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## The Economic Analysis of Freedom of Expression

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This paper should be treated as a draft version. Comments and suggestions are very welcome, but please do not quote the paper without permission.

## **THE ECONOMIC ANALYSIS OF FREEDOM OF EXPRESSION**

### **INTRODUCTION**

There is not a large literature by economists writing about the issue of freedom of expression, especially in comparison with the vast amount that has been written on the subject by political philosophers and constitutional lawyers. But it is a topic that has attracted the attention of some of the most prominent figures in the field of the economic analysis of law: Aaron Director, Ronald Coase, Richard Posner, and Richard Epstein, among others. In this essay I will review what has been written in this tradition, and then try to identify what is distinctive about the economic approach to the question. This will not be a sweeping analysis of the philosophical issues that arise in the economic analysis of law in general. The focus is on one specific branch of the law, and whether economic analysis can make a useful contribution.

One further limit to the essay's scope: the metaphor of the "marketplace of ideas" is often invoked in the commentary on this question, but it requires a separate paper to untangle what exactly is meant by this phrase. Although it is an interesting question, it tends to only confuse the issue of what economists think they can contribute to the important policy question of how freedom of expression ought to be limited by the state.

### **GOODS AND IDEAS**

Coase states the pith of his argument like this: "I do not believe that this distinction between the market for goods and the market for ideas is valid. There is no fundamental difference between these two markets and, in deciding on public policy with regard to them, we need to take into account the same considerations."<sup>1</sup> His concern is the implications for regulatory policy, and the behaviour and (in)competence of government agencies, not the nature of different sorts of

markets. Observing that expression is much less regulated than markets for goods, he concludes: “We have to decide whether the government is as incompetent as is generally assumed in the market for ideas, in which case we would want to decrease government intervention in the market for goods, or whether it is as efficient as it is generally assumed to be in the market for goods, in which case we would want to increase government regulation in the market for ideas.”<sup>2</sup>

Coase, and Director<sup>3</sup> before him, want to make a political point – that intellectuals have a tendency to value their own sphere of activity, the world of ideas, more than the world of commerce, that intellectuals are willing to trust in government’s ability to regulate commerce but not to regulate the world of ideas, and that since intellectuals (including judges) are the ones who write opinions, the literature on these matters tends to overwhelmingly favour freedom of expression combined with substantial regulation of goods markets.

It needs to be said that Coase is often confusing on this subject. In a later paper he states a desire to clarify his 1974 essay, since readers seem to have misunderstood him. He restates his case that the two “markets” are essentially the same, although government treats them differently. He goes on to say that if one did believe in the general regulatory competence of government, it is the market for ideas that should be more heavily regulated, since it is the one where “property rights are so difficult to define or enforce.”<sup>4</sup> Of course we *do* have property rights in expressions of ideas (copyright) and in inventions (patents). What’s more, they are entirely created by statute, with regulations as complex as for real property. There are no property rights in “ideas” as such because they are pure public goods, and the enclosure of the intellectual commons would make no economic sense.

Although Posner admits at the outset that on the economics of freedom of expression his “coverage ... is partial, and ... conclusions tentative,”<sup>5</sup> he uses strong language on the appropriateness of applying economic analysis to the issue. “What I shall not assume, however, is that freedom of speech is a holy of holies which should be exempt from the normal tradeoffs that guide the formation of legal policy.”<sup>6</sup> He writes further: “even brilliant conservative judges seem

to suspend some of their critical faculties in the presence of claims to freedom of speech. Perhaps the time has come to give the free-speech icon an acid bath of economics.<sup>7</sup> Although one often finds an ambiguity in the law and economics tradition – is it a positive analysis demonstrating the underlying efficiency of common law doctrine, or a guide to how the law *should* be interpreted? – there is no ambiguity in this case.

### **COSTS AND BENEFITS**

Posner<sup>8</sup> draws extensively on the balancing framework proposed by Judge Learned Hand in *United States v. Dennis*.<sup>9</sup> This framework is reminiscent of the formula proposed by Hand, and now textbook law and economics, of determining negligence in a tort case. Restriction of freedom of expression is justified when

$$V + E < PL/(1 + i)^n$$

where V is the social loss from suppressing valuable information, E is the legal error cost of trying to distinguish which expression is valuable and which is not, P is the probability that harm will occur if the expression is allowed, L is the cost of the harm *if* it occurs, i is the discount rate, and n is the amount of time between the potentially harmful expression and the occurrence of the loss resulting from it.

On the left-hand side of the inequality we have the cost of suppressing expression, and on the right-hand side the probable cost if the expression is allowed. The inequality offers nothing very controversial. The key issue will be measurement - Posner notes that it will be “impossible”<sup>10</sup> to quantify, although it can still serve as a useful guide - and indeed the inclusion of E in the inequality incorporates this very problem. It needs to be taken into account that since expression is a public good in the economist’s sense, and there are incomplete property rights (and imperfect enforcement of those rights even when they do exist), it is a good that will in general be underproduced. For this reason alone the restriction of expression would be only rarely justified.

On the costs of suppressing expression, V, Posner's view is that we should be careful about setting "hierarchies" of speech value, for example placing political speech at the top of a hierarchy, or placing works meant to appeal to reason higher than works that target the emotions. When it comes to expression lines are never perfectly clear; what is a clear definition of "political speech," or a clear distinction between ideas and expression? Much of his discussion of V relates to the way in which the expression is regulated, rather than to the substance of the speech itself. For example, restrictions on the time, place and manner of expression can achieve the goals of limiting harm while still allowing the expression to take place. Local limits on certain types of expression will generally be less harmful than nation-wide limits.

