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Tragic Parlor Pigs and Comedic Rascally Rabbits: Why Common Law Nuisance Exceptions Refute Coase's Economic Analysis of the Law

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TRAGIC PARLOR PIGS AND COMEDIC RASCALLY RABBITS: WHY COMMON LAW NUISANCE Exceptions Refute Coase’s Economic Analysis of the Law

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INTRODUCTION: RONALD H. COASE AND THE LAW

In *The Problem of Social Cost*, economist Ronald H. Coase criticized what he called the traditional “economic analysis” of legal questions as embodied in the work of Arthur C. Pigou, another economist.\(^1\) Thirty years later, Coase received the Nobel Prize in Economics “for his discovery and clarification of the significance of transaction costs and property rights for the institutional structure and functioning of the economy.”\(^2\) The Nobel Committee stated that Coase’s “achievements have provided legal science . . . with powerful impulses and are therefore also highly significant in an interdisciplinary context” and that “Coase’s theories are among the most dynamic forces behind research in . . . jurisprudence.”\(^3\)

The Committee singled out Coase’s work in *The Problem of Social Cost* as a “major study” in which

Coase found that courts probably try to distribute . . . rights among the parties so as to realize the solution which would have

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2. Press Release, Royal Swedish Acad. of Sciences, Royal Swedish Acad. of Sciences Awards the Sveriges Riksbank (Bank of Sweden) Prize in Economic Sciences in Memory of Alfred Nobel, 1991, to Professor Ronald Coase, Univ. of Chi. (Oct. 15, 1991) (on file with author). The Nobel Committee describes Coase's discovery as follows:

   [Coase] postulated that if a property right is well defined, if it can be transferred, and if the transaction costs in an agreement which transfers the right from one holder to another are zero, then the use of resources does not depend on whether the right was initially allotted to one party or the other (except for the difference which can arise if the distribution of wealth between the two parties is affected). If the initial holding entailed an unfavorable total result, the better result would be brought about spontaneously through a voluntary contract, as it can be executed at no cost and both parties gain from it. In other words, all legislation which deals with granting rights to individuals would be meaningless in terms of the use of resources; parties would “agree themselves around” every given distribution of rights if it is to their mutual advantage. Thus, a large amount of legislation would serve no material purpose if transaction costs are zero . . . This led Coase to conclude that it is the fact that transaction costs are never zero which indeed explains the institutional structure of the economy, including variations in contract forms and many kinds of legislation. Or, more exactly, the institutional structure of the economy may be explained by the relative costs of different institutional arrangements, combined with parties’ efforts to keep total costs at a minimum.

   *Id.*

3. *Id.*
been the outcome of an agreement, if such an agreement had been possible. The underlying idea is that this is a natural and rational way for a court to reason if it is more intent on setting a precedent to generate expedient incentives for the future than solving a particular dispute. This means that common pleas courts serve as an extension of the market mechanism to areas where it cannot function due to transaction costs. This hypothesis has become immensely important because, along with the general formulation in terms of rights or property rights, it has become the impetus for developing the new discipline of “law and economics” and . . . for renewal of many aspects of legal science.4

Indeed, The Problem of Social Cost is one of the most frequently cited articles in law reviews.5

Coase offers an economic analysis that explains the results of three important English legal developments: the institution of building regulation in London, the establishment of legal protection for easements and profits, and the establishment of legal protection from interference with quiet enjoyment. These developments provide a suitable context for illustrating and demonstrating his work. All three protect property from unwanted interferences—in legal parlance, from nuisances. They are especially appropriate for examination because the “analytics of the classic nuisance dispute have been the touchstone of economic theories of the law,” and especially the theories of Coase.6

Coase’s work justifies the early English nuisance decisions by arguing that the law imposes liability for activities that impose net social costs if and only if the market and firms are unable to correct the resulting inefficiency because of transaction costs.7 Yet, there are

4. Id.
5. See, e.g., William M. Landes & Sonia Lahr-Pastor, Measuring Coase’s Influence, 54 J.L. & ECON. S383, S383 (2011) (“The Problem of Social Cost’ (1960) . . . [is] among the most cited articles in both economics and law and continue[s] to be widely cited.”). Not coincidentally, the statement that Coase’s The Problem of Social Cost is the most cited work in law reviews is probably the most frequent footnote.
7. This Note is unconcerned with the part of Coase’s work analyzing the behavior of individuals in a hypothetical world of no transaction costs and the so-called Coase Theorem’s predictions of this behavior. Rather, this Note concerns Coase’s economic analysis of the necessary and sufficient conditions for government action, an analysis at the core of his work in The Problem of Social Cost. Coase has always acknowledged the existence of transaction costs in the real world. See Robert C. Ellickson, The Case for Coase and Against “Coaseanism,” 99 YALE L.J.
some actions that impose net social costs without subjecting the actor to common law liability. Two English legal decisions in particular established absolute exceptions to the nuisance cause of action and are counterexamples that disprove Coase’s economic analysis of the common law. In 1410, *Hamlyn v. More* established the little-discussed competitive nuisance exception still followed today in England and the United States, and in 1596, *Boulston v. Hardy* established the wild-animal nuisance exception that Coase explicitly acknowledged to run counter to his economic analysis of the common law in *The Problem of Social Cost*.8

The common law nuisance exceptions established in *Hamlyn v. More* and *Boulston v. Hardy* show that Coase’s economic analysis is unsound because it yields false positives by justifying recognition of causes of action in spite of insufficient sympathy with the plight of potential plaintiffs and the perceived incapacity of legal intervention to make a difference.9 Moreover, the failure of Coase’s economic analysis to account for sympathy and capacity suggests it may also be incomplete.10

If Coase’s economic analysis of the common law is neither sound nor complete—if it does not offer either the necessary or sufficient conditions for government action—his transaction-cost justification for government action should be rejected.

I. Three Important English Legal Developments That Protect Property Use from Interference

Coase’s famous article focuses on regulations designed to protect property use from interference. The importance of these regulations and the role of government as a coordinator of land use are frequently disparaged, in no small part thanks to Coase and his Nobel-winning economic analysis of common law nuisance cases in *The Problem of Social Cost*.11 Robert Ellickson offers a typical example:

*In the nineteenth century several million people in the Midwest coordinated their efforts and built the city of Chicago. No one*

611, 612–13 (1989) (debunking the “[c]ardboard” conception of Coase as believing that the Coase Theorem operates in the real world).

8. *See infra* Part III.A–B.

9. To yield false positives is to be unsound. A vending machine that accepts counterfeit notes is unsound. A theory is unsound if it does not offer a sufficient condition for the occurrence of the result to be explained. Unsouness is demonstrated in Parts III and IV.

10. To yield false negatives is to be incomplete. A vending machine that rejects genuine notes is incomplete. A theory is incomplete if it does not offer a necessary condition for the occurrence of the result to be explained. Incompleteness is suggested in Part IV.C.

11. *See infra* Part II.A.
supervised this achievement and no single actor had more than a small part in it. Indeed, that Chicago’s growth was largely undirected likely helped it develop so quickly.12

Perhaps the city of Chicago was built without extensive regulation and governmental land use coordination, but Ellickson’s flippancy is misplaced. Today, Chicago is known as the Second City because its first iteration, built in the nineteenth century, burned to the ground.13 Moreover, the builders of the first and second Chicagos could rely on the land use patterns and conflict-resolution norms pioneered by the builders of the city of London. And, like the nineteenth-century builders of Chicago, the eleventh- and twelfth-century builders of London watched the city burn to the ground—frequently.14

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13. ELIZABETH CANNING BLACKWELL, FROMMER’S IRREVERENT GUIDE TO CHICAGO 5 (6th ed. 2007); but see REID BADGER, THE GREAT AMERICAN FAIR 39 (1979) (presumably referring to New York as the first city and observing that, after the Great Fire of 1871, residents of Chicago began referring to the rebuilt city as the “second city”).

William J. Novak refers to the constant threat of fire as the “most revealing of the underlying assumptions of nineteenth-century American governance.” WILLIAM J. NOVAK, THE PEOPLE’S WELFARE 53 (1996). Novak disputes claims of nineteenth-century American “statelessness,” such as Ellickson’s account of undirected development of cities, by pointing out that the threat of fire in fact was “met with immediate state action that was restrictive, forceful, and anything but voluntary.” Id. at 56.

Ellickson recently addressed the fire that destroyed Chicago as well as several other great fires and disasters in his analysis of urban street layouts. Robert C. Ellickson, THE LAW AND ECONOMICS OF STREET LAYOUTS: HOW A GRID PATTERN BENEFITS A DOWNTOWN, 64 ALA. L. REV. (forthcoming Jan. 2012). Ellickson demonstrates that many cities do not use disasters as an opportunity to reshape downtown grids. Id. He argues that the absence of post-disaster grid transformation speeds recovery. Id. His argument on this point is similar to his argument in ORDER WITHOUT LAW that inaction by city government is an urban stimulant. Id. While Ellickson points to several mechanisms underlying the inaction-stimulant theory, it seems largely based on his distrust of the men and women who serve as local government officials:

[T]he outcomes that result from planning may be inferior to those that would have otherwise resulted [without planning]. Like all humans, planners have limited cognitive capacities, may have worse information than people on the ground, and may be tempted to pursue self-interested ends.

Id. (manuscript at 52).

14. See LONDON ASSIZE OF NUISANCE 1301–1431, at ix (Helena M. Chew & William Kellaway eds., 1973) (“In a period of less than one hundred and fifty years there were, perhaps, as many as five major conflagrations.”).
To stop their city from burning down every thirty years, the thirteenth-century rebuilders of London instituted the Assisa de Edificiis, a regulation mandating the use of stone in construction.\textsuperscript{15} The Assisa de Edificiis provided both a mechanism for sharing the cost of expensive stone construction—the party wall—and a mechanism for resolving the conflicts between neighbors fueled by their resulting proximity—the formal assize procedure.\textsuperscript{16}

The institution of the Assisa de Edificiis is one of three monumental English legal developments that afforded property users protection from interference. Around the time of the Assisa de Edificiis, new patterns of land use in rural areas created overlapping rights in land through division of ownership in the form of easements and profits. This overlap also created conflicts that required resolution. In response, the common law recognized a new cause of action to protect easements and profits from interference and disruption—the early assize of nuisance.\textsuperscript{17} The protection afforded by the early assize of nuisance soon evolved into a broader cause of action for resolving any dispute over land use interference—the modified assize of nuisance.\textsuperscript{18}

Taken together, these three English legal developments that protect property use from interference—institution of the Assisa de Edificiis, recognition of the early assize of nuisance, and recognition of the modified assize of nuisance—provide an appropriate context for evaluating and understanding Coase’s economic analysis of the common law in The Problem of Social Cost. Coase’s economic analysis of transaction costs explains and justifies each of these legal decisions. This apparent analytical power is at the heart of the popularity of Coase’s economic analysis of the common law in legal scholarship. Yet, as Parts III and IV will demonstrate, two English legal decisions that established absolute exceptions to the nuisance cause of action reveal that Coase’s economic analysis is analytically weak and therefore worthy of rejection by legal scholars. But first, the good news for Coase.

