transactions costs. But, under the assumption of zero transactions costs, paradoxically, it matters not one whit what the court decides. (9) in terms of who is to be the owner of the relevant property rights? (10) If the court award then to the railroad, then the farmer will not be able to bribe the railroad into installing the smoke prevention device, since the device will cost \$75 or more, while the farmer will offer at most slightly less than \$60. On the other hand, if the farmer wins, the railroad will be able to bribe him into allowing continued pollution. For example, the railroad could offer the farmer \$65, thus saving \$10, compared to the SDP cost of \$75. The farmer for his part would accept the \$65 since this is more than the value of his damaged crops (see Fable 1).

To summarize Coase's argument, cases 1, 2, and 4 are "good" for Coase since total wealth is maximized at + \$15; case 3 is "bad" since social wealth is minimized at -\$15. A bribe takes place in case 1 since the farmer values his crops at only \$60, while the railroads reservation demand for the use of these crops as a sink for pollution is \$75. A bribe need not take place in case 2 for economic reasons: the only one who can bribe is the railroad, and it need not, since it has won the verdict. Bribes cannot take place in case 3 and 4 due to the assumption of high transactions cost.

The essence of the Coasian system is that private property rights are subsidiary to wealth maximization. There are indeed rights to private property for Coase, but they serve at the pleasure of wealth maximization. He states (1960,p.9):

The court's decision established that the doctor had the right to prevent the confectioner from using his machinery. But, of course, it would have been possible to modify the arrangements envisaged in the legal ruling by means of a bargain between the parties. 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 or from having to curtail his activities at this location or, as was suggested as a possibility, from having to build a separate wall which would deaden the noise and vibration. The confectioner would have been willing to do this if the amount he would have 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. 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 (emphasis added).

Table 1.

Farmer Wins	Railroad Wins
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	(1)	(2)
Zero transactions costs	No SPD RR bribes F \$65 Wealth F: \$65-\$60 = \$5 Wealth RR: \$75-\$65 = \$10 Total wealth: \$15 ("good")	No SPD No bribe (economic) Wealth F: -\$60 Wealth RR: +\$75 Total wealth: +\$15 ("good")
	(3)	(4)
High transactions costs	Yes, SPD No bribe (economic, trans. costs) Wealth F: \$60 Wealth RR: -\$75 Total wealth -\$15 ("bad")	No SPD No bribe (trans.costs) Wealth F: -\$60 Wealth RR: +\$75 Total wealth: +\$15 ("good")

We see, therefore, that the justification of a particular set of rights at any given time for Coase is that they maximize wealth. When they stop attaining this goal, they must be altered and abolished, and a new ownership pattern set up in their place. This is, of course, the reverse of the traditional theory based on the Lockean homesteading principle. (11) There, property rights (12) are the basic bedrock of the system, and wealth maximization is predicated on them. (13)

In the traditional outlook based on homesteading, matters are very different: wealth maximization takes a back seat to the question of who first homesteaded the given right amenity. Does this mean that the traditional view is indifferent to wealth maximization and that Lockeans are simply unconcerned with such matters? Not at all. But for them wealth maximization must be predicated on a strong private property rights base; it cannot determine it. For the Lockeans, property rights are the dogs, wealth maximization the tail; for the Coasians, it is the reverse: wealth maximization is the exogenous, property rights endogenous.

Suppose that I punch Coase in the nose, without provocation or mitigating circumstance. Under the old "unsophisticated" legal dispensation, I could go to jail for assault and battery since I aggressed against him. If I admit the facts, it would be an open and short case.

Now consider what would occur under the Chicago school's legal dispensation. Here, despite an equal willingness to admit to the facts, it is no longer clear that I aggressed against him. It is equally possible that he aggressed against me by sticking his nose out at my onrushing fist. First, rather than straightforward assault and battery, there is now reciprocity and mutual determination.

The way to determined not who is at fault (this is too unidirectional and old fashioned) but rather whether I should be allowed to go on punching him, or be made to stop and instead be punished for it, is to determine which cause of action will maximize wealth. The problem with this, of course, is interpersonal comparison of utility. Without such comparison, it cannot objectively be determined which course of action will minimize costs.

Why do the Lockeans insist, in contrast, that the property dog wags the wealth tail? For one thing, the alternative option implies arbitrariness. This can be seen by an examination of the illustrative numbers employed above or in any of the numerical examples offered by Coase (1960). These figures are entirely made up; they bear no relationship to reality whatsoever. Nor is the judge capable of discerning their true values. They are not objective entities that can be measured by third parties. Costs are instead subjective (Mises, 1966; Buchanan, 1969; Buchanan and Thirdly, 1981; DiLorenzo, 1990). Any finding on the part of the judge to the effect that the railroad values permission to pollute to thus and such an extent and the farmer, crops, to

this or that other extent must, at bottom, be capricious- For another, the Coasian system, purposefully or not, unleashed a modicum of central planning on our society. It gives the judge powers simply not available to him in the more traditional Lockean system. (14)

Coase assigns precisely these tasks to the judge in the case of property rights under dispute. He says (1960, pp.15, emphasis added), "The economic problem in all cases of harmful effects is how to maximize the value of production." However, we are a litigious people; everything, potentially, can come under dispute (15)- as to what is and what is not a harmful effect. This would be especially true if it became known that the judge would not look askance at those who sought to overturn ordinary property titles (16) But if the judge can allocate property base on his arbitrary evaluations of contending values, and if this applies to all or most property in a society, then it cannot be denied that he takes on the role of central planner. (17)

Third, it is internally contradictory to set up wealth maximization as exogenous and property rights as endogenous. Property rights are logically prior to wealth maximization. This can be seen by considering titles in one's own person, a topic discussed below at great length.

