Mercer Law Review

Volume 74
Number 3 *Lead Articles Edition*

Article 9

5-2023

Coase's Parable

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ABSTRACT

Most legal stories are generally about identifying wrongdoers and vindicating the rights of victims, but what if legal wrongs are jointly-caused? It was Ronald Coase who first proposed this novel and unorthodox counter-narrative to the standard victim-wrongdoer story in law. Researching and writing in the late 1950s and early 1960s, Professor Coase—an obscure, middle-aged English economist at the time—revisited a number of leading nuisance cases. Coase then used these old cases to create a compelling but controversial legal counter-narrative: compelling because Coase's parable forever changed the way many economists and lawyers see the law; controversial because harms are conceptualized as a "reciprocal" problem: whenever one party accuses another party of harming them, it is almost always the case that both parties are responsible for the harm—that is the essence of Coase's parable.

I. INTRODUCTION

Some stories have heroes and villains.[1] Others involve a voyage, a quest, or a monster to be defeated.[2] The law is no exception. Most legal stories are about identifying wrongdoers and vindicating the rights of victims, and this standard victim-wrongdoer model not only informs recent developments in legal scholarship, such as feminist jurisprudence[3]

* The author would like to thank Jordan Stone, the Lead Articles Editor of the *Mercer Law Review*, for inviting me to present my work at a special symposium on "Legal Narratives and the Law's Potential for Justice and Injustice," which was held at Mercer University School of Law on October 7, 2022. I would also like to thank Steven G. Medema, who answered many of my questions about Ronald Coase at the annual meeting of the History of Economics Society in Minneapolis in June of 2022.

1. CARMINE GALLO, THE STORYTELLER'S SECRET 133 (2016) ("[A]ll great stories . . . have a hero and a villain.").

2. *See* CHRISTOPHER BOOKER, THE SEVEN BASIC PLOTS: WHY WE TELL STORIES (2006).

3. *See, e.g.*, Gwen Hunnicutt, *Varieties of Patriarchy and Violence Against Women: Resurrecting "Patriarchy" as a Theoretical Tool*, 15 VIOLENCE AGAINST WOMEN 553, 553 (2009) ("The concept of patriarchy holds promise for theorizing violence against women because it keeps the theoretical focus on dominance, gender, and power."); *see also* FEMINIST JURISPRUDENCE (Patricia Smith ed., 1989) (describing generally women as victims of the patriarchy).

or critical race theory;[4] it also informs our classical liberal tradition.[5] But what if harms are reciprocal or jointly caused? In other words, what if victims are just as responsible as wrongdoers for their plight?

It was Ronald Coase who first proposed this novel alternative to the standard victim-wrongdoer story in law. Researching and writing in the late 1950s and early 1960s, Professor Coase, an obscure middle-aged English economist at the time, plucked a number of leading cases from the English Law Reports and other sources—classic nuisance cases that he may have first studied in the late 1920s or early 1930s when he was still an undergraduate student at the London School of Economics.[6] Coase then used these cases to create a compelling but controversial counter-narrative; compelling because Coase's parable forever changed the way many economists, lawyers, and judges see the law, and controversial because harms are conceptualized as a "reciprocal" problem.[7] Simply put, whenever one party accuses another party of harming them, it is almost always the case that both parties are responsible for the harm—that is the essence of Coase's unorthodox parable.

The remainder of this Article is thus organized as follows: Part II will step away from the law to look at the larger literary picture: what do all stories have in common? Next, Part III of this Article applies the storytelling taxonomy developed in Part II to three of the most well-known works of legal scholarship ever published: "The Right to Privacy,"[8] "The Path of the Law,"[9] and "The Problem of Social Cost."[10]

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4. *See, e.g.*, IBRAM X. KENDI, HOW TO BE AN ANTI-RACIST 6 (2019) ("Racist ideas make people of color think less of themselves, which makes them more vulnerable to racist ideas. Racist ideas make White people think more of themselves, which further attracts them to racist ideas.").

5. Consider, for example, John Stuart Mill's formulation of the harm principle in his influential 1859 essay *On Liberty*: "the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others." John Stuart Mill, On Liberty, THE COLLECTED WORKS OF JOHN STUART MILL, VOL. 23, 223 (John M. Robson, ed. 2016) (1859).

6. *See* Alain Marciano, *Ronald H. Coase (1910–2013)*, THE PALGRAVE COMPANION TO LSE ECONOMICS 557 (Robert A. Cord, ed. 2019).

7. Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 2 (1960) [hereinafter Coase, *Social Cost*] ("We are dealing with a problem of a reciprocal nature."). The word "reciprocal" appears multiple times in Ronald Coase's work to describe the problem of harmful effects. *See, e.g., id.* at 19, 28, 35.

8. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

9. Oliver Wendell Holmes, *The Path of the Law*, 78 B.U. L. REV. 699 (1998) [hereinafter Holmes, *Path of the Law*].

10. Coase, *Social Cost*, *supra* note 7.

These three works are not only the most cited law review articles of all time;[11] they also depart from the standard victim-wrongdoer narrative in law.

Part IV then describes how Ronald Coase ended up creating a new type of legal narrative through his analysis of "four actual cases" in his social cost paper,[12] while Part V concludes with the crown jewel of Coase's counter-narrative: Coase's cattle trespass story,[13] a simple pastoral parable that has since become one of the most famous legal narratives in academic circles.[14] The conclusion sketches out some possible moral and political implications of Coase's controversial but compelling story.[15]

II. BOOKER'S LITERARY TAXONOMY

A story is a series of events[16] that can be told in many different ways and in myriad media,[17] but what do all good stories have in common? Among the plethora of books devoted to the craft of storytelling,[18] the work of Christopher Booker (1937–2019), a British private eye journalist who wrote a weekly column for *The Telegraph*,[19] is worth pointing out. In summary, Booker identified seven types of stories in his monumental work *The Seven Basic Plots*.[20] Using a wealth of examples—from the myths of ancient Greece to the plays of Shakespeare, from the folk tales of yore to the popular TV shows and movies of today—Booker shows that there are seven archetypal themes that recur in every kind of

11. *See* Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489 (2012).

12. *See infra* Part IV.

13. *See infra* Part V.

14. *See, e.g.*, Steven G. Medema, *What Happened on Blackstone Avenue? Exorcising the Coase Theorem Mythology* (Ctr. For Hist. of Pol. Econ. At Duke U., Working Paper No. 2021-14, 2021) [hereinafter, Medema, *Blackstone Avenue*].

15. *See generally* Coase, *Social Cost*, *supra* note 7.

16. *See* GALLO, *supra* note 1, at 43 (explaining a story is a series of connected events told through words or pictures).

17. *See* JOHN TRUBY, THE ANATOMY OF STORY: 22 STEPS TO BECOMING A MASTER STORYTELLER 8 (2008).

18. *See, e.g.*, GALLO, *supra* note 1; ROBERT MCKEE, STORY: SUBSTANCE, STRUCTURE, STYLE, AND THE PRINCIPLES OF SCREENWRITING (1997); DAVID R. TROTTIER, THE SCREENWRITER'S BIBLE: A COMPLETE GUIDE TO WRITING, FORMATTING, AND SELLING YOUR SCRIPT (7th ed. 2008); TRUBY, *supra* note 17.

19. *See* Gareth Davies, *Former Telegraph and Private Eye Journalist Christopher Booker Dies Aged 81*, THE TELEGRAPH (July 3, 2019), https://perma.cc/5BFP-263N.

20. BOOKER, *supra* note 2. I mean "monumental" in the literal sense, for Booker's magnum opus is 736 pages long.

storytelling.[21] In brief, Booker's reductionist but intriguing taxonomy consists of the following seven standard story sequences:

> **Overcoming the monster**[22] The protagonist—the hero or heroine of the story or "H" for short—sets out to defeat an evil force.
>
> **Rags to riches**[23] H acquires power, wealth, or a mate (or all three), loses it all, and then ends up on top.
>
> **The quest**[24] H sets out to acquire an important object or to get to a location but must confront many temptations or other obstacles along the way.
>
> **Voyage and return**[25] H goes to a strange land and, after learning important lessons unique to that location, returns wiser.
>
> **Comedy**[26] H finds himself entangled in a perplexing situation but is somehow, against all odds, able to get the girl (or vice versa).
>
> **Tragedy**[27] H suffers from a character flaw that is ultimately his undoing.
>
> **Rebirth**[28] An external event or threat leads H to change his ways and become a better person.

Although I am generally highly skeptical of all such reductionist projects, including Booker's, his taxonomy nevertheless intrigues me because of my background in law.[29] Over the years, I have heard countless times how the practice of law is similar to storytelling.[30] If this

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21. *Id.*
22. *Id.* at Chs. 1–2.
23. *Id.* at Ch. 3.
24. *Id.* at Ch. 4.
25. *Id.* at Ch. 5.
26. *Id.* at Chs. 6–7.
27. *Id.* at Chs. 8–10.
28. *Id.* at Ch. 11.
29. I studied law at the Yale Law School and now teach business law courses at the University of Central Florida.
30. *See, e.g.*, PHILIP N. MEYER, STORYTELLING FOR LAWYERS (2014); JIM M. PERDUE, WINNING WITH STORIES: USING THE NARRATIVE TO PERSUADE IN TRIALS, SPEECHES AND LECTURES (2006). *See also* STEVEN LUBET, LAWYER'S POKER: 52 LESSONS THAT LAWYERS CAN LEARN FROM CARD PLAYERS (2006) (containing a large collection of legal stories and anecdotes about lawyers and the law); GERALD KORNGOLD & ANDREW P. MORRISS, PROPERTY STORIES (2d ed. 2009) (part of a larger series of thirty-four books called *Law Stories*).

comparison between the practice of law and storytelling is true, and law is ultimately about telling stories, then what type of stories do lawyers and judges and law professors like to tell?

III. THREE LEGAL NARRATIVES

How does Booker's sevenfold taxonomy apply to legal narratives?[31] This Article will explore this question through three of the most influential and most cited law review essays of all time:[32] "The Right to Privacy"[33] by Samuel Warren and Louis Brandeis (1890), "The Path of the Law"[34] by Oliver Wendall Holmes (1897), and "The Problem of Social Cost"[35] by Ronald Coase (1960).

In general, writing about the law is like writing an adapted screenplay for a Hollywood movie studio.[36] Legal scholars take pre-existing materials—such as case law, statutes, and other law review articles—and weave them into a compelling narrative. But what makes the three articles mentioned above so special is that these three classic and

31. As an extended aside, when I first began to consider these questions, my initial reaction was to research stories about lawyers or the law from a pop culture perspective—books like Harper Lee's classic To Kill a Mockingbird (HARPER LEE, TO KILL A MOCKINGBIRD (J.B. Lippincott & Co. ed. 1960)) or any of John Grisham's best-sellers; or movies like A Few Good Men (A FEW GOOD MEN, (Castle Rock Ent. 1992)), My Cousin Vinny (MY COUSIN VINNY, (Palo Vista Prod. 1992)), or Legally Blonde (LEGALLY BLONDE, (Type A Films 2001)); or TV shows featuring such iconic lawyer-protagonists like Perry Mason **or** anti-hero Saul Goodman, the crooked conman lawyer in Vince Gilligan's Breaking Bad (*Breaking Bad*, (High Bridge Ent. 2008)) and Better Call Saul (*Better Call Saul*, (High Bridge Prod. 2015)) series—and then show how these works of popular culture can be used to illustrate Booker's narrative categories. I even thought of conducting a comprehensive survey and meta-analysis of TV and billboard lawyer ads in the Central Florida market in light of Booker's taxonomy. But as tempting or fun as this exercise might sound, I quickly vetoed that approach. Such a matching exercise is too facile. We already know, for example, that movies like My Cousin Vinny and Legally Blonde are romantic comedies or that most lawyer ads fall into Booker's "rags to riches" category. Worse yet, such an exercise would be pointless. Is Better Call Saul a tragedy or a story about rebirth—or both? Either way, who cares? What really matters instead is, are those shows worth watching?

