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Economic Analysis of Freedom of Expression

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ECONOMIC ANALYSIS OF FREEDOM OF EXPRESSION

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INTRODUCTION

In a short, influential paper, Nobel Prize-winning economist Ronald Coase challenged the belief that the "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."[1] He clarified that "[i]t may not be sensible to have the same legal arrangements governing the supply of soap, housing, automobiles, oil, and books."[2] But, he argued that "we should use the same *approach* for all markets when deciding on public policy."[3]

This Article considers the various attempts of economists, following the path indicated by Coase, to provide an economic analysis of freedom of expression. What does it mean to "use the same *approach*" when studying the "market for ideas"? Are any useful insights gained by doing so?

To obtain a full understanding of how economists have attempted to apply their techniques to freedom of expression, it will be necessary to dispense at the outset with the confusing and poorly chosen metaphor of the marketplace of ideas. To be sure, there are markets in artistic and intellectual products, whether songs, performances, books, or patents; these are true markets in the sense of exchanges taking place between buyers and sellers. However, when Justice Holmes noted in his dissent that "the best test of truth is

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1. R.H. Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384, 389 (1974) [hereinafter *Market for Goods*].

2. *Id.*

3. *Id.*

the power of the thought to get itself accepted in the competition of the market," he referred to something else, akin to a contest of ideas, where truth is what becomes generally accepted and can withstand challenges from competing ideas.[4] Holmes was right that there is a competition, but it is not the same meaning of competition that an economist would apply to the market. John Milton was closer to the mark: "Let [Truth] and Falshood grapple; who ever knew Truth put to the wors, in a free and open encounter."[5] The competition is more of a *contest* than a *market*. Richard Posner compounded the confusion of the marketplace of ideas:

> Ideas are a useful good produced in enormous quantity in a highly competitive market. The marketplace of ideas of which Holmes wrote is a fact, not merely a figure of speech. As a practical matter it is this marketplace, rather than some ultimate reality, that determines the "truth" of ideas. For we say that an idea (for example, that the earth revolves around the sun) is true not because it's *really* true—who knows?—but because all or most of the knowledgeable consumers have accepted ("bought") it.[6]

However, when we say we *buy* the idea that the earth revolves around the sun, we are not using the word *buy* in the same way as when we refer to a market exchange; when a person buys a copy of *Economic Analysis of Law*, they do not necessarily buy the pragmatists' view of truth and knowledge.[7]

Similarly, the market metaphor does not help Breton and Wintrobe's analysis of why rules of evidence in trials strictly regulate

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4. Abrams v. United States, 250 U.S. 616, 630 (1919).

5. JOHN MILTON, AEROPAGITICA AND OTHER POLITICAL WRITINGS OF JOHN MILTON 45 (Liberty Fund 1999) (1644).

6. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 693 (6th ed. 2003) [hereinafter ECONOMIC ANALYSIS].

7. *See* Uskali Mäki, *Science as a Free Market: A Reflexivity Test in an Economics of Economics*, 7 PERSP. ON SCI. 486, 503 (1999); RICHARD A. POSNER, FRONTIERS OF LEGAL THEORY 84 (2001) (noting that "the 'market in ideas' is frequently metaphorical rather than literal" for the same reasons that this Article gives, but persisting with the use of the metaphor).

the information that attorneys can present to juries.[8] They described courts as "markets for ideas in which attorneys on each side of a case compete to convince an impartial tribunal of the truth or justice of their own side."[9] However, there is no exchange in the sense of mutually beneficial trades in the courtroom. Hence the court is nothing at all like the markets where expressions of ideas *are* exchanged, such as the markets for books, newspapers or patents.

Many areas where governments seek to regulate expression do not involve market transactions: consider hate literature distributed in leaflets, a march through the streets by neo-Nazis, or the desecration of national or religious symbols. As we see below, it is possible, although not necessarily helpful, to think about policy regarding expression in terms of the benefits and harms the expression might cause, and weigh these benefits and harms, at least conceptually, in terms of the monetary values people attach to them. However, it adds nothing to talk about these questions in terms of a marketplace.

To keep the scope manageable, this Article ventures into the vast literature on the First Amendment only where it is necessary to illuminate the economic models under consideration. Further, this Article does not address here the work by constitutional economists on why the Constitution protects speech.[10] Coase's assessment and the research under review here concern the public policy aspects of regulation of expression in particular cases.

I. COASE AND THE REGULATION OF EXPRESSION

A. *Coase and Externalities*

If Coase recommended applying the same approach to all public policy questions, including the regulation of expression, we should first consider what approach he has in mind.[11] Since the economic

8. *See* Albert Breton & Ronald Wintrobe, *Freedom of Speech vs. Efficient Regulation in Markets for Ideas*, 17 J. ECON. BEHAV. & ORG. 217, 221-22 (1992).