The discounting of potential future harms is consistent with the tradition of allowing greater restrictions on freedom of expression when the harms are likely to be immediate. In *Abrams*, where Holmes dissented from the U.S. Supreme Court's decision to uphold the conviction of persons handing out pamphlets advocating, during wartime, a general strike to protest U.S. intervention against the Russian revolution, Holmes judged, "It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned."<sup>11</sup> (Holmes goes on to claim that no immediate danger was presented by "the publishing of a silly leaflet by an unknown man"). Another possible immediate harm from speech arises from so-called "fighting words", "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."<sup>12</sup> Fighting words, or incitements to riot, give no opportunity for a competing idea to intervene. On the contrary, a pamphlet advocating that people begin to lay the groundwork for a workers' revolution will be in a contest with tracts claiming that that is not the way to paradise.

In Canada the legal framework surrounding freedom of expression is explicitly based on a principle of balance. Section 2(b) of Canada's *Charter of Rights and Freedoms* states: "Everyone has the following fundamental freedoms: freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication..." However, Section 1 of the

*Charter* allows restrictions on those same freedoms, by “reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” The balancing framework is more explicit in the method adopted for determining when limits are “reasonable,” known as the *Oakes* test.<sup>13</sup> Arising from *R. v. Oakes*, the test holds that a government wanting to invoke Section 1 as a justification for a restriction of freedom must (1) demonstrate that the objective the limit on freedom is meant to serve is “of sufficient importance to warrant overriding a constitutionally protected right or freedom,” (2) adopt only measures “carefully designed to achieve the objective in question” and which are not “arbitrary, unfair or based on irrational considerations,” (3) adopt a restriction that impairs “as little as possible the right or freedom in question,” and (4) maintain “a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of sufficient importance.”<sup>14</sup> This puts the burden on governments that would restrict freedom of expression to show that it passes a balancing test. This would appear to be wholly consistent with the approach Posner advocates; the government must demonstrate that the expected cost of allowing the speech – the right-hand side of Posner’s inequality – is substantial enough to warrant intervention, and that  $V$ , the cost from suppression, is being held to the minimum necessary amount.

To see the balancing approach in action, consider the cases involving the regulation of expression decided by Posner in his role as judge in the Seventh Circuit of the U.S. Court of Appeals. In *Piarowski v. Illinois Community College District 515*, the chairman of the art department of a junior college, who also served as coordinator of the college’s art gallery, claimed that his right of freedom of speech was violated when the college removed from the gallery some of his own sexually frank works, which also had racial overtones, that had drawn complaints of being offensive. The college’s gallery was located in the principal building of the campus, adjoining the mall near the entrance to the building. In affirming the lower court’s ruling that the college did not abridge the constitutional rights of the artist, Posner notes that the loss

from the college's action (V) was low, since it suggested alternative venues for the exhibit (there was no response given to the suggestions), or even the simple installation of blinds to shield the gallery from the view of every passer-by. The costs of the exhibit remaining as the artist installed it (L) were high; it was disturbing to a large number of people who could not avoid viewing it without much inconvenience. Posner ruled: "The concept of freedom of expression ought not be pushed to doctrinaire extremes. No museum or gallery, public or private, picks the most prominent place in the museum to display those works in its collection that are most likely to offend its patrons; and even though the consequence of the decision is to discourage – though very mildly we should think – the production of art calculated to shock, to outrage, to epater le bourgeois, we do not think the decision has constitutional significance."<sup>15</sup> He concludes: "Not every trivial alteration of the site of an art exhibit – not every modest yielding to public feeling about sexually explicit and racially insulting art – is an abridgement of freedom of expression."<sup>16</sup>

In *Miller v. Civil City of South Bend*, Judge Posner concurs with the Appeals Court decision that an Indiana statute banning nude dancing was an unjustified infringement of freedom of expression. He begins by establishing that nude dancing is certainly an expressive activity, and not simply "conduct": "What it expresses, what it communicates, is, like most art – particularly but not only nonverbal art – emotion, or more precisely an ordering of sights and sounds that arouses emotion."<sup>17</sup> This is so even though the dancers at the bar in question, the Kitty Kat Lounge, neither promise nor deliver high culture. Posner continues: "It is tempting to argue that a striptease just *can't* be expressive because if it is then everything is – including kicking one's wastebasket in anger and putting geraniums in a window box. ...But the expression that is relevant to freedom of speech, and absent when the wastebasket is kicked in private, is the expression of a thought, sensation, or emotion *to another person*."<sup>18</sup> He then moves to address the question of whether ideas deserve more freedom from regulation than "mere" expression: "But if this were decisive, ...it would thrust outside the [constitutional protection of freedom of speech] virtually all nonverbal art – except the relatively small fraction that is didactic – and much

literature as well.”<sup>19</sup> In response to the notion that “high art” *does* in fact convey ideas, he responds: “The notion that all art worthy of the name has a “message” is philistine, and leads to the weird conclusion that nonrepresentational art and nonprogrammatic, non-vocal music are entitled to less protection ... than striptease dancing because the latter has a more distinct, articulable message. And likewise that Beethoven’s string quartets are entitled to less protection than *Peter and the Wolf*.”<sup>20</sup> He notes: “The difference between the intellectual and the emotional is not the difference between heavy and light. There are solemn emotions, and there are frivolous ideas.”<sup>21</sup>

Once having established that the dancing is indeed expressive activity and so deserves some consideration for protection from outright prohibition, Posner turns to the theme of balance. He notes that bullfighting is an expressive activity, even having affinities to dance. Should it also then be protected from suppression, on the grounds of freedom of expression? His answer is no, because:

there are many grounds for regulating and even prohibiting particular forms of expressive activity. In the case of bullfighting, the grounds are aversion to mutilating or killing animals for sport and also aversion to sports that are highly dangerous to the (human) participants. The [United States] Constitution does not place freedom of expression above all other values; it does not privilege gladiatorial contests any more than it privileges the employment of children to make pornographic movies. Nevertheless when government suppresses bullfights it is not suppressing mere “entertainment” that has little in common with ballet. They have a great deal in common. The difference between bullfighting and ballet has nothing to do with expressiveness; they are equally expressive, albeit of a different range of emotions. The pertinent difference is that ballet does not entail the torture and killing of animals or a high risk of injury or death to the dancers, and bullfighting does.<sup>22</sup>