The O.J. Case

How, can we apply these insights to the O.J. Simpson's case? In the traditional view, matters are quite simple. On the assumption that Simpson actually killed Nicole Brown Simpson and Ronald Goldman, things go ill for him. This is because each person is a self-owner. Murder, therefore, is akin to stealing one's personhood from someone else.

One would think that Coase would assent to this commonsensical (albeit awkwardly put) way of looking at matters. After all, the legitimacy of slavery is hardly a contentious issue in the modern era. Unfortunately, such a conclusion cannot be reconciled with his own position. Although he shows no sign of recognizing it, the logic of this wealth-maximization philosophy compels him to adopt an altogether different stance and a very strange one at that.

Consider the following case. O.J. values the possession of Nicole at \$100 million. She, for her part, no longer wishes to be associated with him. He is, for her, a negative value. However, assuming that she is relatively poor and has low self-esteem, so much so that for a mere \$10 million she will give him what he asks for.

In the world of zero transactions costs the wealth maximization solution is clear. If the judge awards O.J. the possession of Nicole against her will, (18) all is well and good. Society gains to the tune of \$90 million. He values her at \$100 million; she loses only \$10 million by being forced to accommodate him. He will accept a bribe greater than \$100 million to set her free; she is unwilling to offer more than \$10 million. Even if the judge errs and awards Nicole her freedom, all is still well on the wealth-maximization front. For now, O.J. will bribe Nicole with some amount between \$10 and \$100 million- say \$40 million- and she will accede to his wishes. He will still get her- that is, resources will be rationally allocated.

True, O.J. will be the poorer, when the two alternative decisions are compared. In the first case he has \$100 million at his disposal, and in the second, he can call on only \$60 million ($\$100 \text{ million} - \$40 \text{ million} = \60 million). On the other hand, Nicole will be richer in the second case, the only conclusion to be expected when we move from a situation where the verdict went against her favor. In the first case, her wealth position was minus \$10 million; in the second, plus \$30 million, a gain of \$40 million to match an equal impoverishment of O.J. But for Coase this is not the essential element of the analysis. (19) Much to the contrary, Coase's aim here is to show that whichever decision is rendered, the aggregate wealth of the society will be exactly the same- \$90 million under our assumptions. In the first case O.J. enjoys \$100 million- \$10 million for Nicole= \$90 million; in the second, O.J. has \$100 million- \$40 million= \$60 million, while Nicole has \$40 million- \$10 million= \$30 million, again for the total of \$90 million (see Table 2)

To summarize Coase's argument, cases 1,2, and 3 are good for Coase since total wealth is maximized at +\$90 million; case 4 is bad since total wealth is minimized at -\$90 million. A bride need not take place in case 1 for economic reasons: the only one who can bride is O.J., and he need not, since he won the verdict. A bribe cannot take place in case 2 since Nicole values herself at only \$10 million, while O.J.'s reservation demand for her is \$100 million. Bride cannot take place in cases 3 and 4 due to the assumption of very high transactions costs.

Now let us provide a Coasian analysis of the very high transactions costs scenario. Again, if the judge awards Nicole's person and freedom to O.J., all is well as fair as wealth maximization is concerned. O.J. benefit by possessing Nicole to the tune of \$100 million, she loses only \$10 million, and as a result, their combined wealth is again \$90 million. However, if under the assumption of high transactions costs the judge erroneously releases Nicole under her own recognizance, wealth is not maximized. For in this case, there is no possibility of a bribe making good the judge's oversight. By assumption, very high transactions cost renders this an impossibility. Here, O.J. will have to suffer in silence. He will lose the \$100 million at which he rates his ownership over her, while she will gain only \$10 million from having gotten rid of him. Thus, social wealth plummets from +\$90 million to -\$90 million, wealth loss of \$180 million, given the numbers we are using for illustrative purposes.

The defense rests

How, then, does this constitute a defense for O.J.- on the assumption that he is indeed guilty of murdering his former wife? (20) The reasoning is as follows: the judge should have awarded O.J. the custody of Nicole. He would have done so had he been rational and (thus) engaged in wealth-maximizing behavior in behalf of society. Therefore, O.J. was justified in seizing that which should have been awarded to him in the first place. What occurred to O.J. was simply incompatible with the Coasian system of jurisprudence. (21) His own self-help righted this wrong. He may have gone a bit far when he killed his former wife, but if so, he should not be found guilty of the crime of murder. At most, he should be held guilty of whatever level of law violation, if any that was deemed appropriate for slave owners during the pre-Civil War period that promptly killed their slaves. (22)

Table 2.

	O.J. Wins	Nicole Wins
	(1)	(2)
Zero transactions costs	O.J. gets Nicole No bribe (economic) Wealth O.J.: \$100m Wealth Nicole: -\$10m Total wealth: \$90m ("Good")	O.J. gets Nicole O.J. bribes Nicole \$40m Wealth O.J.:(100-40)\$60m Wealth Nicole (40-10)\$30m Total wealth: \$90m ("Good")
	(3)	(4)
High transactions costs	O.J. gets Nicole No bribe (econ, trans.) Wealth O.J.: \$100m Wealth Nicole: -\$10m Total wealth: \$90m ("Good")	O.J. doesn't get Nicole No bribe (trans. cost) Wealth O.J.: -\$100m Wealth Nicole: +\$10m Total wealth: -\$90m ("Bad")

Let us put this in other words. A defense of O.J.'s actions can be predicated on Coasian analysis. In that viewpoint, O.J. should have been given the rights to do with Nicole exactly as he wishes. This did not occur. The actions of this aggrieved husband were compatible with rights he would have been granted if he lived in a Coasian world. At best, then, he should be set free; at worst, this should at least be seen as a mitigating circumstance.