\textbf{A. Preventing Hazard: The Assisa de Edificiis}

In response to “as many as five major conflagrations,” the city of London instituted the Assisa de Edificiis (hereafter Assisa) “for settling disputes between neighbours concerning boundaries and other matters, and for encouraging the use of stone in building.”\textsuperscript{19} Reducing

\begin{itemize}
  \item 15. \textit{Id.} at ix–xi.
  \item 16. \textit{Id.; see also infra} Part I.A.
  \item 17. \textit{See infra} Part I.B.
  \item 18. \textit{See infra} Part I.C. It is this cause of action that Coase analyzes in \textit{The Problem of Social Cost. See infra} Part II.A.
  \item 19. \textit{London Assize of Nuisance 1301–1431, supra} note 14, at ix.
\end{itemize}
the frequency and spread of fires required the use of stone in building, and the expense of stone in turn necessitated the use of a single wall shared by two adjacent buildings, called a party wall.\textsuperscript{20} As adjacent buildings were not usually built at the same time or by the same builder, party walls were designed to be built into by the neighbor at a later date, with half of the stone wall’s three-foot width on each side of the property line.\textsuperscript{21} The \textit{Assisa} required the owners of neighboring parcels to split the cost of the party wall—even owners who did not yet plan to or would not ever build into the wall.\textsuperscript{22}

This posed a problem if the owner of an adjacent parcel was unable to pay the required share when the other owner wanted to build. In a brilliant civic compromise that resembles a mix of adverse possession and eminent domain, the \textit{Assisa} provided that if a neighbor was unable or unwilling to pay her share, the entire three-foot width of the wall would be built on the non-paying neighbor’s land and the property line would shift one-and-a-half feet to the center of the wall.\textsuperscript{23}

These wall-sharing regulations pushed neighbors closer together. Building stone walls without splitting the cost with others was not only expensive, but a property owner who built inside the property line would also still have to contribute either money or land for the construction of a party wall on the property line upon the demand of a neighbor. Accordingly, it is unsurprising that building up to the property line quickly became the norm.

This proximity in turn increased the probability and frequency of conflict between neighbors. To put one common conflict delicately, there was no indoor plumbing in early London and little room for outdoor privies, and so human waste was often eliminated indoors and subsequently defenestrated.\textsuperscript{24} This practice was less problematic when there were land buffers between neighbors, but the new building arrangements meant that this filth tended onto—or even into—the neighbor’s dwelling. Sewage was not only a threat from above. Improper maintenance of indoor privies’ cess pits resulted in seepage

\begin{itemize}
  \item \textsuperscript{20} \textit{Id.} at x; \textbf{PAUL CHYNOWETH, THE PARTY WALL CASEBOOK} 3 (2003).
  \item \textsuperscript{21} \textit{LONDON ASSIZE OF NUISANCE} 1301–1431, \textit{supra} note 14, at x.
  \item \textsuperscript{22} \textit{Id.} at xx–xxi.
  \item \textsuperscript{23} \textit{See id.} (“\textit{[I]f one party could not or would not build jointly with the other, he was to give 3 ft. of his land and the other was to build at his own expense and the wall so built was to be shared equally between them.”).
  \item \textsuperscript{24} \textit{Id.} at xxv. Another frequent dumping site was, of course, any moving body of water, so much so that the bodies would occasionally cease moving. \textbf{BILL BRYSON, AT HOME} 357–59 (2010).
\end{itemize}
across the property line. 25 Other conflicts arose over the flow of water, stench, and noise. The Assisa offered much needed “elaborate regulations for the settlement of [these] disputes between neighbours, concerning walls, gutters, windows, privies and paving.” 26

The Assisa provided that upon the complaint of a land owner, a formal assize consisting of twelve elected aldermen and the mayor would come to the site of the dispute, hear the land owner’s complaint, view the premises, and then issue an order resolving the conflict. 27 In a typical case, a neighbor “complains that the cess-pit of the privy” of his neighbor “adjoins so closely his stone wall that the sewage penetrates his cellar . . . . [T]he assize comes upon the land” and “it is adjudged” by the assize “that within 40 days” the neighbor must move his “cess-pit 2 ½ ft.” away from the wall. 28

In this way, the Assisa’s institution of the assize procedure protected land users in London from interference. But this protection did not extend outside the city. Protection of land users throughout the entire kingdom developed not through legislation, as was the case with the Assisa, but through common law recognition of causes of action in the royal courts for interference with land use. This development of the modern cause of action for nuisance proceeded in two stages.

B. Facilitating Division: The Early Assize of Nuisance

The earliest recorded form of the cause of action for nuisance protected the use of land not owned by the user in fee simple but in which the user held a lesser interest in the form of an easement or profit. Easements and profits are rights to use land owned by others, such as rights of way and rights to take timber or fish. 29 This seemingly humble beginning for the nuisance cause of action was actually quite illustrious, because easements and profits were once vitally important in facilitating increased division of land ownership in England into smaller parcels. Before turning to the common law recognition of protection for easement and profit holders, it is helpful to understand the important role easements and profits once played in permitting the beneficial division of land ownership amongst

25. Indoor privies and cess pits had to be emptied, a job not only unpleasant but dangerous as well because “[w]orkers ran the risk of asphyxiation and even of explosions, since they worked by the light of a lantern in powerfully gaseous environments.” BRYSON, supra note 24, at 356.


27. Id. at xiii–xviii, xxv.

28. Id. at 1.

29. See 3 CATHERINE PALO, TIFFANY REAL PROPERTY § 756 (3d ed. Supp. 2011) (easements); id. § 839 (profits).
concurrent users and reducing the need for full ownership of large parcels of land. 30

A miller must obtain full ownership of the parcel of land on which the mill will sit because the constant physical presence of the mill precludes use by others. If this property is not immediately adjacent to a public road,31 the miller must also obtain a path for her customers to access the mill or face liability for causing customers to trespass to get to the mill.32 But the miller does not need the right to exclude others from using this path in ways that do not interfere with customers’ ability to access the mill. Thus, the miller need not obtain full ownership of the path—she need only seek a nonexclusive right of way (the right to have customers occasionally use the path) over land owned in fee simple and used concurrently by others. A partial interest providing a nonexclusive right of use for traveling is an easement.

Similar in origin and function to an easement, a profit is a partial interest in land providing a nonexclusive right of use for periodically harvesting timber, crops, or fish. Markets were expensive and difficult

30. Full ownership in this context means the right of exclusive use, including an estate for a term, not necessarily ownership in fee simple.

31. The placement of watermills is constrained by the need for running water. This constraint is substantial and in many places would make building next to a public road difficult or impossible. Indeed, as a graduate student touring historic engineering sites in France, Jim Edmonson, Chief Curator of the Dittrick Medical History Center at Case Western Reserve University, was guided by a fellow graduate student to the site of an ancient mill solely on the basis of the city’s topography, as water must run downhill. E-mail from Jim Edmonson, Chief Curator, Dittrick Med. History Ctr., Case W. Reserve Univ., to author (Mar. 15, 2012, 04:16 EDT) (on file with author). As he relates,

[W]e were looking for the Forges de Buffon in Burgundy, near the town of Montbard. Signage was poor and we were pretty lost until one of the [other graduate] students, Duncan Hay, said that he could probably figure out the location of the forges by analyzing the topography and waterways, because such water-powered mills could only be situated in areas where there were significant waterfalls. Sure enough, we looked at the lay of the land and it led us to the probable site—eh voila! there was the Forges de Buffon.

Id.

32. In an early reported nuisance case, an action lay against a mill for failing to obtain land for such a path because customer traffic to and from the mill created a path across an adjacent meadow owned by another. S.F.C. Milsom, Introduction to Novae Narrationes, at xciii (Elsie Shanks & S.F.C. Milson eds., 1963). In the suit, the plaintiff “[had] a hay meadow adjoining the mill” erected by the defendant and a path had been worn “across this meadow by reason of this mill, where there never was a path before.” Id. at B 147.
to finance for a long time following the Norman Conquest. In this pre-Walmart economy, land owners needed access to timber, grains, and fish. Thus, each parcel of land had to contain woods, fields, and rivers. Accordingly, estates had to be large enough to contain the resources necessary for daily sustenance. Profits offered an alternative to large estates that afforded land owners access to timber, crops, and fish. One individual could own land without woods and another individual could own land without rivers, and each could make up the deficiency by obtaining a profit from the other. Thus, profits enabled land owners to decrease the size of their estates, generally increasing the potential number of individual estates in England.

Easements and profits work only if they can be enforced and are not easily defeasible. The miller must be able to rely on the continued right of way after the construction of the mill. The profit holder must be able to rely on the continued right to extract after the consideration has been paid. This reliance would not be possible if the rights were enforceable only against the party that granted them. Land owner A could give a right of way to B and subsequently convey the land in fee simple to C, who might build a wall that would prevent B from using the right of way, and B would have no remedy. Without a mechanism for enforcement against subsequent owners, no potential partial user of land could rely on its continued use. Accordingly, holders of easements and profits needed a cause of action affording broader protection of their rights than was offered by the previously recognized cause of action interfering with grantors of easements and profits. The common law courts provided

33. In order to open a market, one had to obtain permission from the crown and obtain a charter, presumably for a fee. And even if one were able to open a market, one ran the risk that other nearby markets would draw away business or bring an action for competitive nuisance. See discussion infra Part III.A.

34. Markets were designated by the particular day of the week on which they were open. See James Masschaele, Market Rights in Thirteenth-Century England, 107 Eng. Hist. Rev. 78, 83 (1992) (recounting conflict between two nearby “Tuesday” markets); id. at 85 (describing a grant of a “Wednesday” market).

35. Had C built a wall on land B owned in full, B would have the remedy of ejectment, but this remedy does not exist for nonowners. Because C has not breached any agreement with B, B has no remedy in contract. See, e.g., City of Cincinnati v. White’s Lessee, 31 U.S. (6 Pet.) 431, 441 (1832) ("[T]he plaintiff must have, not only the legal title, but a clear present right to the possession of the premises; or he cannot recover in an action of ejectment.").

36. Glanvill provides a “writ for having easements in free tenements” against the grantor of an easement or profit. Ranulf de Glanvill, Tractatus de Legibus et Consuetudinibus Regni Anglie qui
this needed protection in the form of the early assize of nuisance, first recognized by Glanvill in the twelfth century as a form of the assize of novel disseisin\(^{37}\) and later recognized by Bracton in the thirteenth century as the assize of nuisance.\(^{38}\) The early assize of nuisance permitted an easement or profit holder to bring suit against a non-grantor whose activities disrupted enjoyment of the easement or profit.\(^{39}\)

C. Preventing Interference: The Modified Assize of Nuisance

The early assize of nuisance only lay against activities occurring on the land of others if those activities interfered with an easement or a profit, but that constraint was soon left behind. In its place came the more expansive action for any activity that frustrated a plaintiff’s use and enjoyment of any land in which the plaintiff held an interest.\(^{40}\) This included for the first time activities interfering with

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37. Id. bk. XIII, c. 33; see also id. c. 35 (“N. has complained . . . that R. unjustly and without a judgment has raised up (or knocked down) a bank in such-and-such a vill . . . to the nuisance of N.’s free tenement in the same vill.”).

38. Henrici de Bracton, De Legibus et Consuetudinibus Angliae f. 233 (Samuel E. Thorne ed. & trans., Harvard Univ. Press 1977) (ca. 1245–1257) [hereinafter BRACHTON] (“[O]ne has complained to us that such a one wrongfully and without judgment constructed a certain wall (‘bank,’ ‘hedge,’ ‘palisade,’ ‘house,’ ‘gate,’ ‘bridge,’ ‘pond,’ ‘sluice,’ ‘weir,’ ‘mill’ [or] ‘sheep fold’) in such a vill to the nuisance of his free tenement in the same vill . . . .”).

39. In one example, Bracton provides that the owner of a profit permitting the use of land for pasturing livestock

   is entitled to free ingress and egress. If he whose land it is does something to his means of ingress, so that he can hardly enter at all, or only with greater inconvenience, as where he builds a wall, a bank or a hedge, he commits a wrongful nuisance.

   Id. f. 231b. Further, as to easements, Bracton provided for a like result “if the right of going over another’s land is granted and the road is obstructed in some way or narrowed, so that it may not be traversed at all, or only with difficulty.” Id.