Two things are notable in these cases. First, Posner states in both cases that the value in being able to express oneself without restraint must be weighed against other factors. Through this balancing he finds that suppression of bullfighting, or asking exhibitors of controversial art to ensure that only those who want to see an exhibit actually do so, are reasonable, but that banning nude dancing in a lounge is unreasonable. Second, in each of the cases Posner is careful not to judge from the position of a highly educated, highly cultured person. In *Piarowski* he sides with

the cleaning staff and non-elite junior college students against an art gallery coordinator, and in *Miller* sides with the dancers, even though “the likelihood that the videotape of the Kitty Kat stripteases will one day achieve the cultural renown of *Déjeuner sur l’herbe* is vanishingly close to zero.”<sup>23</sup>

The essence of Posner’s approach is *balance*. The root of his criticism of liberals who hold freedom of expression to be a “holy of holies,” or of the extreme censorship proposed by Catharine MacKinnon,<sup>24</sup> is that in each case there is little or no consideration of what is being sacrificed to obtain either completely unrestricted expression on one hand or a world free of all images deemed harmful to women on the other.

But is Posner’s approach economic? Begin with the use of the formula proposed by Learned Hand in *Dennis*. Although superficially it is related to the formula for negligence in *United States v. Carroll Towing*,<sup>25</sup> there is a great difference in the two uses of the formula. *Carroll* has made its way into every textbook in the economic analysis of law because it provides a rule for solving an economic problem. By holding the individual who is in a position to take steps to prevent accidents liable when the marginal cost of taking precautions is less than the marginal benefit of reducing the probability of accident, the individual internalizes the social consequences of his behaviour. An efficient degree of precaution is taken. But in *Dennis*, all we have is a formula indicating that expression should be restricted when the expected benefits of expression are less than its expected costs, taking due account of the costs of administering justice. But a weighing of the consequences of a particular ruling is a very broad definition of what constitutes an *economic* analysis. Although in his writings on freedom of expression Posner frequently uses economic terms, there is very little of what we expect in an economic analysis of a legal question: how will individuals’ behaviour respond to changed incentives? The closest the analysis comes to putting an economic insight to work is that some expression, especially political expression, has large external benefits, and is likely if anything to be underproduced in an unrestricted world. This makes suppression of such expression particularly costly.

I would not want to suggest that Posner's analysis suffers from not being economic enough. Some legal issues will benefit more than others from an application of economic technique. Rather, the question that needs to be asked about Posner's analysis is: if it is right to take a consequentialist approach to the regulation of expression, have all the potential consequences been considered?

For Posner the cost-benefit approach "need be 'founded' on nothing deeper or more rigorous than a showing that it has consequences that we like."<sup>26</sup> His response to the suggestion that there is something "tragic" in the restriction of expression, beyond an ordinary cost-benefit analysis, is that the law is filled with restrictions on expression, with laws about defamation, copyright, and so on, that exist, quite rightly, because such restrictions come with more benefits than costs. But in the regulation of expression there is a variety of possible restrictions that are surely different in kind, and not simply in degree. A restriction placed on me that I not distribute this essay is simply not the same as a restriction that I not circulate without his permission Posner's essay with my name listed as the author. By "tragic" Martha Nussbaum means a situation where whatever policy choice is made, someone is going to bear a cost that no person should be asked to bear, and that there should be a recognition of the need for reparations for those suffering the loss.<sup>27</sup>

But that takes us into the realm of "rights" as something apart from those freedoms that are allowed because in aggregate they have good consequences. In general, rights of this kind are alien to the economic approach. To be sure, economists refer to rights, but in the sense of entitlements. In the framework developed by Calabresi and Melamed, such rights can be protected by property, liability, or inalienability rules.<sup>28</sup> As Hausman and McPherson note, liability rules, which provide that John can take possession of Mary's entitlement without an *ex ante* agreement so long as he compensates her for her loss, protect Mary's material interests but not her liberty.<sup>29</sup> But liability rules are at the heart of the cost-benefit approach to policy: is it possible for those who gain from a policy change to compensate those who lose? Rights to liberty cannot be compensated in this way, but that simply means they will be absent from the traditional

cost-benefit calculus. As Coleman notes, “giving meaning to rights, at least over the domain of transfer, is the task of property, liability and inalienability rules. That is all the transaction rules do. That is why it is unhelpful to think of them as tools or instruments for protecting entitlements.”<sup>30</sup>

## **ASPECTS OF THE ECONOMIC APPROACH**

What makes the economic approach to freedom of expression distinctively *economic*? After all, *every* commentator on the issue agrees that there exist circumstances, at least of the time, place and manner variety, where some restrictions are justified, and that these justifications arise out of a consideration of costs and benefits, even if not stated in those terms.

### **Expression**

At the heart of the economic approach to public policy is consumer sovereignty. It is presumed that individuals come to the political process with fully formed preferences about what constitutes the good life, and will either use economic exchange, or political action (through voting, lobbying, campaigning, and so on) to pursue their goals. *Pluralist* theories of government are those that view individuals as entirely self-serving, in the public as well as the private sphere. *Civic republicanism* emphasises the “conversation” between citizens, and the interaction that turns individuals into participants in the governing process. Hanna Pitkin writes: “we come to politics with our private interest firmly in hand, seeking by any means necessary to get as much as we can out of the system. ...Drawn into public life by personal need, fear, ambition or interest, we are there forced to acknowledge the power of others and appeal to their standards, even as we try to get them to acknowledge our power and standards. ...In the process we learn to think ... about our stake in the existence of standards, of justice, of our community, even of our opponents and enemies in the community; so that afterwards we are changed. Economic man becomes a citizen.”<sup>31</sup> This is the republican conception of self-government.

