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DO PIGS NEED WINGS? INTRODUCTORY THOUGHTS ON LAW REVIEWS, ERRORS, AND THE COASE THEOREM

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Ever since shepherd children stumbled upon the Dead Sea Scrolls, a small group of scholars controlled access to these writings. These scholars painstakingly edited and published so far about half the historic texts. Scholars not numbered among the select few complained of the arrogance implicit in limiting access to the original materials.

Now the critics have their chance. In late 1991 the Biblical Archaeology Society published a "facsimile edition" of the previously unpublished scrolls. Professor Robert H. Eisenman, co-editor of the new edition, boasted that this was "the last stage in breaking the monopoly" of authorized editors over the scroll texts.¹ One of those authorized editors responded that it would be "presumably immoral and unethical" for scholars to work with the newly released texts until he and his colleagues had translated them. He forecast shoddy research.² Professor Eisenman

† Professor of Law, Wayne State University Law School. The author thanks Martin Adelman, Alan Goodman, and Stephen Schulman for reviewing a draft of this introduction, Anna Maiuri and Cathleen Cassisa for research assistance, and especially John Dolan for his many helpful suggestions. Responsibility for error remains with the author.

1. Suplee, *Book to Open Access to Dead Sea Scrolls; Biblical Society Will Issue Facsimile Edition of Unpublished Texts*, Wash. Post, Nov. 20, 1991, at A1, col. 2.

2. "Shoddy research" were the words used to paraphrase the comments of Notre Dame Professor Eugene Ulrich. Wilford, *Dead Sea Scrolls to Be Published*, N.Y. Times, Nov. 20, 1991, at A7, col. 1.

was unconcerned: "Now we can let free competition determine what the best scholarship is."³

I. LAW REVIEWS

Access to law review publication is the antithesis of access to the Dead Sea Scrolls. Some wonder whether much law review writing is worthwhile;⁴ no one argues that legal scholars are denied adequate opportunity to offer thought to the world.⁵ Scholars in other disciplines envy the ease with which we publish, or, increasingly, they join us in contributing to law reviews. No cartel doles out information; free competition determines the best legal scholarship.⁶

3. Professor Robert M. Eisenman, *quoted in* Suplee, *supra* note 1.

4. "There are two things wrong with almost all legal writing. One is its style. The other is its content." This classic attack is from Fred Rodell's *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 38 (1936), *reprinted and supplemented*, 48 VA. L. REV. 279 (1962). Although few if any have improved upon Rodell's work, his themes are regularly explored. *E.g.*, Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926 (1990). Three of the most noteworthy contributions are Cramton, "The Most Remarkable Institution": *The American Law Review*, 36 J. LEGAL EDUC. 1 (1986), which laments the proliferation and degradation of student-edited law reviews; Nowak, *Woe Unto You, Law Reviews!* 27 ARIZ. L. REV. 317 (1985), which blames professors who can not write and have nothing to say; and Austin, *Footnotes as Product Differentiation*, 40 VAND. L. REV. 1131 (1987), which satirically mocks footnotes such as this one.

5. A charming and deservedly well-known discussion of the law review as a democratic institution is Havighurst, *Law Reviews and Legal Education*, 51 NW. U.L. REV. 22 (1956); *see also* Martin, *The Law Review Citadel: Rodell Revisited*, 71 IOWA L. REV. 1093, 1097 (1986) (law reviews as forums for the unknown); Vitiello, *In Defense of Student-Run Law Reviews*, 17 CUMB. L. REV. 859, 872 (1987) (rejoicing that "the array of journals makes publication inevitable").

Dean Havighurst's discussion of this point is all the more apt because his guess that few new reviews would be launched, *Law Reviews and Legal Education*, 51 NW. U.L. REV. 22, 25 (1956), underestimated the incentives to publish that his article catalogued. Reviews are even more open to a variety of articles than suggested by their extraordinary number, moreover, because editorial boards change annually. Note, *A Student Defense of Student Edited Journals: In Response to Professor Roger Cramton*, 1987 DUKE L.J. 1122, 1127-28. Whereas a faculty-edited review could be "captured" by a single view, student editors change, and, because grades usually have a roll in the selection process, editorial boards have trouble cloning themselves.