32. *See* Shapiro & Pearse, *supra* note 11 at 1489. As an aside, for a tongue-in-cheek survey of the most cited law review articles of all time, *see* Andrew Jensen Kerr, *The Law According to the Most-Cited Law Review Articles of All Time*, 20 GREEN BAG 2D 371 (2017).

33. Warren & Brandeis, *supra* note 8.

34. Holmes, *Path of the Law*, *supra* note 9.

35. Coase, *Social Cost*, *supra* note 7.

36. *See generally* RICHARD KREVOLIN, HOW TO ADAPT ANYTHING INTO A SCREENPLAY (2003). An "adapted screenplay" is a movie script that is based on pre-existing material or on another source, such as a novel, a memoir, an article, a short story, a TV series, or even another film.

oft-cited articles depart from the standard victim-wrongdoer narrative in law.

A. The Quest for Autonomy in "The Right to Privacy"

Samuel Warren and Louis Brandeis's begin their famous article "The Right to Privacy"[37] by telling the following quest-like epic:

> That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses *vi et armis*. Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and . . . the term "property" has grown to comprise every form of possession—intangible, as well as tangible.[38]

What is most remarkable about this quest story is its historical sweep, for the protagonist or hero of Warren and Brandeis's story is not a person.[39] It is the common law, a massive body of Anglo-American legal precedents going back centuries.[40] This body of judge-made law has been the subject of many scholarly studies, from Sir William Blackstone's four-volume Commentaries on the Laws of England[41] to Oliver Wendell Holmes's 1881 book *The Common Law*;[42] but Warren and Brandeis were the first to cast the common law as an actual hero, a protagonist on an epic, never-ending ethical quest: the pursuit of human autonomy or "the full protection in person and in property" of every individual.[43]

Moreover, this story is so captivating and compelling that Warren and Brandeis's privacy article is one of the few works of legal scholarship to

37. Warren & Brandeis, *supra* note 8.

38. *Id.* at 193.

39. *Id.*

40. *See generally,* SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1916).

41. *Id.*

42. OLIVER WENDELL HOLMES, THE COMMON LAW (1881).

43. Warren & Brandeis, *supra* note 8, at 193.

have actually changed the law.[44] Today, judges in the United States generally recognize four types of privacy harms or privacy invasions, including intrusion into one's private life and affairs, public disclosure of embarrassing private facts, false light, and misappropriation of one's name or likeness for financial advantage.[45]

Samuel Warren and Louis Brandeis thus told a cogent and compelling story in their classic article on the right to privacy, but is their story true? After all, autonomy is not the only ethical or moral value embodied in the law.[46] The great Oliver Wendell Holmes, writing seven years later, would tell a much different tale about the common law.[47]

B. Intellectual Rebirth in "The Path of the Law"

Although Samuel Warren and Louis Brandeis's article "The Right to Privacy"[48] can be read as a quest narrative, another famous law review article—"The Path of the Law"[49] by Oliver Wendell Holmes—paints a very different picture of law.[50] For Holmes, the law is not about autonomy or some other teleological goal; it is first and foremost about making accurate predictions on the outcomes of court cases: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[51] In support of his predictive theory of law, Holmes

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44. *See* Dorothy J. Glancy, *The Invention of the Right to Privacy*, 21 ARIZ. L. REV. 1 (1979). The Supreme Court of the United States, for example, has cited Samuel Warren and Louis Brandeis's article "The Right to Privacy" in many different types of cases. *See*, *e.g.*, Bartnicki v. Vopper, 532 U.S. 514, 534 (2001) and Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 487 (1975) (leading First Amendment cases citing "The Right to Privacy" by Warren and Brandeis). *See also* Katz v. United States, 389 U.S. 347, 350 n.6 (1967) (leading Fourth Amendment case citing "The Right to Privacy").

45. *See* RESTATEMENT (SECOND) OF TORTS § 652 (AM. L. INST. 1950).

46. *See, e.g.*, Roger Cotterrell, *Common Law Approaches to the Relationship Between Law and Morality*, 3 ETHICAL THEORY & MORAL PRAC. 9 (2000) (emphasizing the communitarian aspects of the common law).

47. Holmes, *Path of the Law*, *supra* note 9.

48. Warren & Brandeis, *supra* note 8.

49. Holmes, *Path of the Law*, *supra* note 9.

50. This influential essay was the publication of an address Holmes gave at Boston University Law School on January 8, 1897. *See* Holmes, *Path of the Law*, *supra* note 9, at 703 n.1; *see also* DAVID KENNEDY & WILLIAM W. FISHER III, THE CANON OF AMERICAN LEGAL THOUGHT 21 (2006). Holmes's guest lecture was then published as the lead article in the March 25, 1897 issue of the *Harvard Law Review*.

51. Holmes, *Path of the Law*, *supra* note 9, at 461. Full disclosure: Holmes's predictive theory of law has shaped my own research agenda. *See* F.E. Guerra-Pujol, *Chance and Litigation*, 21 B.U. PUB. INTEREST L. J. 45 (2011); *see also* F.E. Guerra-Pujol, *A Bayesian Model of the Litigation Game*, 4 EUR. J. OF LEGAL STUD. 220 (2011); F.E. Guerra-Pujol, *Why Don't Juries Try 'Range Voting'?* 51 CRIM. L. BULL. 680 (2015); F.E. Guerra-Pujol, *The Case for Bayesian Judges*, 6 J. OF LEGAL METRICS 13 (2019).

conjures up one of the most enduring and indelible anti-heroes in the annals of legal scholarship: the bad man.[52] In brief, Holmes's bad man is an amoral utility maximizer "who cares nothing for an ethical rule which is believed and practised by his neighbors."[53] The bad man, in other words, only wants to avoid legal liability and "keep out of jail if he can."[54]

After introducing this memorable anti-hero, Holmes makes a direct appeal to his audience:

> If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.[55]

Alas, Holmes's sinister protagonist drops out of his essay early on. Although this fictional figure makes multiple appearances on the first few pages of Holmes's 1897 essay,[56] he soon disappears entirely from view. The bad man is instead replaced by the "man of statistics and the master of economics,"[57] both of whom take center stage in Holmes's story:

> When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal. For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.[58]

Given this dragon reference, it is tempting to describe Holmes's classic essay as a story about "overcoming the monster."[59] But who is the monster in Holmes's story? For his part, legal scholar Thomas Grey (1997) has described "The Path of the Law" as a quest narrative with

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52. *See* Holmes, *Path of the Law*, *supra* note 9.

53. *Id.* at 700.

54. *Id.*

55. *Id.* at 701.

56. *Id.* at 700–04.

57. *Id.* at 708.

58. *Id.* Holmes then goes on to say, in perhaps one of the most memorable statements about the law of all time: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." *Id.*

59. *See* BOOKER, *supra* note 2, at Chs. 1–2.

Holmes himself (presumably) as the hero of his story.[60] On this reading of "The Path of the Law," Holmes's quest is an intellectual one: discovering the true meaning of the "universal law," or in the immortal words of Oliver Wendell Holmes himself:

> To an imagination of any scope the most far-reaching form of power is not money, it is the command of ideas. . . . Read the works of the great German jurists, and see how much more the world is governed today by Kant than by Bonaparte. We cannot all be Descartes or Kant, but we all want happiness. And happiness, I am sure from having known many successful men, cannot be won simply by being counsel for great corporations and having an income of fifty thousand dollars. An intellect great enough to win the prize needs other food beside success. The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.[61]

At a deeper level, however, "The Path of the Law" could also be read as a story about "rebirth."[62] Christopher Booker, for example, describes the basic sequence of a rebirth story in Chapter 11 of his magnum opus *Seven Basic Plots*; for Booker a rebirth story unfolds as follows:

> 1. First, a young hero or heroine falls under the spell of an evil power.[63]
>
> 2. All may seem to go well, but eventually the danger or threat returns in full force, and it appears as if the evil power will triumph.[64]
>
> 3. The story then concludes with a miraculous redemption, and the protagonist changes his ways and becomes a better person.[65]

As it happens, all these elements are present in "The Path of the Law."[66] The evil power in Holmes's story, for example, is money.[67] To have a successful career and become wealthy, a lawyer must be able to

60. *See* Thomas C. Grey, *Plotting the Path of the Law*, 63 BROOKLYN L. REV. 699 (1997).

61. Holmes, *Path of the Law*, *supra* note 9, at 715.

62. *See generally* BOOKER, *supra* note 2, at Ch. 11.

63. *Id.* at 204 ("a young hero or heroine falls under the shadow of [a] dark power.").

64. *Id.* ("for a while, all may seem to go reasonably well . . ., but eventually it [the threat] approaches again in full force").

65. *Id.* ("finally comes the miraculous redemption").

66. *See* Holmes, *Path of the Law*, *supra* note 9.

67. *Id.* at 715.

make accurate predictions about the law.[68] But a lawyer who falls under the spell of money, who uses the law solely to guide self-interested clients, is trading off happiness for wealth, and what really matters for Holmes is not money but the "command of ideas."[69] He thus concludes his essay by appealing to the "remoter and more general aspects of the law"[70] and invites his audience to "catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law."[71] In other words, Holmes's narrative is really a story about rebirth. To be a good lawyer it is not enough to make accurate legal predictions; one must also nourish one's intellect.

Thus far, we have revisited two of the most cited and influential law review articles ever published, "The Right to Privacy" and "The Path of the Law." The former contains a traditional quest narrative, while the latter is ultimately about rebirth and transcending material pursuits like power and wealth in order to "connect . . . with the universe . . . ."[72] The most cited law review article of all time, however, is Ronald Coase's "The Problem of Social Cost,"[73] the 1960 article that gave rise to the law and economics movement.[74] What type of story does Coase's strange article tell?

C. Reciprocal Harms in "The Problem of Social Cost"

For those who are already familiar with Coase's work, it is tempting to reframe his landmark paper, "The Problem of Social Cost," as a voyage into an imaginary world, such as the abstract world of zero transaction costs,[75] or as a story about overcoming the monster, namely Pigou and

68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. Coase, *Social Cost*, *supra* note 7*; see also* Shapiro & Pearse, *supra* note 11, at 1489.
74. *See* RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 4 (1981) (tracing the origins of "law and economics" to Coase's 1960 article and to Guido Calabresi's 1961 article "Some Thoughts on Risk Distribution and the Law of Torts").
75. *See*, *e.g.*, GEORGE J. STIGLER, THE THEORY OF PRICE 110–14 (3d ed. 1966) [hereinafter STIGLER, THEORY OF PRICE]. Broadly speaking, "transaction costs" refers to the costs of carrying out market transactions; as a result, a world in which transaction costs are zero would be a world of frictionless markets. *See generally* RONALD H. COASE, THE FIRM, THE MARKET, AND THE LAW 174–79 (1988) [hereinafter COASE, FIRM, MARKET, AND LAW]; Ronald H. Coase, *The Nature of the Firm: Meaning*, 4 J. OF LAW, ECON., & ORGANIZATION 19 (1988).

the Pigovian tradition in economics.[76] The voyage narrative fills up the first few pages of the paper,[77] where Coase introduces the make-believe or mythical world of "costless market transactions,"[78] while the monster narrative occurs in the middle part of the paper,[79] where the role of the villain is played by Coase's archenemy and fellow British economist A. C. Pigou.[80] But these familiar reframings of Coase's article miss its most compelling and controversial idea,[81] for what is most remarkable about "The Problem of Social Cost" is that it presents a new type of legal narrative, one that does not fit into any of Booker's seven archetypal plots.[82]

To the point, most law stories are populated with wrongdoers and victims, or "bad men" and "good" ones in the Holmesian lexicon.[83] Coase's world, by contrast, has neither. For Coase, harms are a reciprocal problem.[84] Because of the originality and haunting implications of Coase's counter-narrative, the remainder of this Article will focus almost exclusively on "The Problem of Social Cost." Here, however, I will present a brief sketch of Coase's social cost paper to set the stage.

