# On Academic Sound Bites

*By* REZA DIBADJ*

THE MASS MEDIA is often justifiably criticized for conveying information with out-of-context "sound bites."[1] Unfortunately, academic literature is not immune to this problem. In this short Essay, I take four iconic articles—each standing for a well-worn proposition—and make the rather simple argument that the articles themselves are far more nuanced than the sound bites for which they have become famous.

I address four articles: Ronald Coase's *The Problem of Social Cost*,[2] Oliver Wendell Holmes's *The Path of the Law*,[3] Warren and Brandeis's *The Right to Privacy*,[4] and Jensen and Murphy's *CEO Incentives—It's Not How Much You Pay, But How*.[5] According to one well-known study, the first three are the most-cited law review articles of all time.[6] The fourth is a classic article on executive compensation—a topic of great social controversy at the moment—from the business literature.

First, and perhaps most troubling, is the life that Coase's pathbreaking article has taken. A life quite apart from what it actually says. Coase starts *Problem of Social Cost* by imagining a hypothetical and unrealistic world without transaction costs.[7] In such a fantasy world, parties could bargain to optimal outcomes;[8] as a corollary to this, it would not matter how courts

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1. Daniel C. Hallin, *Sound Bite News: Television Coverage of Elections, 1968-1988*, J. COMM., Spring 1992, at 5.

2. R. H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

3. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

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

5. Michael C. Jensen & Kevin J. Murphy, *CEO Incentives—It's Not How Much You Pay, But How*, HARV. BUS. REV., May–June 1990, at 138.

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

7. *See, e.g.*, Coase, *supra* note 2, at 2 ("[S]trictly this means that the operation of the pricing system is without cost.").

8. *See, e.g.*, *id.* at 4 ("There is clearly room for a mutually satisfactory bargain . . . . ").

assign liability.[9] Coase sums up the first part of his article as follows:

> It is always possible to modify by transactions on the market the initial legal delimitation of rights. And, of course, if such market transactions are costless, such a rearrangement of rights will always take place if it would lead to an increase in the value of production.[10]

This is the so-called "Coase Theorem." Crucially, however, conventional analysis ignores the rest of *Problem of Social Cost* where Coase plainly states:

> The argument has proceeded up to this point on the assumption . . . that there were no costs involved in carrying out market transactions. This is, of course, a very unrealistic assumption. In order to carry out a market transaction it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up the contract, to undertake the inspection needed to make sure that the terms of the contract are being observed, and so on. These operations are often extremely costly, sufficiently costly at any rate to prevent many transactions that would be carried out in a world in which the pricing system worked without cost.[11]

The upshot? *Problem of Social Cost* clearly envisions a world where liability rules matter,[12] as well as important roles for firms[13] and governments[14] in social ordering—contrary to the so-called "Coase Theorem."

Second, Oliver Wendell Holmes's iconic *The Path of the Law*, far from being an ode to legal pragmatism, is arguably a contradictory work. In it, Holmes famously pronounced:

> But if we take the view of our friend the bad man we shall find that he does not care two straws for axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.[15]

Yet the irony is that, beyond this criticism of high legal theory, Holmes himself delves into deep epistemological inquiries by questioning the role of

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9. *See, e.g.*, *id.* at 10 ("With costless market transactions, the decision of the courts concerning liability for damage would be without effect on the allocation of resources.").

10. *Id.* at 15.

11. *Id.*

12. *See, e.g.*, *id.* at 16 ("In these conditions the initial delimitation of legal rights does have an effect on the efficiency with which the economic system operates.").

13. *See, e.g.*, *id.* at 17 ("[I]t would be hardly surprising if the emergence of a firm or the extension of activities of an existing firm was not the solution adopted on many occasions to deal with the problem of harmful effects.").

14. *See, e.g.*, *id.* at 18 ("[T]here is no reason why, on occasion, such governmental administrative regulation should not lead to an improvement in economic efficiency.").

