Externalities

Paternalism explains and justifies morals regulation from the point of view of the single person being regulated.

When we move beyond the solitary individual, we come to a different reason for morals regulation: the effects of someone’s behavior on other people. Externalities are a problem in nonmonetary interactions. If A drinks large amounts of whisky, he is more likely to wish to engage in violence against B, who happens to be sitting in the same bar. This does not mean that A should necessarily stop drinking whisky altogether, since he derives pleasure from it himself, but he should drink less than if B were not also affected. This externality does not argue against solitary drinking, but it does argue for restricting drinking in social situations.¹

Multiple equilibria are a real possibility in social interactions, because convention is so important. It is unimportant whether people salute, shake hands or kiss when they meet, but it seems to matter that one convention or the other be established. The purpose may be to acknowledge that the two greeters are peers and can use further conventions in the assurance of being understood. Multiple equilibria similar to those in boom/recession and banking models discussed may also exist. It might be, for example, that if more people are alcoholic, it makes more sense for any one person to become an alcoholic, because fewer people engage in sports, and that two equilibria would exist: one in which most people drink heavily, and one in which most people engage in sports, and that the equilibria can be ranked in their welfare levels.² ³

Network externalities are also important. Much of the pleasure of conversation builds on the common knowledge of the conversors, for example. If more people watched basketball, I would be more likely to watch it, because to the pleasures of the spectator would be added those of the disputant. Similarly, if we all had classical training, I could tell my limerick about Marcus Aurelius and discuss whether Achilles is more admirable than Odysseus. Regulations encouraging cultural uniformity help encourage acquisition of any culture at all. It is an unusual feature of coordination games, however, that government intervention can increase welfare even if it just takes the form of “jawboning,” without any penalties or rewards. Immigrants want to know whether the society uses kisses or handshakes in its greetings, and a simple statement by the government, without penal sanction, would be enough to avoid embarrassment and ensure

¹Implementation is a different issue. One way is to tax whisky. A second is to impose penalties for fighting in bars. A third is to allow bartenders to refuse service to people they think likely to start fights. All of these are used in practice.
² “An individual getting regularly drunk on gin may be a private matter. Millions of workers and parents’ regularly getting drunk on gin is a social disaster— and was a reason for British licensing laws.” George Will, supra note ?? p. 84.
uniformity.4

Most of my discussion here

When I make the decision to habitually use marijuana, there are a number of different spillover effects. I may physically affect other people by puffing smoke at them. I may affect them in an equally physical way, by withdrawing my company or by otherwise changing how I interact with them. Or, less directly, other people may care about my welfare, or they may care about my conduct per se, not just though its physical effect on them or through its effect on my utility.

Mental Externalities

In addition to the increased importance of the standard reasons for market failure, a number of other difficulties arise in social interactions, and I will spend more time on these, since they are less well-known. The most interesting are perhaps those that I will call “mental externalities,” a particular class of real externalities. Failures of economic rationality provide another reason for government intervention. Paternalism has been generally accepted as a reason for regulation of children by parents and government, but failures of judgement and self-control also are a reason for social regulation of adults. Finally, economics generally takes tastes as given, but certain tastes are useful to society and should be encouraged. These include the general taste for altruism—taking pleasure in the pleasure of other people—and a number of more specific tastes covered by the name “duties.”

Mental Externalities: Ideological, Sympathetic, Altruistic, and Aesthetic

A special type of real externality is what I will call the mental externality, a particular type of real externality. In general, a real externality arises when A’s action hurts B’s utility in some way other via a change in prices or an agreement between them. I will call such an externality a mental externality if it arises without any physical link between A and B. If A’s air pollution hurts B’s lungs, or even if it offends his eyes, it will not be a mental externality; if its very existence offends him, it will. Mental externalities will be subdivided, in turn, into ideological externalities, sympathetic externalities, altruistic externalities, and aesthetic externalities.5

The first three mental externalities are based on A’s actions: they occur when knowledge of the action of A increases or decreases B’s utility, even if there is no direct impact of B’s action on A’s senses.6 This may be because B does not like the idea of such actions taking place in his

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4 xxx Add a paragraph on how the Coase Theorem fails a lot because bargaining is difficult—strangers hurt me, or info makes bargaining costly as in marriage.