On the question of freedom of expression, civic republicanism holds that the metaphor of the marketplace of ideas is a very poor one: “Speech ... does not involve alienating one’s ideas and trading them for a commensurable, fungible, objectifiable chunk of a listener’s or reader’s attention or time. ...Speech is an interaction arguably akin not to sales but to government. Speech not only produces information, but also seeks to change the listener’s perspective or preferences or tastes, and to shift them closer to the speaker’s. The government/proprietary distinction recurs in the individual writ small, distinguishing the experiences of speech and sales.”<sup>32</sup> The American tradition of the civic republican ideal and expression was forcefully put in Justice Brandeis’ concurring opinion in *Whitney v. People of State of California*: “Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. ...They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.”<sup>33</sup>

Sandel<sup>34</sup> and Sunstein<sup>35</sup> rely on Brandeis’ statement regarding the values of freedom of expression, distinguishing it from Holmes’ conception that the “marketplace of ideas” is the way to truth, and liberal theorists’ emphasis on the importance of freedom of expression for individual self-fulfilment. Sunstein calls his approach *Madisonian*; the central goal of a political constitution is to create a deliberative democracy. While the complexities of this approach to freedom of expression won’t be examined here, I do wish to draw attention to one of the central results of the approach, that political speech warrants special consideration in the regulation of expression, and that suppression of any particular act of political expression can only be justified if that

expression is actually harming democratic deliberation. Sunstein advocates a “two-tier” approach to expression, with political speech on the higher tier.

But couldn't the importance of political speech simply be incorporated into a balancing framework? Sunstein argues that it cannot: “if everything could be properly balanced, we could not properly object to balancing. ...But in the real world balancing has notorious problems. Ad hoc determinations of the harm from speech pose extremely high risks. ...Ad hoc determinations of free speech value may be even worse. Here the prejudices and myopia of particular judges, even judges operating in good faith, would produce unacceptable dangers. ...In the real world, ad hoc balancing is likely to be inferior to many categorical approaches.”<sup>36</sup> To ask whether something is political is not to look at whether it has political effects or sources, but “whether the speech is intended and received as a contribution to political deliberation. ...Thus, for example, there is a distinction between a misogynist tract, which is entitled to full protection [from regulation], and many pornographic movies, which are not...There is a difference between personal, face-to-face racial harassment by an employer of an employee, which is not entitled to full protection, and a racist speech to a crowd, which indeed falls within the core, and cannot be regulated in the absence of a clear and present danger.”<sup>37</sup>

In response to the two-tier constitutional protection of freedom of expression, Posner notes that while there are indeed good reasons for protecting political speech from regulation (discussed further in section 4.4, below), a problem, “which plagues all lexical orderings, is that even if eliminating freedom of political speech entirely would be more harmful than eliminating all art, all advertising, or even all scientific debate, a limited abridgement of political speech may be less harmful than a more sweeping abridgement of nonpolitical speech. Forbidding all Nazi advocacy would do less harm to society than suppressing all scientific discussion or, for that matter, all price advertising.”<sup>38</sup>

Posner does not share Sunstein's worry that judges would be unreliable in performing balancing calculations. In *Collin v. Smith*, an American court ruled that a local ordinance banning

a Nazi march through the Chicago suburb of Skokie, home to many concentration camp survivors, violated the U.S. Constitution's protection of freedom of speech. In its judgement, the court ruled: "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."<sup>39</sup> Exposing this case to his "acid bath," Posner raises serious questions about the wisdom of the court's decision, noting the very low value of V (the Nazis could not be seen to be disseminating ideas, since in this situation it was obvious that no one would be receptive, and the ordinance was local and limited to a particular means of expression), the very high value of PL (the probability of harm was essentially unity, and even the judge in the case noted that "many people would find [the] demonstration extremely mentally and emotionally disturbing,"<sup>40</sup> and that this was exactly the result hoped for by the Nazis), and the immediacy of the harm (so no discounting of harms). The *only* way the balancing in this case could favour the rights of the Nazis to have their march is the perception of high E, the possibility of judicial error. In *Collin* the judge notes "it is, after all, in part the fact that our constitutional system protects minorities unpopular at a particular time or place from governmental harassment and intimidation, that distinguishes life in this country from life under the Third Reich."<sup>41</sup> But Posner concludes "although I think I have given pretty persuasive reasons for distinguishing between a Nazi march in Skokie and a civil rights march in Selma, scholars less trusting of judicial discretion than I may consider the distinctions too fine to be entrusted to the judiciary and may prefer to err on the side of tolerance."<sup>42</sup>

### **Individuals**

Coase, on his theme of the unjustified distinctions between the marketplace of ideas and the marketplace of goods, writes: "in the market for ideas, consumers are assumed to be able to choose appropriately between what they are offered without serious difficulty. ... But in the market for goods, we do not seem to believe that consumers are able to make such a fine

discrimination and it is deemed necessary to regulate producers with regard to what they tell consumers, how goods are to be labelled and described, and so on, lest customers make the wrong choices.”<sup>43</sup> The interesting question here is what effect economists think the reception of expression has on individuals. Since the point of commercial advertising and political speech is to change the preferences of the listener, an interesting question is whether it makes the preferences better. As Coase puts it, “we have to judge an activity such as advertising which influences tastes, by deciding whether it tends to produce good men and a good society, or, at any rate, better men and a better society.”<sup>44</sup>

Posner is doubtful that fiction or poetry has any lasting effect on our morals: “lawyers and judges will not become better people by trolling in literature for ethical insights. Ordinary readers will not become worse people by seeking erotic stimulation in pornography.”<sup>45</sup> In his discussion of commercial advertising Posner confines himself to discussion of the treatment of advertising that is demonstrably false; E is low in this case, since it is straightforward enough to determine when advertising is false regarding price or quality.<sup>46</sup>

Although the Canadian legislation appears to be an application of the balancing approach,<sup>47</sup> Moon notes that judgements in Canada take an odd approach to the nature of individuals. Presumably, he writes, protections of freedom of religion, belief, and expression appear in the Canadian *Charter* through a liberal conception of the autonomous individual, “a maker of choices, an autonomous agent capable of giving direction to his or her life.”<sup>48</sup> But when the limits of freedom of expression, “as can be demonstrably justified in a free and democratic society,” appear in the same *Charter*, “the individual is seen as irrational, manipulable, directed by unchosen preferences, urges, desires.”<sup>49</sup> In both Canada and the U.S. it is this easily manipulated individual who takes centre stage in regulations over commercial advertising.