Objections

There will no doubt be objections to the foregoing modest proposal. We do well then to anticipate a few of them.

Objection 1

First and foremost will be the claim that we are all self-owners and that slavery is an abomination. This is true but only under traditional codes of law. Coasianism, usurps all of this. For in the law and economic perspective of the University of Chicago and elsewhere, there is no such thing as starting with self-ownership or indeed with any other pattern of property rights. On the contrary, property rights--all of them, those to the person as well as those to physical goods--are the handmaidens of wealth maximization. One cannot simply start out with the premise that anyone owns anything, even including himself. How, after all, could such an arbitrary conclusion be justified? If we allowed people to simply own themselves--slavery being forbidden outright--this would amount to a market failure. (23) The state must step in by judicially promulgating findings that are aimed at wealth maximization. This can be done, as we have seen, by ensuring that intensive would-be slave owners, such as O.J., are not balked by a high-transactions-cost world in their desire to own people who only have a timid, tepid, and tentative hold on themselves, such as the Nicole of our numerical example. Should O.J. be prevented from realizing his goal merely because he happens to occupy a high-transactions-cost world? Not at all says Coase, certainly not when it is well within the power of the judge to right so egregious a wrong. (24)

In the traditional view of property rights, the one rejected by the new law and economic dispensation, the possibility of Nicole being given to O.J. as his lawful property, does not even arise. In the Lockean view, each person is a self-owner, period. No one can prove, moreover, that turning anyone over to the ownership of another can maximize wealth. The numbers furnished in the illustration are just that--numbers. In the absence of an agreement between two parties, (25) which by stipulation did not occur in this case, there is no warrant to assume that any rearrangement of property titles will enhance social welfare or total wealth--The only way to demonstrate that a reallocation of property will indeed enhance social wealth is to observe a trade-taking place. Then, we may posit, at least in the *ex ante* sense that there was mutual benefits.

But nothing of the sort occurred in the O.J.-Nicole case considered above. Therefore, in the "simplistic" economics that the law and economic perspective is trying to replace, it is illegitimate to conclude that wealth will increase if Nicole is awarded to O.J.

Objection 2

The second objection is that in our attempt to provide a *reductio ad absurdum* to the Coasian system, we have made an illegitimate assumption, Coase's views, properly interpreted, have a limited application. They apply only to cases where property rights are not well established. For example, if the parties in *Sturgis v. Bridgeman* are having an altercation concerning noise rights, or if the Coasian farmer and railroad cannot resolve a dispute concerning pollution, then and only then may the courts step in and resolve matters. And there, of course, the Coasian insights should be the ones applied: wealth must be maximized. But until and unless such a situation of ill-established property rights is presented to the court, it must refrain from applying

the Coase theorem.

The response to this objection is that for the Coasians there is no such thing as well-defined property rights. All property right, even the best defined of them, whatever that might mean for a Coasian, are the handmaidens of wealth maximization. They exist only at the pleasure of the latter consideration. If anything is well defined, it is that each person is the sole proprietor of himself. Yet even this holds true only because, in the Coasian view, this is the way to maximize wealth. Were it ever contemplated that slavery could better lead to this goal than self-ownership; the followers of Coase would perforce have to embrace that system.

Objection 3

A third objection arises from the views of Posner, one of the preeminent Coasian. In his (1985, p.1196) analysis, he states,

If I covet my neighbor's car, it is more efficient to force me to negotiate with my neighbor- to pay him his price- than it is to allow me to take his car subject to being required by a court to pay the neighbor whatever the court decides the car is worth. If I happen to have no money but want a car, it would be inefficient to let me just take a car. Indeed, unlike the first case, this transfer cannot possibly improve the allocation of resources- that is; it cannot move resources from a less to a more valuable employment- because value is a function of willingness to pay.

There are several problems with this attempted defense. First of all, it is incompatible with Posner's (1986, p. 440) perspective on altruism. There, he maintains that:

the altruist faces a free rider problem. A in our example will derive welfare from the increase in B's income whether or not A is the source of the increase. Naturally, A would like to buy this increase in his welfare at the lowest possible price, so he will have an incentive to hang back in giving to charity in the hope that others will give. It might seem that regardless of what others give his contribution will add to the total amount of resources devoted to an end he values. But this is not certain. His contribution may lead others to cut back their contributions, since now a smaller contribution on their part will (in combination with A's contribution, which is new) buy the same reduction in poverty. So A will get less than a dollar benefit for every dollar he contributes, and this will lead to a lower contribution.

From whence arises the incompatibility? In the first statement above, value is (correctly) deduced by willingness to pay. Without an agreed on deal that transfers resources from seller to buyer, we have no warrant to assume any wealth improvement. In the second statement, however, it is simply assumed, without any such warrant whatsoever, that "A will derive welfare from B" in the total absence of any such willingness or agreement. How do we know this? How can we, even in principle, ever know this?

Suppose that Posner were poor and that his neighbor with the car were rich. Then, based on his views in 1986, it would be justified to take the car away from the neighbor and give it to Posner. This is logically incompatible with his 1985 writing, where, unaccountably and surprisingly, he tries to defend traditional (that is, non-Coasian) notions of private property. But logical consistency will not allow him, to have it both ways.

Second, it is only inefficient for the neighbor to be forced to give Posner his car in a zero transactions cost world. In the very high transactions cost world (26) we have been considering, this is entirely a different matter. It is perhaps no exaggeration to say that the entire Coasian edifice is built to support the claim of Posner against his neighbor for that car under these assumptions.