9. *Id.*

10. *See generally* ROBERT D. COOTER, THE STRATEGIC CONSTITUTION (2000); Ejan Mackaay, *The Emergence of Constitutional Rights*, 8 CONST. POL. ECON. 15 (1997).

11. *See Market for Goods*, *supra* note 1.

analysis of freedom of expression centers on the question of how to deal with expression that causes harm to at least some people, we turn to Coase's study of the problem of externality.

Suppose that a business' activity imposes a cost on a neighboring business. The Coase theorem is as follows:

> It is necessary to know whether the damaging business is liable or not for damage caused since without the establishment of this initial delimitation of rights there can be no market transactions to transfer and recombine them. But the ultimate result (which maximizes the value of production) is independent of the legal position if the pricing system is assumed to work without cost.[12]

If all rights are clearly assigned and if economic agents can exchange those rights without prohibitively high transaction costs, in the end, the rights will be held by those who value them most highly, which is efficient.[13] Further, under the condition of low transaction costs, the initial assignment of rights does not determine where they will end up, so the initial assignment has distributional but not efficiency consequences.

For example, suppose a nightclub and a restaurant are on the same city block where the noise from the nightclub disturbs some restaurant patrons and reduces the restaurant's business. The cost to the restaurant from the noise is X, and the cost to the nightclub for installing noise reduction equipment is Y. First, suppose X is greater than Y, so it is efficient if the nightclub installs noise reduction equipment. An injunction against the nightclub would force it to install the equipment. However, without an injunction, the restaurant would find it in its interest to pay the nightclub to install the equipment; paying Y to the nightclub for the equipment is better than suffering the losses of X. Now suppose X is less than Y, so the noise reduction equipment is not efficient. Without an injunction, the

12. R.H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 8 (1960) [hereinafter *Social Cost*].

13. The term efficient is defined as an arrangement where scarce resources cannot be reallocated to increase the total value of economic activity.

nightclub will not install the equipment. If the restaurant does have the right to demand quiet, the nightclub can pay the restaurant not to pursue an injunction; paying the restaurant X is less costly than installing the equipment at cost Y. In every case, the efficient outcome results regardless of the assignment of rights.

We see why Coase considers *externalities* an "unfortunate word" for describing harms from spillover effects: the root of externalities is that there is a benefit or cost imposed on some party in a way external to the price system, so there is neither payment made for benefits received nor compensation made for costs endured.[14] However, a spillover effect need not be external to the price system, and if it exists within the price system, it will not represent an inefficient allocation of resources.

Although the Coase theorem is famous, most of the essay is devoted to circumstances where there *are* significant transaction costs and the initial assignment of rights will have consequences for economic efficiency.[15] Transaction costs in rights are likely to be high when the issue affects many individuals. This is especially true when the case involves a benefit or harm that has a small benefit or harm per individual but a large aggregate effect. In such cases, individuals have little incentive to undertake the costs of organizing themselves into a position where they can collectively bargain over rights, and individuals will free ride, hoping that someone else will bear the costs of organizing to obtain benefits that will be available to all.

When transaction costs are high, developing public policy in the assignment of rights where spillover effects are possible involves asking what initial assignment will produce the highest value of output given that parties are not likely to trade rights. In these cases, policy should aim to assign rights in a way that will mimic the results of a rights trading market in a world of costless contracting.

14. *Market for Goods*, *supra* note 1, at 389.
15. *See generally Social Cost*, *supra* note 12.

Coase's insight into this sort of situation was to recognize the "reciprocal nature of the problem."[16] Coase stated that:

> The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm.[17]

Coase was at pains to distinguish his approach from what he saw as the misguided tradition in welfare economics of assuming that the solution is to alter the behavior of the entity so that it will internalize the costs imposed on the neighbors and will treat them as its own costs. Imposing a tax on the entity according to the damages caused or requiring the payment of compensation might achieve this effect.[18] However, this is not necessarily an efficient policy.

For example, suppose a polluting firm's net output is $50,000. There are 100 neighboring businesses which suffer a loss of $200 each from the pollution when located near the polluting firm. Each business could relocate to a pollution-free area for $100. The polluting firm could spend $15,000 to install equipment that would eliminate the pollution. Because transaction costs are sufficiently high, the 100 neighboring businesses would not be able to organize themselves to bargain collectively with the polluting firm. The pollution is causing $20,000 damage but could be eliminated by installing $15,000 of equipment. As an alternative, the polluting firm could compensate neighboring firms for the pollution damages. However, by Coase's logic, if no one forces the polluter to reduce the pollution or compensate neighboring firms for damages, the neighboring businesses will find it in their interests to relocate. This

16. *Id.* at 2.
17. *Id.*
18. *See id.*

would be done at a total cost of only $10,000, which is a more efficient outcome.[19] Applying Coase's method does not involve transaction costs but rather the full scope of the outcome under different policy arrangements. In addition, Coase's method suggests that policies which seek to alter the behavior of the polluting firm are not necessarily the policies that are efficient.