Economic analysis won’t tell us which view of the individual is substantially correct. But economic analysis consistently assumes that individuals receive the expression of others and,

provided it is not in the immediate context of a mob, will use the received expression in a reasonably rational way.

Strauss notes that American courts have consistently refused to allow suppression of speech that is meant to be *persuasive*.<sup>50</sup> On his definition, persuasive speech does not induce action on the part of the listener through misinformation, or through inciting an emotional, impulsive response, but relies on the listener to use her rational faculties before acting on the basis of the expression. This unwritten rule seems to provide some respect for individual autonomy, but Strauss notes that most writers justify the rule on consequentialist grounds. They rely upon the principle by Brandeis cited above – “discussion affords ordinarily adequate protection against the dissemination of noxious doctrine” - and indeed such discussion is necessary for a vibrant democracy. So discussion of the nature of individuals leads us back to the previous question, on the purpose of expression.

Perhaps Posner rejects creating any hierarchies of expression to be used in the principles of its regulation because of this very problem: we are unlikely to be able to give practically useful answers to the questions about the value of different categories of expression or the autonomy of individuals. We decide on a case-by-case basis, since abstractions will not tell us anything useful about the law.<sup>51</sup> But if we cannot say much about the value of expression in the abstract, what can we say about its harm?

## **Harm**

Do the harms created by “bad” expression have essentially the same nature as other harms? In a recent paper firmly rooted in the economics tradition, Eric Rasmusen asserts that they do.<sup>52</sup> His essay is focused on laws that would ban the desecration of important symbols, and in particular on the U.S. case of *Texas v. Johnson*, where the Supreme Court held that a Texas statute outlawing the desecration of the American flag was an unconstitutional restriction of freedom of speech.<sup>53</sup> He sees the issue as an ordinary case of externality, of one person doing something that

another would pay to prevent. For fairly obvious reasons Coasean bargaining between those who venerate the flag and those who would burn it is highly unlikely. So Rasmusen would recommend granting the property right to the side that would most value it, and he attempts to show that it is most likely to be the case that by this reasoning those who venerate the flag should have the right to prevent others from burning it.

On the nature of the harm from seeing something offensive Rasmusen is very clear: “A factory emits sulphur dioxide, harming the neighbours’ trees. A desecrator burns a flag, hurting its venerators’ feelings. From the economic point of view, the situations are identical. In each case, one party inflicts a negative externality on another party.”<sup>54</sup> Further, he argues that the amount of externality is, as usual, measured by examining the willingness to pay for its elimination: “The economic approach can cope with hurt feelings as easily as with damaged trees. If someone would pay \$3,000 to avoid flag burning, that is the amount of the desecration externality. The economist need not judge whether \$3,000 is too much or too little. It is simply data. If someone is willing to pay for something, that something has economic value, whether it be a material good or not. The point is crucial because both sides will claim their tastes are privileged. ...The economic approach allows for an objective analysis that depends on the empirical facts rather than special pleading.”<sup>55</sup>

It is hard to see how by applying some numbers (which Rasmusen admits will be challenging to measure), in this case willingness-to-pay, to the balancing question one has “objectively” solved this very complex ethical problem. But beyond that, Rasmusen is skirting an important economic question: why do we have *constitutional* protections of some rights? Many countries, the US among them, have chosen to grant special protection to freedom of expression, and by Posner’s and Rasmusen’s own reasoning economics should provide part of the answer.

In an earlier paper Rasmusen makes an argument for social regulation based on the criterion of willingness-to-pay by those who would undertake an activity and those who are opposed to it,<sup>56</sup> without analysis of why any country would then have a constitutional protection of certain

individual rights. Posner does try to answer the question. In a version of the Director-Coase hypothesis, he suggests that the interest group of intellectuals and others who derive income from publication and/or advocacy is generally sufficiently well-organized to obtain for themselves protection from potential censorship by the statutes of a directly elected legislature.<sup>57</sup> But there is an alternative hypothesis. The framers of a constitution, perhaps representing the interests of their constituents in an unbiased way, could provide a protection of rights on the grounds that a long-term contract between the governors and the governed protecting freedom of expression would generate a higher level of welfare than one in which citizens would need to be perpetually debating whether this or that particular form of expression should be banned. In particular, citizens might choose to bind themselves to the mast of constitutional rights knowing that one offended group after another would sing the siren's song of censorship, often when emotions on an issue would be running particularly high.<sup>58</sup> Rights that are protected by a constitution requiring something more than a majority of votes, or higher aggregate willingness-to-pay, in order to be changed are not inconsistent with wealth-maximization, broadly defined.

There are a further two interesting issues here. The first is the claim that the harms from an offensive act are in *all* respects identical to physical harms. This is consistent with Coase's assertion that there are no fundamental differences between the marketplace of ideas and the market for goods. It is a view shared by several other writers (some unlikely to be associated with Rasmusen on other issues). Stanley Fish, for instance, believes the body has been systematically stigmatised and devalued in First Amendment jurisprudence.<sup>59</sup> And Charles R. Lawrence III notes that racist speech can do real, tangible harm:

I have heard people speak of the need to protect "offensive" speech. The word offensive is used as if we were speaking of a difference in taste, as if I should be learn to be less sensitive to words that "offend" me. I cannot help but believe that those people who speak of offense – those who argue that this speech must go unchecked – do not understand the great difference between offense and injury...*injury* inflicted by words that remind the world you are fair game for physical attack, evoke in you all the millions of cultural lessons regarding your inferiority that you have so painstakingly repressed, and imprint upon you a badge of servitude and subservience for all the world to see.<sup>60</sup>