Broadly speaking, most law review articles are "doctrinal" in nature, that is, they survey a given body of case law and try to discover or explain the underlying logic of that area of law, a common thread that makes sense of the conflicting decisions in those cases.[85] Coase, however, was

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76. *See*, *e.g.*, Stewart Schwab, *Coase Defends Coase: Why Lawyers Listen and Economists Do Not*, 87 MICH. L. REV. 1171 (1989); GEORGE J. STIGLER, MEMOIRS OF AN UNREGULATED ECONOMIST Ch. 5 (2003) [hereinafter STIGLER, MEMOIRS].

77. Coase, *Social Cost*, *supra* note 7, at 2–8.

78. *Id.* at 15.

79. *Id.* at 28–34.

80. About one-third of Coase's social cost paper is devoted to Pigou's treatment of the problem of harmful effects and to the Pigovian tradition in economics. *See id.* at 28–42 (Part VIII & IX). For a survey of Coase's critique of Pigou and the Pigovian tradition, *see* Schwab, *supra* note 76, at 1184–88.

81. Most of the scholarly literature citing "The Problem of Social Cost" tends to focus on two aspects of Coase's work: the idea of transaction costs and the idea of efficient bargaining. *See*, *e.g.*, George J. Stigler, *Two Notes on the Coase Theorem*, 99 YALE L. J. 631 (1989) [hereinafter Stigler, *Two Notes*]. My work, by contrast, focuses on the idea of reciprocal harms. *See* F.E. Guerra-Pujol & Orlando I. Martinez-Garcia, *Clones and the Coase Theorem*, J. OF L. & SOCIAL DEVIANCE 43, 65–73 (2011); *see also* F.E. Guerra-Pujol, *Of Coase and Copyrights: The Law and Economics of Literary Fan Art*, 9 NYU J. OF INTELL. PROP. & ENT. L. 92, 103–05 (2019).

82. *See supra* Part II.

83. Holmes, *Path of the Law*, *supra* note 9, at 699–701.

84. *See* Coase, *Social Cost*, *supra* note 7, at 1–2.

85. *See, e.g.*, William Baude, et al., *Making Doctrinal Work More Rigorous, Lessons from Systematic Reviews*, 84 UNIV. OF CHI. L. REV. 37 (2017).

not writing as a law professor when he wrote his social cost paper; he was writing as an economist.[86] Although Coase cites several legal sources,[87] he specifically wrote his social cost paper to clarify the "externality" problem in economics,[88] or what Coase himself refers to as "the problem of harmful effects."[89]

In summary, "The Problem of Social Cost" surveys a wide variety of harms, such as cattle trespass,[90] noise and vibrations,[91] railway sparks,[92] and smoking chimneys,[93] just to mention a few such harms. In all, Coase's social cost paper features over a dozen "actual cases" and "classroom examples" of the problem of harmful effects.[94] These multifarious cases all share a common thread: a business firm is engaged in a lawful activity, but that activity produces "harmful effects" on third parties.[95] Coase then used these examples to create a compelling but

86. Coase himself, when recalling his early years at the University of Chicago in the early 1960s, was once quoted as saying, "I have no interest in lawyers or legal education." *See* Edmund W. Kitch, *The Fire of Truth: A Remembrance of Law and Economics at Chicago*, 26 J. OF L. & ECON. 163, 192 (1983). Regarding Coase's rudimentary legal training (at best) and limited legal scholarship skills, *see generally* David Campbell & Matthias Klaes, *What Did Ronald Coase Know about the Law of Tort?* 39 MELB. L. REV. 793, 810–11 (2016).

87. In addition to law cases (over a dozen in all; *see infra* note 104), Coase's 1960 article cites the second edition of "Prosser on Torts" (see Coase, *Social Cost*, *supra* note 7, at 20 n.16), the sixth edition of "Winfield on Torts" (*id.* at 20 n.17), the twelfth edition of "Salmond on the Law of Torts" (*id.* at 20 n.17, 21 n.22), the thirteenth edition of "Gale on Easements" (*id.* at 20 n.20), an article on "The Law of Tort in Local Government" by one M. B. Cairns (*id.* at 27 n.34), an article on "Railways and Canals" in Halsbury's *Laws of England* (*id.* at 30 n.41) and an article on "Liability for Legal Animals" by one G. L. Williams (*id.* at 36 n.49).

88. *See*, *e.g.*, DARON ACEMOGLU ET AL., ECONOMICS 199–212 (2d ed. 2015) (discussing the economics of negative and positive "externalities").

89. Coase, *Social Cost*, *supra* note 7, at 1 ("This paper is concerned with those actions of business firms [that] have harmful effects on others."). Ronald Coase himself explained why he avoided the term "externality" in the introduction to his collection of essays in COASE, FIRM, MARKET, AND LAW, *supra* note 75, at 26–27.

90. Coase, *Social Cost*, *supra* note 7, at 2–8.

91. A law case involving noise and vibrations (*Sturges v. Bridgman*) is discussed in Coase, *Social Cost*, *supra* note 7, at 8–10; Sturges v. Bridgeman, 11 Ch. D. 852 (1879).

92. Coase, *Social Cost*, *supra* note 7, at 29–34.

93. A law case involving a smoking chimney (*Bryant v. Lefever*) is discussed in Coase, *Social Cost*, *supra* note 7, at 11–13; Bryant v. Lefever, 5 Eq. 166 (1867–1868).

94. The phrase "actual cases" appears in Coase, *Social Cost*, *supra* note 7, at 8, while the words "classroom example[s]" appear in *id.* at 35.

95. Coase, *Social Cost*, *supra* note 7, at 1 ("This paper is concerned with those actions of business firms [that] have harmful effects on others.").

controversial narrative: harms are always jointly produced; harms are a reciprocal problem.[96]

Put another way, in Coase's world, there are no heroes or villains. Instead, Coase's social cost paper replaces the standard victim-wrongdoer story of the common law with a new type of story.[97] Where did Ronald Coase come up with this new and unorthodox storyline? My conjecture is that Coase made this discovery in the late 1920s or early 1930s, while he was still an undergraduate student at the London School of Economics,[98] for it was then and there that Coase must have first encountered the old case of *Sturges v. Bridgman*.[99]

IV. "FOUR ACTUAL CASES"[100]

Among other things, Coase's social cost paper contains a careful and painstaking analysis of four leading nuisance cases from England: *Sturges v. Bridgman*,[101] *Cooke v. Forbes*,[102] *Bryant v. Lefever*,[103] and *Bass v. Gregory*.[104] From a legal or doctrinal perspective, Coase's four cases pose the following two questions: (1) did the defendant in any of these

96. *See id.*

97. *Id.*

98. *See* MARCIANO, *supra* note 6, at 3. Coase had enrolled in an undergraduate commerce degree at the London School of Economics in 1929, and he attended the lectures of Arnold Plant during his second year of studies.

99. *See* Sturges v. Bridgman, 11 Ch.D. 852 (1879) (reprinted in Edmund H. Bennett, 28 *The American Law Register* 348 (1880)). As I shall explain below (*infra* Part IV.A), this is the case that may have led to Coase's novel insight that harms are almost always a reciprocal problem.

100. The words "four actual cases" appear in Coase, *Social Cost*, *supra* note 7, at 8.

101. 11 Ch.D. 852 (1879); *see also infra* Part IV.A.

102. 5 Eq. 166 (1867–1868); *see also infra* Part IV.B.

103. 4 C.P.D. 172 (1878–1879); *see also infra* Part IV.C.

104. 25 Q.B.D. 481 (1890); *see also infra* Part IV.D. In addition to these four cases (*Sturges v. Bridgman, Cooke v. Forbes, Bryant v. Lefever, and Bass v. Gregory*), Coase's social cost article refers to fifteen other nuisance cases in the following order: (i) Fontainebleu Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So.2d 357 (1959); (ii) Attorney General v. Doughty, 28 E.R. 290 (1752); (iii) Versailles Borough v. McKeesport Coal & Coke Co., 83 Pitts. Leg. J. 379, 385 (1935); (iv) Webb v. Bird, 143 E.R. 332 (1863); (v) Rushmer v. Polsue and Alfieri, Ltd., 1 Ch. 234 (1906); (vi) Adams v. Ursell, 1 Ch. 269 (1913); (vii) Andreae v. Selfridge and Company Ltd., 1 Ch. 1 (1938); (viii) Delta Air Corporation v. Kersey, 193 Ga. 862 (1942); (ix) Thrasher v. City of Atlanta, 178 Ga. 514 (1934); (x) Georgia Railroad and Banking Co. v. Maddox, 116 Ga. 64 (1902); (xi) Smith v. New England Aircraft Co., 270 Mass. 511 (1930); (xii) Vaughan v. Taff Vale Railway Co., 3 H. & N. 743 (1858); (xiii) Boulston v. Hardy, 77 E.R. 216 (1597); (xiv) Stearn v. Prentice Bros Ltd., 1 K.B. 395 (1919); and last but not least, (xv) Bland v. Yates, 58 Sol. J. 612 (1913–1914). As an aside, of these 15 cases five were decided after Coase's undergraduate years at the London School of Economics.

cases generate an unlawful nuisance, and if so, (2) what legal remedy is the plaintiff entitled to: injunction or damages or both?[105]

Before proceeding any further, however, a methodological query is in order. Why did Coase decide to focus on the law of nuisance, a notoriously confusing area of law?

The law of nuisance, a "tort" that is almost as old as the common law itself,[106] has been described as a "legal garbage can" full of vagueness, uncertainty, and confusion.[107] According to no less an authority than William Lloyd Prosser,[108] "there is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance'. It has meant all things to all men, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie."[109] Maybe Coase decided to focus on nuisance law precisely because this area of law is so contradictory and confusing. Take Coase's four nuisance cases, for example: two of the plaintiffs prevailed in court, while the other two lost.[110] Why did the courts enjoin some of the harms in these cases but allow others to continue unabated? And furthermore, of all the

105. By way of background, damages are a common law remedy and refer to the award of monetary compensation. If the plaintiff can prove by a preponderance of the evidence that the defendant has breached a legal duty owed to the plaintiff, a judge or jury may award monetary damages to the plaintiff. By contrast, an injunction is a court order prohibiting the defendant from doing something and is considered an equitable or extraordinary remedy because the penalty for disregarding an injunction is contempt of court. Only judges (not juries) have the power to provide this remedy. *See generally* A. MITCHELL POLINSKY, RESOLVING NUISANCE DISPUTES: THE SIMPLE ECONOMICS OF INJUNCTIVE AND DAMAGE REMEDIES (Nat'l Bureau of Econ. Rsch., Working Paper No. 463, 1980).

106. *See*, *e.g.*, MARK LUNNEY & KEN OLIPHANT, TORT LAW: TEXT AND MATERIALS 633 (3d ed. 2008) ("One of the oldest actions known to the common law is the action for nuisance. Its foundation can be traced to the twelfth century, to the establishment of the Assize of Nuisance.").