Legal commentary has recognized Coase's point that simply allowing some spillover effects to occur would be more efficient than efforts to correct them. He approvingly cites Prosser—"[t]he world must have factories, smelters, oil refineries, noisy machinery and blasting, even at the expense of some inconvenience to those in the vicinity, and the plaintiff may be required to accept some not unreasonable discomfort for the general good,"[20]—and Salmond—"[h]e who dislikes the noise of traffic must not set up his abode in the heart of a great city. He who loves peace and quiet must not live in a locality devoted to the business of making boilers or steamships."[21]

At this point, it is worthwhile to distinguish between three critiques of the welfare economics approach to the regulation of externalities. Coase expressed the first critique in his emphasis on the reciprocal nature of externalities—sometimes those annoyed by the nuisance can most effectively bear the harm resulting from the externality.[22] Courts should allocate rights to the party that will value them the most. Government failure provides a second critique. Government failure consists of insistence on a policy of regulation of the polluter, which leads to a worse outcome than simply leaving the market unregulated. The failure results from the technical demands to optimize regulation, incompetence in the public sector, and politicians and bureaucrats making decisions more consistent with their private goals than with an efficient allocation of resources.[23] A third critique draws on the Coase theorem and suggests that the welfare economics approach neglects the insight that efforts to reduce

19. *See id.* at 41-42.
20. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 412 (2d ed. 1955).
21. R.F.V. HEUSTON, SALMOND ON THE LAW OF TORTS 182 (12th ed. 1957).
22. *See Social Cost*, *supra* note 12, at 41-42.
23. *See* Charles Wolf, Jr., *A Theory of Non-market Failures*, 55 PUB. INT. 114, 117-20 (1979).

transaction costs in the market will increase the instances where parties can contract their way to an efficient outcome.[24]

Each of these critiques has a relationship with Coase's work. Although his most stringent attack in *The Problem of Social Cost* is on Pigou's failure to think more broadly about the most efficient way to allocate the costs of an externality, Coase believed that government was mired in incompetence and controlled by special interests.[25]

Understanding Coase's approach to questions of public policy, we can now turn to his analysis of the regulation of expression.

B. Coase and the Market for Ideas

Coase aggressively argued that government regulation of markets for goods and services is generally harmful because it is wealth-reducing:

> I have been puzzled as to why the 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 the 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.[26]

He challenged liberal commentators, who maintain faith in the government's ability to regulate in the public interest, to either allow government to turn its regulatory powers more attentively to the regulation of expression or, preferably for Coase, to apply the same

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24. *See* Richard O. Zerbe, Jr. & Howard E. McCurdy, *The Failure of Market Failure*, 18 J. POL'Y. ANALYSIS & MGMT. 558, 571-72 (1999).

25. *See Social Cost*, *supra* note 12, at 28-39. *See generally* A.C. PIGOU, THE ECONOMICS OF WELFARE (4th ed. 1948).

26. R.H. Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1, 6-7 (1977) [hereinafter *Advertising*].

distrust for government utilized in the regulation of speech to other government regulation:

> I assume that support for the First Amendment prohibitions on government action—and the support is widespread—is based on beliefs about what the effects would be if the government intervened in the market for ideas. It seems to be believed that the government would be inefficient and wrongly motivated, that it would suppress ideas that should be put into circulation and would encourage those to circulate which we would be better without. How different is the government assumed to be when we come to economic regulation. In this area government is considered to be competent in action and pure in motivation . . . .[27]

Coase attributed the difference between the liberal attitudes to regulation of commercial markets and regulation of expression to self-interest. Those who are in the business of writing opinions, including the defenders of a general freedom of expression, want to see their market (i.e., markets for products of the intellect) less regulated than other markets.[28]

However, Coase's line of attack does not derive from any application of economic method, and Coase failed to explain his idea of an appropriate way to consider regulation of expression. In the concluding remarks of his second paper on the regulation of expression, Coase quoted his classic paper on externalities:

> I have argued, in my "Problem of Social Cost," that rights to perform a certain action should be assigned in such a way as to maximize the total wealth (broadly defined) of the society. The

27. *Id.* at 2; *see also* Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, 59 U. CHI. L. REV. 41, 59 (1992) (advising that distrust of government is at the root of concerns over freedom of expression and that we would do well to apply this scepticism to government regulation of the markets for goods and services as well).

28. *Market for Goods*, *supra* note 1, at 386; *see also* Aaron Director, *The Parity of the Economic Market Place*, 7 J. L. & ECON. 1, 6-7 (1964).