Jonathan Rauch, whose libertarian views on the economy are likely similar to those of Rasmusen, writes: “Criticism, however unpleasant, is not violence. Except in cases where violence is threatened or incited, the very notion of ‘words that wound’ or ‘verbal harassment’ is to be repudiated and junked.”<sup>61</sup> But his position is rarely held. Lawrence seems to be directing his words not at those who think harm from speech is categorically different from physical harm, but simply against those who would minimise it, perhaps from an absence of personal experience of being a target of such harm. All North American schoolchildren (and maybe others – I don’t know) are taught the folk-saying “sticks and stones may break my bones, but names will never hurt me.” But what adult would hold that to be true?<sup>62</sup> Frederick Schauer notes that both insults and physical attacks can be temporary or permanent, and of different intensities, are likely to hurt more if the hurt was intentional, and induce us to try to “steel ourselves” from potential injury. In the final analysis, “there is no non-question-begging way of basing a principle of free speech *on* the descriptive claim that the category of speech is less harmful as a category than the category of conduct.”<sup>63</sup>

Rasmusen’s second claim is that willingness-to-pay is the means by which we should measure the harms of expression. Here is Rasmusen’s basic example:

Smith and his followers bow down to a symbol, the Smith flag. Jones, Smith’s rival, burns a replica of the Smith flag. This causes X dollars in pain to the Smithians, and Y dollars in pleasure to Jones. Everyone else in the country is indifferent to the flag’s burning. The potential burning of the flag is a good that has value to both Jones and the Smithians. The amounts X and Y represent the amounts the Smithians and Jones would pay for the good, the right to control the action. These values will depend on the wealth and the tastes of the individuals involved. As always, efficiency requires allocating consumption of the good to whoever has the highest willingness to pay for it.<sup>64</sup>

The issue of income distribution is not raised at any other point in Rasmusen’s essay. For many cases of expression that are legally contested, we could make some generalizations about wealth. For example, hate speech is typically directed at groups who are poor; indeed, it is the very social dominance of the speaker’s group over the victim’s group that gives hate speech its

particular sting.<sup>65</sup> For an example on the other side, it could be expected that an individual driven to publicly burn the U.S. flag in the U.S. will not be someone doing all that well financially. Fish claims that when it comes to free speech, people tend to interpret principles in whatever way they can twist them to suit what they really want to allow or ban, noting that (the first) U.S. President George Bush argued simultaneously *for* statutes outlawing flag-burning and *against* university campus hate-speech codes.<sup>66</sup> However, it is not unreasonable to expect that consistent application of Rasmusen's method would lead directly to George Bush's position.

### **Government**

Coase brings to his analysis of freedom of expression a distrust of government that is immoderate, to say the least: "studies of regulation show, I think without exception, that regulation either makes little difference or makes things worse. Somewhere one would have expected to find a regulation which did more good than harm. ...I have come to the tentative conclusion that an important reason may be that government at the present time is so large that it has reached the stage of negative marginal productivity, which means that any additional function it takes on will probably result in more harm than good. It does appear that the governmental machine is now out of control."<sup>67</sup>

Epstein bases his analysis of the inappropriate distinction between the market for goods and market for ideas on the foundation of distrust of government. His theme is that the market for goods warrants the same kinds of protections from regulation that are granted to expression, and for the same reason: "the idea of distrust is a universal solvent that can be brought to bear on any political initiative. ...*Quis custodiet custodiet?* ...has lost none of its vitality in its contemporary setting. ...[D]istrust alerts us to the constant temptation facing any public official who is entrusted with extensive power, but who is all too often subject to only limited supervision."<sup>68</sup>

The distrust of government is a theme that runs throughout the economic literature on freedom of expression, most obviously in the public choice analysis of regulation of expression.<sup>69</sup> Posner also

brings a distrust of government to his analysis, although without Coase's and Epstein's goal of using this against regulation of the marketplace for goods (at least not in the essays presently under consideration). It is this distrust which leads Posner to place a high value on political speech, not the arguments of the civic republicans that the goal of freedom of expression is to foster democratic debate: "The most dangerous of monopolies is a monopoly of political power. Political competition is impeded if the government is allowed to prevent the expression of opposition views."<sup>70</sup> He writes further: "the most important aspect of freedom of political speech is simply the right to criticize government officials and policies – that is, the right to disseminate information that may affect how people vote in the next election. The suppression of relevant information in the political market, as in the market for (ordinary) goods and services, may distort choice and in that way reduce welfare even if there is no competition in ideas because competing political parties subscribe to the same ideas."<sup>71</sup>

Posner also reminds us that there *is* a link between the markets for goods and ideas worth keeping in mind: government dominance of the market for goods allows it to effectively control the market for ideas, without doing so explicitly:

Political dissent requires financial resources. . . . In the heyday of Senator Joseph McCarthy, people believed to be sympathetic to communism were barred from government employment, even in nonsensitive jobs. These people did not starve. They found jobs in the private sector and today some of them are again active in politics. The costs of dissent would have been greater had the government been the only employer so that the consequences of holding unpopular views might be denial of all opportunity to obtain a livelihood.<sup>72</sup>

## **AN ASSESSMENT**

When we read Posner's thoughts on particular cases of the regulation of freedom of expression, we find a wealth of common sense in his balanced approach. Posner cannot agree with Holmes' judgement in *Gitlow v. New York*,<sup>73</sup> that free speech should be allowed even if it would eventually lead to a totalitarian state with no freedom of expression. Posner is surely right that freedom of expression should not be treated as a "holy of holies." It is difficult to disagree

that allowing Nazis to march through Skokie did much more harm than could be justified by not interfering with “political speech,” that a community college should be well within its rights to ask its art administrators to be sensitive in their choice of venue for exhibits, and that, so long as it is kept out of view of passers-by, it is difficult to make the case for a state-wide ban on nude dancing. He recognises that expression is about more than just appeals to reason, and that art should not be accorded a lower status of constitutional protection simply because it is not polemical. Finally, in his judgements on these cases he is careful not to denigrate the preferences of ordinary folk, whether residents of Skokie, cleaning staff at a college, or those for whom the preferred place of relaxation is the Kitty Kat Lounge.