107. *See* William L. Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 410 (1942) (quoted in L. Mark Walker & Dale E. Cottingham, *An Abridged Primer on the Law of Public Nuisance*, 30 TULSA L. J. 355, 355 (1994)). For a contrary view of nuisance law, *see* Louise A. Harper, *Untangling the Nuisance Knot*, 26 BOS. COLL. ENV'T AFF. L. REV. 89 (1998).

108. *See*, *e.g.*, Craig Joyce, *Keepers of the Flame: Prosser and Keeton on the Law of Torts (Fifth Ed.) and the Prosser Legacy*, 39 VAND. L. REV. 851, 852 (1986) ("Rarely in the history of American legal education has one author's name been so clearly identified with his subject as the name of William L. Prosser is with the law of torts."). Among other things, Prosser shepherded the Second Restatement of Torts to completion and was the author of the leading casebook on tort law: *Prosser on Torts*. *See generally* David J. Jung, *Commentary on William Lloyd Prosser, Strict Liability to the Consumer in California*, 50 HASTINGS L. J. 861 (1999).

109. *See* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 571 (4th ed. 1971) (quoted in Walker & Cottingham, *supra* note 107, at 355).

110. *See* cases discussed in *infra* Part IV.

hundreds or thousands of reported nuisance cases in the common law universe, why did Coase choose this particular set of cases? Among other things, Coase may have chosen these four cases for the following reasons:

> 1. *Business Narratives.* First off, Coase's social cost paper is primarily "concerned with those actions of business firms [that] have harmful effects on others,"[111] so Coase needs cases involving business activities. As it happens, Coase's "four actual cases" feature a wide variety of business firms, including a noisy confectioner,[112] a carpet weaver,[113] a gas works,[114] and a pub or "public house."[115]
>
> 2. *Hard Cases.* Secondly, Coase's four cases are "hard cases" in the Dworkian or jurisprudential sense; that is, these cases could have been decided differently since plausible legal arguments are available to both sides in each of these legal disputes.[116]
>
> 3. *Homage to Arnold Plant.* Most importantly, Coase may have already been familiar with these four cases from his undergraduate student days, when Coase most likely attended a seminar on industrial law taught by Arnold Plant.[117]

Of these reasons, the third merits further consideration. Coase had enrolled in the Bachelor of Commerce or "B.Com." program at the London School of Economics (LSE) in October 1929,[118] and by Coase's own admission, his teacher Arnold Plant played a major role in his (Coase's) intellectual life.[119] For his part, Plant had begun teaching at the London School of Economics in 1930, when he was appointed to the newly-created position as Sir Ernest Cassel Professor of Commerce with special reference to Business Administration.[120] At the time, Plant's teaching

111. Coase, *Social Cost*, *supra* note 7, at 1.

112. *Sturges v. Bridgman*, 11 Ch.D. 852 (1879); *see infra* Part IV.A.

113. *Cooke v. Forbes*, 5 Eq. 166, 167 (1867–1868); *see infra* Part IV.B.

114. *Bryant v. Lefever*, 4 C.P.D. 172 (1878–1879); *see infra* Part IV.C.

115. *Bass v. Gregory*, 25 Q.B.D. 481 (1890); *see infra* Part IV.D.

116. *See generally* Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975); *see also* DWORKIN, TAKING RIGHTS SERIOUSLY Ch. 4 (1977).

117. *See* MARCIANO, *supra* note 6, at 557.

118. *See id.* at 557; *see also* Campbell & Klaes, *supra* note 86, at 809–10.

119. *See* COASE, FIRM, MARKET, AND LAW, *supra* note 75, at 20*; see also* MARCIANO, *supra* note 6, at 559–60; Jim Thomas, *Coase and the London School of Economics in the 1920s-1940s*, THE ELGAR COMPANION TO RONALD H. COASE 23 (Claude Ménard & Elodie Bertrand, eds. 2016) [hereinafter Thomas, *Coase and the LSE*].

120. *See* THE PALGRAVE COMPANION TO LSE ECONOMICS, *supra* note 6, at 332; *see also* RONALD H. COASE, ESSAYS ON ECONOMICS AND ECONOMISTS 179 (1994); Thomas, *Coase and the LSE*, *supra* note 119, at 21.

and research duties centered on the Industry and Trade Group in the B.Com.[121]

Here is where the paths of Ronald Coase and Arnold Plant intersect, for as part of his studies for the undergraduate B.Com. degree, the young Coase would have very likely enrolled in courses on the Elements of Commercial Law and Industrial Law,[122] courses that were most likely taught by Arnold Plant, who was the director of the Industry group at LSE at the time.[123] Was it Plant who taught Coase about the reciprocal nature of harms?

But the most important feature of these four cases—the main reason why Coase likely decided to devote extra time and space to them—is the reciprocal nature of the harms alleged in them: the plaintiff, the party alleging the injury, is just as responsible for the harm caused as the defendant, the party being sued for causing the injury.

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121. THE PALGRAVE COMPANION TO LSE ECONOMICS, *supra* note 6, at 332. In addition to the Industry Group, the B. Com. program at LSE comprised several other sections as well, including "Banking and Finance," "General Transport," "Shipping and Inland Transport," "Public Utilities," and "Art in Relation to Commerce." *See* JIM THOMAS, ARNOLD PLANT: THE LSE STUDENT WHO OBTAINED FIRST CLASS RESULTS IN TWO DEGREES AT THE SAME TIME (1920–1923) Appendix 3 (June 11, 2020) (unpublished manuscript, second draft).

122. Coase himself once mentioned attending multiple law courses at the London School of Economics, where Coase studied commerce as an undergraduate from 1929 to 1931. *See* COASE, FIRM, MARKET, AND LAW, *supra* note 75, at 29; *see also* Campbell & Klaes, *supra* note 86, at 809–10.

123. *See*, *e.g.*, Campbell & Klaes, *supra* note 86, at 809–10. According to Jim Thomas, an Emeritus Reader and Research Associate at the London School of Economics (LSE), the Bachelor of Commerce degree was a three-year degree that was first offered by the LSE in 1919, and this undergraduate degree required three sets of exams: an Intermediate Examination at the end of the First Year as well as a Final Examination (the B.Com. Final) consisting of two parts, with Part 1 being taken at the end of the Second Year and Part 2 at the end of the Third Year. *See* THOMAS, *supra* note 121, at 6–7. Among the subjects that Coase would have been tested on for Part 1 of the B.Com Final was "Elements of Commercial Law (treated from the commercial rather than the legal standpoint)." *See* THOMAS, *supra* note 121, at 19, Appendix 3(b). Likewise, for students in the Industry group, Part 2 of the B.Com Final Exam encompassed the following four subjects: (i) an "Approved Modern Foreign Language," (ii) "Business Organization and Scientific Management," (iii) "Works and Factory Accounting, with special reference to Cost Accounts and Depreciation," and last but not least, (iv) "Industrial Law" or "The Law relating to Factories and Workshops, Workmen's Compensation, Trade Unions, Employer's Liability, Friendly Societies, National Insurance, [and] Labour conditions." *See* THOMAS, *supra* note 121, at 20–21, Appendix 3(c).

A. Sturges v. Bridgman: The Case of the Noisy Confectioner

Coase's first story involves a noisy confectioner and a silence-loving doctor.[124] In fact, Coase first introduced the case of the noisy confectioner, not in his 1960 social cost paper, but in his 1959 FCC paper.[125] Tucked away in one small corner of Coase's 1959 paper is the story of *Sturges v. Bridgman*, a new type of story, a style of narrative in which it is impossible to distinguish heroes from villains or victims from wrongdoers.[126] In that paper, Coase tells the story of *Sturges v. Bridgman* this way:

> A confectioner had used certain premises for his business for a great many years. When a doctor came and occupied a neighboring property, the working of the confectioner's machinery caused the doctor no harm until, some eight years later, he built a consulting room at the end of his garden, right against the confectioner's premises. Then it was found that noise and vibrations caused by the machinery disturbed the doctor in his work.[127]

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124. *Sturges v. Bridgman*, 11 Ch.D. 852 (1869). Coase calls this case "an illustration of the general problem," namely, the general problem of harmful effects. Coase, *Social Cost*, *supra* note 7, at 8.

125. Ronald H. Coase, *The Federal Communications Commission*, 2 J. OF L. & ECON.1, 26–27 (1959) [hereinafter Coase, *FCC*].

126. *Sturges*, 11 Ch.D. 852.

127. Coase, *FCC*, *supra* note 125, at 26. Coase gives a more detailed statement of facts in his 1960 paper: "In this case, a confectioner (in Wigmore Street) used two mortars and pestles in connection with his business (one had been in operation in the same position for more than 60 years and the other for more than 26 years). A doctor then came to occupy neighbouring premises (in Wimpole Street). The confectioner's machinery caused the doctor no harm until, eight years after he had first occupied the premises, he built a consulting room at the end of his garden right against the confectioner's kitchen. It was then found that the noise and vibration caused by the confectioner's machinery made it difficult for the doctor to use his new consulting room." Coase, *Social Cost*, *supra* note 7, at 8–9. An even more detailed statement of facts appears in the case itself: "The plaintiff was a physician, who occupied as his professional residence the house No. 85 Wimpole Street, the lease of which he purchased in 1865. Wimpole street is crossed at right angles by Wigmore Street, and the plaintiff's house . . . had at its rear a garden, at the end of which the plaintiff erected a consulting-room in 1873. The defendant was a confectioner, who carried on business at 30 Wigmore Street, and his kitchen was at the back of his house, having been erected on ground which was formerly a garden, and which abutted on the portion of the [doctor's] garden on which he [the doctor] built the consulting-room. Thus one of the side walls of the consulting-room was the back wall of the defendant's kitchen. The defendant had in his kitchen two large marble mortars, set in brickwork, built up to and against the party-wall, which separated his kitchen from the plaintiff's consulting-room, and worked by two large wooden pestles, held in an upright position by horizontal bearers, fixed into the party-wall. These mortars were used for breaking up and pounding loaf sugar, and other hard

As a result of this state of affairs, the doctor sought an injunction to stop the "noise and vibration[s]" produced by the confectioner.[128] The trial court granted the injunction, and the court of appeals affirmed the trial court's decision.[129] In deciding to grant the injunction, the appellate court painted the following picture in vivid detail of the harm suffered by the doctor:

> The plaintiff alleged that when the defendant's pestles and mortars were being used—and they were generally used between 10 A.M. and 1 P.M.—the noise and vibration caused thereby was very great, and were heard and felt in the plaintiff's consulting-room, and that such noise and vibration seriously annoyed and disturbed the plaintiff, and materially interfered with him in the practice of his profession; and that in particular the noise prevented him from examining his patients by auscultation for diseases of the chest, and that he also found it impossible to engage with effect in any occupation which required thought and attention.[130]

Coase, by contrast, highlighted the reciprocal nature of the harm: "the working of the confectioner's machinery caused the doctor no harm until [the doctor] built a consulting room at the end of his garden, right against the confectioner's premises."[131] Coase goes on to say:

> This example also brings out the reciprocal nature of the relationship which tends to be ignored by economists who . . . approach the problem in terms of a difference between private and social products but fail to make clear that the suppression of the harm which A inflicts on B inevitably inflicts harm on A. The problem is to avoid the more serious harm. This aspect is clearly brought out in *Sturges v. Bridgman*, and the case would not have been different in essentials if the doctor's

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substances, and for pounding meat." *Sturges*, 11 Ch.D. 852 (paragraph break omitted). For an 1860s-era map showing the location of Wimpole and Wigmore streets, see Appendix A.