6. This is a somewhat naive view of the process. Articles in the *Harvard Law Review* are more likely to be noticed than articles in "Podunk U's" review, and, human nature being what it is, are more likely to be warmly received. Rosenkranz, *Law Review's Empire*, 39 HASTINGS L.J. 859, 917-18 (1988). Em-

This tradition of legal scholarship is not without costs, however, not the least of which is the timber sacrificed to feed law review presses. A more serious problem is the risk that the tidal wave of writing may overwhelm the audience. Increasing numbers of lawyers, judges, and academics respond by reading more selectively or even by not reading at all.⁷ The sheer number of published

pirical studies repeatedly find that a relatively small number of journals account for a disproportionately high number of citations by courts and journals. Mann, *The Use of Legal Periodicals by Courts and Journals*, 26 JURIMETRICS J. 400 (1986); Maru, *Measuring the Impact of Legal Periodicals*, 1976 AM. B. FOUND. RES. J. 227; Sirico & Margulies, *The Citing of Law Reviews by the Supreme Court: An Empirical Study*, 34 UCLA L. REV. 131 (1986). The direction of causation is uncertain, however, because the more honored journals tend to attract the more honored authors. A surprising number of leading articles, moreover, are published in what some might regard as lesser law reviews. Richard Mann's "judicial high impact group"—the twenty-three law reviews that accounted for fifty per cent of judicial citations—included the following law reviews: Baltimore, Gonzaga, Hofstra, Louisiana, Massachusetts, Missouri, Oklahoma, Southwestern, Syracuse, Texas Tech, and Wayne State. 26 JURIMETRICS J. at 404. Rankings by citations in law reviews follow more closely conventional guesses about law school hierarchies, but even here there are exceptions. The "journal high impact group" included Emory, Hastings, Hofstra, Miami, Southwestern, the *American Bar Association Journal*, the *Business Lawyer*, and *Judicature*. *Id.* at 402. A well-known list of the fifty most cited law review articles was dominated by articles from the premier law review of very elite schools, but it also included articles in the *Indiana Law Journal*, *Law and Contemporary Problems*, and the *Southwestern Law Review*, and it would have included Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960), had it not been in an unindexed interdisciplinary journal. Shapiro, *The Most-Cited Law Review Articles*, 73 CALIF. L. REV. 1546, 1550-51 (1985).

Periodically the status quo is the subject of protest. Legal academics, and especially those with unhappy experiences with student editors, cast covetous eyes toward their colleagues elsewhere in the university and argue for peer-reviewed law journals. Cramton, *supra* note 4, at 9-10 (future of student-edited reviews "in doubt"). Many professors reportedly believe "that having students select the scholarship that deserves publication is akin to letting the inmates run the asylum." Rothfeld, *A Lament: Too Few Interesting Law Articles*, N.Y. Times, Nov. 23, 1990, at B1, col. 3. Change has come, however, not by the dethroning of student-edited law reviews, but by the addition of faculty-edited law reviews such as the *Supreme Court Review*, the *Journal of Law and Economics*, and the *Journal of Legal Studies*. This development has diminished the clout of traditional reviews, Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 779-80 (1987), but more fundamental change is unlikely. No leading school is likely to switch to a peer-edited review, because the current system disproportionately benefits these schools' students, who can attract and work with prominent authors and faculty. Faculty at elite schools benefit because their "home" reviews are elite, and their articles are received relatively favorably at other reviews in part because the authors are identified as being at an elite school. *E.g.*, Liebman & White, *How the Student-Edited Law Journals Make Their Publication Decisions*, 39 J. LEGAL EDUC. 387 (1989).

7. *E.g.*, Church, *A Plea for Readable Law Review Articles*, 1989 WIS. L.

articles also virtually guarantees that some work will be dull and some will contain error.

II. POSIN'S ARTICLE

In a recent issue, the Wayne Law Review published *The Coase Theorem: If Pigs Could Fly*,⁸ by Daniel Q. Posin, professor of law at Tulane Law School. The piece was not dull. It was indeed uncommonly bold, in that it declared the Coase Theorem—the polestar of the law and economics movement—unequivocally wrong.