40. Some have interpreted the early assize of nuisance recognized by Glanvill as affording this protection all along. See 2 Frederick Pollock & Frederic William Maitland, The History of English Law 53 (2d reissued ed. 1968) (“To meet that troubling of possession which is caused by nuisances as distinguished from trespasses, that is, by things that are erected, made, or done, not on the soil possessed by the complainant but on neighbouring soil, there has all along been an ‘assize of nuisance’ which is a supplement for the novel disseisin.” (citing GLANVILL, supra note 36, bk. XIII, c. 34–36)). This stems from the language in two example writs following the general writ. GLANVILL, supra note 36, bk. XIII, c. 35. The first concerned the raising of mill ponds: “N. has complained . . . that R. unjustly and
neighboring land owners. Thus, Bracton provided that a land owner may be forbidden by a court to

   do anything wrongfully in his own land by which his neighbour may be damaged, that is, that he not make a pond (or raise its level or lower it) lest by an overflow of water he flood his neighbour’s tenement, nor a house, bridge, pond, weir, sluice or mill by which his neighbour is wrongfully damaged.41

   This modified assize of nuisance effectively endowed land ownership with a broad and powerful right of quiet enjoyment.42 Whether Bracton and the others who modified the early assize of nuisance intended this result for policy reasons or simply believed it followed logically from the early assize of nuisance is unclear. Some have argued that the law merely recognized a “natural right” associated with land ownership from time immemorial.43 It is also plausible that because the right of quiet enjoyment was formerly ensured by the relationship between adjoining tenants and their mutual lord—each tenant had a right against unreasonable interference from the lord—extension of the right of quiet enjoyment became necessary as freeholds grew increasingly prevalent. When neighboring land was owned by the lord, the lord had a seigniorial authority and responsibility to manage conflicts between adjacent without a judgment has raised the level of his mill pond in such-and-such a vill . . . to the nuisance of N.’s free tenement in the same vill (or in another vill).” Id. bk. XIII, c. 36 (emphasis added)). The second concerned interference with rights of common pasture: “N. has complained . . . that R. unjustly and without a judgment has disseised him of his common pasture in such-and-such a vill which is appurtenant to his free tenement in the same vill (or in some other named vill).” Id. XIII, c. 37 (emphasis added)). Whether this language actually recognized actions for nuisance unrelated to the raising of mill ponds is unclear. When the broader right developed, it seems unlikely to have preceded or been concurrent with the initial use of the assize of novel disseisin for protection of easements and profits that provided the necessary precedent. See also Restatement (Second) of Torts § 821D cmt. a (1979) (simply observing that the “assize of nuisance also extended to interferences with easements and profits” without discussing whether this was a concurrent or precedent development).

41. Bracton, supra note 38, f. 232b. Bracton’s reference to mill ponds is evidently a reference to Glanvill. See Glanvill, supra note 36, bk. XIII, c. 36.

42. See Restatement (Second) of Torts § 821D cmt. a (1979) (“[T]he assize of nuisance provided redress [for] . . . indirect damage to the land or an interference with its use and enjoyment . . . . [T]he assize of nuisance [was directed] to secure . . . free enjoyment.”).

parcels. Owners of neighboring freeholds had no such recourse if either owner held directly of the Crown. It thus became necessary to provide the coordination and conflict resolution, formerly provided by the lord, through direct actions between neighbors in the Crown (as opposed to seigniorial) courts. This modified form of the assize of nuisance eventually surpassed its predecessor in popularity and importance, and it comes down to us today as the modern cause of action for nuisance. This is the cause of action that Coase famously analyzed in *The Problem of Social Cost.*

II. Coase’s Economic Analysis of the Common Law Explains These Three English Nuisance Developments

The common law developments to institute the *Assisa de Edificiis,* to recognize the early assize of nuisance, and to recognize the modified assize of nuisance seem self-explanatory. The *Assisa* helped regulate hazardous building conditions, the early assize of nuisance enabled the greater partition of land, and the modified assize of nuisance protected the quiet enjoyment of land from interference. But in 1960, Ronald H. Coase’s *The Problem of Social Cost* famously argued that the last of these three decisions—recognition of the modified assize of nuisance cause of action—and many other legal regimes are justified by a more subtle economic analysis. Coase’s theory, whatever its merit, does explain and predict each of the three common law decisions outlined in the previous Part.

A. Coase’s Economic Analysis

Coase framed his economic analysis of the common law as a criticism of the earlier work of Arthur C. Pigou. Coase recounted Pigou’s justification of government action, such as recognition of the nuisance cause of action, on the basis of a divergence between the net cost felt by a decision maker and the net cost felt by all members of society. This divergence is traditionally called an externality. An externality exists whenever a local decision has a nonlocal effect. Pigou noted that some externalities involve uncompensated benefits,

44. See Glanvill, supra note 36, bk. IX, c. 4 (“The bond of trust arising from lordship and homage should be mutual, so that the lord owes as much to the man on account of lordship as the man owes to the lord on account of homage, save only reverence.”); id. bk. XII, c. 10 (providing a writ prohibiting a lord from “unjustly vexing” a tenant or “permitting him to be vexed”). The lord was also responsible for maintaining “reasonable boundaries” between tenants as they “ought to be and customarily are.” Id. bk. XII, c. 16.

45. See infra Part II.A, D.

46. Coase, supra note 1, at 28 (citing A.C. Pigou, *The Economics of Welfare* 183 (4th ed. 1932)).
such as the benefits provided by a lighthouse, and others involve uncompensated costs, such as the costs created by a foul-smelling pig sty.47

Coase agreed that the problem is externalities but put it differently: Coase framed the issue as preventing activities that impose greater net social cost than net social gain.48 But he added that government need not and should not act to correct every externality because the market will minimize social costs through contracts or the development of firms.49 Coase hypothesized that, in some instances, those who generate positive externalities can negotiate for payment from those who benefit and that those who suffer from negative externalities can negotiate with those who cause them harm.50 He also hypothesized that, in some instances, a single entity will come to own the agents that cause and that are either benefited or harmed by externalities and will internally coordinate to resolve conflict. Coase theorized that market forces and firm formation will fail to minimize social costs only if transaction costs—the expense and difficulty of entering into contracts or creating firms—are prohibitively high.51

47. Id. Coase excerpted Pigou’s statement that

one person A, in the course of rendering some service, for which payment is made, to a second person B, incidentally also renders services or disservices to other persons (not producers of like services), of such a sort that payment cannot be exacted from the benefited parties or compensation enforced on behalf of the injured parties.

Id. (quoting Pigou, supra note 46, at 183).

48. Id. at 44.

49. See id. at 15 (“It is always possible to modify by transactions on the market the initial legal delimitation of rights. . . . [I]f 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.”).

50. Coase assumed that courts will reliably enforce the resulting agreements. This assumption is frustrating because it presumes a particular government response in propounding a theory of the role of government but does not do so explicitly. No contract regarding land use is worth the paper it is written on unless the obligations run to subsequent owners or users of the land. Coase ignored the difficult issues involved in establishing the laws relating to such servitudes with his examples of ranchers contracting with farmers. The law has never withdrawn all supervision over the creation of running obligations. Coase did not discuss the economic issues relating to servitudes and whether they should run. Criticism of Coase must accordingly assume that in all instances these agreements would run. Perhaps this is just one form of a transaction cost, but it is distressing nonetheless for Coase to have theorized about basic governmental decision making while assuming that all governments enforce land use restrictions on subsequent assigns.

51. Coase, supra note 1, at 15.
Coase asserted that, because “the governmental administrative machine . . . [can] be extremely costly[,] . . . direct governmental regulation will not necessarily give better results than leaving the problem to be solved by the market or the firm.”52 Therefore, he argued government should only intervene “on occasion,” and only if “governmental administrative regulation [would] lead to an improvement in economic efficiency” because “the costs of handling the problem through the market or the firm” are too high.53 Coase provided the example of a “smoke nuisance”—a factory emitting smoke to the disturbance of nearby residences—because “a large number of people are involved and . . . therefore the costs of handling the problem through the market or the firm may be high.”54

B. Coase’s Analysis Explains the Assisa de Edificiis

Building decisions in cities create externalities that the market and the firm do not solve because of transaction costs. Cities are densely populated and structured regions, and so city fires can take many lives and result in enormous economic damage. Firetraps thus pose disproportionately high risks beyond any potential private cost that is or could be imposed on the builder. An ideal illustration of the potential divergence between private and social costs resulting from decisions that cause or spread fires involves the infamous Chicago milkmaid who placed her lantern too close to a cow’s hooves.55 It would have been in all Chicagoans’ economic interest that the lantern be placed farther away (or that that milkmaid wait until daylight). But it was not possible for other property owners to negotiate with the milkmaid and get her to agree not to place the lantern where she did. Nor does it seem feasible for all property in the city to be owned by a firm that also employs all milkmaids in the city so that the firm could direct the socially optimal placement of the lantern. Under these circumstances, it is evident that without government action “[o]ne person’s carelessness or folly could put the public safety and common welfare at immediate and severe risk.”56

52. Id. at 18.
53. Id.
54. Id.
55. In the infamous initial report, the Chicago Evening Journal stated that “[t]he fire broke out on the corner of DeKoven and Twelfth streets, at about 9 o’clock on Sunday evening, being caused by a cow kicking over a lamp in a stable in which a woman was milking.” The Great Calamity of the Age! Chicago in Ashes!!, CHI. EVENING J., Oct. 9, 1871. While the Great Chicago Fire of 1871 “did start in Mrs. O’Leary’s barn,” O’Leary and others denied that “Mrs. O’Leary, her cow, and her lantern” were to blame. Richard F. Bales, The Great Chicago Fire and the Myth of Mrs. O’Leary’s Cow 53 (2002).
56. Novak, supra note 13, at 55.
The choice of whether to use stone buildings similarly involves the decision to bestow either an uncompensated benefit or cost on others—that is, to create either a positive or negative externality. Using stone reduces the risk of fire spreading and benefits other property owners. Using flammable materials increases the risk of fire spreading and imposes a cost on other property owners. And, like the decision of the milkmaid, neither the market nor the firm could be expected to ensure that stone was used. Thus, the Assisa’s requirement of stone use is justified by Coase’s economic analysis.

C. Coase’s Analysis Explains the Early Assize of Nuisance

Easements and profits also create the potential for externalities. Easements and profits always result in divided use of land. An individual’s use of land concurrent with others’ use has obvious potential to affect the other users. An individual’s decision to engage in an activity that interferes with the concurrent use of the land by an easement or profit holder poses an uncompensated-for cost on the easement or profit holder. Excessive transaction costs result from the bilateral monopoly problem, in which two parties must deal with one another because “if neither party has good alternatives to dealing with the other, transaction costs may be quite high.” Since the owner of the easement or profit has no alternative to negotiating with the individual whose use is interfering with the easement or profit, the common law’s decision to impose liability on interferers with easements and profits is justified by transaction costs created by a bilateral monopoly problem.

D. Coase’s Analysis Explains the Modified Assize of Nuisance

Land owners have the power to decide between using land in ways that do or do not create harmful impacts on the use and enjoyment of neighboring land. This creates the possibility of uncompensated-for harms. In The Problem of Social Cost, Coase


Because the plaintiff can settle only with the defendant, and the defendant only with the plaintiff, there is a range of prices within which each party will prefer settlement to the more costly alternative of litigation. Ascertaining this range may be costly, and the parties may consume much time and resources in bargaining within the range. Indeed, each party may be so determined to engross the greater part of the potential profits from the transaction that they never succeed in coming to terms.