128. *Sturges*, 11 Ch.D. 852.

129. *Compare* Coase's description of the procedural posture of the case—"The courts had little difficulty in granting the doctor the injunction he sought" (Coase, *Social Cost*, *supra* note 7, at 9)—*with* the official description that appears in the case syllabus or headnote—"The Master of the Rolls granted an injunction, and from this decision the defendant appealed" (*Sturges*, 11 Ch.D. 852). As an aside, a case syllabus is "[a] head-note; a note prefixed to the report of an adjudged case, containing an epitome or brief statement of the rulings of the court upon the point or points decided in the case." *See* Case Syllabus, BLACK'S LAW DICTIONARY (2nd ed. 1910).

130. *Sturges*, 11 Ch.D. 852.

131. Coase, *FCC*, *supra* note 125, at 26. As it happens, the confectioner's attorney made this same point in court: "if the plaintiff had built his consulting-room with a separate wall, and not against the wall of the defendant's kitchen, he would not have experienced any noise or vibration." *Sturges*, 11 Ch.D. 852.

> complaint had been about smoke pollution rather than noise and vibrations.[132]

In other words, however the case is decided, one of the parties will be harmed. If the court grants the injunction (as it did in this case), the confectioner will be harmed since he will have to shut down his business, move to another location, or replace his two large and noise-making "marble mortars" with a quieter method of production.[133] If, however, the confectioner had won the case ("as well he might," as Coase himself adds),[134] the doctor will be harmed since now it is the doctor who will either have to move his consulting room to another location or stop consulting patients altogether, or in the words of Coase:

> What the courts had . . . to decide was whether the doctor had the right to impose additional costs on the confectioner through compelling him to install new machinery, or move to a new location, or whether the confectioner had the right to impose additional costs on the doctor through compelling him to do his consulting somewhere else on his premises or at another location.[135]

With this novel analysis of *Sturges v. Bridgman*, Coase invented a new style of narrative, one in which it is impossible to distinguish heroes from villains or victims from wrongdoers. What is so remarkable about this new type of story is that it is generalizable to all kinds of legal disputes.

B. Cooke v. Forbes: The Case of the "Dull and Blackish" Carpets

Coase's next story involves a dispute between a carpet business and a gas works.[136] One of the plaintiffs in this case was a carpet weaver, "James Figgis, of Cannon Street, Old Ford, Bow, tenant of the premises, and manufacturer of matting for the other Plaintiffs."[137] The defendants were "James Forbes and John Abbott, who, in the year 1863, became and

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132. Coase, *FCC*, *supra* note 125, at 27.

133. *Sturges*, 11 Ch.D. 852.

134. Coase, *FCC*, *supra* note 125, at 27.

135. *Id.* at 26. In a footnote, Coase further states: "Another possibility is that the doctor or confectioner might abandon his activity altogether." *Id.* at 26 n.52.

136. *Id.* Coase calls this case "[a]nother example of the same problem." Coase, *Social Cost*, *supra* note 7, at 10.

137. *Cooke v. Forbes*, 5 Eq. 166, 167 (1867–1868). The "other plaintiffs" were "William Cooke, Samuel Hindley, and David Law, of Friday Street, in the city of London, wholesale carpet dealers, and dealers in cocoa-nut fibre and cocoa-nut fibre matting, lessees for a term of twenty-one years, from the 14th of November, 1849, of a manufactory at Old Ford, Bow, Middlesex, adjoining the river Lea" *Id.* For an 1860s-era map show the location of Friday Street, see Appendix B.

had since been occupiers of premises abutting on those of the Plaintiffs toward the north."[138]

Coase tells the story of this case as follows:

> One process in the weaving of cocoa-nut fibre matting was to immerse it in bleaching liquids after which it was hung out to dry. Fumes from a manufacturer of sulphate of ammonia [released by the defendants' gas works] had the effect of turning the matting from a bright to a dull and blackish colour. The reason for this was that the bleaching liquid contained chloride of tin, which, when affected by sulphuretted hydrogen, is turned to a darker colour.[139]

Given this state of affairs, the carpet weaver (Figgis) joined forces with "William Cooke, Samuel Hindley, and David Law," who were "wholesale carpet dealers, and dealers in cocoa-nut fibre and cocoa-nut fibre matting."[140] They sued for damages and sought an injunction to stop the gas works from emitting fumes in the future:

> The [plaintiffs] alleged damage, and prayed that the Defendants might be restrained 'from carrying on the said works of the Defendants in such a manner as in any way to operate to the damage of the Plaintiffs . . . ,' and for the payment of damages as the Court might think the Plaintiffs entitled to receive.[141]

In their defense, the defendants made two points: (1) they invested a lot of money in their gas works business ("the Defendants filed an answer, in which they stated that . . . they erected valuable plant and machinery for carrying on the business above stated [i.e. the gas works],") and (2) they were extra careful ("extraordinary precautions were taken to prevent the escape of free ammonia and sulphuretted hydrogen[.]").[142]

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138. *Cooke*, 5 Eq. at 167.

139. Coase, *Social Cost*, *supra* note 7, at 10. *Compare* Coase's statement of the facts to the court's: "From the allegations in the [pleadings] it appeared that the work carried on by [the plaintiffs] consisted of weaving cocoa-nut fibre into mats, for which purpose the matting had to be immersed in bleaching liquids, and then hung out to dry." *See Cooke*, 5 Eq. at 167. The problem, however, was that "fumes . . . from the works of the Defendants, who were manufacturers of sulphate of ammonia and carbonate of ammonia from the ammoniacal liquor of gas works, particularly when the wind was in the north-west, north, or north-east, [would] turn the Plaintiff's matting, when hung up to dry after bleaching, from a bright to a dull and blackish colour, requiring the material to be again dyed, at considerable expense, the colour even then being permanently injured." *Id*.

140. *Cooke*, 5 Eq. at 167.

141. *Id.* at 168. For whatever reason, Coase omits the action for damages: "An injunction was sought to stop the manufacturer from emitting the fumes." Coase, *Social Cost*, *supra* note 7, at 10.

142. *Cooke*, 5 Eq. at 168.

The case was decided by "Sir W. Page Wood, V.C." on December 11, 1867.[143] Judge Wood concluded that the gas works was the cause of the plaintiffs' woes:

> I think it is proved beyond dispute in this case, that sulphuretted hydrogen does produce an injurious effect . . . on the manufacture of cocoa-nut matting, owing to the use in the bleaching liquid of chloride of tin, which when affected by sulphuretted hydrogen is turned to a darker colour.[144]

Judge Wood further stated that the plaintiffs had a right to use the bleaching liquid in the manufacture of their carpets:

> [I]t appears to me quite plain that a person has a right to carry on upon his own property a manufacturing process in which he uses chloride of tin, or any sort of metallic dye, and his neighbour [i.e. the defendant gas works] is not at liberty to pour in gas which will interfere with his [i.e. the plaintiff carpet weaver's] manufacture.[145]

Despite these observations, the defendants somehow won this case![146]

For his part, Coase devotes only a few lines to the legal aspects of this case. Instead, Coase focuses on the economics of the dispute, and central to this economic analysis of the carpet case is Coase's notion of reciprocal harms. On the one hand, fumes from the gas works were harming the carpet weaver: "Fumes from [the gas works] had the effect of turning the matting [of the carpets] from a bright to a dull and blackish colour."[147] But the reason for this was that the carpet weaver's own choice of bleaching liquid![148] In short, although the fumes from the defendant's gas works discolored the plaintiffs' carpets, the carpet weaver himself could have taken measures to avoid this harm. But what if the court had ruled for the carpet weaver by granting the injunction? Then, it would be the owners of the gas works who would be harmed, or in the words of Coase: "To avoid the damage [to the plaintiffs' carpets], the sulphate of ammonia

143. *Id.* at 171. Although the plaintiffs initiated their case on October 31, 1865, and the defendants filed their answer on February 23, 1866, the case was not decided until the end of 1867.

144. *Id.* at 171.

145. *Id.* at 172.

146. *Id.* at 174 ("The result, therefore, of the whole case is, that I must dismiss the [plaintiffs' case].").

147. Coase, *Social Cost*, *supra* note 7, at 10.

148. Or in the words of Coase: "[a]s was suggested in the legal proceedings, the amount of damage [to the carpets] could be eliminated by changing the bleaching agent (which would presumably increase the costs of the matting manufacturer)." Coase, *Social Cost*, *supra* note 7, at 11.

manufacturer could increase its precautions or move to another location. Either course would presumably increase his costs. Alternatively, he could pay for the damage."[149] Coase's retelling of the story of the dull and blackish carpets thus emphasizes the reciprocal nature of the dispute.

C. Bryant v. Lefever: The Case of the Smoking Chimney

Coase's third story involves a "novel" smoke nuisance case—indoor air pollution.[150] Coase himself states the relevant facts of *Bryant v. Lefever*,[151] but his statement of facts is not taken from the court's decision of the case. Instead, it was most likely plagiarized from a legal periodical called "Law Notes: A Monthly Magazine for Law Students and Practitioners."[152] Coase's plagiarized version of the story tells us that the parties in this case "were occupiers of adjoining houses, which were of about the same height" and that "[b]efore 1876 the plaintiff was able to light a fire in any room of his house without the chimneys smoking[.]"[153] But then, in 1876, "the defendants took down their house, and began to rebuild it."[154] When they rebuilt their house, the defendants "carried up a wall by the side of the plaintiff's chimneys much beyond its original height, and stacked timber on the roof of their house, and thereby caused the plaintiff's chimneys to smoke whenever he lighted fires."[155]

Given this intolerable state of affairs, the plaintiff sued the defendants for damages.[156] The case went to trial, and the jury bought the plaintiff's story. According to the plaintiff, it was the defendants' new high wall—

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149. Coase, *Social Cost*, *supra* note 7, at 11.

150. *Bryant v. Lefevre*, 4 C.P.D. 172 (1878–1879). Coase himself uses the adjective "novel" to describe this case. Coase, *Social Cost*, *supra* note 7, at 11. Also worth noting, the plaintiff in this case was suing for money damages, not an injunction. The official case syllabus or headnote states: "This was an action to recover damages for a nuisance caused by the defendants having obstructed the free access of air to the chimneys of the plaintiff's house." *Bryant*, 4 C.P.D. at 172.

151. Coase, *Social Cost*, *supra* note 7, at 11.

152. *See* Albert Gibson & Arthur Weldon, *Curious Cases. No. 11. Can I Cause My Neighbour's Chimney to Smoke?,* LAW NOTES (London), at 334 (1886). This periodical was originally published in London in 1886.

153. Coase, *Social Cost*, *supra* note 7, at 11 (quoting without attribution from Gibson & Weldon, *supra* note 152, at 336).