The centerpiece of Posin's article was a variation of Professor Coase's famous hypothetical relationship between a rancher and a farmer. In Posin's hypothetical, the rancher can raise cattle or ponies. Cattle fetch higher prices but stray onto the farmer's crops, causing damage. Posin calculated that a rancher liable for damaged crops would raise fewer cows than a rancher free from liability—contrary, he asserted, to the Coase Theorem. Posin claimed his hypothetical thus disproved the Coase Theorem, and he celebrated the theorem's demise.

Let it never be said that Coaseans do not care. Swarms of supporters repel assaults on the sainted Coase, and defenders quickly manned the battlements against Posin. The *Wayne Law Review* received unsolicited responses from Lloyd Cohen of IIT Chicago Kent; Barry A. Currier and Jeffrey L. Harrison of Florida; Gail L. Heriot of San Diego; Stephen Marks of Boston University; and Stewart Schwab of Cornell; and, in response to invitations to comment, from Gregory S. Crespi of SMU; Robin Paul Malloy

REV. 739 (professor confessing he reads fewer law review articles, and calling for shorter pieces). Many argue that law review readership also has been diminished by the perceived irrelevance of much that passes as law review scholarship. "We do not need to worry about the consumers of law reviews because they really do not exist. A few professors who author texts must read some of the articles, but most volumes are purchased to decorate law school library shelves." Nowak, *supra* note 4, at 321. As New York Court of Appeals Judge Judith Kaye wrote, "Prominent law reviews are increasingly dedicated to abstract, theoretical subjects, to federal constitutional law, and to federal law generally, and less and less to practice and professional issues, and to the grist of state court dockets." Kaye, *One Judge's View of Academic Law Review Writing*, 39 J. LEGAL EDUC. 313, 319 (1989). Concern for law review readers is not new. In 1956 Dean Havighurst made his classic observation that "[w]hereas most periodicals are published primarily in order that they may be read, the law reviews are published primarily in order that they may be written." Havighurst, *supra* note 5, at 24. For an argument that law reviews are influential, even though not read, because they may be consulted, see Liebman & White, *supra* note 6, at 398, and Martin, *supra* note 5, at 1096-97.

8. 37 WAYNE L. REV. 89 (1990).

of Syracuse; and Thomas S. Ulen of Illinois. The writers disagree about many Coasean issues; they are virtually unanimous, however, in their criticism of Posin's article.

These responses, which the Law Review understandably felt obligated to publish, are collected in this issue. Several responses go well beyond a simple refutation of Posin. Also included here is Posin's reply, in which he acknowledges that his solution to the hypothetical was erroneous.⁹ Posin continues to insist that the Coase Theorem is wrong, however, for reasons related to but somewhat different from those set forth in his article.

III. THE COASE THEOREM

An introduction to a set of articles about a theorem should begin with the theorem. This beginning is more difficult than the uninitiated might think because Coase's famous article, *The Problem of Social Cost*,¹⁰ never set forth a theorem as such.¹¹ To this day, scholars talk confidently about the Coase Theorem yet mean different things. Compare the versions in three leading texts. First, Judge Posner's celebrated law and economics book states the theorem as follows: "[I]f transactions are costless, the initial assignment of a property right will not determine the ultimate use of the property."¹² Professor Polinsky, who authored another celebrated law and economics book, disagrees: "If there are zero transactions costs, the efficient outcome will occur regardless of

9. Posin, *Bringing Home the Bacon: A Response to Critics*, 38 WAYNE L. REV. 107 (1991). Readers should know that the Law Review, per agreement with Posin, showed his reply to none of the responders—but, then, Posin did not see a copy of this introduction.

10. 3 J.L. & ECON. 1 (1960). Coase's article may be the most cited economics work of our time. Cheung, *Ronald Harry Coase*, 1 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 455, 456 (J. Eatwell, M. Milgate & P. Newman eds. 1987). The article is included in the standard lists of the "greatest" and most cited law review articles. Shapiro, *supra* note 6, at 1540, 1546 & n.33 (citing GREAT AMERICAN LAW REVIEWS (R. Berring ed. 1984)).