Third, and most important, Posner speaks as if different people actually own things. But this (too) is incompatible with the entire Coasian (and his own) worldview. There, people own things but only and insofar as this status lends itself to wealth maximization. How do we know that Posner's neighbor should own the car

in the first place? What gives him, the initial right to it? Homesteading? Purchase? Certainly not. (27) The problem is that Posner here too easily accepts his neighbor's ownership claim. To say the least, this failure to question the neighbor's initial property holding is very much out of keeping with his other voluminous writings. If Posner had called this into question, he might have been as justified in seizing the car as O.J. was appropriating the person of Nicole, his former wife.

Objection 4

A fourth objection also concerns the applicability of the Coasian theorem. Specifically, does it apply only to objects- goods, services, and capital equipment (such as cows and corns, doctor's waiting rooms and confectioners, airports and houses, railroad and farms), or does it pertain also to the ownership and control of people?

The force of this objection, of course, is that if it concerns only the former and not the latter, then our attempted reductio ad absurdum fails completely. That is, if the Coasian theorem is relevant to things and not people, then there is no case at all for entertaining the notion that O.J. may own Nicole.

But this objection fails on three grounds. First of all, even if Coase intends that his theory be narrowly construed, we need not acquiesce. Mere intention is not enough; he would have to put forth reasons that considerations of wealth maximization should be compelling when it comes to inanimate objects but not to human capital. This, to say the least, he has not done.

Second, there is such a thing as generalizability in (social) science; the more generalizable a theory is, other things equal, the stronger it is. This means that even if Coase gave reasons for the inapplicability of his theory to human beings- which he did not- we could still reject them, or at least give his theory lesser weight, on that ground alone.

Third, although Coase himself vouchsafed us no answer to this question on either side, followers of his have expressed themselves most forcefully on it, and in their opinion the law and economics philosophy makes no distinction between the human and the nonhuman: it applies to both.

Let us consider Posner's views (28) on rape, since this is perhaps the closest he comes to applying the theory to people in general. Certainly, his treatment is highly relevant to our concerns regarding O, J. and Nicole, in particular. He defends (1986, pp 1198-1199) his economic theory of the criminal law against the charge that it can justify rape, on the ground that the rapist "derives extra pleasure from the coercive character of his act." He rejects this unwelcome conclusion on several grounds, one of which concerns us: "it does not follow that he values the rape more than the victim disvalues it."

But suppose that the rapist does indeed value the rape more than the victim disvalues it. (29) The inescapable conclusion would appear to be that Posner would have to exonerate the rapist, however unwelcome he found this position. And if the rapist, why not the murderer, again assuming that O.J. is actually guilty of this crime?

Another difficulty here is that Posner continually writes as if it were a foregone conclusion that women should own their own bodies. Until and unless he realizes that this is the very thing in question in the (Coasian) analysis of rape, (30) he will not be acting consistently with his own premises.

Posner (1992, p. 386) revisits this question. He states:

The rational model [this is the name Posner has chosen for his own view] has been said to imply, however, contrary to our unshakable moral intuitions, that a man who derives a special pleasure, sexual or otherwise, from the coerciveness of rape ought to be permitted to rape, provided only that he derives more pleasure from the act, over and above all substitutes (such as sex with a

prostitute who will, for a price, consent to the man's abusing her physically), than the pain suffered by his victim. This example points to a familiar problem of utilitarianism- the problem of the "utility monster," who by virtue of having a capacity for enjoyment vastly greater than that of the average person in the society appears to stake a utilitarian moral claim to engross a disproportionate share of the society's goods. Only here the utility monster really is a monster, who by virtue of having a capacity for sadistic pleasure greater than his victim's capacity for pain stakes a moral claim to be allowed to torture, rape and kill.

This is very apropos, since our depiction of O.J. (in Table 2 above) is consistent with considering him to be a utility monster in this sense.

But Posner 1992 pp 386-387) rejects this critique of utilitarianism: "... it should be plain that licensing utility monsters such as Bluebeard or de Sade to rape would not really be utility-maximizing, if only because of the fear that it would engender in the community as a whole and the expense of the self-protective measures that this fear would incite."

This response, however, is highly problematic. First of all, on Posner's own grounds, there is no case for rejecting the possibility of the utility monster. If Coase can contemplate all sorts of possible relationships between cattleman and corn grower, between farmer and railroad, then we are entitled to construct a Table 2 in effect depicting O.J. as a utility monster.

Second, a reprobate such as Bluebeard or de Sade is certainly not needed to illustrate our point, although it certainly is sufficient. But there are other alternatives. All we need is that there be a significant difference between how a man values the forced possession of a woman's body and how he rates self-ownership over her own person. One way to accomplish this is by resort to the utility monster such as Bluebeard. But this difference can also be attained by considering the case of a "normal" man, and a woman so lacking in self-esteem or value for her own person that it is (somehow?) determined that his value for her is greater than her own for herself. Female candidates for this position might include prostitutes, masochists, and attempted suicides. In these particular cases, using the usual Coasian-Posnerian analysis, we can, while being true to the basic premises of their system, declare rape, murder, and torture to be legal, on "rational" or "economic" grounds, since the female "obviously" values herself lower than does the male.

Nor should we be taken in by Posner's discussion of fear and the cost of self-protective measures. Yes, with a utility monster on the loose, all women have good reason for fear and self-protection. Even in this case, Posner has failed to show that the gains enjoyed by the mad killer-rapist would be less important than those costs. But in the example of the "ordinary" killer rapist, it simply is not true that all women would be in danger. On the contrary, this would apply only to women who have less than average demand for themselves- for example, the Nicole of our numerical example. In any case, self-protective measures are likely not to amount to much, for they would be illegal (31) under a system strictly implied by the Posnerian analysis.