154. Coase, *Social Cost*, *supra* note 7, at 11.

155. *Id.*

156. The jury awarded the plaintiff a total of £60 in damages: "£40 [for the obstruction of air caused] by the building of the defendants' wall, and £20 [for the] falling of timber and other matters from defendants' stacks [of timber] on the plaintiff's premises." *See* Lord Justice Cotton's concurring opinion in the case of *Bryant*, 4 C.P.D. 172. Curiously, Coase mentions only the award of £40 for the obstruction of air and omits the award of £20 for the falling timber. *See* Coase, *Social Cost*, *supra* note 7, at 11.

as well as the tall stack of timber on top of the defendants' roof—that obstructed the free flow of air, and it was this airflow obstruction that caused the plaintiff's fireplaces to smoke up his house.[157]

By contrast, one of the appellate judges in this case, George William Wilshere Bramwell, First Baron Bramwell (1808–1892), told a radically different story when he reversed the jury's verdict on appeal.[158] After discussing some technical issues of law (prescription and the doctrine of lost grant), Lord Justice Bramwell dropped the following bombshell:

> But it is said, and the jury have found, that the defendants have done that which has caused a nuisance to the plaintiff's house . . . No doubt there is a nuisance, but it is not of the defendants' causing. They have done nothing in causing the nuisance. Their house and their timber are harmless enough. It is the plaintiff who causes the nuisance, by lighting a coal fire in a place the chimney of which is placed so near the defendants' wall that the smoke does not escape, but comes into the house. Let the plaintiff cease to light his fire, let him move his chimney, let him carry it higher, and there would be no nuisance. Who, then, causes it? It would be very clear that the plaintiff did[.][159]

For his part, Coase totally rejects Lord Justice Bramwell's version of smoke nuisance in *Bryant v. Lefever*.[160] For Coase, the nuisance in this case was caused by both parties:

> 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

157. This story is certainly a plausible one. In fact, had this case arisen in 1979 instead of 1879, the plaintiff could have called Richard L. Stone as an expert witness. In his 1969 research article "Fireplace Operation Depends upon Good Chimney Design" for the official journal of the American Society of Heating, Refrigeration, and Air-Conditioning Engineers (ASHRAE), Stone concludes that "[a]n inoperative fireplace is completely at the mercy of indoor-outdoor [air] pressure differences caused by winds, building stack effects, and from operation of forced air heating systems or mechanical ventilation." Richard L. Stone, *Fireplace Operation Depends Upon Good Chimney Design*, 11 ASHRAE J. 3 (1969); *see also* A. Grant Wilson, *Influence of the House on Chimney Draft*, 2 ASHRAE J. 63 (1960) (modelling "venting failures" in terms of air pressure differentials).

158. For an artistic caricature of Judge Bramwell, see Appendix C.

159. *Bryant*, 4 C.P.D. 172.

160. *Id.*

> been no smoke nuisance without the fires. Eliminate the wall *or* the fires and the smoke nuisance would disappear.[161]

This observation about the reciprocal nature of the smoking chimney case is a crucial one. Harms are always a reciprocal problem, or in the words of one tort law scholar, "it takes two to tort."[162]

D. Bass v. Gregory: The Case of the Jolly Anglers

The fourth and last story in Part Five of Coase's social paper features a pub/micro-brewery called the Jolly Anglers, which was located in the city of Nottingham.[163] Coase identifies the parties to this case as follows: "The plaintiffs were the owners and tenants of a public house called the Jolly Anglers. The defendant was the owner of some cottages and a yard adjoining the Jolly Anglers."[164]

Coase then paints the following picture: "Under the [Jolly Anglers] was a cellar excavated in the rock. From the cellar, a hole or shaft had been cut into an old well situated in the defendant's yard. The well therefore became the ventilating shaft for the [Jolly Anglers'] cellar."[165] For his part, the judge who tried this case, Sir Charles Edward Pollock (1823–1897), reached the following conclusions: first, "that, without some ventilation, the cellar could not be used,"[166] and two, that the cellar "had been used for a particular purpose in the process of brewing, which, without ventilation, could not be carried on."[167]

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161. Coase, *Social Cost*, *supra* note 7, at 13 (emphasis in original). Coase also makes the following mischievous observation: "The case would have been even more interesting if the smoke from the chimneys had injured the timber." *Id.*

162. *See* Schwab, *supra* note 76, at 1173.

163. *Bass v. Gregory*, 25 Q.B.D. 481 (1890). Coase describes this case as "an excellent final illustration of the problem," namely, the problem of harmful effects. Coase, *Social Cost*, *supra* note 7, at 14. For a picture of the Jolly Anglers pub, see Appendix D.

164. Coase, *Social Cost*, *supra* note 7, at 14. *Compare* Coase's description of the parties (quoted above) with the court's: "The plaintiffs were the owners in fee, and her tenant, of a public-house called the Jolly Anglers, and the defendant was the owner of some cottages and a yard adjoining the plaintiffs' premises." *Bass*, 25 Q.B.D. 481. The term "pub" is short for "public house." *See generally Public House*, ENCYCLOPAEDIA BRITANNICA (Apr. 9, 2023), https://www.britannica.com/topic/public-house [https://perma.cc/SJH5-PNSW].

165. Coase, *Social Cost*, *supra* note 7, at 14. *Compare* Coase's picture with the court's: "[T]he cellar of [the Jolly Anglers] [was] ventilated by means of a hole or shaft cut therefrom through the rock into an old well situated in the yard which was occupied by the defendant." *See Bass*, 25 Q.B.D. 481.

166. *Bass*, 25 Q.B.D. at 482.

167. *Id.*

The "inciting incident"[168] (so to speak) in this case occurred when the owner of the cottages "wrongfully" blocked "the free passage of air from [the Jolly Anglers'] cellar upwards through the well . . . ."[169] The owner of the pub then sued the owner of the cottages,[170] and the case was tried on July 8, 1890, by "Pollock, B."[171] Judge Pollock ruled for the owner of the Jolly Anglers:

> I am of opinion that the Court ought to presume a lost grant here, and I know no case in which the doctrine could be more properly applied, because it is impossible to suppose that the precise history of two adjoining tenements such as these should have been preserved. One must look at the state of things existing for a series of years, and then see what is the fair presumption where a person allows an easement of this kind to grow up to the benefit of his neighbour's land and the detriment of his own. I am of opinion, therefore, that the plaintiffs have properly stated their case, and that they have proved a legal right to the relief which they claim. *Judgment for the plaintiffs for an injunction and damages, and dismissing the counterclaim*.[172]

For Coase, however, the doctrine of lost grant is totally irrelevant to the proper outcome of the case:

> The economic problem in all cases of harmful effects is how to maximise the value of production. In the case of *Bass v. Gregory* fresh air was drawn in through the well which facilitated the production of beer but foul air was expelled through the well which made life in the adjoining houses less pleasant. The economic problem was to decide which to choose: a lower cost of beer and worsened amenities in adjoining houses or a higher cost of beer and improved amenities. In

168. The inciting incident of a story is an event or action that gets the story going. *See*, *e.g.*, McKee, *supra* note 18, at 189–94.

169. *See Bass*, 25 Q.B.D. 481. For his part, Coase adds: "What caused the defendant to take this step is not clear from the report of the case. Perhaps 'the air . . . impregnated by the brewing operations' which 'passed up the well and out into the open air' was offensive to him. At any rate, he preferred to have the well in his yard stopped up." Coase, *Social Cost*, *supra* note 7, at 14.

170. The plaintiff in this case was suing for both money damages and an injunction. *See Bass*, 25 Q.B.D. 481.

171. The official case syllabus or headnote states: "Trial before Pollock, B., at the Nottingham spring assizes, 1890." *Id.* The judge in this case, Sir Charles Edward Pollock (1823–1897), was also one of the last Barons of the Court of the Exchequer. *See* James McMullen Rigg, *Pollock, Charles Edward*, 3 DICT. OF NAT'L BIOGRAPHY (1901).

172. *Bass*, 25 Q.B.D. 481 (emphasis in original).

> deciding this question, the "doctrine of lost grant" is about as relevant as the colour of the judge's eyes.[173]

Notice how, in Coase's telling of the story of the Jolly Anglers pub, the reciprocal nature of this dispute is impossible to miss. On the one hand, allowing the owner of the cottages to block the flow of air through his well would harm the owner of the pub because the well was serving as a ventilation shaft for the pub's in-house brewery. But by the same token, allowing the pub owner to use the well as a ventilation shaft would harm the owner of the cottages by reducing the "air quality" and the overall quality of life of the tenants residing in the cottages.[174]

The reciprocal nature of the harm is not an afterthought or something of secondary importance. It is the lynchpin of Coase's approach to law. Since there is no way of resolving these cases without harming one of the parties, the correct decision, for an economist like Coase, is one that maximizes the total value of production. Imagine, for example, that the pub and the cottages were owned by the same person. What decision would he make regarding the well? Coase is asking us to imagine a counter-narrative—a story in which the hero and villain are the same person! The most memorable of Coase's parables, however, was not an old English nuisance law case. It was a simple story involving a cattle rancher and a crop farmer.

V. THE RANCHER-FARMER PARABLE

One of the most famous legal narratives of all time is Ronald Coase's cattle trespass story, or what one scholar has dubbed "the Parable of the Farmer and the Rancher."[175] At the center of every good story is

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173. Coase, *Social Cost*, *supra* note 7, at 15. Coase concludes his analysis of the Jolly Anglers case with three further points: (1) "the immediate question faced by the courts is *not* what shall be done by whom *but* who has the legal right to do what," (2) "[i]t is always possible to modify by transactions on the market the initial legal delimitation of rights," and (3) "if such market transactions are costless, such a rearrangement of rights will always take place if it would lead to an increase in the value of production." *Id.* That is, once the courts assign the legal right to do X to one of the parties, the parties will alter or modify the court's decision via a mutually-beneficial bargain when the benefits to be obtained from such a bargain outweigh the costs of reaching the bargain. *See generally* Stigler, *Two Notes*, *supra* note 81; *see also* STIGLER, THEORY OF PRICE, *supra* note 75, at 111–13.

174. Or as Coase himself notes: "Perhaps 'the air . . . impregnated by the brewing operations' [that] 'passed up the well and out into the open air' was offensive to him." Coase, *Social Cost*, *supra* note 7, at 14. Additionally, allowing the pub owner to use the well as a ventilation shaft would interfere with the owner's right to do with his well as he pleases. After all, the well belonged to the owner of the cottages and was located on his land.

175. *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 2 (1991) [hereinafter ELLICKSON, ORDER WITHOUT LAW]; *see also* Robert C.

conflict,[176] and Coase's parable is no exception, for Coase's "picturesque example"[177] has all the elements of a good story: captivating characters, along with tension and triumph.[178] The protagonists in Coase's parable are next-door neighbors, a cattle rancher, and a crop farmer,[179] and the conflict between them is a bucolic one: straying cattle who wander off the rancher's land, invade the farmer's neighboring land, and trample his crops.[180]

Coase further illustrates his simple story with an arithmetical table consisting of three columns and five rows.[181] To the point, Coase's arithmetical table depicts a linear relationship between the size of the rancher's herd or "Number in Herd (Steers)" and the magnitude of the "Annual Crop Loss (Tons)."[182] For reference, Coase's simple arithmetical table is reproduced below:

Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 23 STAN. L. REV. 624 (1986). Another scholar of Coase's work, Stewart Schwab, also refers in passing to Coase's cattle trespass example as a "parable." *See* Schwab, *supra* note 76, at 1173. Coase's rancher-farmer parable appears in parts III and IV of his 1960 social cost paper. Coase, *Social Cost*, *supra* note 7, at 2–8. For his part, the Chicago economist George Stigler refers to the "case of wandering cattle" in the third edition of his textbook *The Theory of Price*. STIGLER, THEORY OF PRICE, *supra* note 75, at 111–13.

176. *See*, *e.g.*, TROTTIER, *supra* note 18, at 11–28 (showing how "at the center of every story is a core conflict that we can feel from the very first instant.").

177. This is how the economist George Stigler describes Coase's cattle trespass parable. *See* STIGLER, MEMOIRS, *supra* note 76, at 76.

178. *See*, *e.g.*, GALLO, *supra* note 1, at 212 ("Inspiring stories must have two elements: tension and triumph."). For his part, David Trottier, author of the influential *Screenwriter's Bible*, which is now in its seventh edition, describes the flow of a story in terms of "[s]ituation, conflict, and resolution." *See* TROTTIER, *supra* note 18, at 11–28; *cf.* MCKEE, *supra* note 18, at 303–14 (describing the structure of stories in terms of "crisis, climax, and resolution").