11. An approximation of what came to be known as "the Theorem" is given in *The Problem of Social Cost*, 3 J.L. & ECON. at 8: "the ultimate result (which maximizes the value of production) is independent of the legal position if the pricing system is assumed to work without cost," but Coase credited George Stigler with the phrase "Coase Theorem" and with the theorem's original formulation. R. COASE, *THE FIRM, THE MARKET, AND THE LAW* 157-58 (1988) quoting G. STIGLER, *THE THEORY OF PRICE* 113 (3d ed. 1966). Although Stigler discussed only *The Problem of Social Cost* and the theorem is closely associated with that work, much of the underlying thinking can be seen in Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 25 (1959). See R. COASE, *THE FIRM, THE MARKET, AND THE LAW* 157-58.

12. R. POSNER, *ECONOMIC ANALYSIS OF LAW* 7 (3d ed. 1986).

the choice of legal rule.”¹³ Professor Cooter, who wrote the relevant entry in the monumental *The New Palgrave: A Dictionary of Economics*, sets forth three versions: “[T]he initial allocation of legal entitlements does not matter from an efficiency perspective [1] so long as they can be freely exchanged,” or, “[2] so long as the transactions costs of exchange are nil,” or, “[3] so long as they can be exchanged in a perfectly competitive market.”¹⁴

Many writers distinguish between the theorem’s “efficiency claim” and its “invariance claim.” For instance, Professor Zerbe’s version of the theorem is as follows: “In a world of zero transactions costs, the allocation of resources will be [1] efficient, and [2] invariant with respect to legal rules of liability, income effects aside.”¹⁵ Professor Cooter, among others, finds “general agreement that the invariance version is untenable.”¹⁶ Others disagree.¹⁷ For that matter, while some leading scholars consider the Coase Theorem an empirically testable prediction,¹⁸ others call it merely an interesting tautology.¹⁹

13. A.M. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 12 (2d ed. 1989).

14. Cooter, *Coase Theorem*, in 1 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 457 (J. Eatwell, M. Milgate & P. Newman eds. 1987). Yet another version is offered by Stigler, whom Coase credited with the theorem’s first formulation: “[U]nder perfect competition private and social costs will be equal.” Stigler, *supra* note 11, at 113.

15. Zerbe, *The Problem of Social Cost in Retrospect*, 2 RES. L. & ECON. 83, 84 (1980). Professor Regan is closely associated with this distinction. Regan, *The Problem of Social Cost Revisited*, 15 J.L. & ECON. 427 (1972). Professor Donohue finds a third Coasean rule, a “distributional prediction [that] asserts that under certain circumstances the assignment of the initial legal entitlement will not affect the distribution of wealth.” Donohue, *Diverting the Coasean River: Incentive Schemes to Reduce Unemployment Spells*, 99 YALE L.J. 549, 550 n.3 (1989).

16. Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1, 15 (1982); accord Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211, 1215 n.12 (1991) (“What Coase (and his followers) clearly meant, however, was that, absent transaction costs, an equally *efficient* point would be reached regardless of starting points.”) (emphasis in original; citation omitted).

17. E.g., Donohue, *supra* note 15, at 550 n.3.

18. E.g., *id.* (reviewing others’ experimental studies and presenting one which found that people may not bargain to efficient outcomes). Schwab has observed that Coase appeared to treat his theorem as testable, which makes it more a prediction than a theorem, because “theorems are simply interesting tautologies.” Schwab, *Coase Defends Coase: Why Lawyers Listen and Economists Do Not*, 87 MICH. L. REV. 1171, 1176 (1989). Perhaps the best known real-world empirical test of Coase’s prediction is Ellickson’s, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986);

Given these disparate views, it is not surprising that even scholarly supporters of the Coase Theorem rely on versions of it to support widely different policy recommendations. Judge Posner relies on the Coase Theorem to recommend giving legal rights to the parties that value them most (the parties who eventually would enjoy the right in a Coasean world).²⁰ Professor Polinsky derives a somewhat different precept: "[T]he preferred legal rule is the rule that minimizes the effects of transaction costs."²¹ Skeptics of governmental intervention regularly cite Coase,²² but governmental activists also cite him.²³ Activists reason in part that because the Coasean process will take care of efficiency, one might as well award entitlements to the poor, who are likely to benefit disproportionately.²⁴

Confusion at the highest scholarly level regarding the Coase Theorem's meaning, validity, and teaching does not commend this most celebrated of law review articles to the courts.²⁵ To be sure,

the best known simulations Hoffman and Spitzer's, e.g., Coursey, Hoffman & Spitzer, *Fear and Loathing in the Coase Theorem: Experimental Tests Involving Physical Discomfort*, 16 J. LEGAL STUD. 217 (1987).