> same is true when we come to what are termed personal rights or civil liberties, the kind of activity covered by the First Amendment. Some legal writers have sought to treat First Amendment rights as being, in some sense, absolute and have objected to what is termed the "balancing" by the courts of these rights against others. But such "balancing" is inevitable if judges must direct their attention to the general welfare. Freedom to speak and write is bound to be restricted when exercise of these freedoms prevents the carrying out of other activities which people value. Thus it is reasonable that First Amendment freedoms should be curtailed when they impair the enjoyment of life (privacy), inflict great damage on others (slander and libel), are disturbing (loudness), destroy incentives to carry out useful work (copyright), create dangers for society (sedition and national security), or are offensive and corrupting (obscenity). The determination of the boundaries to which a doctrine can be applied is not likely to come about in a very conscious or even consistent way. But it is through recognition of the fact that rights should be assigned to those to whom they are most valuable that such boundaries come to be set.[29]

Has Coase accomplished anything except to assert that the principles of wealth maximization and the assignment of rights that lead to wealth maximization (where wealth is defined broadly enough to include all aspects that affect our well-being, including exposure to valuable or offensive expression) should be applied to policy on expression as well as to policy on industrial regulation and the like?

II. COASIAN METHOD APPLIED

To apply the same approach to regulation of expression as to regulation of markets for goods and services, we must treat harms created by bad expression.

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29. *Advertising*, *supra* note 26, at 32.

The idea that harm from offensive expression is no different from ordinary externalities is at the heart of Eric Rasmusen's application of economic method to social regulation.[30] Consider his treatment of laws that would ban the desecration of important symbols, and in particular his treatment of *Texas v. Johnson*,[31] where the Supreme Court held that a Texas statute outlawing the desecration of the American flag was an unconstitutional restriction of freedom of speech.[32] Rasmusen stated the issue as an ordinary case of externality, where one person does something that another would pay to prevent.[33] For fairly obvious reasons, Coasean bargaining between those who venerate the flag and those who would burn it is highly unlikely. Rasmusen would recommend granting the property right to the side that would most value it.[34]

Rasmusen was very direct about the nature of the harm that arises from seeing something offensive: "A factory emits sulfur dioxide, harming the neighbors' 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."[35] Further, he argued that the amount of externality is 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

30. *See* Eric Rasmusen, *Of Sex and Drugs, and Rock 'n' Roll: Does Law and Economics Support Social Regulation?* 21 HARV. J.L. & PUB. POL'Y 71, 76 (1997) [hereinafter *Sex and Drugs*].

31. Texas v. Johnson, 491 U.S. 397 (1989).

32. *Id.* at 420; Eric Rasmusen, *The Economics of Desecration: Flag Burning and Related Activities*, 27 J. LEGAL STUD. 245, 263-65 (1998) [hereinafter *Desecration*].

33. *See Sex and Drugs*, *supra* note 30, at 76.

34. *See Desecration*, *supra* note 32, at 249-50.

35. *See id.* at 248.

> allows for an objective analysis that depends on the empirical facts rather than special pleading.[36]

It is hard to see how applying some figures, in this case willingness-to-pay, to the balancing question objectively solves this very complex ethical problem.[37] Surely the special pleading does not disappear since those who would like to be allocated the relevant rights, but who have a lower willingness-to-pay for them than other parties, will plead that willingness-to-pay is not the appropriate criterion for the initial assignment of rights.

Rasmusen would apply the Coasean principles of assignment of rights across all social legislation. For example:

> The value of something is what people are willing to pay for it, and if people are willing to pay for something abstract like a heroin-free society, efficiency demands that they be given the right to purchase that society. Such a society restricts [an addict's] liberty, but no more than a society in which he is forbidden to drive off in someone else's car. When people want different things, society must resolve the conflict, and efficiency suggests resolving it in favor of whoever cares more about it.[38]

There are two additional issues to consider here. The first is the claim that the harms from an offensive act are identical to physical harms in *all* respects. This is consistent with Coase's assertion that there are no fundamental differences between the marketplace of ideas and the market for goods.[39] Several other writers (some unlikely to be associated with Rasmusen on other issues) share this

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36. *Id.* at 249.

37. *See id.* at 250.

38. *Sex and Drugs*, *supra* note 30, at 76. Arguably, there is a critical difference between the freedom to take self-destructive drugs and the freedom to drive off in someone else's car. The former involves using one's own possession of a scarce good and is, as a result, a freedom that can be given to all in society without conflict, whereas the latter involves taking someone else's possession. We cannot give the freedom to use any scarce good, regardless of ownership, without ultimately being destructive of the value of property. *See* Clifford G. Holderness et al., *The Logic of the First Amendment* 6-7 (Mar. 3, 2000) (Harvard NOM Research Paper No. 00-01), *available at* http://ssrn.com/abstract=215468.