Remember, the whole issue revolves around the question of why people should be thought to own themselves. The answer emanating from the Chicago law and economics tradition is that this result should obtain only if it is wealth maximizing. In the examples we have been considering, this would patently not be the case.

Objection 5

A fifth objection attacks the logical consistency of the Lockean position. The charge is that the Lockeans criticize the arbitrariness inherent in the Coasian judicial decisions; however, they are forced to resort to an identical procedure with regard to damages.

How will the Lockean system deal with the situation where the railroad had already destroyed some of the farmer's crops? Suppose the judge ordered compensation to the farmer in the amount of the dollar value of

the crops as a redress for the trespass. For Coase this presents no problem. Indeed, his many numerical examples highlight such behavior time and again. However, it might be claimed that for the Lockean this is a conundrum, for any such order would of necessity have to be arbitrary.

How might the Lockean? If he is honest, he would have to concede that there is indeed an element of arbitrariness involved in any such juridical finding and, further, that it would be justified to make it, despite this undeniable fact. There seem to be no possible better alternative. Complex choices cannot always be made in tiny watertight compartments, no matter how highly desirable.

However, just because reality impinges with its rough edges does not mean we have to embrace it when there are alternatives. Damage awards do indeed violate economic strictures against interpersonal comparisons of utility. Who knows how much the farmer really suffered by his loss in crops or the railroad suffered in being forced to take good on the market-based monetary equivalent. But this is no reason to employ such a method in defining property rights, especially when a preferable, (Lockean homesteading) alternative exists.

By all means, say the Lockean, allow the judge to make monetary awards when he can do nothing else. But do not over generalize from this situation and unnecessarily support Coasian considerations for the very definition of property rights when they are unnecessary and on the grounds highly problematic.

Objection 6

A sixth objection, from Posner (1983, pp. 94- 96), is tailor made as a reply to our attempt at a reductio. Although rather lengthy, it is worth quoting in full to avoid any misunderstanding. He states:

Another area in which the principle of consent and the principle of wealth maximization are potentially in conflict...is in the initial assignment of property rights, the starting point for the market system.

What if A's labor is worth more to B than to A? Then, it would be efficient to make A the slave of B but this result would hardly comport with the principle of consent. Such cases must be very rare. Not only will A probably have a better idea than anyone else where he could be most productively employed, but the costs of overcoming A's disincentive to work hard when the benefits of his hard work would ensure exclusively to another are likely to make the net value of his labor less than if owned it himself. If there are cases where the costs of physical coercion are so low relative to the costs of administering contracts as to make slavery a more efficient method of organizing production than any voluntary system, they either arise under such different social conditions from our own as to make ethical comparison difficult, or involve highly unusual circumstances (e.g. military discipline) to which the term slavery is not attached.

A related problem is that where large allocative questions are involved, as in the initial assignment of rights, the very concept of wealth maximization becomes problematic. Since the wealth of society is the output of all tangible and intangible commodities multiplied by their market value, it is difficult to compare the wealth of two states of society in which prices are different. The prices in a social order in which one person owned all the other members of society might be different from the prices in a social order where everyone was his own master. But even here guesses may be possible. For example, if we started with a society where one person owned all the others, soon most of the others would have bought their freedom from that person because their output would be greater as free individuals than as slaves, enabling them to pay more for the right of their labor than that right was worth to the slave owner. It would be clear, then, that the slave society was inefficient, even though the price in a slave and free society might be different for many commodities.

Consider the following example of how the initial assignment of rights might appear to have such an effect on price that the wealth of society under alternative assignments could not be compared. Imagine that A, if a free man, would derive a lifetime market income of 100 in present value from working and a non-market income

of 50 from leisure, for a total income of 150, but that if A is B's slave, A will be forced to produce an output having a market value of 110 and will obtain zero non-pecuniary income. A's wealth is high in the free than in the slave state (150 vs. 0), so that if he had the right to his labor he will not sell that right to B. Freedom is therefore wealth maximizing if A is free to begin with. But if B owns the right to A's labor, then it may seem that A will not be able to buy it back from B. How can A pay more than 100 since that is the value of his output as a free man? A's output is worth 110 to B, and A cannot use his non-pecuniary income in the free state to buy his freedom because his leisure has no value to anyone else. Therefore, it seems that slavery is wealth maximizing if the initial assignment of rights is to make A the slave of B.

But this analysis overlooks the possibility of converting non-pecuniary income into pecuniary income. A's preferred mixture of work and leisure is such as to yield 100 in market income and 50 in pecuniary income from leisure, but A could work harder, as he does for B. Suppose by working harder (but not all the time), A could earn a market income of 120 and leisure income of 10. A could then buy his freedom from B. It is true that having done so, A would be worse off than if he had had the right by labor in the first place. The point of this analysis, however, is that freedom is indeed more efficient than slavery, because by giving A his freedom in the first place we obviate the need for a transaction whereby A buys his freedom from B.

Thus, while the theoretical possibility exists that efficiency might dictate slavery or some other monstrous rights assignment, it is difficult to give examples where this would actually happen. I conclude that it is possible to deduce a structure of rights congruent with our ethical intuitions from the wealth-maximizing premise.

This is indeed a thorough and well-thought-out defense of the wealth-maximizing position. Unfortunately, however, it is not without difficulties.

To begin with, Posner (1983, p. 94) claims that there are only a few cases where it would be more efficient—that is, wealth maximizing—to allow slavery than self-ownership and freedom. All it takes, however, is one such case to show that the Posnerian system is not "congruent with our ethical intuitions" (Posner, 1983, p.96). This author is wedded to wealth maximization as a basic premise. If, through its use, we can show that even in one case a careful deduction from his premise leads to slavery, it casts doubt on the entire edifice.