6 As noted in footnote ??, the problem of externalities can be reduced to that of establishing property rights.
society (an “ideological externality”) or because B imagines the emotions of A, of himself taking A’s action, or of some third party directly affected by A’s action (a “sympathetic externality”). Something that is distinctive about all of these mental externalities is that if the action is taken, but B believes it was not, the action has no externality. What B doesn’t know, doesn’t hurt him. These externalities may be either positive or negative. If A engages in sodomy and that bothers B, the externality is negative. If A gives money to charity and that pleases B, the externality is positive. The link in either case may be either sympathetic, ideological, or altruistic.

An interesting feature of these externalities is that they tend to diminish with distance. Whether A disapproves of B’s drinking because A thinks drinking is (a) sinful, (b) disgusting, or (c) unhealthful, it seems a psychological rule that A cares less the further away in time and place is B. A will be very concerned if B lives in the same room, less concerned if he lives in Somalia. This gives some reason for why it may be efficient for customs to differ across times and places.

The fourth type of mental externality, the aesthetic externality, is a bit different. The first three types of externalities are emotions induced by the actions or feelings of other people. Aesthetic externalities are emotions induced by things other than people— especially, by the regulations themselves. If A passes a law banning Islam in North Dakota, that may offend B even if there are no Moslems in North Dakota and never would be even without the law.

**Mental Externalities: Ideological**


“§ 42.09. Desecration of Venerated Object

(a) A person commits an offense if he intentionally or knowingly desecrates:

One way of saying that A if forbidden to engage in sodomy in B’s presence is to say that the property right of “A engaging in sodomy in B’s presence” has been allocated to B. Formally, regulations make this right inalienable, but in practice if A buys the right from B, B is likely not to complain to the authorities.

7 Gordon Tullock has said that “If, however, none of the people who are offended by the existence of the brothel discovers that it exists, it generates no negative externality. Nevertheless, our laws do not prohibit brothels whose existence is known to puritans, they prohibit all brothels.” Gordon Tullock (1970) *Private Wants, Public Means*, p. 150. But Tullock is wrong, for the law, in action, does permit inobtrusive brothels. People do not want evils brought to their attention, but they may not mind having them around in a suppressed form. Recall also a point Hans Linde has made: “Contrary to the instrumentalist canon, the ineffectiveness of a law to achieve its goal may be itself a policy, a policy shared by the act’s opponents and some of its supporters, and may be the price for permitting the law to reach enactment.” Linde, *supra* note ?? at 233.

8 How disapproval of an activity affects the optimal policy is not always clear; a number of subtleties arise. Suppose A is displeased when B gets drunk, and pleased when B resists getting drunk when all that is stopping him is his own better feelings. If the pleasure of seeing B resist temptation on his own is greater than the displeasure of seeing him succumb, and he succumbs half the time, then there should not be a law constraining drunkenness.

9 This phenomenon has been noted in the context of public aid for the poor. People seem much more willing to help the nearby poor than the distant. See Pauly (1973) “Income Distribution as a Local Public Good,” *Journal of Public Economics*, 2:35.
(1) a public monument;
(2) a place of worship or burial; or
(3) a state or national flag.

(b) For purposes of this section, 'desecrate' means deface, damage, or otherwise physically
mistreat in a way that the actor knows will seriously offend one or more persons likely to
observe or discover his action.

(c) An offense under this section is a Class A misdemeanor.” (Tex.Penal Code Ann. (1989))

This statute is entirely driven by mental externalities. On its face, it seems that one may
legally burn an American flag, if nobody cares, but one may not burn down one’s own church, if
that would seriously offend even someone who was not a member. The harm prohibited is the
unhappiness of observers over the offensive behavior, not its effects on patriotism or morality.
Whether this statute is justified on efficiency grounds therefore becomes a question of whether
such desecration tends on average to increase the happiness of the desecrator more than it
decreases the unhappiness of other citizens. The citizens in general are given a property right in
desecration; the desecrator must obtain a release from them before he can engage in desecration.