Id. at 60–61. He noted that this “problem in strategic behavior” implicates game theory. Id. at 61.
argued that, in some cases of nuisance, harm is caused to a neighbor because it is economically efficient. He explained that it is therefore only appropriate to impose liability if the decision causing the nuisance results in an economic inefficiency that remains uncorrected because of transaction costs.\textsuperscript{58} According to Coase’s analysis, this explains the balancing approach used in nuisance cases.\textsuperscript{59} While the proper boundaries under Coase’s approach are uncertain, he explicitly asserted that, at least in the case of a smoke nuisance, the cause of action is justified because of the “large number of people” involved and the high “costs of handling the problem through the market or the firm.”\textsuperscript{60}

III. Coase’s Economic Analysis of the Common Law Disagrees with Two Important Nuisance Exceptions

As the previous Part demonstrates, Coase argued that the law should impose liability for activities that create net social costs. Yet some actions impose net social costs without subjecting the actor to common law liability. Two decisions in particular are counterexamples that disprove Coase’s economic analysis of the common law. The early common law courts recognized several causes of action for harm caused by competition. According to Coase’s analysis, this is a sound result. But the common law reversed course in 1410 in Hamlyn v. More.\textsuperscript{61} Coase’s economic analysis does not provide justification. Nor does his analysis justify the result in Boulston v. Hardy, a common law decision in 1596 holding that land owners are never liable for harms to neighbors caused by wild animals.\textsuperscript{62}

\textsuperscript{58} Coase, \textit{supra} note 1, at 18.

\textsuperscript{59} See Smith, \textit{supra} note 6, at 967 (According to Coase’s view of the balancing approach, “when conflicts between actors and their activities arise, a court’s job . . . is to decide which use shall prevail. The hallmark of nuisance law then becomes reasonableness, where each use must be justified in terms of a grand cost-benefit analysis.”).

\textsuperscript{60} Coase, \textit{supra} note 1, at 18.

\textsuperscript{61} Y.B. 11 Hen. 4, fol. 47, Hil., pl. 21 (1410) (Eng.); \textsc{John Baker, Baker and Milsom: Sources of English Legal History} 671 (Oxford Univ. Press 2d ed. 2010) (1986) [hereinafter \textit{Baker & Milsom}]. The \textit{Baker & Milsom} translation of the report from the original middle French is provided below at note 72 for the reader’s convenience, as it is quite short and is not widely available.

\textsuperscript{62} Boulston v. Hardy, (1596) 77 Eng. Rep. 216 (K.B.); Bowlston v. Hardy, (1596) 78 Eng. Rep. 794 (K.B.) (reported with a different spelling of Boulston). There is some uncertainty over the precise date of this case. The former report cites the case as occurring in the Michealmas (“Mich.” in the reporter) term (October to December) in the thirty-ninth and fortieth year of the reign of Elizabeth (1596 and 1597), while the latter report cites the case as occurring in the Hillary term (January
A. Competitive Nuisance: Hamlyn v. More

The common law courts recognized causes of action for harm caused by economic rivals before the decision in Hamlyn v. More. The operator of a mill, oven, or other capital project could bring an action on the case against economic rivals once the operator gained prescriptive rights against local inhabitants forcing them to use the mill or other capital project. The underlying quasi servitude on nearby land permitted the operator to bring an action to compel former customers to use the operator’s mill, oven, or other capital project instead of one operated by a rival, provided the operator could show that the local inhabitants had used the operator’s facility since time immemorial. The action on the case lay against the competitor who subsequently built a rival facility and caused these customers to cease doing business with the operator who held the prescriptive right to their patronage. Furthermore, the modified assize of nuisance was available to protect the operator of a market from those who might set up a rival market. All founders of markets had to obtain permission from the Crown, but even if a founder obtained the required charter to hold a market, the founder could be liable for setting up shop too close to a market held by another.

At first, recognition of these rights against economic rivals appears to involve the creation of a monopoly by the lord in order to reap benefits through April) of the thirty-ninth year of the reign of Elizabeth (1596). The full texts of both reports are provided below at note 85 for the reader’s convenience, as they are quite short and are not widely available.


64. 3 William Blackstone, Commentaries *234–35; Novae Narrationes, supra note 32, at xc–xcvi; Baker, supra note 63, at 449. The operator of a mill would have to show that “the defendant and his ancestors had been compelled to grind their corn only at that mill” by “manorial custom” or “reserv[ation] on a freehold grant before 1290” when the statute of Quia Emptores made such reservations invalid. Id. Thus, the common law recognized a right against land owners that accrued outside of a personal relationship between the operator and the disloyal customer on the basis of custom. This is actually how Bracton justified the modified assize of nuisance—as a legally enforceable servitude created by custom. Bracton, supra note 38, f. 232.

65. Baker, supra note 63, at 449.

66. Id. at 431, 449.

67. Masschaele, supra note 34, at 78–79. Operators of markets earned their return by charging tolls to those who sold their wares. The markets would attract many people to the area on the market day. By holding a market nearby, a second market holder could attract sellers with the prospect of nabbing customers traveling to visit the first market, a “medieval version[] of the corporate raider.” Id.
at the expense of tenants. The Crown's primary interest, as residual beneficiary of all production, was to see production maximized in order to generate higher revenues. Why, then, did the Crown courts enforce customary monopolies on behalf of the independent operators? These capital projects, especially mills, involved investments of significant magnitude, duration, and potential public benefit. The Crown courts evidently adopted policies that subsidized these considerable investments in order to increase their frequency.

Then, in 1410, a schoolmaster in Gloucester brought suit against a rival schoolmaster whose recent competition drove down prices.

68. This was evidently the case on the continent, where seigniorial monopolies were "[o]ne of the most effective and most widely employed instruments of seigniorial control." Jerome Blum, The End of the Old Order in Rural Europe 80 (1978) (citing Slavic, German, Romanian, Slovakian, Swiss, Bohemian, and Russian examples).

69. See supra text accompanying notes 63–65 (discussing actions in royal courts).

70. The Crown received income from production. If production increased, the Crown's revenue increased. If production decreased, the Crown's revenue decreased. It is therefore understandable that the policies of the Crown courts fell in line with the needs and desires of the Exchequer.


72. Y.B. 11 Hen. 4, fol. 47, Hil., pl. 21 (1410) (Eng.); Baker & Milsom, supra note 61, at 671–72. The Hamlyn v. More decision is reproduced below, translated from the original middle French, as it is relatively short and not widely available:

Two masters of a grammar school brought a writ of trespass against another master, and counted that, whereas the collation to the grammar school of Gloucester belonged from time immemorial to the prior of Llanthony near Gloucester, and the said prior had made collation to the said plaintiff to have the governance of the scholars and to teach the children and others: the defendant had set up school in the same town, as a result of which the plaintiffs—who had been accustomed to take 40d. or two shillings a quarter from each child—now took only 12d.; to their damage etc. ¶ Horton made a full defense. —Tildesley. Truly, his writ is invalid. ¶ Skrene. It is a good action on the case, and the plaintiffs have shown sufficient matter and have shown how they are damaged. ¶ HANKFORD. Damnum may be absque injuria. For instance, if I have a mill and my neighbour sets up another mill, so that the profit from my mill is reduced, I shall have no action against him; and yet it is damaging to me. ¶ THIRNING [C.J.] agreed, and said that teaching children is a spiritual matter. And if a man retains a master in his own house
The plaintiff relied on the mill, oven, and market precedents. This reliance was not ill conceived, as a ferry owner had previously succeeded in suing the operator of a rival ferry under a similar
to teach the children, although it would damage the common school-master of the town, I believe he shall not have an action. ¶ Skrene. The masters of St Paul’s School claim that there shall be no other schoolmasters in the whole city of London except them. ¶ Then Horton demanded judgment whether the court would take cognisance. ¶ Skrene. You have passed that [step]. ¶ Then Horton demurred, that the action was not maintainable. ¶ Skrene. Since we will aver the prior’s title, as above, and that we are damaged by reason that he has drawn away our schoolboys—so that where we used to take 40d. or two shillings from each schoolboy for the quarter we now only take 12d.—we demand judgment, and pray our damages. ¶ Hill. In this there is lacking a foundation to support an action, because the plaintiffs have no estate, but only a ministry for the time being. And if another person, who is as well learned in the faculty as the plaintiffs are, comes to teach the children, this is a virtuous and charitable thing and [needful] to the people and for that he shall not be punished by our law. ¶ Thirning. This court cannot take cognisance whether the prior can have such collation of schools or not, because the teaching and instruction of children is a spiritual matter. It seems to me that, since the plaintiffs have claimed the school by the prior’s collation, and have based their action on that, which is accessory to and dependent on the prior’s title, which is the principal matter, and since that is a spiritual matter, this action cannot be tried in this court. ¶ Skrene. If a market is set up to the nuisance of my market, I shall have an assize of nuisance. And in a common case, if those coming to my market are hindered or beaten, whereby I lose my tolls, I shall have a good enough action on my case. Likewise here. ¶ Hankford. It is not comparable, because in your example you have a freehold and an inheritance in the market. Here, however, the plaintiffs have no estate in the schoolmastership, save for an uncertain time. And it would be against reason for a master to be prevented from holding school wherever he pleases, unless in the case of a university which has been incorporated, or schools founded in ancient times. In the case of a mill, as I said before, if my neighbour sets up a mill, and others who used to grind at my mill go to the other mill, so that my toll is reduced, I shall not for this reason have an action. If, however, a miller prevents the water from running to my mill, or commits some nuisance of that kind, I shall have such action [against him] as the law gives. ¶ And the opinion of the court was that the writ did not lie. So it was awarded that they take nothing by their writ etc.

Id. at 671–73 (alterations in original) (footnotes omitted). The author also relied on an original translation by David Carper.

73. Baker & Milsom, supra note 61, at 672 (“If a market is set up to the nuisance of my market, I shall have an assize of nuisance. . . . Likewise here.”).
The case could not be decided on the grounds that competition always benefits the public. The plaintiff presented instances in which the royal courts held that spurring investment was preferable to free competition, so at a minimum the court was familiar with exceptions to such a broad proposition.75 Further, the case precedes the laissez-faire thesis that “[t]he natural operation of supply and demand in the free market . . . maximize[s] the satisfaction of all parties and establish[es] the common good” by three and a half centuries.76

After much discussion, the court held that no cause of action lay.77 The court noted a distinction between “damnum” (damage) and “injuria” (injury) and observed that not all damages give rise to a legal remedy.78 The court concluded that to draw away customers from a mill would be damnum absque injuria, damage without injury, but to draw away water would cause injuria and give rise to a legal remedy.79 By rejecting the schoolmaster’s argument, Hamlyn v. More came to stand for the proposition that competition never gives rise to a cause of action for nuisance.

74. See, e.g., S.F.C. Milsom, Introduction to Novae Narrationes, supra note 32, at lxxxviii–lxxix (describing an “action . . . for nuisance” in 1220 where “the owner of an established ferry complai[ned] of the opening of a new one”); 9 Curia Regis Rolls of the Reign of Henry III, Mich., 4-5 Henry III, Roll 77, 266 (1220); 10 Curia Regis Rolls of the Reign of Henry III, Mich., 5-6 Henry III, Roll 78, 172. But it appears that the mill, oven, and other capital-project causes of action had fallen out of favor. The court stated that “if I have a mill and my neighbour sets up another mill, so that the profit from my mill is reduced, I shall have no action against him,” and, again, that “if my neighbour sets up a mill, and others who used to grind at my mill go to the other mill, so that my toll is reduced, I shall not for this reason have an action.” Baker & Milsom, supra note 61, at 671–72. Thus, the end of the economic rivalry causes of action may have preceded Hamlyn v. More, at least with respect to mills, by some years. Yet, the underlying action to force customers to use the ancient mill is included in Blackstone in 1768. Blackstone, supra note 64, at *234–35.