19. E.g., Calabresi, *Transaction Costs, Resource Allocation and Liability Rules—A Comment*, 11 J.L. & ECON. 67, 68 (1988). Cooter argues that every version of the theorem "is probably false or a mere tautology" that turns on an inflated definition of transaction costs. Cooter, *supra* note 14, at 458-59. As this implies, scholars use widely differing meanings of "transactions costs." Schlag, *The Problem of Transaction Costs*, 62 S. CAL. L. REV. 1661, 1675-72 (1989) (reviewing alternative meanings); see also Ellickson, *The Case for Coase and Against "Coaseanism,"* 99 YALE L.J. 611 (1989) (describing multiple kinds of transaction costs).

20. R. POSNER, *supra* note 12, at 45. My reference to a "Coasean world" is for convenience. In fact, Coase recognized that transactions costs are often high.

21. A.M. POLINSKY, *supra* note 13, at 13.

22. E.g., Posin, *supra* note 8, at 19 (collecting authorities).

23. E.g., B. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* 54 (1984); Gjerdingen, *The Politics of the Coase Theorem and Its Relationship to Modern Legal Thought*, 35 BUFFALO L. REV. 871 (1986). For an impassioned argument that the Coase Theorem has been captured unfairly by the political right, see Schlag, *An Appreciative Comment on Coase's The Problem of Social Cost: A View from the Left*, 1986 WIS. L. REV. 919.

24. See Hovenkamp, *Marginal Utility and the Coase Theorem*, 75 CORNELL L. REV. 783 (1990); Schwab, *supra* note 18, at 1195-96. For a variation of this, see Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211 (1991), which argues that society is always at or approaching Pareto efficiency, so distributional analysis is inevitable.

25. In contrast, confusion may have increased frequency of citation by scholars, or so Zerbe argues: "The many insights, the timing, and the lack of

commentators observe that courts "increasingly" cite the theorem,²⁶ which is unsurprising given the number of law and economics devotees who have donned judicial robes. Nonetheless, opinions cite it only about twice a year.²⁷

Another reason why courts cite the Coase Theorem only rarely is that, in each of its versions, it is inherently counter-intuitive.²⁸ The central teaching of the theorem is that rights are reciprocal:²⁹ my "right" to breathe clean air impinges upon your "right" to pollute just as surely as your pollution fouls my air. George Stigler observed that Coase taught us "what of course we should already have known"³⁰—but we did not. The world of Coasean thinking is a world into which anyone can enter but in which almost no one resides. Entering that world is somewhat akin to putting on three-dimensional spectacles: one does it deliberately, is disoriented

clarity combine to make 'The Problem of Social Cost' a bench-mark article. Since it is unclear, critics and advocates have been able to read into Coase's work what they wished to support or criticize." Zerbe, *supra* note 15, at 84.

26. The usual citation is to White, *Coase and the Courts: Economics for the Common Man*, 72 IOWA L. REV. 577, 578 (1987) ("courts show a growing interest in Coase's arguments").

27. *The Problem of Social Cost* was virtually ignored by the courts until 1979. In the nineteen years from 1960 through 1978, it was cited in only five opinions. In the thirteen-plus years since 1978, it has been cited in twenty-six opinions. It was cited in four opinions only once (1983), in three opinions thrice (1982, 1988, and 1990). Since the end of 1981, when Judge Posner was confirmed, it has been cited in twenty-three opinions, including six by Posner and four by other Seventh Circuit judges. No opinion mentioned the phrase "Coase Theorem." Some opinions cited Coase's article only in passing; others mentioned an aspect of the article tangential to the theorem; all were counted. LEXIS STATES library, MEGA file, search term "Coase," and then looking for *Social Cost* in the original or as republished in R. COASE, *supra* note 11. On the other hand, Coase has surely affected judicial thinking indirectly, by influencing scholars on whom courts rely without crediting Coase.