That being said, it remains to be demonstrated that *economic analysis* has a role to play. For one does not need to be an economist to arrive at the same conclusions in the above-mentioned cases as Posner. Non-economists also advocate a weighing of costs and benefits. Where economic analysis *has* been applied systematically, say by Rasmusen, we arrive at a result that would allow the government to outlaw a particular form of potent, non-violent protest directed at the government itself.

Posner’s “acid bath” is really a call for not holding freedom of expression sacred, but instead for justifying it on the basis of its consequences, under the assumptions of a reasonable public and a government that will always be tempted to suppress criticism of itself. These assumptions inform much of economics. But it still remains to be shown that economic analysis can contribute in a substantive way to the issue.

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<sup>1</sup> R.H. Coase, “The Market for Goods and the Market for Ideas,” *American Economic Review, Papers and Proceedings* 64 (1974): 384-91, p. 389.

<sup>2</sup> *Ibid.*, p. 390.

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<sup>3</sup> Aaron Director, “The Parity of the Economic Market Place,” *Journal of Law and Economics* 7 (1964): 1-10.

<sup>4</sup> R. H. Coase, “Advertising and Free Speech,” *Journal of Legal Studies* 6 (1977): 1-34, p. 4.

<sup>5</sup> Richard A. Posner, “Free Speech in an Economic Perspective,” *Suffolk University Law Review* 20 (1986): 1-54, p. 3.

<sup>6</sup> *Ibid.*, p. 6.

<sup>7</sup> *Ibid.*, p. 7.

<sup>8</sup> *Ibid.*, and Richard A. Posner, *Economic Analysis of Law*, 4<sup>th</sup> edition (Boston: Little, Brown, 1992), pp. 665-77.

<sup>9</sup> *United States v. Dennis*, 183 F.2d 201 (2d Cir. 1950), *aff’d*, 341 U.S. 494 (1951).

<sup>10</sup> Posner, *Economic Analysis of Law*, p. 667. Also see Peter J. Hammer, “Free Speech and the ‘Acid Bath’: An Evaluation and Critique of Judge Richard Posner’s Economic Interpretation of the First Amendment,” *Michigan Law Review* 87 (1988): 499-536 who centers his critique of Posner’s approach around the measurement issue.

<sup>11</sup> *Abrams v. United States*, 250 U.S. 616 (1919), p. 628.

<sup>12</sup> *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942), p. 572.

<sup>13</sup> See David Dyzenhaus, “Regulating Free Speech,” *Ottawa Law Review* 23 (1991): 289-318, and Richard Moon, “The Supreme Court of Canada on the Structure of Freedom of Expression Adjudication,” *University of Toronto Law Journal* 45 (1995): 419-70, for discussion.

<sup>14</sup> *R. v. Oakes*, 1 S.C.R. 103 (1986).

<sup>15</sup> *Piarowski v. Illinois Community College District 515*, 759 F. 2d 625 (7<sup>th</sup> Cir. 1985).

<sup>16</sup> *Ibid.*

<sup>17</sup> *Miller v. Civil City of South Bend*, 904 F.2d 1081 (7<sup>th</sup> Cir. 1990), p. 1091.

<sup>18</sup> *Ibid.*, p. 1092, emphasis Posner’s.

<sup>19</sup> *Ibid.*, p. 1093.

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<sup>20</sup> *Ibid.*, p. 1094.

<sup>21</sup> *Ibid.*, p. 1095. Also see Marci A. Hamilton, “Art Speech,” *Vanderbilt Law Review* 49 (1996): 73-122 for a discussion of the ability of art to convey emotions that cannot be expressed in alternative forms, and that can in turn expand the viewer’s ability to imagine different worlds – critical for effective political opposition.

<sup>22</sup> *Miller v. Civil City of South Bend*, p. 1097.

<sup>23</sup> *Ibid.*, p. 1098.

<sup>24</sup> Catharine A. MacKinnon, *Only Words* (Cambridge MA: Harvard University Press, 1993). For his review see Richard A. Posner, *Overcoming Law* (Cambridge MA: Harvard University Press, 1995), pp. 357-67.

<sup>25</sup> *United States v. Carroll Towing*, 159 F.2d 169 (2d Cir. 1947).

<sup>26</sup> Richard A. Posner, “Cost-Benefit Analysis: Definition, Justification, and Comment on Conference Papers,” *Journal of Legal Studies* 29 (2000): 1153-77, p. 1169.

<sup>27</sup> Martha Nussbaum, “The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis,” *Journal of Legal Studies* 29 (2000): 1005-36.

<sup>28</sup> Guido Calabresi and A. Douglas Melamed, “Property Rules, Liability Rules, and Inalienability: One View of the Cathedral,” *Harvard Law Review* 85 (1972): 1089-1128.

<sup>29</sup> Daniel M. Hausman and Michael S. McPherson, *Economic Analysis and Moral Philosophy* (Cambridge UK: Cambridge University Press, 1996).

<sup>30</sup> Jules L. Coleman, *Markets, Morals and the Law* (Cambridge UK: Cambridge University Press, 1988), p. 39.

<sup>31</sup> Hanna Fenichel Pitkin, “Justice: On Relating Public and Private” *Political Theory* 9 (1981): 327-52, p. 347.

<sup>32</sup> Kathleen Sullivan, “Free Speech and Unfree Markets,” *UCLA Law Review* 42 (1995): 949-65, p. 963.