75. See supra note 72.

76. E.P. Thompson, The Moral Economy of the English Crowd in the Eighteenth Century, 50 Past & Present 76, 90 (1971); see also id. at 89 (“[The laissez-faire model of] political economy may, with convenience, be taken as that of Adam Smith, although The Wealth of Nations may be seen not only as a point of departure but also as a grand central terminus to which many important lines of discussion in the middle of the eighteenth century . . . all run.”).


78. Id.

79. Id. at 672.
The resulting distinction is that, as famously noted in *Keeble v. Hickeringill*, “[i]f one man keeps a school in such a place, another may do so likewise in the same place, though he draw away the scholars from the other school: 'tis true this is *damnunum*, but 'tis *absque injuria*; but he must not shoot guns at the scholars of the other school to fright them from coming there any more.”*80* And from Pollock and Maitland: “If I erect a mill upon my land and so subtract customers from your mill, I do you damage, but no injury.”*81* In other words, land use activities that reduce the economic return of neighboring land may be legally actionable as nuisances, but not if the activity is economic competition with the neighbor.*82*

**B. Wild Animal Nuisance: Boulston v. Hardy**

It is unclear whether Coase considered the common law exception for competitive nuisance, but he certainly considered another common law exception that undermines his economic analysis. In *The Problem of Social Cost*, Coase used *Boulston v. Hardy* as an example of the common law courts failing to recognize a cause of action when the courts should have according to his economic analysis.*83* The plaintiff brought suit against his neighbor for digging and maintaining rabbit holes (coney-boroughs) on the neighbor’s property to such an extent that the plaintiff’s land became overrun with rabbits (coneys). The plaintiff had good reason to believe the action would lie. The modified assize of nuisance was by that time well established, with only the competition exception of *Hamlyn v. More*. *84* The neighbor had

80. *Id.* at 683; *Keeble v. Hickeringhall*, (1707) 91 Eng. Rep. 659 (Q.B.) (this report uses a nontraditional spelling); Lord Chief Justice Holt’s analogy to *Hamlyn v. More* in *Keeble v. Hickeringill* is separately reported based on his notes as follows:

This is like the case of 11 H. 4, 47. One schoolmaster sets up a new school to the damage of an antient school, and thereby the scholars are allured from the old school to come to his new. (The action was held there not to lie.) But suppose Mr. Hickeringill should lie in the way with his guns, and fright the boys from going to school, and their parents would not let them go thither; sure that schoolmaster might have an action for the loss of his scholars.


82. This is a surprisingly little-mentioned result. *See infra* note 88.

83. Coase, supra note 1, at 35–39 (extensively discussing the case).

84. By this time, the action for private nuisance was procedurally more convenient than the modified assize of nuisance. *See RESTATEMENT (SECOND) OF TORTS* § 821D cmt. a (1979) (“Early in the fifteenth century, the assize of nuisance was replaced by an action on the case for nuisance that became the sole common law remedy.”).
engaged in an activity that brought harm to the plaintiff’s land, and that harm was not caused by economic rivalry so as to fall into the *Hamlyn* exception. But the court held that no cause of action for nuisance lay against the rabbit-hole-digging neighbor because the harm to the plaintiff flowed through the activities of wild animals.\(^85\)

85. Coase cited this report of the case:

Between Boulston and Hardy it was adjudged in the Common Pleas, that if a man makes coney-boroughs in his own land, which increase in so great number that they destroy his neighbours’ land next adjoining, his neighbours cannot have an action on the case against him who makes the said coney-boroughs; for so soon as the coneys come on his neighbour’s land he may kill them, for they are *ferae naturae*, and he who makes the coney-boroughs has no property in them, and he shall not be punished for the damage which the coneys do in which he has no property, and which the other may lawfully kill.

*Boulston v. Hardy*, (1596) 77 Eng. Rep. 216 (C.P.) 216–17 (footnotes omitted), cited in Coase, *supra* note 1, at 37. Coneys are rabbits and coney-boroughs are rabbit holes. A more extensive report of *Boulston*, not cited by Coase, offers greater detail:

Action upon the case. Whereas he was seised of certain lands in fee, and the defendant was seised of other lands adjoining, the defendant had made two coney-burrows in his lands adjoining, and had put conies in them, which increased to a great number, and went into the plaintiff’s land, and destroyed his corn, and made it barren, whereby he lost the profits of his land, and therefore brought the action . . . . [W]hether an action upon the case lay upon this matter? was the only question. —*Anderson*. The action lies not; for although one hath conies in his land, he hath not any property in them, because they be *ferae naturae*. And to have an action against one for damage done by savage and wild creatures, wherein he hath not any interest, and they cannot be known whether they come out of his land, is unreasonable: he who hath the damage thereby may well kill them, and they may be said to be his conies when they are upon his lands. And if other men have other warrens adjoining, against whom shall the action be brought? Truly, against none of them. —*Walmsley* accord. For the property of the conies is not in any, nor can any man so keep them, but that they will break out of themselves; which is reason that none can have them in his own land, unless by grant from the King, or by prescription: if otherwise, he is punishable in a *quo warranto*; for the Queen hath the royalty in such things whereof none can have any property. This cause is not like to the cases put, on the other side, of erecting a lime-kiln, dye-house, or the like; for there the annoyance is by the act of the parties who make them; but it is not so here, for the conies of themselves went into the plaintiff’s land, and he might take them when they came upon his land, and make profit of them. None may erect a dove-house but he who is lord of a manor; and if any other private man erects it, it is punishable in the leet as a common nuisance; but no action upon the case lies by any private man against him.
The decision in *Boulston* meant that land uses causing wild animals to harm neighboring land were, like competition, to be considered *damnnum absque injuria* under the common law.

C. Coase’s Analysis Does Not Explain These Decisions

Coase explicitly disagrees with the holding of *Boulston v. Hardy*, and his economic analysis justifies a result contrary to the holding of *Hamlyn v. More*.

1. Disagreeing with *Hamlyn v. More*

Coase’s analysis is not in accord with the holding in *Hamlyn v. More*—that land users are never liable for harms to neighboring land when those harms are caused by competition. The harm caused to the old school operator by the new school operator is an uncompensated cost imposed on the old school operator. The large number of potential school operators would be too great for the old school operator to enter into noncompete agreements with all potential rivals, and this transaction cost eliminates the presumption that the market will achieve the economically efficient result. Therefore, Coase would have a cause of action lie and would have the judges who erects it.—Quod Anderson et Beaumond conesserunt. And they said, they had seen it to be enquired of before the Lord Dyer at the Assises as a nusance. And this case is not like to other cases which were put of nusances; for there the tort is by the party himself who doth it; but here the putting the conies into his own land is not any tort, and if there be any wrong it is by the conies themselves, who are *ferae naturae*; wherefore it is not reasonable to punish any other.

*Boulston v. Hardy*, 78 Eng. Rep. 794 (1596) (reported with a different spelling of Boulston).

86. This assumes that such agreements would be enforceable, a question that would pose the same public policy issues as the question of whether competition should be fettered to encourage investment. The common-law courts refused to enforce such an agreement in 1414 in *Dyer’s Case*, Y.B. 3 Hen. IV, fol. 5, Mich., pl. 26 (C.P.) (1414). See generally Harlan M. Blake, *Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625, 635–37 (1960) (discussing the vague facts underlying *Dyer’s Case* and the decision). Under Coase’s analysis, such noncompete agreements should always be enforced by the courts because they reduce transaction costs. More recent cases show an increased willingness to enforce the agreements, but only to the extent that they are reasonable. See *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, [1894] A.C. 535 [Eng.]. Still, by frequently refusing to uphold restrictive covenants, courts reach results contrary to Coase’s economic analyses, just as in *Hamlyn v. More* and *Boulston v. Hardy*. Unlike *Hamlyn v. More*, the more recent decisions limiting enforcement are based on the notion that competition is almost always beneficial to the public, but courts recognize that in some instances other effects and purposes are sufficient to justify enforcing an agreement.
apply the ordinary law of nuisance, just as he would have in *Boulston v. Hardy*, so that the courts could decide whether a given competitive activity was inconsistent with the public interest. 87 Applying the ordinary law of nuisance as Coase suggested, courts would use an economic balancing test. They would hold in many cases that competition is not a nuisance because the competitive harms imposed by the activity are an efficient result, but in some cases courts would find that the imposition of the competitive harms is inefficient. 88

While *Hamlyn v. More* is evidently the broadest limitation on the nuisance doctrine, it has received little discussion—even less than the narrower exception for wild animal nuisances in *Boulston v. Hardy*. 89 Oliver Wendell Holmes Jr. briefly noted the exception and the privilege it creates: “a man has a right to set up a shop in a small village which can support but one of the kind, although he expects and intends to ruin a deserving widow who is established there already.” 90 Holmes related that the exception “rests on the economic postulate that free competition is worth more to society than it costs.” 91 But the law recognizes numerous exceptions to this oft-

87. Coase’s disagreement with *Boulston v. Hardy* is explicit, and it follows from this disagreement that his analysis also conflicts with *Hamlyn v. More*. See infra Part III.C.2 (discussing Coase’s stated disagreement with *Boulston v. Hardy*).

88. One potential set of cases where this could apply is in failed attempts at restrictive covenants in anchor arrangements. There is ongoing litigation in Florida over Dollar General stores that sell groceries in retail centers established around grocery store anchor tenants. Winn-Dixie Stores, Inc. v. Dolgencorp, Inc., 964 So. 2d 261 (Fla. Dist. Ct. App. 2007). The court held that Dolgencorp had constructive notice of the noncompetition servitudes created by the anchor tenant lease, but the company is arguing on appeal that the notice was insufficient and does not bind the stores. As an alternative to the legal fiction of constructive notice, a court could hold that unreasonable competition with an anchor tenant is a nuisance.


90. Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 *HARV. L. REV.* 1, 3 (1894).

91. *Id.*
advanced laissez-faire position that competition is a public good. And whatever the proper result, the failure of Coase’s economic analysis to explain this significant exception is troubling.

2. Disagreeing with *Boulston v. Hardy*

Coase disagreed with the holding in *Boulston v. Hardy*—that land users are never liable for harms to neighboring land when those harms flow through wild animals. Indeed, Coase spent four pages in *The Problem of Social Cost* challenging Pigou’s analysis of the rabbit nuisance problem. Pigou stated that a negative externality is “rendered to third parties when the game-preserving activities of one occupier involve the overrunning of a neighbouring occupier’s land by rabbits.” Accordingly, Pigou would have the game preserver always face liability. In *The Problem of Social Cost*, Coase argued that the absolute immunity from liability conferred in *Boulston v. Hardy* “is as undesirable, from an economic point of view” as Pigou’s preferred result of “fixing the rule at the other pole and making the harbourer of rabbits always liable.” Coase noted that “the ordinary law of nuisance would seem likely to give economically more satisfactory results than adopting a rigid rule.” Thus, Coase would have courts recognize a cause of action for wild animal nuisances, contrary to *Boulston v. Hardy*. Coase would have liability determined through an economic balancing that weighs social costs and benefits to determine the efficient result.

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92. See, e.g., U.S. Const. art. I, § 8, cl. 8 (granting Congress the power “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”). While there has long been hostility toward enforcing anticompetitive restrictive covenants, especially in the context of employment contracts, some form of anticompetitive agreement is enforceable in every state. See supra note 86 (reviewing restrictive covenant law). Noncompete agreements in anchor tenant arrangements play a crucial role in development deals. See supra note 88.