Posner is intent. And rightly so, to maintain that his system can work based on the principle of consent. For without consent there is coercion, and no man can be free who is coerced. Given that his goal is to reconcile his system with ordinary rejection of slavery in particular and coercion in general, he does well to start down this path. There is a problem here, though. Consent implies self-ownership. Logically, the issue of consent can only arise if one is free. In order to see this, let us consider a case of slavery where, paradoxically, our moral sense can be mobilized in favor of slavery.

Suppose that my son has an otherwise fatal disease for which the cure is \$1 million dollars. Assume further that

1. I value his life at more than \$1 million dollars
2. I value my freedom at less than \$1 million dollars (in effect, I value my freedom lower than I value my son's life),
3. I do not have the requisite fund at my disposal, and
4. There is a wealthy man who is willing to pay me a million dollars for my freedom— that is, he will pay me this money as the purchase price of my total servitude.

Under these conditions, the path to wealth maximization is clear. I sell myself into slavery to this man and give the million dollars to the doctors who save my son's life. All are beneficiaries. I gain to the extent that I value my son's life more than my freedom; the doctors gain to the extent that they value the \$1 million more than the costs of treatment; the rich man gains to the extent that he values me as a slave more than the cost to

him of \$1 million.

Now' let us return to the point. I am now the legitimate slave of the rich man. Does the concept of my concept make any sense? Hardly. I have given up the right to engage in any such activity. The only consent that is needed to determine my actions is not mine but rather that of my legitimate owner.

I have given up my self-ownership rights; consent, therefore, cannot apply to me. How about the case where I never had ownership over myself. Can I consent to anything then? No. Consent, by its very nature, implies ownership over oneself. Here is where Posner runs into trouble. He is trying to analyze consent as it applies to people for whom ownership rights have yet to be determined.

Let us put this in another way. Consent implies, at the very least, the use of vocal chords. But suppose we are agnostic, as Posner claims he is, about the ultimate source of self-ownership. (32) If so, how can someone legitimately consent to something, with clear title to a voice? Posner has constructed a circular argument: he relies on consent to establish ownership, but without ownership in the first place, there can be no consent (Hoppy, 1993).

We are treated to the reddest of red herrings when Posner (1983, p.95) distinguishes between a scenario where no one owns anyone else and one where a single person owns the entire remainder of the world. Yes, under these latter conditions, and under his (not totally unrealistic) assumptions that people will work harder on their own account than for someone else, it may well be possible that many if not most slaves will be able to buy their way out of this predicament.

This analysis, however, is predicated on slaves who are able to buy their freedom from their masters. And in Coase's world of zero transactions costs, this is unexceptionable. But in the real world of positive and even very high transactions costs this option is of far lesser moment. (33)

Even under these conditions, how does Posner square this situation with our intuitions about the morality he is so anxious not to offend? The problem is, why should the slave have to buy his way out of anything? Under traditional ethical assumptions, freedom is the natural order. If you want to enslave someone, you may have to buy him into this situation; but you can't first enslave him and then magnanimously allow him to purchase a manumission contract- at least not if we are operating within the bounds of conventional ethical mores.

Let us therefore eschew Posner's case of a single individual owing all other and consider some more realistic possibilities- for example, older people who own younger ones or males who own females (to hark back to our case of O.J. and Nicole) or smart people who own those who are stupid. Perhaps even better yet, let us borrow a leaf from the writings of Hernstein and Murray (1994) and consider the case of high I.Q. people (the "Cognitive elite") owning the low I.Q. people (the "very dull").

Now Posner's scenario falls totally to the ground. Even without the existence of positive and very high transactions costs, it's extremely unlikely that the slaves will be able to buy their way to freedom, even granting that "the slave would borrow against his future earnings to finance the purchase of his freedom" (Posner, 1983, p.95).

The bedrock of Posner (1983, pp.95-96) numerical example is that the slave would work harder for himself than for his master. But working harder is merely part and parcel of the by now long discredited labor theory of value (Bohm Bawerk, 1959). The key isn't merely working hard but also and even more importantly, working smarter. And if there is anything that the cognitive elites can do, it is, presumably, wring every last bit of productivity out of their slaves at the opposite end of the I.Q. bell curve- by seeing to it that they work smarter, more so than they are capable of doing their own. It may be true in many cases that "freedom is indeed more efficient than slavery" (Posner, 1983, p.96), but this applies under his own assumptions and not for reasonable alternative ones such as we have specified. The point is that Posner fails to reckon with a

scenario where the "cognitive elite" might be able to increase the productivity levels of those who are relatively intellectually incapacitated to greater degrees than they are able to do for themselves. On this assumption, it is possible that the productivity levels of the latter will actually be higher as slaves than as free men. If this is true, in turn, then the reasonableness of Posner's assumption must be called into question. For if such people are more productive as slaves than as free men, there will be no increase in human capital out of which to finance the manumission purchase.

Even disregarding this latter possibility, it is still not true that a positive differential between productivity as a slave and a free person will be sufficient to finance voluntary manumission. The differential will have to be greater than whatever given level of "taste for slavery" exists on the part of the slave owner. As well, it will have to overcome any desire to be controlled that may exist in the mind of the slave.

What of the slavery that occurred in the antebellum south? The fact that it existed, long endured, and needed outside physical invasion to overturn it (Forgel and Engerman, 1974; see also Thorton, 1994), is surely evident that it was not inefficient in the sense proposed by Posner.

Yet another difficulty with Posner's made-up numbers is that they fail to incorporate our analysis of O.J. and Nicole- the "will to own" other people, the "timidity" or loose link to self-ownership in one's own person. Nicole's "demand" for her own person, under our assumption, is weaker than O.J.'s for her. The bottom line is that each of us is free to concoct any number we wish. Posner is a master at creating scenarios that show wealth maximization to good effect, but we can also create numbers showing the opposite. This is sufficient to override his contention that wealth maximization is necessarily compatible with traditional notions of morality.