39. *See Market for Goods*, *supra* note 1.

view. Stanley Fish believes the body has been systematically stigmatized and devalued in First Amendment jurisprudence.[40] Further, Charles R. Lawrence, III noted 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 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 that 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.[41]

Lawrence directed his comments against those who would minimize the harm caused by speech, as opposed to physical harm, perhaps due to an absence of personal experience as a target of such harm.[42] All North American schoolchildren learn the folk-saying "sticks and stones may break my bones, but names will never hurt me." However, would an adult hold that to be true? Frederick Schauer noted that both insults and physical attacks can be temporary or permanent, are different in intensity, and are likely to hurt more if the injury was intentional.[43] This induces us to try to "steel [ourselves]" from potential injury.[44] In his final analysis, "there is no non-question-begging way of basing a principle of free speech *on* the

40. STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING TOO 125 (1994).

41. Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 461.

42. *Id.*

43. *See* Frederick Schauer, *The Phenomenology of Speech and Harm*, 103 ETHICS 635, 647-53 (1993).

44. *Id.* at 649.

descriptive claim that the category of speech is less harmful as a category than the category of conduct."[45]

Rasmusen's second claim was that willingness-to-pay is the best means by which to measure the harms of expression.[46] Here is his 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 that 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.[47]

Coase's insight in *The Problem of Social Cost* was that we must approach externalities cautiously and inquire into the likely outcomes of various possible legal entitlements on a case-by-case basis.[48] There are many questions we could ask about the example:

- Why does Jones want to burn Smith's flag? Does the pleasure arise *because* Smith is offended, or is Smith's offense a byproduct of Jones' trying to communicate what he believes to be an important message? Rasmusen compared flag desecration to a pollution externality, but polluters do not gain pleasure as a result of our suffering the pollution. Indeed, the owners of the polluting firms might even suffer some of the pollution cost themselves when they are at home. The production of valuable output causes pollution. Presumably, while flag desecrators know that they will offend some people

45. *Id.* at 652.
46. *Desecration*, *supra* note 32, at 249-50.
47. *Id.* at 246-47.
48. *See Social Cost*, *supra* note 12, at 43.

by their actions, there is a greater good at stake in the desecrator's mind.

- How did the values that the Smiths place on their flag and that the Joneses place on desecrating it emerge? Of course, the standard method of cost-benefit analysis is to take willingness-to-pay values as data. In the analysis of more ordinary public policies, like whether to construct a particular dam or whether to mandate fuel economy standards for new cars, it is hard to see a preferable method of finding values. However, the desecration case is different because, as Rasmusen argued, costly effort will have gone into increasing the value of the flag or symbol, and if desecration is allowed, it will discourage those valuable efforts in the same way that a lack of a copyright system leads to less creation of literary works.[49] In other words, the formation of preferences and values is explicitly part of the analysis but is still taken as unquestioned data.
- If desecration is allowed, will *fewer* or different symbols of veneration be created that are perhaps more immune to desecration?
- If desecration is not permitted or is mildly sanctioned with fines for infringement, what alternatives do the Joneses have for making their point in a striking way?

Each of these questions takes Rasmusen's basic framework as a given and illustrates the complex nature of each case. However, we still need to inquire into whether the basic framework *should* be taken as a given.

Rasmusen did not significantly raise the issue of income distribution at any other point in the essay.[50] For many cases of legally contested expression we could make some generalizations about wealth. For example, hate speech is typically directed at poor groups, and it is the social dominance of the speaker's group over the

49. *See Desecration, supra* note 32, at 253-57.
50. *See generally id.*

victim's group that gives hate speech its particular sting.[51] Alternatively, we expect an individual driven to burn the U.S. flag publicly in the United States will not be someone who is wealthy.

Rasmusen acknowledged some other possible objections to his framework. Discovery of the values people are willing to pay will be very difficult. The field of *contingent valuation*, where researchers attempt to discover the values citizens place on goods such as environmental or architectural heritage, is rife with imperfections where there are no clear existing markets from which to draw data.[52] Even if accurate values are determinable, real policy could suffer from a misrepresentation of values by government. Further, it may be especially difficult to put values on *meta-preferences*, where people might value freedom from laws restricting expression even if they have no particular stake in the Smith and Jones battle.[53]

However, these difficulties sidestep the main issue. Even if we had a foolproof way of estimating willingness-to-pay for or against desecration, including the value of meta-preferences on restrictive laws, and even if these values were used by a scrupulous and honest government bureaucracy whose only goal was to pursue efficient policies, why should efficiency be our sole guide to policy in the free speech arena?

III. POSNER'S ACID BATH

Although Richard Posner admitted that his economics of freedom of expression "coverage . . . is partial, and . . . conclusions tentative," he used strong language on the appropriateness of applying economic analysis to the issue.[54] "What I shall not assume, however, is that freedom of speech is a holy of holies which should be exempt from

51. *See* OWEN M. FISS, THE IRONY OF FREE SPEECH (1996); ANDREW KERNOHAN, LIBERALISM, EQUALITY, AND CULTURAL OPPRESSION (1998); Andrew Altman, *Liberalism and Campus Hate Speech: A Philosophical Examination*, 103 ETHICS 302, 309-12 (1993).