28. See Posin, *supra* note 8, at 91.

29. See Schwab, *supra* note 18, at 1173.

30. "Ronald Coase taught us, what of course we should already have known, that when it is to the benefit of people to reach an agreement, they will seek to reach it." Stigler, *Two Notes on the Coase Theorem*, 99 YALE L.J. 631, 631 (1989). Stigler earlier observed that the invariance version of the Coase Theorem is "extraordinarily nonobvious," and that "the world of zero transaction costs turns out to be as strange as the physical world would be with zero friction." Stigler, *The Law and Economics of Public Policy: A Plea to the Scholars*, 1 J. LEGAL STUD. 1, 11-12 (1972). Coase claims his ideas are "so simple indeed as almost to make their propositions fall into the category of truths which can be deemed self-evident," R. Coase, *supra* note 11, at 1, but this seriously understates their challenge.

for a while, sees things from a different perspective, and then returns to normal sight, not altogether sure what one saw. The judiciary, our most conservative institution, hesitates to engage in such a daring exercise.

Even regular users of the Coasean perspective may neglect it. Such is the suggestion of Professor Donohue, in his marvelously-titled commentary, *Opting for the British Rule, or if Posner and Shavell Can't Remember the Coase Theorem, Who Will?*³¹ According to Donohue, the Coase Theorem indicates that rates of settlement should be unaffected by whether or not parties pay their own legal expenses (the American rule), yet two leading law and economics scholars overlooked this Coasean prediction. Regular wearers, too, may forget their Coasean spectacles.

The counter-intuitive nature of the Coase Theorem, and its inherent ambiguity, also lead to error in its application. Even Dean Calabresi felt compelled to correct some of his published thoughts about the theorem.³² Professor Posin, himself a distinguished academic who regularly teaches law and economics, also may see imperfectly when he dons Coasean spectacles. In his *Wayne* article he added to the national Coase Theorem debate a new argument, but, unfortunately, rested his argument principally on a hypothetical with a flawed solution.

If nothing else, the response to Posin's article disproves the more extreme suggestions that law reviews go unread. Legal academics participate, in effect, in a continuing symposium in which they propose, explore, attack, and defend ideas. The vigorous response to Posin's article belies the charge that the audience for legal writing is inattentive.

Posin's article affords readers an unusual opportunity to test their critical faculties while wearing Coasean spectacles. The article sets forth a hypothetical fact pattern. A detailed analysis of the scenario concludes that the rancher would raise thirty-nine head of cattle when liable for trampling the farmer's crops, fifty head when not.³³ Posin now concedes error, recognizing that at least in the short run the number would be the same either way. Enterprising readers should pause here to read, or reread, Posin's article and try their hands at finding his error. Wearing Coasean spectacles is always stimulating.

31. 104 HARV. L. REV. 1093 (1991).

32. See *infra* note 57.

33. Posin, *supra* note 8, at 108-10.

IV. POSIN'S ERROR

As Posin notes in his response, critics of his solution to the hypothetical fall into two camps, not counting Malloy,³⁴ who raises separate concerns. Currier and Harrison,³⁵ Heriot,³⁶ and Ulen³⁷ make essentially the same point, namely, that Posin considered opportunity costs only when the rancher faced liability, not when liability was absent. Cohen's discussion of Posin's error is more cryptic, but he appears to take the same approach.³⁸ Although neither Ulen nor Cohen offers a numerical solution to the hypothetical, they likely would agree with the other papers' conclusion that the rancher would raise thirty-nine head of cattle whether or not liability attached. Marks³⁹ and Schwab⁴⁰ also focus on Posin's asymmetric treatment of opportunity costs, but their solution to Posin's hypothetical is fifty, not thirty-nine. In his response, Posin agrees that fifty is the correct answer; it seems that Marks and Schwab better understood the hypothetical as assuming a declining marginal profit from raising ponies.⁴¹