94. Id. at 35 (quoting Pigou, supra note 46, at 185).

95. Id. at 35–38.

96. Id. at 38.

97. To Coase’s credit, others have criticized the result in *Boulston v. Hardy* as well, on the grounds that it makes nuisance less rational. See id. at 36 n.49 (citing Glanville L. Williams, Liability for Animals (1939)). For a description of Coase’s conception of the role of the court in balancing of costs and benefits in nuisance cases, see Smith, supra note 6, at 967.
IV. THE ANALYSIS’S DISAGREEMENT WITH IMPORTANT COMMON LAW NUISANCE EXCEPTIONS DEMONSTRATES ITS UNSOUNDNESS AND SUGGESTS ITS INCOMPLETENESS

Social resources are scarce and, as a result, sufficient sympathy with the plight of potential plaintiffs and the perception of the capacity of legal solutions to make a difference are crucial aspects of the common law decisions. The flaw in Coase’s analysis lies in his failure to account for these two factors. In failing to account for sympathy by distinguishing between tragic and comic misfortune, Coase unsoundly advocates a result contrary to Hamlyn v. More. In failing to adequately account for capacity by distinguishing between parlor pigs and rascally rabbits, Coase unsoundly advocates intervention contrary to Boulston v. Hardy.

A. Coase’s Analysis Unsoundly Ignores Sympathy

1. Evocation of Sympathy: Tragedy v. Comedy

Unhappiness and disappointment are a familiar part of life, albeit part of some lives more than others. Everyone can relate to the unhappy or the disappointed. Yet this is not enough for recognition of a cause of action to provide redress. The law—common law courts included—must recognize a specific plight affecting a potential class or group of people before it will be moved to action. Such action requires more than a mere understanding of the plight. Recognition requires sympathy. Sympathy, from its Greek roots syn (together) and pathos (passion), describes the phenomenon of concern for others reaching a level that may impel social action. But sympathy for the plight of a class of potential plaintiffs is not merely a function of the sum of the unhappiness and disappointment of its members. Often, the sufficiency of sympathy depends upon whether the circumstances of the plight are tragic or comic.

The broad circumstances of the unhappiness or disappointment matter more than their magnitude in determining the social response. The common law courts reached results on whether a cause of action would lie according to broad descriptions of circumstances, as in Hamlyn v. More. The schoolmaster’s fortunes may or may not have been shattered, and the effect of competition on another schoolmaster’s fortune in a similar case may have been the opposite. But the individual plaintiff’s life did not determine the result—it was not even considered. As such, though courts will often recognize a cause of action in nuisance cases where the nuisance has relatively little negative impact on the life of the litigant, they always refuse to recognize a cause of action in competitive nuisance cases, notwithstanding the fact that the plaintiffs in some such cases suffer significant harm. Even under the metric of Coase, the rule that competition is never a nuisance will occasionally prevent the resolution of an economic inefficiency greater than inefficiency.
unrelated to competition that may be resolved by the courts under nuisance law generally. In other words, while some noncompetitive nuisances pose smaller net social costs than some competitive nuisances, a cause of action for the competitive nuisance will not lie, even though a cause of action for the noncompetitive nuisance will. Though the common law courts recognized this, Coase failed to provide an adequate explanation for such results, focusing instead solely on net social costs. Unlike Coase, the common law courts addressed broad circumstances in deciding whether an action would lie independent of the particular facts of a case and the particular fortunes of the plaintiffs.

Differences in the broad circumstances of a case, independent of the specific details of the plaintiff and defendant, determine whether a cause of action will lie because social concern for an individual plight requires sympathy. The individual plight must evoke feelings of concern that are more than personal; they must reach a social level in order to animate a social response. The individual plight must be neither too ordinary nor too special. The individual plight must flow from something common to the human experience, yet its occurrence must be rare enough to evoke special feelings in members of the community.

One form of plight that consistently evokes sympathy is tragic misfortune caused by a failing of human nature. In particular, the failure of humans to foresee consequences of their actions is frequently depicted on stage and in literature. In a typical nuisance case, there is the essential element of tragedy—a mistake grounded in the frailties of human nature. The landowner, for example, fails to take precautions such as buying up surrounding land or purchasing land in a different place in order to prevent facing a future interference with the landowner’s use and enjoyment of the land. As most uses of adjacent land would not interfere, the risk of future interference is unlikely and unforeseeable. But the landowner may misjudge the prospects of future interference or fail to take precautions because the risk is low. If interference later arises, we nonetheless sympathize with the landowner’s plight caused by such unlikely and unforeseeable circumstances that the landowner reasonably failed to prevent.

On the other hand, a form of plight that does not evoke sympathy, and instead evokes derision and ridicule, is comic misfortune caused by foolishness. In Der Zauberlehrling, Goethe tells the story of a sorcerer’s apprentice who causes a great mess by animating a broom to do his chores even though he is too unskilled to reverse the animation.98 Readers of the poem, and viewers of the Walt

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Disney version,\textsuperscript{99} may understand and appreciate the young man’s plight, but do not sympathize with him because he famously brings the trouble on himself.\textsuperscript{100} Instead, he is laughed at, and the story is that of comic misfortune.

Thus, if the circumstances of the plight of a potential class are tragic, a cause of action may be recognized. But if the circumstances of the plight are comic, the common law courts will likely refuse to recognize a cause of action. This is, of course, only one aspect of the common law decision-making process, but it is crucial to explaining cases like \textit{Hamlyn v. More} that remain unexplained by the economic analysis offered by Coase.

2. Insufficient Sympathy Explains \textit{Hamlyn v. More}

The most striking aspect of the decision in \textit{Hamlyn v. More}—that the court reversed long-standing precedent to craft a seemingly arbitrary exception to the nuisance cause of action—is understandable in light of the events that created differences between sympathy for those facing economic competition and those facing other forms of nuisance. Facing economic competition was not a tragic misfortune in 1410 because competition had become foreseeable and inevitable following the rise of the free laboring class.\textsuperscript{101} In fact, that economic

\textsuperscript{99} Fantasia (Walt Disney Prods. 1940).

\textsuperscript{100} The lines from the poem in which the apprentice pleads with his master for help yields a German cliché—\textit{Die Geister, die ich rief}, for foolishly bringing misfortune on one’s self:

\begin{quote}
Ach, da kommt der Meister! \quad Ah, here comes the master!
Herr, die Not ist groß! \quad I have need of Thee!
Die ich rief, die Geister, \quad From the spirits that I called
Werd’ ich nun nicht los. \quad Sir, deliver me.
\end{quote}

Goethe, \textit{supra} note 98, at 94.

\textsuperscript{101} For a recounting of the rise of the free laboring class, see THEODORE F. T. PLUCKNETT, \textit{A Concise History of the Common Law} 32–33 (5th ed. 1956). Plucknett argues that the rise of economic actors unattached to a particular manor was in part a result of the population changes caused by the Black Death:

\begin{quote}
[T]he arrival of the Black Death (1348–1349) from the East wrought a revolution in social and economic conditions. The terrible mortality from this plague completely disorganised the manorial system, which had hitherto depended upon a plentiful supply of labour born and bred within the manor. The plague accelerated and intensified forces which were already at work, and the result was a very serious depletion of the labour supply. The population of the manor was no longer sufficient to work the lord’s estates. Consequently lords began to compete among themselves for such free labour as was available. This tempted
competition was formerly less foreseeable and likely before the rise of the free laboring class explains why the common law once recognized actions for competitive nuisances. When competition with a capital project was more random and less foreseeable, it was more similar to other cases of nuisance. But the predilections of the lord of the nearest manor no longer determined whether a capital operator faced competition once freeholds and wealth independent of the manor accumulated in England. Having lost the randomness and attendant unpredictability, the circumstances of the capital operator facing sudden competition lost the element of tragedy crucial to a social response in the form of continued recognition of a cause of action.

Any prospective builder of a capital project who foolishly relied on the lack of competition would be a comic figure. When the schoolmaster in *Hamlyn v. More* is represented as having delivered schooling since time immemorial, the schoolmaster is represented as having relied on the lack of competition in making decisions regarding his practice. In two key parts of the report of the case, the court even belittled this reliance, as if to point out how ridiculous it is for anyone in 1410 to expect not to face competition.

As competition transformed from a tragic to a comic misfortune, the resulting loss of social concern explains the end of common law recognition of a cause of action for competitive harms and the decision to distinguish between competitive harms and other forms of nuisance. Yet social concern plays no role in Coase’s analysis. As a result, his economic analysis would support continued recognition of a cause of action for competitive nuisance, even though there is no generally felt concern for the plight of competitive-nuisance plaintiffs because their misfortune in facing competition is neither unlikely nor unforeseeable.

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*servile inhabitants of manors to leave their holdings and become hired labourers.*

*Id.* at 32. Plucknett relates that this condition gave rise to yet another example of a common law limitation on competition:

> So keen was the competition that a series of ordinances and statutes beginning in 1349 regulated for the first time the relationships between master and servant, and provided machinery for the establishment of scales of wages above which any payment would be unlawful.

*Id.*

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103. The court noted at the beginning of its opinion that, “*If I have a mill and my neighbour sets up another mill, so that the profit from my mill is reduced, I shall have no action against him; and yet he is damaging me.*” *Id.* at 671 (emphasis added). The court repeated this principle again towards the end of the opinion. *Id.* at 672.
3. Insufficient Sympathy Explains Other Legal Decisions

The importance of sympathy extends beyond competitive nuisance—other legal protections are withheld in less tragic cases while protection is afforded in more tragic cases.

The provisions of Article 2 of the Uniform Commercial Code, and in particular implied warranties of fitness, are interpreted as applying to the sale of goods, but not to mixed goods-services transactions.104 One court noted that this creates a distinction that prevents plaintiffs from invoking Code protections for redress of “no less real but somehow less impelling economic loss[es].” 105 The court justified this result by observing that the purpose of the protection is to deal with the impelling circumstance of “mass public reliance on [sellers’] products’ fitness and safety.” 106 Therefore, “the code’s warranties attaching to sales of goods are underpinned by an assumption of some form of reasonable reliance by the unleveraged buyer.” 107

Coase would argue that the decision depends upon transaction costs resulting from the “unleveraged” position that prohibits buyers from negotiating with the mass producers of products. But the exception applies to the mass provision of mixed goods and services and to health care transactions in which clients and patients have just as little leverage as when they purchase wares from a store. For example, New York courts have held that Article 2 does not apply to transfusions of “‘bad’ blood, supplied by the hospital for a price as part of the customary services rendered by the hospital to its patients” because such transfusions are “part of, and incidental to, [the patient’s] medical treatment.” 108 It is undeniable that patients have at least as little ability to negotiate with hospitals regarding

104. See Milau Assocs., Inc. v. N. Ave. Dev. Corp., 368 N.E.2d 1247 (N.Y. 1977) (holding that a sprinkler system installation is not covered under Article 2). The Code limits the application of Article 2 to “transactions in goods” without specifying whether mixed goods-services transactions are covered. U.C.C. § 2-102 (1977). Goods are defined as

all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. “Goods” also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).

U.C.C. § 2-105(1).

105. Milau, 368 N.E.2d. at 1251.

106. Id.

107. Id. at 1252.

blood supply quality as customers have to negotiate with the manufacturer of retail goods regarding product safety, if not far less.\textsuperscript{109}

The difference between these cases and pure goods transactions is simply that the plight of the plaintiffs in the mixed goods-services cases is, as the court observed, less “impelling” than the plight of the plaintiff in a pure goods case.\textsuperscript{110} We usually purchase and consume conforming goods, just as land owners usually enjoy their land free from nuisance. Thus, like the plight of the land owner who suddenly faces interference with that enjoyment, the plight of the consumer who consumes a defective product is tragic.

On the other hand, it is a common and frequent aspect of service transactions that the consumer is left dissatisfied. The result is that we are far less sympathetic to the plight of consumers of defective services. As an illustration, consider how frequently rat-in-the-yogurt-cup stories make the news compared to how frequently botched car repair jobs make the news. We can relate to the frustrated car owners, but as common sufferers, and perhaps ironically, the public is less interested in providing redress when the results are more frequent. Accordingly, the sympathy that generated sufficient social concern for the recognition of the implied warranties in goods cases is lacking in mixed goods-services cases, and courts have refused to extend greater protection.

