Foreword

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As a lawyer who has for many years been working on the interface between law and economics, I have observed with impatience the increasing divergence between academic economics and governmental policy making. Too often economists are too obsessed with the mathematical modeling of their ideas and insufficiently concerned with the applications. This book constitutes a major and refreshing exception to that trend. Dieter Schmidtchen and his colleagues at Saarbrücken have addressed some issues of European transport policy by re-examining the fundamental ideas on which current analysis appears to be based and finding them wanting because they take too narrow a view on the options available.

Some will find this study controversial, not the least because it may be viewed as a major challenge to the sacred cow of the ‘Polluter Pays Principle’ (although, in what follows, I will suggest that with a given interpretation it is possible still to apply that principle in some form). But few will be able to resist the powerful logic with which the authors seek to answer a simple question: when there are competing demands on a resource, such as the environment, what method of resolving that conflict is cheapest for society?

Their approach draws upon Ronald Coase’s pathbreaking paper on social costs, published nearly half a century ago (Coase, 1960). Although Coase was in 1991 awarded the Nobel Prize and although that paper is the most cited article in legal academic journals (Shapiro, 1996), the innovatory character of Coase’s reasoning has still been insufficiently appreciated by lawyers and others working in policy-making areas (Ogus, 2006). When there is a conflict of resource uses – for example, one user wishes to use a part of the environment to dispose of waste, while other adjacent landowners wish to have it free from that waste in order that they can use it for other, profitable purposes – Coase’s paper is most often invoked to show that the problem can be solved by market negotiations between the interested parties, without other forms of legal intervention. That is true, and it is important, but it is a corollary to the more fundamental insight that is sometimes referred to as the ‘reciprocity principle’.

To understand that principle, let us return to the example of pollution by waste matter. While that pollution clearly harms the interests of neighboring landown-

ers, so also, if less obviously, those landowners 'harm' the polluter if through the exercise of their property rights they prevent the disposal of the waste. Coase considers that the position of the polluter and the 'victim' landowners is symmetrical and reciprocal: each wishes to use the environment in ways which are utility-maximizing. There is no a priori reason for assuming that the use which the polluter wishes to make of the environment is less valuable than that of the other landowners. The normative (economic) proposition which flows from this is not necessarily that the physical interference be abated or paid for by the inflictor, but rather that the friction between the conflicting resource uses be relieved at lowest cost, taking account both of the value of the resource uses and the costs of adapting behavior.

Why has the reciprocity principle and its normative implications been neglected by policy makers and lawyers? I think that the answer to this question must lie in some inherent moral notion of corrective justice. Those who actively 'cause harm' are to be treated differently from those who play only a passive role in the sequence of events leading to the conflict of resource use; the behavior of the harm 'inflictors' is deemed to be wrongful and it follows that they should have to pay for the harm. This is, of course, the famous 'Polluter Pays Principle' (Bugge, 1996).

One can acknowledge the force of this non-economic argument but it can be met by two substantial rejoinders. In the first place, in many situations the conflict of resources arises from a complex set of interactions, and it is artificial to select from this multiplicity of factors a single cause of the problem which from a moral perspective should alone attract blame. Ackerman makes the point well: 'the reactive lawyer employs a *narrow temporal frame* in stating his facts, focusing upon the culpability of the individual actions that constitute the obvious disturbance of the peace. In contrast, the Coasean insists upon a *broad temporal frame*, beginning at the moment foresighted men and women might possibly have reorganized their activities to avoid the trouble' (Ackerman, 1984, p. 54 emphasis in original). The generalization can be applied to the case studies which are most expertly analysed in this book. If, from a broader timescale, we take account of the competing demands of natural habitats, human residences, environmental amenities, agriculture, industry and transport facilities, can we say that one of those activities must necessarily have priority over all the others for a single part of the landscape?

Note also how the language of policy making can be used to attempt to escape the logic of Coasean reasoning. Call something (noise and other emissions from the highway?) 'pollution' and immediately the 'Polluter Pays Principle' is invoked. But what is 'pollution'? The merest disturbance from a baseline of environmental purity? Hardly, because there is no such thing as environmental purity, given nature's own degradation. In any event, once it is appreciated that pollution generates benefits as well as costs, it has to be recognized that it is a

relative concept. It depends partly on individuals' perceptions of what is harmful, and this clearly may vary according to time, place and individual sensitivity (Dales, 1968, pp. 18–19). And since pollution abatement is costly, it also reflects individual and community preferences as to resource allocation: in certain areas or countries citizens may prefer lower standards of environmental amenity if that is consistent with, for example, higher prospects of employment. In short, there is no alternative to what the authors of this book refer to as the cheapest cost avoider analysis.

The second rejoinder is more accommodating to the moral perspective. Contrary to intuition, the economic objective of identifying the cheapest cost avoider has no necessary implications as to who is to pay for the avoidance measures. Although we normally proceed on the assumption that, for example, waste generators who engage in pollution abatement themselves bear the cost, legislation may allow for some form of tax concession with the cost then being transferred to general public funds or else to local funds financed predominantly by local landowners. More obviously, avoidance behavior taken by pollution victims can be paid for by polluters. In short, the question of what conflict resolution action should, at lowest cost, be taken is analytically distinct from the question as to who should pay for it (Calabresi and Melamed, 1972).

It follows that the question who should pay can be answered by reference to moral or distributional considerations; less attractively it can also be resolved on the basis of political dictates, for example, those consequent on interest group lobbying. It should be noted that economic considerations are not irrelevant to the choice, as transferring the cost from those engaged in the action to others is itself costly, and that cost will vary according to the complexity of financial arrangements envisaged. Subject to this, not unimportant, qualification, it therefore becomes possible to reconcile the analysis in this book with the 'Polluter Pays Principle': whatever solution to the highway problems encountered in transport policy is found to be cheapest, there are ways of ensuring that the cost is primarily borne by those who are deemed to be the 'polluters' in a given scenario; though whether that will always be the 'fairest' solution is another matter.

REFERENCES

- Ackerman, B.A. (1984), *Reconstructing American Law*, Cambridge, MA: Harvard University Press.
- Bugge, H.C. (1996), 'The principle of "Polluter Pays" in economics and law', in E. Eide and R. Van den Bergh, *Law and Economics of the Environment*, Oslo: Jurisdisk Forlag, pp. 53–90.
- Calabresi, G. and D. Melamed (1972), 'Property rules, liability rules and inalienability: one view of the cathedral', *Harvard Law Review*, **85**, 1089–128.

- Coase, R. (1960), 'The Problem of Social Cost', *Journal of Law & Economics*, **3**, 1–44.
- Dales, J.H. (1968), *Pollution, Property and Prices: An Essay in Policy-Making and Economics*, Toronto: University of Toronto Press.
- Ogus, A. (2006), *Costs and Cautionary Tales. Economic Insights for the Law*, Oxford: Hart.
- Shapiro, F.R. (1996), 'The most-cited law review article revisited', *Chicago-Kent Law Review*, **71**, 751–79.