Posner speaks of a tendency for slaves to buy their way out of this predicament. But even if this could occur, why should they have to do any such thing? Surely, a system of slavery, even with manumission written into the code as a possibility, provided that the master agrees, is an offense against ordinary notion of morality and ethics. It is also undeniable that this is one of the criteria that any theory of law must satisfy. If it is to be acceptable, it must show a deeper understanding of the ordinary conclusions in law and convince us that when it does not, that it, and not the traditional view, is somehow more in touch with basic human values. (34)

Disregarding objections about interpersonal comparisons of utility, we can perhaps agree with Posner that there will be a tendency for slaves to buy their way out of their plight, because of the reasonable assumption that people will be more productive on their own. If so, they can finance the purchase of their freedom with capitalized value of the difference in the two incomes streams- one under slavery, the other under freedom.

However this is only a tendency or a presumption. It need not apply in all cases. Specifically, it will not hold true given the Hernstein-Murray effect. Further, it will fail if the slave-owner has a strong taste for slavery (Zerbe, 1994) the situation we are supposing by hypothesis to be true of O.J. Nor will it apply if the slave has a weak desire for freedom, (35) precisely our assumption for Nicole.

Conclusion.

We have succeeded in subjecting the views of Coase and Posner to a reductio ad absurdum. If their own principles are applied to the charges against O.J. for killing Nicole, the defendant has an exculpatory case on the assumption that he is indeed guilty of killing her: in a zero transactions cost world, he would have been the owner of Nicole, with the right to do with her exactly as he pleased. In the real world of prohibitive transactions costs, (36) he should have been granted the ownership rights over her. Too bad Lance Ito wasn't a Coasian judge. Were he, the world would have been in for a surprise: he would have thrown out the case before it was even heard.

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Notes

1. It is fair to say that the O.J. Simpson murder trial was subjected to the most intensive scrutiny of any criminal case, or, indeed, any other lawsuit, in the history of American jurisprudence. Public interest in O.J. Simpson vastly outstripped other such high-profile cases as Sacco and Vanzetti (Communist spies), Leopold and Loeb (murder of a small boy), Pollard (Israeli spy), and Ethel and Julius Rosenberg (Communist spies). This one judicial extravaganza probably claimed more interest than all of these others put together. One reason for this is, undoubtedly, that we now live in an age of television. O.J. Simpson, moreover, a former professional football player, was perhaps the most famous and accomplished athlete in the history of U.S. sports. A black man, he was married to a white woman and had a history of physically abusing her. When his wife, Nicole Simpson, was found murdered, Simpson was accused of the crime and then found innocent. If the trial was itself the focus of a media feeding frenzy, this applied to be aftermath as well. For, apart from a few exceptions, the freeing of Simpson was received with dismay on the part of whites and glee on the part of blacks; this, coupled with charges of black jury nullification (black jury are less likely to find black defendants guilty) and countercharges of previous white jury nullification, ensures that this case will remain in the spotlight for a long time to come.
2. A third alternative, jury nullification, had recently been adumbrated. Simpson is guilty, but because two many black men are in jail, he should go free. This exercise in affirmative action may well lead to future modification of our jury system.
3. This article has little to do with the O.J. Simpson case per se. Rather, it is an attempt to create a reductio ad absurdum of the legal philosophy emanating from the University of Chicago. Almost any other lawsuit could have been selected as the vehicle for criticizing the views of legal theorists such as Coase, Posner and Landes. The O.J. Simpson case was selected because it dominated the news while I was writing this paper- and because it allows for a dramatic analysis. My claim is the truly horrendous one that on the basis of arguments emanating from the University of Chicago, a case can be made for the freeing of O.J. Simpson from the charges of murder, even if he actually committed the crime. That such an abhorrent conclusion could be even contemplated follows logically from errors in this philosophical system.
4. For critiques of Coase from a free enterprise or libertarian perspective, see Krecke (1992). North (1992), Block (1977), Cordato (1989, 1992, 1993). For a reply to the latter that strengthens the case against Coase, see Gordon (1993).
5. The value judgment is unsupported by any value-free axiom of economic analysis. For an alternative view, see Arnold (1982), Benson (1989a, 1989b, 1991), and Pasour (1979, 1992)
6. Under the assumption, that is, that the farmer arrived on the scene before the railroad. Even John Locke (1955, 1960), the main intellectual opponent of Coase, would dismiss the case if the railroad had first arrived on the scene and engaged in an act of "mixing its labor with the land." For then it would have a legitimate title to the property under dispute.
7. In this regard, see Barnett (1978), Flew (1982), Machan (1978), and Rasmussen (1980).
8. For a critique of the use of such externalities and public-good arguments as a justification for government intervention, see Fox (1992), Hummel (1990), Hoppe (1989), and Pasour (1981).
9. About whether the smoke prevention device is installed (allocation of resources). But, as we have seen, it matters very much for the relative wealth position of the farmer and the railroad.
10. We abstract, here, from the issue of psychic income. For a treatment of this consideration, see Block