15. Holmes, *supra* note 3, at 460–61; *see also id.* at 460 ("I once heard the late Professor Agassiz say that a German population would rise if you added two cents to the price of a glass of beer.").

history[16] and quite presciently predicting the ascendance of economics and statistics in social science.[17] The irony, of course, is that he seemingly engages in the very type of theorizing he condemns elsewhere in his article. And to the extent economics relies on logic, this creates tension with his earlier critique of an over-reliance on logic.[18] I have read *Path of the Law* several times and am inevitably struck when I reach the part of the article where Holmes laments that "[w]e have too little theory in the law rather than too much."[19] What happened to Holmes's admonishment earlier in the article that "[t]he prophecies of what courts will do in fact, and nothing more pretentious, are what I mean by the law"?[20]

Third, consider Warren and Brandeis's *Right to Privacy*, widely credited with providing a basis for the right of privacy by analogizing from existing common law doctrines.[21] What is too often forgotten, however, is that *Right to Privacy* presents at least four very significant (and ambiguous) limits to such a right:

> 1. The right to privacy does not prohibit any publication of matter which is of public or general interest . . . .
> 2. The right to privacy does not prohibit the communication of any matter, though in its nature private, when the publication is made under circumstances which would render it a privileged communication according to the law of slander and libel . . . .
> 3. The law would probably not grant any redress for the invasion of privacy by oral publication in the absence of special damage . . . .
> 4. The right to privacy ceases upon the publication of the facts by the individual, or with his consent.[22]

As such, it is far from an absolute manifesto arguing for a right to privacy. Indeed, upon re-reading the article after two decades, I was struck by how carefully delimited and nuanced it is.

Finally, consider Jensen and Murphy's iconic article on executive compensation—widely viewed as providing the intellectual justification that

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16. Holmes, *supra* note 3, at 468 ("Most of the things we do, we do for no better reason than that our fathers have done them or that our neighbors do them, and the same is true of a larger part than we suspect of what we think.").

17. *Id.* at 469 ("For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.").

18. *Id.* at 465 ("The danger of which I speak is. . .the notion that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct."). *See also id.* at 468 ("So much for the fallacy of logical form.").

19. *Id.* at 476.

20. *Id.* at 461.

21. Their article provides a sweeping overview of the late nineteenth-century common law of property, trust, and tort as it relates to what the authors characterize as the right "to be let alone." *See* Warren & Brandeis, *supra* note 4.

22. *Id.* at 214–18.

eventually fueled the massive increases in executive compensation via equity incentives such as stock options and restricted stock.[23] What is often overlooked is that, if read carefully, their article also proposes a significant downside for poor performance. For example, Jensen and Murphy note that "[s]alaries, bonuses and stock options can be structured so as to provide big rewards for superior performance *and big penalties for poor performance . . . [In addition,] threat of dismissal for poor performance can be made real*."[24] And it is too often forgotten that the article must be understood within the broader context of Jensen's fundamental concern about what are euphemistically termed "agency costs"—or, put more bluntly, shirking by corporate fiduciaries such as executives.[25]

Whether the emergence of sound bites is due to convenience, sloppiness, or a broader agenda in political economy, I leave to other treatments. Nonetheless, the legacy of each discussed article is starkly different from each article's actual substance. If we are to learn anything from this occurrence, it is the necessity to read the article for the complexities it offers and not take the soundbite out of context. A caution for every reader.

23. *See generally* LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION 1, 6 (2004).

24. Jensen & Murphy, *supra* note 5, at 139 (emphasis added). *See also id.* at 141 ("Creating better incentives for CEOs almost necessarily means *increasing the financial risk CEOs face*.") (emphasis added).

25. *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976). In keeping with the theme of this short Essay, I also note that Jensen & Meckling's seminal article cannot be summarized in sound bites and is appropriately caveated. *See id.* at 351–57 ("qualifications and extensions of the analysis").