52. Peter A. Diamond & Jerry A. Hausman, *Contingent Valuation: Is Some Number Better than No Number?*, 8 J. ECON. PERSP. 45, 46 (1994).

53. *See Desecration*, *supra* note 32, at 266-67.

54. Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 3 (1986) [hereinafter *Free Speech*].

the normal tradeoffs that guide the formation of legal policy."[55] He wrote 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."[56]

Posner extensively draws upon Judge Learned Hand's balancing framework in *United States v. Dennis*.[57] This framework is reminiscent of the formula proposed by Hand, now textbook law and economics, for determining negligence in a tort case.[58] 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.[59]

On the left-hand side of the inequality is the cost of suppressing expression. On the right-hand side is the probable cost of allowing the expression.[60] The inequality offers nothing very controversial. Measurement will obviously be difficult—Posner noted that it will be "impossible" to quantify, although it can still serve as a useful framework, "a heuristic, a way of framing and thinking about the regulation of speech, rather than as an algorithm for use by judges."[61] The inclusion of E in the inequality incorporates the very problem of measurement.[62]

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55. *Id.* at 6.

56. *Id.* at 7.

57. 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951); *see* ECONOMIC ANALYSIS, *supra* note 6, at 694-95.

58. *See* ECONOMIC ANALYSIS, *supra* note 6, at 695.

59. *Free Speech*, *supra* note 54, at 8-9.

60. *Id.*

61. RICHARD A. POSNER, FRONTIERS OF LEGAL THEORY 68 (2001); ECONOMIC ANALYSIS, *supra* note 6, at 695; *see also* Peter J. Hammer, Note, *Free Speech and the "Acid Bath": An Evaluation and Critique of Judge Richard Posner's Economic Interpretation of the First Amendment*, 87 MICH. L. REV. 499, 513 (1988).

62. *Free Speech*, *supra* note 54, at 9.

On the costs of suppressing expression (V) Posner's view was that we should be careful about setting hierarchies of speech value. For example, he warned against placing political speech at the top of a hierarchy or placing works meant to appeal to reason higher than works that target the emotions.[63] 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?[64] Much of Posner's discussion of V related to the regulation of expression, rather than to the substance of the speech itself.[65] 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.[66] Local limits on certain types of expression will generally be less harmful than nationwide limits.[67]

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 v. United States*, Holmes dissented from the 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 noted, "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."[68] Holmes went on to claim that the "publishing of a silly leaflet by an unknown man" presented no immediate danger.[69] 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."[70] Fighting words, or incitements to riot, give no opportunity for a competing idea to intervene. On the contrary, a pamphlet advocating that people begin

63. *Id.* at 9-12.
64. *Id.*
65. *Id.* at 12-19.
66. *Id.* at 16-19.
67. *Id.*
68. Abrams v. United States, 250 U.S. 616, 628 (1919).
69. *Id.*
70. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

to lay the groundwork for a workers' revolution will be in a contest with tracts claiming that it is not the way to paradise.

Canada provides an interesting comparison because their 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 . . . ."[71] 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."[72] The balancing framework is more explicit in the method adopted for determining when limits are reasonable, known as the *Oakes* test.[73] 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 limitation's objective 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 that are not "arbitrary, unfair or based on irrational considerations," (3) adopt a restriction that "impair[s] '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.'"[74] This puts the burden on governments to show that it passes a balancing test when restricting the freedom of expression.[75] This would appear to be wholly consistent with the approach Posner advocated; the government must demonstrate that the expected cost of allowing the speech—the right-hand side of Posner's inequality—

71. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 2(b).

72. *Id.* § 1.

73. R. v. Oakes, [1986] S.C.R. 103, 138-39 (Can.).

74. *Id.* (quoting R. v. Big M. Drug Mart Ltd., [1984] S.C.R. 295, 352. For commentary, see Richard Moon, *The Supreme Court of Canada on the Structure of Freedom of Expression Adjudication*, 45 U. TORONTO L. J. 419, 451 (1995).

75. *See Oakes*, [1986] S.C.R. at 138-39.

is substantial enough to warrant intervention and that the cost from suppression is being held to the minimum necessary amount.