Because of ideological externalities, observing someone else burn flags is a consumption
good, but an unusual one in that everyone must consume the same good, even though tastes
differ. It is, to use technical terms, “nonexcludable,” and since it is also nonrivalrous, it is a
“public good.” There is an inevitable conflict, because some people like to burn flags, but other
people derive disutility from it, yet these people must share a society, despite the efforts of
federalism to carve out niches.10 Whether the Texas statute is justified depends on the balance of
those whose utility is increased and those whose utility declines. It raises interesting questions of
federalism as to whether Texas should be allowed to have such a statute if those who gain from it
live in Texas and those who lose by it live in other states who might be able to outvote Texas in
Congress or the Supreme Court.

Ideological externalities abound. A homely example is the issue of zoning restrictions on
funeral parlors.11 Funeral parlors have been held to be a nuisance in a residential area, even in
the absence of a zoning ordinance:

“When constantly forced upon the attention of neighbors and the passers-by of the
community, it is not unreasonable to conclude that these have a depressing influence on
normal people and tend to make them uncomfortable, as well as to render near-by residences
less desirable.”12

10 xxx See Tiebout at note ???. Further complicating the picture is the aesthetic externality that some people derive
utility from flagburning being permitted, and others from it being banned, regardless of whether anybody actually
engages in it.
The ban on funeral parlors is reasonable from the point of view of efficiency. For one reason or another, mortuaries depress most people, reducing property values near them. This depression is no more rational or irrational than a taste for clean air instead of pollution. Given that it exists, it is reasonable to restrict the placement of mortuaries, despite the fact that their only offense is their very existence near other people’s homes.

A common ideological externality is the feelings of indignation at unfairness. This feeling is often desirable, but it can have highly pernicious consequences. An architect friend of mine says that it seems unfair to him that teenage boys pay much higher rates than girls for car insurance. His unhappiness is a genuine externality arising from the transaction between the insurers and the teenagers. But, as is typical with ideological externalities, there are two ways to eliminate the externality. The first is to impose regulations equalizing car insurance rates. The second one is education to change the ideology, so that even if rates differ, third-parties do not feel indignation, a method which might be called “consciousness-lowering.” Which method is optimal depends on which is cheaper—or, perhaps, the efficiency losses from equalizing the rates would outweigh the ideological externality anyway, and the status quo is fine. In the case of my friend, a short explanation of how equalized rates would result in even greater cross-subsidization of bad drivers by good drivers eased his mental distress. Since I actually enjoyed explaining the workings of insurance to my friend, there was no real cost to changing his ideology in this particular example. If half of the population felt similarly aggrieved about discriminatory rates, however, and if the cost of explaining the situation to them was high, it might be more efficient to simply regulate the market and reduce their unhappiness, even though this reduction comes at a high cost in terms of distortion in the insurance market. Whichever route is taken, anti-market ideologies like this one are pernicious: they either cause disutility directly, or they require markets to be regulated, which is inefficient in the standard economic sense.

The dominant force in insurance regulation is probably special interests, rather than ideological externalities, but one subject where ideology is highly important to the formation of government policy is the death penalty. I venture to guess that most opponents of the death penalty oppose it on the ideological grounds that it is wrong for the government to kill someone outside of war, and most supporters wish either to deter crime or to punish it, but do not care so much about the symbolic value of having a death penalty. If this is true, then if crime is low, only the opponents of the death penalty will care very much about the issue, and the death penalty will be banned, but if crime is high, both sides will care, and it is not clear whether the death penalty should or will be banned. This corresponds to the current situations in Western