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- <sup>33</sup> *Whitney v. People of State of California*, 274 U.S. 357 (1927), p. 375.
- <sup>34</sup> Michael J. Sandel, *Democracy's Discontent* (Cambridge MA: Harvard University Press, 1996).
- <sup>35</sup> Cass R. Sunstein, *Democracy and the Problem of Free Speech* (New York: Free Press, 1993).
- <sup>36</sup> *Ibid.*, p. 150.
- <sup>37</sup> *Ibid.*, p. 154.
- <sup>38</sup> Posner, "Free Speech in an Economic Perspective," p. 10.
- <sup>39</sup> *Collin v. Smith*, 578 F.2d 1197 (7<sup>th</sup> Cir. 1978), p. 1203.
- <sup>40</sup> *Ibid.*, p.1200.
- <sup>41</sup> *Ibid.*, p. 1201.
- <sup>42</sup> Posner, "Free Speech in an Economic Perspective," p. 31.
- <sup>43</sup> Coase, "Advertising and Free Speech," p. 2.
- <sup>44</sup> *Ibid.*, p. 11.
- <sup>45</sup> Richard A. Posner, *Law and Literature*, revised edition (Cambridge MA: Harvard University Press, 1998), p. 344.
- <sup>46</sup> Posner, "Free Speech in an Economic Perspective," pp. 39-40.
- <sup>47</sup> Stanley Fish, *There's No Such Thing as Free Speech* (Oxford: Oxford University Press, 1994) praises it as such.
- <sup>48</sup> Moon, "The Supreme Court of Canada on the Structure of Freedom of Expression Adjudication," p. 423.
- <sup>49</sup> *Ibid.*
- <sup>50</sup> David A. Strauss, "Persuasion, Autonomy, and Freedom of Expression," *Columbia Law Review* 91 (1991): 334-71.
- <sup>51</sup> Richard A. Posner, *The Problematics of Moral and Legal Theory* (Cambridge MA: Harvard University Press, 1999).

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<sup>52</sup> Eric Rasmusen, "The Economics of Desecration: Flag Burning and Related Activities," *Journal of Legal Studies* 27 (1998): 245-69.

<sup>53</sup> *Texas v. Johnson*, 491 U.S. 397 (1989).

<sup>54</sup> Rasmusen, "The Economics of Desecration," p. 248.

<sup>55</sup> *Ibid.*, p.249.

<sup>56</sup> Eric Rasmusen, "Of Sex and Drugs and Rock 'n' Roll: Law and Economics and Social Regulation," *Harvard Journal of Law and Public Policy* 21 (1997): 71-81. He does not consider the reverse case. Suppose Tom does not eat broccoli, and would need to be paid \$200 to be willing to do so. Tom's community of 300 would be willing to pay \$1 each to force Tom to eat broccoli. Should the law mandate that Tom eat broccoli?

<sup>57</sup> Posner, *Economic Analysis of Law*, pp. 620-1. Also see Ejan Mackaay, "The Emergence of Constitutional Rights," *Constitutional Political Economy* 8 (1997): 15-36 for discussion of how the ability of some coalition to *organize* in pursuit of constitutional rights is crucial.

<sup>58</sup> See Jeremy Waldron, "Precommitment and Disagreement," in *Constitutionalism: Philosophical Foundations*, edited by Larry Alexander (Cambridge UK: Cambridge University Press, 1998): 271-99 for a critique of the Ulysses metaphor applied to constitutions, arguing that the essence of constitutional adjudication is that people (and judges) differ as to how to apply constitutional rules in particular cases, while Ulysses as a sole individual *knew* how he wanted his binding rule to be applied.

<sup>59</sup> Fish, *There's No Such Thing As Free Speech*, p. 125.

<sup>60</sup> Charles R. Lawrence III, "If He Hollers Let Him Go: Regulating Racist Speech on Campus," *Duke Law Journal* [1990]: 431-83, p. 461.

<sup>61</sup> Jonathan Rauch, *Kindly Inquisitors* (Chicago: University of Chicago Press, 1993), p. 159.

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<sup>62</sup> My colleague Abdella Abdou tells me of the Ethiopian saying (in Amharic) ‘Negeru new inji, chube saw aygodam,’ which he translates as (roughly) ‘It is the matter (of the conversation) that hurts, not the knife.’

<sup>63</sup> Frederick Schauer, “The Phenomenology of Speech and Harm,” *Ethics* 103 (1993): 635-53, p. 652.

<sup>64</sup> Rasmusen, “The Economics of Desecration,” pp. 246-7.

<sup>65</sup> See Andrew Altman, “Liberalism and Campus Hate Speech: A Philosophical Examination,” *Ethics* 103 (1993): 302-317, for a proposal on campus hate-speech regulation that would be based on whether the speech in question works to subordinate its target. Also see Owen M. Fiss, *The Irony of Free Speech* (Cambridge MA: Harvard University Press, 1996) and Andrew Kernohan, *Liberalism, Equality, and Cultural Oppression* (Cambridge UK: Cambridge University Press, 1998) for proposals for restrictions on freedom of expression in the service of promoting equality amongst groups of people.

<sup>66</sup> Fish, *There’s No Such Thing As Free Speech*, p. 110.

<sup>67</sup> Coase, “Advertising and Free Speech,” pp. 6-7.

<sup>68</sup> Richard Epstein, “Property, Speech, and the Politics of distrust,” *University of Chicago Law Review* 59 (1992): 41-89, pp. 48-9.

<sup>69</sup> See Daniel A. Farber, “Free Speech without Romance: Public Choice and the First Amendment,” *Harvard Law Review* 105 (1991): 554-83, Fred S. McChesney, “A Positive Regulatory Theory of the First Amendment,” *Connecticut Law Review* 20 (1988): 355-82, Pablo T. Spiller and Matthew L. Spitzer, “Judicial Choice of Legal Doctrines,” *Journal of Law, Economics, and Organization* 8 (1992): 8-46, and Matthew L. Spitzer, “Freedom of Expression,” *The New Palgrave Dictionary of Economics and the Law*, Vol. 2 (London: Macmillan, 1998): 167-72. Also see J. M. Balkin, “Some Realism about Pluralism: Legal Realist Approaches to the First Amendment,” *Duke Law Journal* [1990]: 375-430, for a legal realist approach.

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<sup>70</sup> Posner, “Free Speech in an Economic Perspective,” p. 9.

<sup>71</sup> *Ibid.*, p. 11.

<sup>72</sup> Posner, *Economic Analysis of Law*, p. 676.

<sup>73</sup> *Gitlow v. New York*, 268 U.S. 652 (1925).