Even within the two camps the differences in approach are intriguing. For instance, Marks relies more heavily on mathematics, and in the process shows the usefulness of marginal analysis. Schwab uses detailed narrative to accomplish the same purpose. Crespi sides with those who regard the Coase Theorem as a "simple (though insightful) definitional tautology," and thus reacted to Posin's claim the way a mathematician would "to the claim that $2 + 2 = 5$."⁴² For different reasons, however, Crespi agrees with

34. Malloy, *If Pigs Could Fly Where Would They Go? A Reply to Professor Posin*, 38 WAYNE L. REV. 83 (1991).

35. Currier & Harrison, *Pigs With Wings: A Comment on Posin's "Refutation" of the Coase Theorem*, 38 WAYNE L. REV. 21 (1991).

36. Heriot, *Whether Pigs Have Wings*, 38 WAYNE L. REV. 31 (1992). Heriot includes a nice collection of encomiums to the Coase Theorem. *Id.* at 31 n.4.

37. Ulen, *Flogging a Dead Pig: Professor Posin on the Coase Theorem*, 38 WAYNE L. REV. 91 (1991).

38. Cohen, *On Judging Whether to Publish Articles that Claim to Refute the Coase Theorem: Analogies to Bayesian Methods*, 38 WAYNE L. REV. 15 (1991).

39. Marks, *Of Posin and Pigs, of Coase and Cost, of Profits Gained and Opportunities Lost*, 38 WAYNE L. REV. 47 (1991).

40. Schwab, *Coase, Rents, and Opportunity Costs*, 38 WAYNE L. REV. 55 (1991).

41. Posin, *supra* note 9, at 109 (wryly observing that "my credibility has been put into question here").

42. Crespi, *If Pigs That Could Fly Could Reply: A Response to Daniel Posin*, 38 WAYNE L. REV. 75, 78 (1991).

Posin that the Coase Theorem is a poor source of policy, and argues that efficiency—even Kaldor-Hicks efficiency, which turns on whether gains outweigh losses—is an invalid test for policy choices. Currier and Harrison share Posin's reservations about the usefulness of the Coase Theorem for resolving policy issues, but conclude that Posin's hypothetical does not disturb Coase's central insight, namely, the "reciprocal nature" of the interests of two intertwined parties.⁴³

V. LARGER ISSUES RAISED BY THE RESPONSES

Several authors use the opportunity of responding to Posin to address larger issues. Cohen characterizes the publication of Posin's article as symptomatic of the problems inherent in an academic publishing system dominated by student-edited law reviews.⁴⁴ Stopping short of a what he recognizes would be a quixotic call for a change to faculty-edited reviews, he urges student editors to consult outside experts before publishing certain kinds of work.

Two authors enter into more general discussions of law and economics. Malloy⁴⁵ leaves to others the task of analyzing whether Posin applied Coase correctly, arguing that it is unnecessary to disprove Coase to focus on value choices. He calls for a comparative approach to law and economics, an approach that sees "all forms of discourse concerning the allocation of scarce resources and political power as law and economics."⁴⁶ Ulen seems to agree with Malloy that the Coase Theorem should be kept in context, but Ulen takes a quite different approach. In the closing section of his paper, Ulen seeks to "repulse"⁴⁷ what he perceives as Posin's attack on the law and economics movement. He makes three points: (1) Coase, and economists, do not minimize the importance of value choices; (2) belief in the Coase Theorem is not essential to productive service in the law and economics vineyard; and (3) the law and economics movement is a "Big Tent," to borrow a political phrase not used by Ulen, inhabited by scholars of diverse

43. Currier & Harrison, *supra* note 35, at 26; *see also supra* note 29 and accompanying text.

44. Cohen thus joins the critics noted *supra* at note 4.

45. Malloy, *If Pigs Could Fly Where Would They Go? A Reply to Professor Posin*, 38 WAYNE L. REV. 83 (1991).

46. *Id.* at 89.

47. Ulen, *supra* note 37, at 101.

views, perspectives, and expertise.⁴⁸ In short, scholars can address values and promote liberal agendas without slaying Coase, and, anyway, slaying Coase would not do any good.