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\[13\] A poll asked people who supported the death penalty whether they would still support it if it were found not to affect the murder rate. 73 percent said yes. The same poll asked opponents whether they would still oppose it if they found that it really did lower the murder rate. Only 71 percent said yes. Thus, about the same numbers on each side think that deterence is the issue. U.S. Department of Justice Statistics, Sourcebook of Criminal Justice Statistics, 1988, p. 228. But another poll found that 76 percent of supporters favored the death penalty mainly to “Protect society” or “Deter others.” (ibid at 230). Most likely, supporters think the death penalty good for a variety of reasons, but the simple principle that society should have a death penalty is not one of them.
Europe and the United States, respectively.\textsuperscript{14} \textsuperscript{15}\textsuperscript{16}

Although from the economic point of view ideological externalities are hard to distinguish from other real externalities, modern Americans do have a feeling they are different. John Stuart Mill was ahead of his time. He expresses his feelings eloquently in \textit{On Liberty}:

\begin{quote}
\textit{The only purpose for which power can rightfully be exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right.}\textsuperscript{17}
\end{quote}

Unfortunately, this is indeed feeling, or perhaps rhetoric, and says very little when analyzed for content. As Richard Epstein notes, it is like the nuisance maxim, \textit{“non sic utere tuo ut alienum laedes”} (do not use your things to harm another person), because it begs the question of what is harm.\textsuperscript{18} These various examples show that efficiency and personal freedom may conflict, but the conflict is even deeper than it might seem. Amartya Sen has pointed out that a libertarian view of personal freedom, in which mental externalities are ignored, conflicts with the almost universally accepted criterion of Pareto optimality, the idea that any law which raises the utility of all members of society is good.\textsuperscript{19} I am sure that some readers object to the utilitarian viewpoint of this paper, and it might be worth showing that my conclusions are somewhat robust even to the broader approach, which seems completely innocuous, that the government should undertake any policy that benefits everyone. Sen’s example involves two people, Prude and Lewd, and two actions for each person, reading or not reading a dirty book. Prude’s ranking of outcomes is that (a) it is best for neither party to read the book, (b) next best for just Prude to read it (to avoid the bad influence on the already-susceptible Lewd), (c) next best for just Lewd to read it, and

\begin{footnotesize}
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  \item There is a subtle difference from the aesthetic externality at work here. Opponents of the death penalty oppose a rule, not an action, but it is not for aesthetic reasons. Think about this.
  \item In the U.S. in 1988, 71 percent supported the death penalty, and 18 percent opposed. This was quite broad support; each of 32 subcategories of people polled had more people favor the death penalty than oppose it, the weakest support being the 46-44 among Black/other. I suppose the typical judge or law professor is male (77-18), white (76-18), college-educated (71-23), professional/business (72-21), earns over $15,000 (74-20), is 50-years or older (70-22), Northeastern (66-26), Protestant (72-22), and a Democrat (62-32). See \textit{Sourcebook, supra} note ?? at 227. As an indication of the uniformity of view, note that the percentage of people opposing the death penalty is identical to the percentage supporting a return of Prohibition (18 percent, ibid at 274, 1987 poll).
  \item Alan Schwartz has noted a similar effect in the context of procedural unconscionability in contracts. If rich people are upset when poor people sign cheap contracts without warranties, then a law requiring warranties will increase the price in the contract, to the benefit of the rich people and the detriment of the poor, despite the rhetoric to the contrary. Alan Schwartz, “A Reexamination of Nonsubstantive Unconscionability,” \textit{Virginia Law Review}, 63:1053, 1061 (1977).
\end{itemize}
\end{footnotesize}
(c) worst for both of them to read it. Lewd’s ranking of outcomes is that (a) it is best for all both people to read the book, (b) next best for just Prude to read it (Lewd being rather a joker), (c) next best for just Lewd to read it, and (d) worst for neither person to read it. The laissez faire outcome, preferred by the libertarian, is that both people make their own choices, in which case Prude will not read the book but Lewd will. But both Prude and Lewd would prefer an outcome in which the government forces them to act against their will, forcing Prude to read the book and preventing Lewd from reading it. Thus, human happiness can require restriction of personal liberties even when our criterion for social welfare is the strong one of pareto optimality — and a fortiori when we impose the more reasonable and weaker criterion of utility maximization.20