To see the balancing approach in action, consider two of Posner's opinions. In *Piarowski v. Illinois Community College District 515*,[76] the chairman of the art department of a junior college, who also served as coordinator of the college's art gallery, claimed that the college violated his right of freedom of speech when it removed some of his own sexually frank works from the gallery because viewers had complained the works contained offensive racial overtones.[77] The college's gallery was located in the principal building of the campus and adjoined the mall near the building's entrance.[78] In affirming the lower court's ruling—that the college did not abridge the constitutional rights of the artist—Posner noted that the loss from the college's action (V) was low because it suggested the exhibit have alternative venues (there was no response given to the suggestions) or even install blinds to shield the gallery from the view of passers-by.[79] The costs of the exhibit remaining as the artist installed it (L) were high; it disturbed a large number of people who could not avoid viewing it without much inconvenience.[80] Posner wrote:

> 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 its decision is to discourage—though very mildly we should think—the production of art calculated to shock, to outrage, to *epater les bourgeois*, we do not think the decision has constitutional significance.[81]

76. 759 F.2d 625 (7th Cir. 1985).
77. *Id.* at 626-27.
78. *Id.* at 627.
79. *See id.* at 632.
80. *See id.* at 627, 632.
81. *Id.* at 630.

He concluded: "[N]ot 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."[82]

In *Miller v. Civil City of South Bend*,[83] Judge Posner concured with the majority opinion that an Indiana statute banning nude dancing was an unjustified infringement of freedom of expression.[84] He established 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."[85] This is so even though the dancers at the bar in question, the Kitty Kat Lounge, neither promised nor delivered high culture.[86] Posner continued:

> 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*.[87]

He then addressed 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."[88] In response to the notion that high art *does* in fact convey ideas, he responded:

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82. *Piarowski*, 759 F.2d at 632.
83. 904 F.2d 1081, 1089 (7th Cir. 1990), *rev'd*, Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).
84. *Id.* at 1089.
85. *Id.* at 1091.
86. *See id.* at 1094.
87. *Id.* at 1092.
88. *Id.* at 1093.

> 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*.[89]

He further noted: "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."[90]

After establishing that the dancing was expressive activity that deserved some consideration for protection from outright prohibition, Posner turned to the theme of balance.[91] He noted that "[b]ullfighting is an expressive activity and even has affinities to the dance."[92] Should it also then be protected from suppression on the grounds of freedom of expression? His answer was no:

> 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

89. *Miller*, 904 F.2d at 1094.

90. *Id.* at 1095. *See generally* Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 79-96 (1996) (discussing 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, which is critical for effective political opposition).

91. *Miller*, 904 F.2d. at 1097.

92. *Id.* at 1095.

> 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.[93]

In both cases, Posner stated that the value in being able to express oneself without restraint must be weighed against other factors.[94] Through this balancing process he found that suppression of bullfighting, or asking exhibitors of controversial art to ensure that only those who want to see an exhibit actually do so is reasonable, but banning nude dancing in a lounge is unreasonable.[95]

The essence of Posner's approach is *balance*.[96] The root of his criticism of liberals who hold freedom of expression to be a holy of holies or of the censorship proposed by Catharine MacKinnon, for example, is that in each case there is little or no consideration of what is being sacrificed to obtain either completely unrestricted expression or a world free of all images deemed harmful to women.[97]

Is Posner's approach *economic*? Begin with the use of the formula proposed by Learned Hand in *Dennis*.[98] Although superficially it is related to the formula for negligence in *United States v. Carroll Towing*,[99] there is a great difference in the two uses of the formula.[100] *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 behavior.[101] An efficient degree of precaution is

93. *Id.* at 1097.
94. *See id.*; Piarowski v. Illinois Cmty. Coll. Dist. 515, 759 F.2d 625, 632-33 (7th Cir. 1985).
95. *See Miller*, 904 F.2d at 1097; *Piarowski*, 759 F.2d at 632-33.
96. *See generally Miller*, 904 F.2d at 1081; *Piarowski*, 759 F.2d at 625.
97. *See Free Speech*, *supra* note 54, at 6; CATHERINE A. MACKINNON, ONLY WORDS 22-23 (1993).
98. United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).
99. 159 F.2d 169 (2d Cir. 1947).
100. *Id.* at 173.
101. *See id.*

taken. 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 while taking due account of the costs of administering justice.[102] However, weighing the consequences of a particular ruling is a very broad definition of an *economic* analysis. Although Posner frequently used economic terms in his writings on freedom of expression, there is very little of what we expect in an economic analysis of a legal question: how will individuals' behavior 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 to be under-produced in an unrestricted world.[103] This makes suppression of this type of expression particularly costly.

In his more recent writings about freedom of expression, Posner emphasized the philosophical pragmatism of his approach: "The pragmatic judge does not embrace cost-benefit analysis, or any other aspect of economics, as dogma ('welfare economics,' derived for example from utilitarianism). He uses it only insofar as it helps him to identify and weigh the consequences of alternative decisions."[104] Although welfare economics is consequentialist, consequentialist decision-making is not necessarily economic. In freedom of expression policy issues, we do not have those aspects of cost-benefit analysis that make them distinctly economic. In particular, the key assumption that competitive market prices, in the absence of externalities, are signals of social values is absent. The cases that arise around freedom of expression do not have market prices to guide the analysis.