Earlier in his paper Ulen explains that Posin's solution to the hypothetical, even if correct, would invalidate only the "invariance thesis" of the Coase Theorem, not the "efficiency thesis."⁴⁹ Schwab makes the same point.⁵⁰ Ulen employs Edgeworth Box diagrams to show that although zero transactions costs will lead to efficient allocations of resources—in his view "the standard interpretation of the Coase Theorem"—only in "atypical" cases will the allocation of resources be unaffected by liability rules.⁵¹ Schwab agrees that Posin's hypothetical, even with his solution, would leave untouched the "efficiency thesis."⁵² He makes this point as part of an attempt "to make a silk purse out of this fallen sow's ear"⁵³ by using Posin's work to raise several interesting points about the Coase Theorem. Schwab offers a lucid explanation of how strategic bargaining and the "wealth effect" can limit the applicability of the Coase Theorem.⁵⁴ Finally, and here controversy continues, Schwab explains why he believes a changed legal rule can increase or decrease a rancher's profitability without changing behavior as a producer—although as a consumer, the rancher "is more likely to buy a Cadillac when the legal rule suddenly favors her."⁵⁵

Here Posin takes a stand. He responds that if ranching becomes less profitable, the rancher will shift resources into other enter-

48. Building on his theme of the inevitable misunderstandings between different cultures, Ulen recalls surprising questions about United States social customs put to him by some Chinese. Ulen, *supra* note 37, at 103 n.26. Reading this account reminded me of the Dutch secretary who innocently asked the visiting American professor: "Is it true that all Americans are fat?"

Ulen is too modest to observe that he has contributed to relaxing the linkage between law and economics and conservatism by publishing an alternative to Posner's text. See R. COOTER & T. ULEN, *LAW AND ECONOMICS* (1988). For this observation and another celebration of the Big Tent of law and economics, see Donohue, *Law and Economics: The Road Not Taken*, 22 L. & Soc'y REV. 903, 920 (1988).

49. Ulen, *supra* note 37, at 92. Ulen colorfully points out that, as noted above, there are multiple interpretations of the Coase Theorem. *Id.* at 91 n.4.

50. Schwab, *supra* note 40, at 64-65.

51. Ulen, *supra* note 37, at 101.

52. Schwab, *supra* note 40, at 64-65.

53. *Id.* at 64.

54. *Id.* at 65-66.

55. *Id.* at 68. The reference to a Cadillac was Schwab's, not the Detroit-based editors.

prises. This “will lead to changes in the number of cattle run,” which shows that the “Coase Theorem is in error.”⁵⁶ Schwab had reasoned that a change in liability rules would affect the value of the rancher’s land, but the land’s cost is a sunk cost that does not affect the land’s use. The reader can decide who has the better argument.⁵⁷

VI. CONCLUSION

This introduction ends where it began, with a disagreement. If nothing else, Posin’s article freshened the debate about the Coase Theorem. That debate is unlikely to end here, for the scroll that is the Coase Theorem is in the public domain, and only uninhibited, vigorous examination of it will satisfy its foes and its champions.

56. Posin, *supra* note 9, at 13. In making this argument Posin relies in part on Ulen’s Edgeworth Boxes to show that in what Ulen called the atypical case which satisfies the invariance thesis, profits would differ depending on assignment of liability. Posin disagrees with Ulen about whether such a case is atypical, however, arguing that this will be common when producers have intersecting interests. *Id.* at 4-5.

57. Disagreement about rate-of-return analysis and the Coase Theorem has a long history, occurring, most notably, between Dean Calabresi and himself. See Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713, 730 n.28, 731 n.31 (1965) (changed liability rules affect rate of return, which will affect long-run resource use), *corrected*, Calabresi, *supra* note 19, at 67-68 (“the same type of transactions which cured the short run misallocation would also occur to cure the long run ones”). Schwab and Posin disagree with unusual asperity, accusing each other of reasoning like an accountant rather than an economist. (The venerable accounting profession must cringe to hear the term “accountant” used as an epithet!) The reader can decide which, Posin or Schwab, deserves the apparently more honored title of economist. For what it is worth, Schwab is the one with the Ph.D. (Posin has an M.A.)—but then, Richard Posner, the revered Pied Piper of law and economics, holds neither.