- (1977). For an alternative view of this issue, see Demsetz (1979). For a reply, see Block (1995)
11. See Locke (1955, 1960); Hoppe (1993); Rothbard (1973, 1982a, 1982b). For a critique of this view, based on wealth considerations, see Stroup (1988); for a reply, see Block (1990).
 12. In the traditional or orthodox view, penal law and commercial law differ with regard to property rights. In penal law, the concept of property rights virtually does not exist; in commercial law, the concern is virtually with property rights. In contrast, the libertarian conception tends to blur the line between criminal and commercial violations of law. Here, property rights are of crucial importance in both cases. For further elaboration of the importance not of this distinction but of blurring it, see Rothbard (1982a, pp. 51-61); see also Epstein (1977). I wish to acknowledge the role of an anonymous referee in bringing this point to my attention.
 13. To further illustrate this divergence; let us note the contrasting analysis each side offers of the law case *Sturgis v. Bridgeman*. For the traditional view, see Rothbard (1982b); the alternative, of course, is Coase (1960).
 14. For a critique of Socialism, no matter how unconventional its justification, see Mises (1969), Anderson and Boettke (forthcoming), Boettke (1994).
 15. For the implication of altering property titles, see Benson (1981, 1993).
 16. The Plethora of "squatters" case is a dramatic case in point.
 17. For implications of this analysis to the area of taxation, see Gordon (1994). For an alternative view, see Buchanan (1984).
 18. We differ until the objections section below considerations of the retort that it is not the business of the judge to even make a ruling in such a case- that instead it should be summarily tossed out of court.
 19. A more critical way of expressing this sentiment is to assert that the Coasian system is an unjust one; it fails to even distinguish, morally between winning and losing. That is to say, it fails to indicate whether the judge should find in favor of plaintiff (O.J.) or defendant (Nicole) with regard to the justice of resulting different wealth distributions. A Coasian might well reply that no more could be expected from a theory that is purposefully economic- that is, value free. However, this claim to being value free is invalid. After all, Coase is advising the judge regarding decision-making, surely a value-laden act. Nor is Coase's initial motivating force- wealth maximization- a value-free concept.
 20. It must be conceded that even Coasianism cannot be interpreted in such a way as to constitute a defense for O.J.'s murder of Ronald Goldman. This, at least, is beyond the ability of the present author.
 21. The same analysis applies to those restraining orders granted to wives whose husbands are harassing them. On the assumption that the male is richer than the female and would have purchased the rights to her in a zero transactions cost world, no such restraints would be issued by the Coasian judge.
 22. Actually, it was legally murder (and hence illegal) to kill one's own slave in the pre-Civil War U.S. south. (I owe this point to an anonymous referee.) But as a de facto matter, such laws were in effect null and void.
 23. Strictly speaking, this could amount to a market failure, to employ the neoclassical perspective on this, if it was indeed true that anyone would buy anyone else in a zero transactions cost world.
 24. Suppose O.J. kidnapped Nicole and kept her imprisoned for one month. Is there no scope for redress through money damages? For the Coasian, of course there is. All a judge need do is ascertain the market value of the wages lost, plus a premium for pains and suffering, and award this to the victim. (This is on the assumption, by no means foreordained, that the kidnapping was justified through consideration of wealth maximization). But no less is true of the Lockean judge. Indeed, both might employ the very same procedure. But in the latter case, there would perhaps be more appreciation of the inescapable arbitrariness of the resulting numbers. Nor would there be the slightest hint of any rearrangement of property titles to the two human beings based on this numbers-, as there would have to be if the Coasian judge were aware of the implications of his methodology.
 25. Not a theoretical one that would have taken place in the never, never land of zero transactions costs.
 26. Who is to say whether the world, or different aspects of it, is characterized by high or low transactions costs? Given the inherent subjectivity of costs (alternatives forgone, which can, by their very nature, be known only by the economic actor in question), it would appear that anyone could maintain anything he

wants.

27. Nor even a process of trade, gifts, and so on that Nozick (1974) calls legitimate title transfers, which, if we trace it far enough, leads us to the first homesteader.
28. See also Demsetz (1966, 1967) for the application of the Coasian system to human beings.
29. Fro the Austrian skeptic, no such thing can ever be known, since interpersonal comparisons of utility are totally incompatible with the subjectivity of costs. But the Chicago school Coasians are forever offering us illustrative numerical examples, of the sort mentioned above in Table 2. Let us hold them to their word, then, and ask that they accept the unwelcome implications of their analysis as well as the more tolerable ones.
30. Or any other crime such as murder.
31. Self-protective measures should be illegal because they would reduce social wealth.
32. Posner, of course, is not agnostic about the procedure by which ownership over the person may properly be determined. For him, it is clearly wealth maximization. But he is agnostic about this in the sense that if the numbers indicate that slavery is the most efficient system of wealth maximization, he will then embrace that "curious institution." For him, ultimately, it is an empirical matter. Will slavery, or will it not, lead to greater wealth? If it will not, Posner opposes it; but if it will, then he has no alternative but to embrace it.
33. Posner (1983, p.83) states: " It would be impossible to identify, let alone negotiate for the consent of, everyone affected by a move from a price regulated to a free tomato market." Yes, indeed, true. Transactions costs are everywhere, and they are everywhere significant. But if this is true for so picayune and unimportant a market as that for tomatoes, it holds even more so, and much more strongly, for (potential) slave markets.
34. For example, even though sales of body organs may well be repugnant to most sensibilities, if it can be shown that legalizing such market will undoubtedly lead to the saving of additional lives, such a theory has satisfied the requirement that when it leads to seemingly untold results, these, too, can be justified in terms of ordinary moral concerns.
35. In the late Roman Empire slaves frequently bought their freedom by credit fro their masters. This might have occurred in the U.S. south had not most of the slaves states passed laws prohibiting it. Firms such as the Tredagar Iron works, which engaged in such voluntary manumission, had to conceal this fact from the authorities. (I owe this point to an anonymous referee.)
36. It cannot be denied that there is an important distinction between the theory of law and the law itself. One should be careful not to overlook this distinction, lest one commit the Ricardian leap or Ricardian vice. On this concept, see Schumpeter (1954, pp. 472, 473). I owe this citation to my colleague Frank Petrella.

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