So, 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

102. *Dennis*, 183 F.2d at 212.

103. *See* Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 563 (1991).

104. RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 363 (2003).

justifications arise out of a consideration of costs and benefits, even if not stated in those terms.

IV. THE LIMITS OF ECONOMIC ANALYSIS

Martha Nussbaum claimed that "not to have the freedom of speech . . . is always a tragedy."[105] In response, Posner wrote:

> To me the real point of tragedy . . . is to show that some conflicts cannot be solved; they do not yield to cost-benefit analysis however generously construed; they are genuine no-win situations . . . . [We can only annul tragedy in] a world in which all conflicts, all public conflicts anyway, are resolved by balancing the competing interests or, as we might say, comparing the costs and the benefits . . . . But constitutional rights are to a large extent determined by a balancing of costs and benefits.[106]

Posner has devoted a substantial amount of his writing to establishing a pragmatic approach to policy and jurisprudence, seeking to evaluate policies according to their consequences in all imaginable aspects. Whether this approach can be defined as *economic* is uncertain.

Amartya Sen has characterized modern economic analysis as combining *consequentialism* with *welfarism*, which holds that only the welfare of individuals in a society should count in determining the aggregate costs or benefits of a policy.[107] In practice, cost-benefit appraisal of policy change assesses changes in the welfare of individuals in terms of what people would be willing to pay to achieve or prevent the policy change. Rasmusen adopted this method in his assessment of the value of banning the desecration of the

105. Martha C. Nussbaum, *The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1005, 1023 (2000).

106. Richard A. Posner, *Cost-Benefit Analysis: Definition, Justification, and Comment on Conference Papers*, 29 J. LEGAL STUD. 1153, 1172-73 (2000).

107. *See* AMARTYA SEN, ON ETHICS AND ECONOMICS 39 (1987).

flag.[108] It is not the goal here to criticize the use of cost-benefit analysis in every case. One of the most significant insights of economic analysis is that, for goods and services supplied in competitive markets, market prices indicate willingness-to-pay in cases where there are no spillover effects. This data makes cost-benefit analysis practicable for a range of policies from construction of public infrastructure to a change in the safety regulations applied to a consumer product. Economic analysis weighing costs and benefits in these cases provides information useful to policy makers; it is surely valuable for many policy makers to consider what people are willing to pay in aggregate for a change that exceeds the costs. It is not the *sole* information that is useful because decision-makers would also take account of whether there are impacts on the distribution of income, individual liberties, etc. However, it is useful nonetheless. Posner defined interests broadly enough that they would include considerations of the value we place on liberty. Although in many spheres life, liberty, and efficiency happily coincide, there are cases where they do not and infringement of liberty could increase efficiency. We do not have well-defined rules for making decisions in these cases, save for an informal pragmatism, but we can certainly recognize the trade-off when it arises.[109]

However, we have to recognize the limits of the economic approach. As one text on cost-benefit analysis states:

> The conclusion of a cost-benefit analysis is . . . an ethical prescription of a rather weak kind: 'such-and-such a course of action ought to be taken, provided that it does not adversely affect social welfare in some dimension other than that of economic efficiency'. The [economic] analyst's role stops at this point. Since he is not equipped to investigate in the other

108. *See Desecration*, *supra* note 32.

109. *See, e.g.*, DANIEL M. HAUSMAN & MICHAEL S. MACPHERSON, ECONOMIC ANALYSIS AND MORAL PHILOSOPHY 121-34 (1996).

> dimensions of social welfare, he cannot produce an unqualified recommendation.[110]

We need to ask whether economic analysis can contribute to our understanding in cases where there are no market prices to observe and where efficiency considerations beyond the criteria of economic analysis will be substantial. Have the analyses of freedom of expression by Coase, Rasmusen, and Posner (without implying that they are the same) provided any economic content beyond the assertion that efficiency, achieved by assigning rights to those who would pay the most to have them, is the criterion by which to judge such policy issues? This is not meant to imply that the conclusions reached by Posner or Rasmusen above are necessarily wrong. Nor is it meant to imply that a consequentialist approach to jurisprudence is incorrect. But, it remains to be shown that economic analysis will bring useful insight to freedom of expression cases.

Coase and Rasmusen's failure to acknowledge that there is more at stake than willingness-to-pay for rights, or even to consider liberal objections, gives a false impression of the mainstream of economic analysis. However, there is a deeper problem: economic analysis alone cannot justify a method of excluding any concerns on which we cannot place an economic value. Coase's claim that "we should use the same *approach* for all markets when deciding on public policy," even when these markets include aspects of basic liberties, still awaits a defense.[111]

110. ROBERT SUGDEN & ALAN WILLIAMS, THE PRINCIPLES OF PRACTICAL COST-BENEFIT ANALYSIS 235 (1978).

111. *Market for Goods*, *supra* note 1.