Even the more liberal gravamen test reflects the importance of tragedy.\textsuperscript{111} The gravamen test treats goods sold as part of hybrid transactions as covered by Article 2 when the essence of the action is for the defectiveness of the good.\textsuperscript{112} By carving out those cases in which the plight is the direct result of the non-conformity of the good and this alone forms the basis of the plaintiff’s claim, courts provide legal remedies in the more tragic cases while continuing to deny legal remedies in less tragic cases.

Insufficient sympathy also explains the special treatment afforded to the provision of medical goods and software. In the case of software, the experience of bugs in those goods is as frequent as the experience of non-conforming service. Thus, there is little social sympathy for the plight of the frustrated software user. In medical cases, no doctor or patient could reasonably believe that any form of medical treatment is without risks far higher in probability (as opposed to magnitude) than the probability of non-conforming goods.

\textsuperscript{109} Many patients need blood transfusions because they have suffered a trauma requiring immediate surgical intervention. In such a state, patients do not usually even select the hospital that will provide care.

\textsuperscript{110} \textit{Milau}, 368 N.E.2d at 1251.

\textsuperscript{111} Anthony Pools v. Sheehan, 455 A.2d 434, 440 (Md. 1983).

\textsuperscript{112} \textit{Id.}
The cases determining whether farmers are merchants under Article 2 also may be more understandable on the basis of the nature of farm products. If farmers are merchants, the Code provides that their goods are impliedly merchantable.113 Courts have reached opposite conclusions on the issue of whether farmers’ annual crop sales are sufficiently regular to qualify farmers as merchants. Sometimes farmers are deemed merchants, and sometimes not.114 Perhaps this difficulty stems from the failure to treat farmers of apples differently from farmers of corn. We are all wary of the rotten apple and the apple with the worm. Can the same be said for corn? Accordingly, in the case of apples, there may be less social sympathy for those visited by worms. But in the case of corn, there would be much sympathy for the plight of the consumer of a worm on the cob. Thus, the confusion may stem from treating dissimilar cases alike, creating a tension between the tragic and nontragic nonconformity of farm products.

An opponent of expanding a cause of action aimed at redressing the plight of individuals, whether it be in tort or through the Code, can argue that the relatively higher frequency of the untoward result or the relatively greater foreseeability of the untoward result make its occurrence less tragic, thereby social concern is not as strong. More powerfully, an advocate in favor of extending a cause of action, whether in tort or through the Code, can argue for only limited advancement when going farther would be impossible by distinguishing between the relative tragedy in the case at hand and other seemingly similar cases. In resolving whether farm products are sold with an implied warranty of merchantability, an advocate against implying the warranty can argue that nonconformity in farm products is so much more likely than in other cases as to remove its occurrence from the realm of the tragic.115 An advocate of implying the warranty in a particular case can argue that the court need only recognize the

113. U.C.C. § 2-314(1) (1977) (providing that unless an exclusion applies, “a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind”). The code defines a merchant as “a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.” U.C.C. § 2-104(1).

114. See Douglas J. Whaley, Problems and Materials on the Sale and Lease of Goods 29 (5th ed. 2008) (reviewing cases in various states involving various crops in which courts reach disparate results on the issue of whether farmers are merchants).

115. This argument would also apply to software.
B. Coase’s Analysis Unsoundly Misconstrues Capacity

A nuisance is, as observed by Justice Sutherland, “like a pig in the parlor instead of the barnyard.” This clever turn of phrase reveals both the importance of capacity in the common law and how capacity is measured. Coase’s disagreement with Boulston v. Hardy stems from his economic analysis’s failure to appreciate capacity as an apparent and relative measure.

1. Estimation of Capacity: Parlor Pigs v. Rascally Rabbits

Coase argued that the capacity of government to achieve its objectives is crucial in determining whether government will or should act. He criticized Pigou for not considering the effectiveness of government when Pigou suggested intervention in all cases of a divergence between private and social costs. Coase suggested that the capacity of government to address a problem must accordingly be measured through an economic analysis that weighs the costs against the benefits of acting. He declared that no government should act if the benefits of acting, as measured by increases in net economic efficiency, do not outweigh the costs, as measured by losses in net efficiency. The weighing of costs against benefits is “above all” the “change in approach” that Coase advocated in The Problem of Social Cost.

Coase was correct in highlighting the importance of capacity, but he misconstrued its measure. It is true that, if it appears a government intervention either does not or will not sufficiently achieve the socially desired objective, the intervention will be abandoned or not undertaken at all. Accordingly, the capacity of a decision to achieve the socially desired objective must be estimated by the decision maker. But, in making this estimate, it is the appearance of capacity that matters. The common law courts were not omniscient. In some cases, the decisions brought about a new state of affairs, and the results could not have been predicted with certainty.

116. This argument might apply to software, if some software is less likely to have bugs than other software.
117. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926). This appears to be an instance of the Supreme Court coining a phrase.
118. As treated by Coase, and for the purposes of this Note, Pigou never considered the capacity of government to eliminate an identified externality.
119. Coase, supra note 1, at 44. (“In devising and choosing between social arrangements we should have regard for the total effect.”).
120. Id.
Even if a prior decision is attacked, it is not always certain what results a given decision caused and what results it did not. Therefore, courts have estimated and continue to estimate capacity based on the appearance of past or potential effects.

Further, Coase treated every decision as binary—to implement or not to implement a proposed policy change—instead of appreciating the multiplicity of options. While he pointed out that government has at least three tools at its disposal—civil liability, taxation, and zoning—he offered no explanation of how to make a decision between civil liability and taxation if the benefits of both would exceed the cost.\textsuperscript{121} It is unreasonable to assume that in all cases there is only a single option producing benefits that outweigh its costs. Thus, the question is not only whether government should act, but how. Nearly every governmental decision is accordingly a choice among many possible actions, and advocating an approach in which governments engage only in profitable actions merely eliminates some possibilities while not distinguishing among the rest. If governmental resources are scarce, all profitable actions may not be possible, and the question becomes relative: What actions are relatively superior?

Thus, recognition of a cause of action is not a simple question of whether the social benefits of recognition outweigh the costs—the question is whether recognition appears to be in the public interest relatively more than nonrecognition or other mechanisms of addressing the problem. As Boulston v. Hardy demonstrates, this is often a question of distinguishing between cases in which the judiciary

\textsuperscript{121} Id. at 1–2 (recognizing that government has three options for dealing with the smoky factory situation—imposing liability for damage caused by the smoke, placing a tax on smoke production, or excluding the factory from residential areas). Recognizing the many possible methods of government action is a consistent blind spot for Coase. One of his later articles, The Lighthouse and Economics, can be read as a blistering parody of antigovernment theory because Coase failed to recognize governmental action when he describes it in detail. Ronald H. Coase, The Lighthouse and Economics, 17 J. L. & Econ. 357 (1974). In the article, Coase made a great show of decrying the use of the lighthouse example to illustrate the need for government by outlining the history of the United Kingdom’s lighthouses as a counterexample. Some lighthouses were built and maintained by private parties. Id. at 363. Yet, in the article itself Coase related that these private parties were given permission by the government to unilaterally tax ships entering the nearby ports. Id. at 364. This would only contradict the use of the lighthouse as a demonstration of the need for government if the government were not acting when it acts through private parties by delegating the taxing and spending authority. While The Lighthouse and Economics does not prove its thesis or disprove the lighthouse example, it demonstrates that Coase is capable of writing for pages about government action while not recognizing that it is in fact government action.
perceived it had the capacity to provide redress and those in which it did not—that is, between parlor pigs and rascally rabbits.

2. Perceived Incapacity Explains *Boulston v. Hardy*

Ordinary nuisance appears easily remedied because the interference is localized and is the result of deliberate activity. The common law courts that recognized the modified assize of nuisance had at their disposal an easily administered and effective remedy in the form of the injunction. A common law court facing a plaintiff who complained of a defendant’s activity would perceive that it could provide redress by ordering the defendant to cease the activity, thereby taking the metaphorical pig out of the parlor. The reports of cases did not include summaries of what followed the decisions, so judges reviewing precedents would have no information regarding the permanency of the redress—that is, whether the pig stayed out of the parlor. But the common law courts had no reason to believe that the plaintiff would soon face interference from a different source because the interferences with quiet enjoyment were infrequent. A court considering a report would read, essentially, that there was once a pig in a parlor, then a court took the pig out of the parlor, and the plaintiff lived happily ever after. So long as the potential remedies in nuisance cases appeared easy and effective, courts were willing to recognize the cause of action.

But eliminating wild animal interferences would not appear as easy to the common law courts as getting the pig out of the parlor—it would appear more like attempting to kill a rascally rabbit. Recognition of a cause of action was therefore perceived as incapable of achieving social objectives, or at least as relatively less capable than in other nuisance cases. Courts, legislators, and citizens prefer to see their government as a fireman rescuing a cat stuck in a tree rather than as Elmer Fudd futilely hunting Bugs Bunny.

Whether the common law courts could have in fact eliminated the rascally rabbit because the problem was not as intractable as it appeared, the social perception of incapacity affected the common law decisions as much as, if not more than, actual incapacity. The court in *Boulston v. Hardy* decided not to recognize the cause of action because it perceived that a legal remedy could not achieve social objectives. Put another way, providing remedies for those harmed by wild-animal nuisances appeared to be a relatively inferior use of social resources. And by avoiding what appeared to be rascally rabbits and what would appear to be an inferior use of resources, whether or not

122. Justice Sotomayor, on a recent episode of Sesame Street, handed down a decision in a dispute over a broken chair, Goldilocks v. Baby Bear, in a way that reflects the judicial perception of capacity: "I say you help Baby fix his chair, and then the two of you can live happily ever after." *Sesame Street: Rhyming Block* (PBS television broadcast Jan. 25, 2012).
those problems were actually tractable, the courts maintained their credibility with the public.

By focusing only on the actual and isolated capacity of a single “proposed policy change,” instead of the apparent and relative capacity of the many possible governmental responses to social concerns, Coase’s economic analysis unsoundly disagrees with Boulston v. Hardy by advocating the hunting of rascally rabbits.

3. Perceived Incapacity Explains Other Legal Decisions

The consequences of perceived incapacity extend beyond Boulston v. Hardy and explain the disparate legal treatment of surface and subsurface resources. A cause of action for nuisance has lain for the diversion of a surface “water-course” since the inception of the nuisance action. As the court noted in Hamlyn v. More, if a “neighbor sets up a mill” and thereby “prevents the water from running to [a neighboring] mill. . . . [the neighboring miller] shall have such action [against him] as the law gives.” Yet, when nineteenth- and twentieth-century courts confronted diversions of subsurface fluids, they created an exception—just as in the case of Boulston v. Hardy and for the same reasons. Adjacent land owners have the same transaction cost problem as do the holder of an easement or profit and a concurrent user of the land discussed in Part II.C, and so recognition of a cause of action is justified by Coase’s economic analysis. But as the Supreme Court of Indiana summarized the rule in People’s Gas Co. v. Tyner, “if an adjoining land owner, in lawfully digging upon his own land, draws the water from the land of another, to his injury, such injury falls within the description of damnum absque injuria, which cannot become the ground of an action.” Thus the so-called rule of capture is properly understood as one of several absolute exceptions to the nuisance action.