179. Coase, *Social Cost*, *supra* note 7, at 2–3 ("Let us suppose that a farmer and a cattle-raiser are operating on neighbouring properties.").

180. *Id.* at 2 ("A good example of the problem under discussion [i.e. the problem of harmful effects] is afforded by the case of straying cattle which destroy crops growing on neighbouring land."). George Stigler's version of Coase's parable is even more fairytale-like: "In a region hitherto devoted to unfenced farms growing grain, a cattle raiser comes. His cattle will, unless fenced in, occasionally wander into the neighboring grain fields and damage the crops." STIGLER, THEORY OF PRICE, *supra* note 75, at 111. *See also* STIGLER, MEMOIRS, *supra* note 76, at 76 ("A cattle rancher lives next to a grain farmer, and occasionally the cattle of the rancher invade the fields and damage the grain of the farmer.").

181. Coase, *Social Cost*, *supra* note 7, at 3.

182. *Id.* In other words, the greater the size of the rancher's herd, the greater the damage to the farmer's crops. As an aside, George Stigler presents a similar but different arithmetical table in the third edition of his textbook *The Theory of Price*. *See* STIGLER, THEORY OF PRICE, *supra* note 75, at 112.

Number in Herd (Steers)	Annual Crop Loss (Tons)	Crop Loss per Additional Steer (Tons)
1	1	1
2	3	2
3	6	3
4	10	4

As a result, the conflict in Coase's cattle trespass parable is not only unavoidable; it is an essential ingredient of Coase's story. Although the rancher's business is socially useful, his cattle-ranching activities harms the neighboring farmer when stray cattle wander onto the farmer's land and trample his crops. How will this conflict be resolved? How much of the farmer's crops will be destroyed, and which party will be responsible for the trampled crops?

Coase resolves this bucolic conflict by introducing a surprising plot twist: a hypothetical bargain between the rancher and the farmer,[183] a result that Coase's fellow economist George Stigler described as "astonishing."[184] What makes this resolution of Coase's parable so unexpected is that the terms of the rancher-farmer bargain will be the same regardless of the legal rule in effect, that is regardless of whether the rancher is legally liable or not for the damage caused by his stray cattle, or in Coase's words, regardless of "the initial delimitation of [legal] rights."[185]

Coase's parable thus concludes with a plot twist of epic proportions, followed by a surprising and triumphant ending: a mutually beneficial and socially optimal (economically efficient) agreement between the farmer and the rancher.[186] George Stigler subsequently denominated this

183. The element of surprise is a crucial aspect of all good stories. *See, e.g.*, LISA CRON, STORY OR DIE 172 (2021) ("The protagonist expects one thing to happen, and something else happens instead."). In the case of Coase's parable, however, the plot twist is directed to the reader. It is the reader who experiences surprise—or disbelief or incredulity—as the case may be. *See* GALLO, *supra* note 1, at 71: "Violating expectations is a 'superior' [storytelling] strategy . . . It works because the human brain cannot ignore novelty."

184. Or in the words of economist George Stigler: "The proposition that the composition of output will not be affected by the manner in which the law assigns liability for damages seems astonishing." STIGLER, THEORY OF PRICE, *supra* note 75, at 113.

185. Coase himself uses the phrase "delimitation of rights" at various points in his social cost paper. *See* Coase, *Social Cost*, *supra* note 7, at 8, 15, 16, 19, 28, 36, 36 n.49.

186. To see this, imagine a world in which the rancher and the farmer are the same person. *See*, *e.g.*, STIGLER, MEMOIRS, *supra* note 76, at 76–77 (explaining one way of making Coase's conclusion plausible is to ask what will happen if both the grain farm and the cattle ranch are owned by the same person); *see also* STIGLER, THEORY OF PRICE, *supra* note 75,

happy ending—one in which the rancher ends up raising the optimal number of steers, while the farmer ends up planting the optimal number of acres—the Coase theorem.[187] Stated in plain English, Coase's theorem is the proposition that, in a world of costless bargaining or zero transaction costs, it does not matter who is legally liable for the crop damage; either way, the parties to the dispute will resolve their differences by making a win-win deal.[188]

But what makes Coase's parable so remarkable and original from a literary or storytelling perspective is the absence of heroes and villains. Most stories are populated with protagonists and antagonists: cops and robbers, saints and sinners, angels and demons, good guys and bad guys. In "Coase-world," by contrast, the hero and the villain are the same person! Both protagonists in Coase's pastoral parable are jointly responsible for the trampled crops, either from an *ex ante* perspective or *ex post*.

Ex ante, for example, both the rancher and the farmer could have taken preventative measures to reduce the risk of cattle trespass.[189]

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at 113 (referring to "the correct social results—the results [that] would arise if the cattle and grain farmer were owned by the same man."). This fictional owner or firm would allocate its scarce resources—either the number of steer or the amount of land dedicated to crops, or both—so as to maximize the value of production. As an aside, this counterfactual is sometimes referred to as the "one-owner" model or the "one-owner" argument in the law and economics literature. *See*, *e.g.*, Mark Wilson, *Legal Liability for Damage, the Coase Theorem, and Opportunity Cost*, 7 CANBERRA L. REV. 75 (2003).

187. *See* STIGLER, THEORY OF PRICE, *supra* note 75, at 113 ("The Coase theorem thus asserts that under perfect competition private and social costs will be equal."); *see also* STIGLER, MEMOIRS, *supra* note 76, at 77. The story of how Coase's conjecture got its name was first told by George Stigler in his memoir (*see* STIGLER, MEMOIRS, *supra* note 76, at Ch. 5), and has since been told multiple times. *See generally* ELODIE BERTRAND, GEORGE STIGLER: ENIGMATIC PRICE THEORIST OF THE TWENTIETH CENTURY 445–75 (Craig Freedman ed., 2020).

188. As an aside, the substance of Coase's theorem has been defined a bewildering number of different ways. By way of example, Coase scholar Stewart Schwab offers the following formulation: "If [bargaining] costs were zero, Coase asserts, parties would maximize their joint output, regardless of which side had the initial right to harm the other. This is the famous Coase theorem." *See* Schwab, *supra* note 76, at 1172. By comparison, Steven Medema has formulated Coase's theorem as follows: "if the pricing system works costlessly and rights are assigned over the relevant resources, agents will negotiate a solution that maximizes the value of output, and this outcome will be reached irrespective of to which party those rights are assigned." *See* Steven G. Medema, *The Coase Theorem at Sixty*, 58 J. OF ECON. LIT. 1045 (2020). For a survey of the literature, *see id.*; *see also* Medema, *Blackstone Avenue*, *supra* note 14, at 23.

189. One might argue that it is the rancher who should take the necessary precautions to prevent his cattle from damaging the farmer's crops—after all, it's his cattle—but the problem with this argument is that the same logic applies to the farmer side of this pastoral equation. That is, one could also argue that it is the farmer who should take the necessary

Likewise, *ex post*, one of the two parties will have to incur a cost regardless of what type of legal rule is eventually chosen: fence-in or fence-out.[190] If we adopt a fence-out rule, it is the farmer who will have to pay the cost of installing a fence or of taking some other costly measure to protect his crops against stray cattle (for example, the farmer could plant cattle-resistant crops).[191] If, however, we choose a fence-in rule, it is the rancher who will have to pay for the fence.[192] Thus, whichever legal rule we apply to this pastoral problem, fence-in or fence-out, one of the parties will have to incur a cost.

Coase's pastoral parable not only paints a picture of reciprocal harms; it also has two additional features. One is that it demolishes Warren and Brandeis's quest narrative of the common law. For Warren and Brandeis, the common law is about the pursuit of human autonomy or "the full protection in person and in property" of every individual.[193] Alas, as Coase invites us to ask, whose autonomy? The rancher's or the farmer's? Depending on whose autonomy we decide to protect in cattle trespass cases, the other party will have to pay the cost of installing the fence.

Coase's classic article also fills a huge gap in Holmes's story. According to Holmes, law is probabilistic: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[194] But Holmes's predictive theory of law has a big blind spot: it is one thing for a lawyer or law professor to try to predict how a judge will rule in a specific case or how an area of law will evolve in the future, but how do judges themselves decide questions of law? As it happens, Coase's article attempts to answer this key question. According to Coase, courts will often take "economic considerations"[195] into account when deciding cases

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steps to protect his crops—after all, it's his crops. *See*, *e.g.*, Guerra-Pujol & Martinez-Garcia, *supra* note 81, at 67.

190. *See*, *e.g.*, STIGLER, THEORY OF PRICE, *supra* note 75, at 112 ("We need [one of] two laws: one imposing fencing costs on grain growers [i.e., on the crop farmer in Coase's parable], the other imposing the costs on cattle ranchers."). For a survey of both fence-in and fence-out rules, *see* ELLICKSON, ORDER WITHOUT LAW, *supra* note 175, at 42–48.

191. The fence-out rule is a pro-rancher rule because it imposes the cost of fencing on the farmer instead of the rancher: it is the farmer who is required to fence-out his neighbor's cattle under a fence-out regime.

192. The fence-in rule is pro-farmer because it imposes liability for crop damage on the rancher: he must either fence-in his cattle or be liable for the crop damage caused by his stray cattle. For a real-world example of the fence-in rule, see Appendix E.

193. Warren & Brandeis, *supra* note 8, at 193.

194. Holmes, *Path of the Law*, *supra* note 9, at 702.

195. Coase, *Social Cost*, *supra* note 7, at 19.

by comparing "what would be gained and what lost by preventing [or allowing] actions [that] have harmful effects."[196]

VI. CONCLUSION

This Article presented several different narratives about the law, such as the quest narrative in "The Right to Privacy,"[197] the possibility of intellectual rebirth in "The Path of the Law,"[198] and the rancher-farmer parable in Coase's social cost paper.[199] Of these three storylines, however, it is Coase's that is the most original and the most difficult to fit into pre-existing literary categories. Most legal stories divide the world into wrongdoers and victims, villains and heroes, bad men and good ones. Coase's parable, by contrast, replaces this standard victim-wrongdoer story with a world without heroes or villains. For Coase, these are incoherent categories; harms are a reciprocal problem.

Coase's cattle trespass parable, with its picture of reciprocal harms, also has deeper and more troubling implications, or in the words of one scholar:

> Traditionally, the law addressed [the problem of harmful effects] by asking such questions as . . . who caused the harm [and] who acted

196. *Id.* at 27–28. At the same time, Coase's article contains some pointed barbs aimed at the courts. By way of example, Coase delivers the following critique of the judges deciding the case of *Sturges v. Bridgman*: "But of this [the economics of the dispute in question] the judges seem to have been unaware." Coase, *Social Cost*, *supra* note 7, at 10. Nevertheless, Coase's critique can also be read in a benign way, i.e., that the judges' decision was the "correct" or "right" one—correct, that is, from an economic perspective—even though the judges themselves were unaware of economic theory. Either way, it is also worth pointing out that, prior to Coase's 1960 social cost paper, the legal literature was beginning to recognize the economic nature of nuisance disputes. By way of example, a student note on "Homeowners' rights versus industrial expediency" published in 1944 had already identified "innumerable instances of the clash of the interests of industry and private property" and had concluded that "[t]he extent of the industrial privilege to burden homeowners with its inescapable inconveniences depends upon the locality, *utility of the industry*, and the effect upon the neighbors' comfort." Note, *Nuisance: Homeowners' Rights Versus Industrial Expediency*, 19 IND. L. REV. 167, 168 (1944) (emphasis added, footnotes omitted). Moreover, in a footnote at the end of this sentence, the student note quotes Prosser thus: "Professor Prosser has said that the extent of this industrial privilege is determined 'by weighing the gravity of the harm to the plaintiff against the utility of the defendant's conduct.'" *Id.* at 168 n.10 (*quoting* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 73 (1941)). As an aside, for a tongue-in-cheek review of Prosser's 1941 Handbook by Professor Prosser himself, *see* William L. Prosser, *Review of Handbook of the Law of Torts*, 4 LOUISIANA L. REV. 164 (1942).