The rule of capture applies not only to water but also to subsurface oil and natural gas reservoirs. The exception for

123 Coase, supra note 1, at 43.
126. People’s Gas Co. v. Tyner, 31 N.E. 59, 60 (Ind. 1892).
128. See, e.g., People’s Gas Co., 31 N.E. 59 (natural gas); Kelly v. Ohio Oil Co., 49 N.E. 399, 401 (1897) (oil). In Kelly, the Ohio Supreme Court gave apt expression to the judicial feeling of incapacity:

To drill an oil well near the line of one’s land cannot interfere with the legal rights of the owner of the adjoining lands, so long as all operations are confined to the lands upon which the well is drilled. Whatever gets into the well belongs to the owner of the
nui... deficiency. The exemption is traceable to Acton v. Blundell, a case in which the court extensively discussed the issue of extending nuisance to interferences caused by activities that disturbed subsurface streams as opposed to surface streams.\(^{129}\) The court noted “that there is a marked and substantial difference between the two cases, and that they are not to be governed by the same rule of law.”\(^{130}\) The rule tending to preserve surface streams in their natural condition is supported by “the implied assent and agreement of the proprietors of the different lands from all ages,” whereas those purchasing land may be entirely unaware of subsurface streams and the restrictions such streams would impose upon mining or other activities if they could not be diverted.\(^{131}\) And the court listed the far more complicated circumstances and consequences of subterranean stream diversion: subterranean pools may be tapped and exhausted by drilling wells, it may be “entirely unsuspected” that a pool will be tapped causing otherwise harmless adjacent activities to become harmful and frustrating significant reliance and investment, and “there is no limit of space within which the claim of right to an underground spring can be confined.”\(^{132}\)

As all of these reasons cited by the court are implicated in any nuisance action, it is clear the court was apprehensive about dealing with these issues in the context of subterranean streams. The distinction, then, between the case of surface and subsurface disturbances is really the court’s feeling of judicial incapacity to

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\(^{129}\) Acton v. Blundell, (1843) 152 Eng. Rep. 1223 (Exch.); 12 M. & W. 324 (Eng.). In the course of the case, Judge Addison framed the question to be decided by referencing Bracton and the holding of Hamlyn v. More. \(^{130}\) Id. at 1230; 12 M. & W. at 341 (Addison J.) (“There are many cases in which a man may lawfully use his own property so as to cause damage to his neighbour, so as it be not injuriosum. . . . He may build a mill near the mill of his neighbour to the grievous damage of the latter by loss of custom . . . .” (citing BRACTON, supra note 38, f. 221)).

\(^{131}\) Id. at 1233; 12 M. & W. at 349 (Tindal C.J.).

\(^{132}\) Id.; 12 M. & W. at 350.
provide redress. Faced with the prospect of a resource it could not see and activities with widespread effects, the court elected to eliminate the cause of action. The court in Acton v. Blundell and the courts that followed its holding did not necessarily reject the utility of the action, nor the fact that some plaintiffs might deserve relief. In essence, the court believed the problem of diversions of subterranean watercourses was a rascally rabbit, not a parlor pig.

The subsequent statutory regulation of the drilling and pumping of oil and gas in the early twentieth century bore out the nineteenth-century common law apprehension about judicial resolution of subterranean pool disputes. The early experience of states in the effects of the common law rule of capture on oil production led those involved to demand regulatory proration of drilling and pumping. By over-drilling fields in order to get as much oil from each find as fast as possible before depletion, oil producers depleted both reservoir energy and market prices for the oil, to their chagrin.133 The efforts of the producers to organize themselves failed.134 With neither a common law nor private solution, the producers turned to state legislators, governors, and even the President of the United States.135 When legislators and government executives heeded the call to regulate a field the judiciary had long ago abandoned, the response can only be described as open rebellion. Producers shirked proration orders, pumping oil at night to avoid detection. Efforts to quell black-market production and distribution of this illegally pumped “hot oil” had limited effect.136 Martial law was declared. Troops were called into the oil fields. It may be debatable whether courts deciding common law cases might have fared better had they tried to intervene. But certainly they perceived that the very nature of disruption of subterranean fluid resources put these disputes beyond the capacity of the common law courts.137

133. GERALD D. NASH, UNITED STATES OIL POLICY 1890–1964, at 120 (1968); BRYAN BURROUGH, THE BIG RICH 76 (2009). Depletion of reservoir energy through overdrilling can waste the entire pool by preventing extraction, since oil drillers rely on subterranean pressure to “pump” the substance to the surface.

134. See NASH, supra note 133, at 122 (“At first, in 1926, they agreed on a voluntary prorationing program to balance production with available demand. As in the case of so many of these voluntary agreements, however, in 1927 a minority of violators disrupted the entire industry.”).

135. BURROUGH, supra note 133 at 76–78.

136. Id. at 78.

137. Following the height of the proration crisis and advancements in understanding oil and gas pools, courts subsequently reinstated a form of the nuisance action for “waste” of a common pool resource. Elliff v. Texon Drilling Co., 210 S.W.2d 558 (Tex. 1948).
C. Coase’s Analysis May Also Be Incomplete

That Coase’s economic analysis disagrees with important common law decisions suggests it may not only be unsound, but it may also be incomplete. Coase’s analysis is unsound because the existence of both externalities and prohibitive transaction costs are not sufficient conditions for common law recognition of a cause of action, as evidenced by the exceptions announced in Hamlyn v. More and Boulston v. Hardy. As this is caused by Coase’s analytical failure to account for sympathy and capacity, it appears that his analysis is also incomplete—that is, it yields false negatives. Externalities and transaction costs are not necessary conditions of government action because sufficient sympathy or the perception of capacity are sufficient for government action in some cases.

1. Sufficient Sympathy May Explain Other Legal Decisions

Coase does not recognize any connection between the degree of social concern and the social willingness to bear inefficiency in an attempt to meet that concern. That there are some instances in which the common law decided not to recognize a cause of action because of insufficient sympathy suggests that governments might also act on the basis of sufficient sympathy alone. And sympathy is just one source of public concern. Contrary to Coase’s economic analysis, governments may act without benefiting the public or increasing efficiency, so long as there is sufficient social concern that something is done. Understanding the actions of representative government requires at least some degree of acceptance of *vox populi, vox dei*. So long as the social concern is legitimate, such as sympathy for the plight of potential plaintiffs, these fruitless social responses cannot be questioned on economic grounds.

Just as in medicine, there is a distinction between a government action’s effectiveness in addressing a problem and a government action’s effectiveness in salving the spirit of the public. The art of medicine is far older than its utility—there has always been healing, but there has not always been curing. Indeed, “[t]he first cry of pain through the primitive jungle was the first call for a physician.” Medicine was “conceived in sympathy” as a response to those crying out in distress. Those who responded could do nothing to cure the medical problem, but they performed the important task of making

138. The voice of the people, the voice of god.
141. *Id.*
the sick feel better. They offered healing. In the nineteenth century, modern medicine gave the healers the power to actually prevent and cure disease. Equipped with this power, doctors offered healing and curing. Even today, large sums of money are spent on remedies that have no effect. These remedies offer healing without curing. It cannot be said that the expenditure of personal resources on such fruitless endeavors is wrong in and of itself.

In the same way, if a society has a sufficiently large social concern, it may and often does elect a social response that is totally incapable of meeting that concern. Consider training civilians to “duck and cover” in case of a nuclear attack. Given a significant enough concern, it is as foolish and unhelpful to say that government should do nothing at all if it will not meet that concern as it would be to tell a terminally ill patient to stop taking herbal remedies because they will not save the patient’s life. If the majority of individuals in a society desire to aid the poor or the unemployed out of sympathy with their plight, their government is well within its rights to expend resources, even futilely. Incapacity itself is no argument in the face of a large and deeply felt concern. There are only two appropriate responses to these fruitless actions—an assessment that the means or ends are illegitimate or that there are superior uses of public resources in meeting public concerns. To respond that they are inefficient when analyzed economically is inappropriate.

142. See Cassell, supra note 139, at 52 (emphasizing the difference between curing and healing).

143. Jakob Henle described the state of medicine at the time he led the charge for the institutional development of modern medicine:

The physician must diagnose the nature of the disease, and after that, define in particular, those external influences which may become remedies. It has been a subject of long controversy to determine what law should guide him in this labor. . . . But incontestable and undisputed remedial prescriptions belong to the rarities. With a material of experience collected during two thousand years, we still see the leaders . . . of the art despairing of all influence of medicines, and others in homogenous cases taking diametrically opposite ways. After two thousand years of instruction, the Medical Profession has not yet acquired so strong a hold that every self-conceited charlatan cannot, for a time at least, figure as a reformer.


144. “I’m sorry if you’re into homeopathy. It’s water.” DARA O’BRIAIN TALKS FUNNY: LIVE IN LONDON (Universal Pictures UK 2008).
2. Perceived Capacity May Explain Other Legal Decisions

Coase argued that the existence of a market solution means the government should not get involved. Yet his analysis purports to examine each proposed policy change in isolation. This assumes that the capacity of government to implement one policy is independent of its decision to implement or not implement another policy. The history of the common law illustrates that, by handling enough parlor pigs, whether or not it was needed, the common law grew in power to an extent that it could handle formerly intractable problems.

Perhaps surprisingly to Coase, it would have been unthinkable in twelfth-century London to expect that any civil body would enforce promissory agreements between neighbors not associated with a conveyance of land. The law of contracts for consideration developed far later than Coase’s analysis would suggest. And its development was preceded by the development of the judiciary and other departments of government through the handling of many other problems—many of which Coase’s analysis might suggest were unnecessary because they could have been handled by the market or the firm. 145 By not simply avoiding recognition of causes of action whenever the market could handle the problem, the common law grew into a more powerful tool of social coordination. Thus Coase is wrong to argue that it is foolish for the government to handle problems that the market can handle. Whether by operating post offices and lighthouses, or by resolving conflicts among neighbors, or by acting merely because government can—and not because government must due to market failure—governments feed on parlor pigs and grow strong enough to tackle rascally rabbits.

CONCLUSION: THE VALUE OF UNSOUND AND INCOMPLETE ANALYSIS

Coase’s economic analysis of the common law, arguing that common law courts and governments act to solve problems if and only if there are both externalities and sufficient transaction costs, is unsound and incomplete. The existence of both externalities and prohibitive transaction costs is neither a sufficient nor a necessary condition for government action. What, then, is the theory worth? What is a vending machine worth if it accepts counterfeit and rejects genuine notes?

145. See Coase, supra note 121 (disputing the traditional economic belief that government should operate lighthouses). Coase’s arguments are based upon a strange failure to appreciate that a government acts when it gives a private party the right to impose taxes on other private parties. See discussion supra note 121.
Coase’s work is venerable and has formed a pillar of the law and economics movement, providing much enjoyment and stimulation to its adherents these past fifty years. But a theory of government that is neither sound nor complete is a broken theory and must be rejected. Some would argue that it is worth modifying Coase’s economic analysis in order to maintain its place in legal scholarship. They would argue that it is better to update Coase’s analysis to account for the competitive nuisance exception and to excise or forgive Coase’s explicit rejection of the wild animal nuisance exception. But that would still leave the problem of the analysis’s failure to justify inefficient yet legitimate government action and Coase’s staunch position that government should never act needlessly, regardless of the effect of action on its power to handle other problems. However attractive it may be to save Coase by fixing his economic analysis for him, it is not worth the trouble. Consider the following parable by Jakob Henle:

A pedant for a long time had a nightingale, which gladdened him with its song. The animal died. The pedant, finding quiet and solitude disagreeable, went out to buy another bird. But there were only a few nests brought to market. The merchant knew not certainly that the eggs were fructified, and, at all events, would not warrant them to produce males; even when hatched, they would require considerable attention and training before they would become singers. To the pedant this appeared hazardous; and he went home, saying he would rather keep his dead nightingale. This was acting conservatively; but was it judicious? That the trouble of training the young brood might be lost, was possible; but that the dead nightingale would never sing—was certain.146

Coase’s unsound and incomplete economic analysis of the common law is a dead nightingale.

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146. HENLE, supra note 143, at xiv–xv.  
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