197. *See supra* Part III.A.

198. *See supra* Part III.B.

199. *See supra* Parts III.C, IV, & V.

> reasonably. Coase, however, emphasized the reciprocal nature of the problem . . . . The Coasean approach [is] a major challenge to the traditional way of thinking about these fundamental issues.[200]

Consider, for example, John Stuart Mill's formulation of the harm principle in his 1859 essay *On Liberty*: "The only purpose for which power [i.e., law] can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[201] Mill's harm principle can, in turn, be traced to Adam Smith, who defines "justice" as restraint from harming others in his 1759 treatise *The Theory of Moral Sentiments*: "Mere justice is, upon most occasions, but a negative virtue, and only hinders us from harming our neighbor."[202] But if Coase's parable is correct—if harms are a reciprocal problem—then Smith's conception of justice and Mill's formulation of the harm principle are both incoherent. Why? Because, as Coase's parable teaches us, harm is unavoidable.[203]

Is it possible to draw a dividing line separating the economics of reciprocal harms from morality and politics? Although the primary concerns of Coase's cattle trespass parable are the definition and allocation of property rights, such rights also have an inescapable moral dimension.[204] As a result, Coase's picture of reciprocal harms has radical implications not only for economics and law but also for ethics and politics.[205] Although these deeper and more troubling implications of

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200. *See* Schwab, *supra* note 76, at 1191. For what it is worth, Schwab also refers to Coase's picture of reciprocal harms as a "fundamental insight." *Id.* at 1173.

201. *See* Mill, *supra* note 5, at 223. For an overview of Mill's harm principle, *see* David Brink, *Mill's Moral and Political Philosophy*, THE STAN. ENCYCLOPEDIA OF PHILOSOPHY § 3.1 (2022). The logic of Mill's harm principle is also often restated as follows: "Your personal liberty to swing your fist ends just where my nose begins." As an aside, the source of this popular refrain has been traced back to an oration delivered in 1882 by John B. Finch, who was the Chairman of the Prohibition National Committee in the 1880s. *See generally* Garson O'Toole, *Your Liberty to Swing Your Fist Ends Just Where My Nose Begins*, QUOTE INVESTIGATOR (2011), https://quoteinvestigator.com/2011/10/15/liberty-fist-nose/ [https://perma.cc/6S9G-UPJ8].

202. *See* ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 82 (1982). For a survey of Smith's conception of justice, *see generally* James R. Otteson, *Adam Smith on Justice, Social Justice, and Ultimate Justice*, 34 SOCIAL PHILOSOPHY & POLICY 123 (2017).

203. Coase, *Social Cost*, *supra* note 7.

204. *See generally* Lawrence C. Becker, *The Moral Basis of Property Rights*, 22 NOMOS 187 (1980). Also, for what it is worth, George Stigler, the economist who coined the term "the Coase theorem," himself concedes this point. *See* STIGLER, THEORY OF PRICE, *supra* note 75, at 114 n.10 ("Some measures [referring to 'limitations on private ownership'] have purely ethical bases—the redistribution of income, the censorship of some forms of behavior (gambling, for example).").

205. *Cf.* Elodie Bertrand, *The Three Roles of the 'Coase Theorem' in Coase's Works*, 17 EUR. J. OF THE HIST. OF ECON. THOUGHT 975, 979 (2010) ("Coase here clearly distinguishes

Coase's parable are beyond the scope of this paper, they merit further study. Sometimes, what is left unsaid is just as important as what is said, or in the immortal words of Ernest Hemingway: "If a writer of prose knows enough about what he is writing about he may omit things that he knows the reader, if the writer is writing truly enough, will have a feeling of those things as strongly as though the writer had stated them."[206]

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the ethical problem of responsibility [i.e., moral blame] from the economic one [i.e., the optimal allocation of property rights]."). The word "here" in this quote refers to Coase's analysis of *Sturges v. Bridgman*, or in the words of Bertrand herself, "without the confectioner there would be no harm, but without the doctor there would not be either." *Id.* This same logic, of course, applies to the rancher-farmer parable and more broadly to most (if not all) harms. Another scholar describes Coase's picture of reciprocal harms as politically ambiguous. *See* Schwab, *supra* note 76, at 1194–98.

206. ERNEST HEMINGWAY, DEATH IN THE AFTERNOON 153–54 (1932) (quoted in NATALIE GOLDBERG, THE TRUE SECRET OF WRITING: CONNECTING LIFE WITH LANGUAGE 172 (2013)).

APPENDICES

A = Map of Wimpole and Wigmore Streets (c1860)
B = Map of Cannon and Friday Streets (c1860)
C = Caricature of Lord Justice Bramwell (c1876)
D = Photograph of the Jolly Anglers (not dated)
E = Example of a Cattle Trespass Law (c1844)

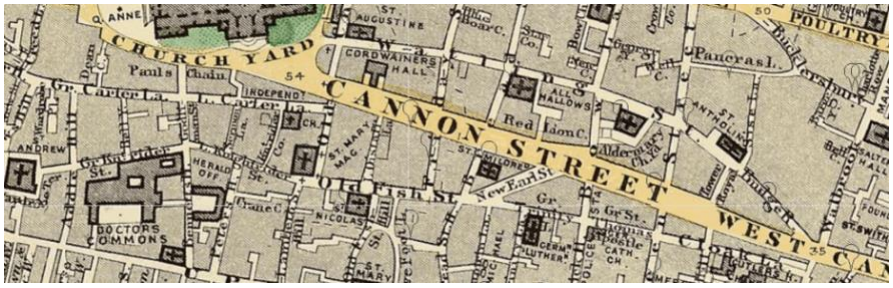
Appendix A

Map of Wimpole and Wigmore Streets

Source: THE UNDERGROUND MAP (2023), https://perma.cc/5MD9-H9CL (Creative Commons CC3 License).

Appendix B

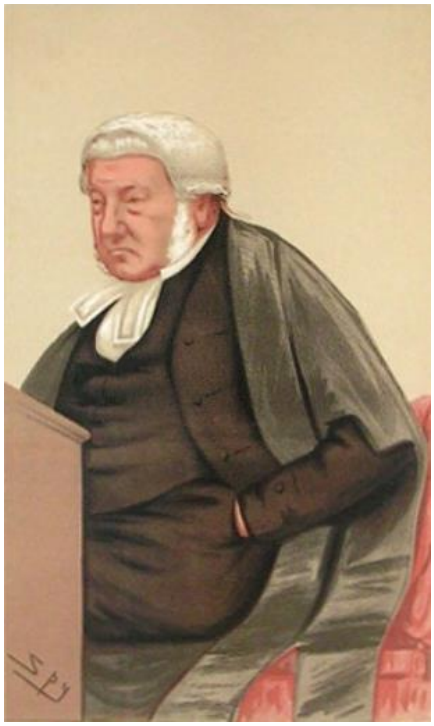
Map of Cannon and Friday Streets



Source: THE UNDERGROUND MAP (2023), https://perma.cc/5MD9-H9CL (Creative Commons CC3 License).

Appendix C

Caricature of Judge Bramwell



Source: *The Exchequer (caricature of Lord Justice Geroge Bramwell, circa 1876)*, WIKIMEDIA COMMONS (2010), https://perma.cc/9P45-XM9X (Creative Commons CC0 License).

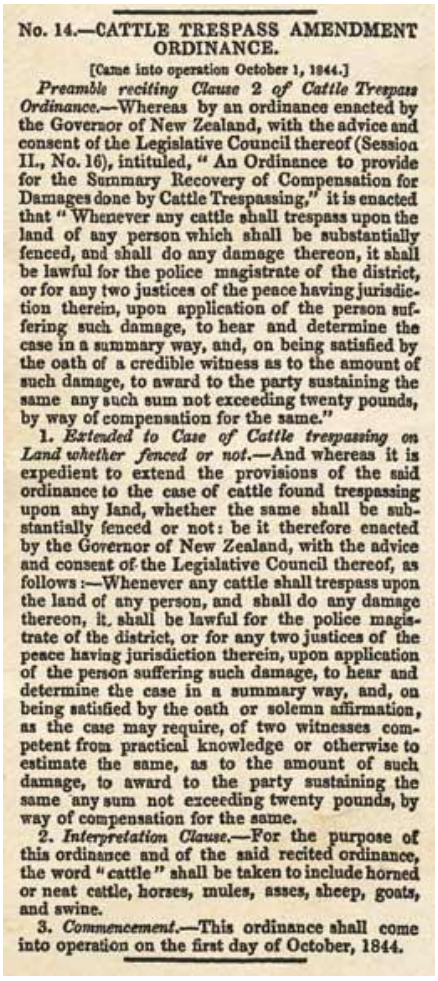
Appendix D

Photograph of the Jolly Anglers

Source: David Hallam, *Jolly Angler*, EXPLORING BEESTON'S HISTORY (2007), https://perma.cc/Q5MQ-VZZG.

Appendix E

Example of a Cattle Trespass Law



No. 14.—CATTLE TRESPASS AMENDMENT ORDINANCE.

[Came into operation October 1, 1844.]

Preamble reciting Clause 2 of Cattle Trespass Ordinance.—Whereas by an ordinance enacted by the Governor of New Zealand, with the advice and consent of the Legislative Council thereof (Session II., No. 16), intituled, "An Ordinance to provide for the Summary Recovery of Compensation for Damages done by Cattle Trespassing," it is enacted that "Whenever any cattle shall trespass upon the land of any person which shall be substantially fenced, and shall do any damage thereon, it shall be lawful for the police magistrate of the district, or for any two justices of the peace having jurisdiction therein, upon application of the person suffering such damage, to hear and determine the case in a summary way, and, on being satisfied by the oath of a credible witness as to the amount of such damage, to award to the party sustaining the same any such sum not exceeding twenty pounds, by way of compensation for the same."

1. *Extended to Case of Cattle trespassing on Land whether fenced or not.*—And whereas it is expedient to extend the provisions of the said ordinance to the case of cattle found trespassing upon any land, whether the same shall be substantially fenced or not: be it therefore enacted by the Governor of New Zealand, with the advice and consent of the Legislative Council thereof, as follows:—Whenever any cattle shall trespass upon the land of any person, and shall do any damage thereon, it shall be lawful for the police magistrate of the district, or for any two justices of the peace having jurisdiction therein, upon application of the person suffering such damage, to hear and determine the case in a summary way, and, on being satisfied by the oath or solemn affirmation, as the case may require, of two witnesses competent from practical knowledge or otherwise to estimate the same, as to the amount of such damage, to award to the party sustaining the same any sum not exceeding twenty pounds, by way of compensation for the same.

2. *Interpretation Clause.*—For the purpose of this ordinance and of the said recited ordinance, the word "cattle" shall be taken to include horned or neat cattle, horses, mules, asses, sheep, goats, and swine.

3. *Commencement.*—This ordinance shall come into operation on the first day of October, 1844.

Source: *Cattle Trespass Amendment Ordinance 1844*, NELSON EXAMINER AND NEW ZEALAND CHRONICLE (Oct. 26, 1844), https://perma.cc/K7SF-25AX.