It may be objected as a practical matter that ideological externalities should not enter into policy decisions because they are hard to measure. To the contrary, the premise and the conclusion in that sentence are unrelated; merely because an element in a cost- benefit analysis is imprecise does not mean it should be left out.21 Many things of value are hard to measure, because they depend on personal taste, but the law does not ignore them. Consider contract disputes over quality. If A is promised Chateau-Lafitte, and B delivers him Algerian red, should A really have a cause of action? One might say that red wine was indeed delivered, and it is A’s problem if he thinks it tastes worse than Chateau-Lafitte, and one might even accuse him of a racist view of African wines. A judge with a wooden palate might say that A has no cause of action.22 Or, a judge who himself could taste the difference might say that there is nonetheless minimal damage; he will not penalize B for subjective tastes, even though he himself and most citizens happen to share them.23

One might object that in the case of wine, a market exists. Indeed, the law does not try to measure A’s damage by measuring the strength of his exquisite taste, and only awards damages based on what other people are willing to pay for wine. This merely reinforces the point that it is the tastes of society, measured in a convenient way, that drive the law, not the tastes of the individual, who is simply unfortunate if he values good wine more than normal people do.24

Joel Feinberg, in Offense Against Others, makes another distinction: between actions felt as

20 One might object and say that the laissez faire outcome would simply be for Prude and Lewd to make an agreement to switch their reading habits — an example of the Coase Theorem at work eliminating externalities. That is a good criticism of the example, and will be valid if Prude and Lewd are roommates, but the example is, of course, a simplification of a situation with a thousand Lewds and a thousand Prudes, who cannot easily bargain with each other or compel each other to keep to their promises. The government may be viewed as a grand go-between, establishing the results that private contracting would obtain were it costless.

21 Suppose, for example, that for ten dollars a sign could be posted next to a drinking fountain to say: “OUT OF ORDER, POISON,” and that this would save an expected two human lives per year. The value of a human life can only be imprecisely measured, but to leave it out of the calculations would be absurd.

22 For an example of a judge with a tin ear, if not a wooden palate, see Sandow at note 77 infra.

23 For this attitude, see O’Connor and Cleburne at note cleburne infra.

24 The hypothetical becomes even more difficult if it is not wine, but a rare coin that is at stake. Suppose that A has been promised a Brasher Doubloon by B, but B actually delivers a fake. The police discover this, reveal the fake, and A brings a civil action against B for the purchase price. B might say that not he, but the police have inflicted harm upon A; A was happy and enjoyed his coin until the police disillusioned him.
directed at oneself and those felt as bad but impersonal (what he calls “profound offenses”). A person feels wronged by someone who insults him, but not by knowing that someone is desecrating a flag. Viewing obscene behavior combines the two. Feinberg defines harm as a setback to a person’s interest (in *Harm to Others*, the first book in his series), a violation of his rights, which does not include profound offense.

Surplus maximization, however, would treat all these forms of offense the same, including profound offense. It measures offense not by direct emotional impact, or by whether a person feels wronged personally, but by how much the person would accept to feel as well off as if the offense had not occurred.

It does seem odd, at first, that person A should care about what person B does inside B’s home, where A cannot see what he is doing and only hears about it second-hand, or perhaps only at some effort to himself. Why, if B is engaging in discreet sodomy, should A care? Could A really care much? And isn’t there something creepy about him caring at all? Isn’t it like the joke about the old lady who complained to the sheriff that some boys were swimming naked in the creek behind her house? The sheriff told the boys to move down the creek a ways. The lady complained again, saying she could still see them from her garden. The sheriff again moved them down. But lady complained yet again. “I can still see them,” she said, “if I go up through the trap door onto my roof.”

Of course, if A does not care much about B’s sodomy, then A would not pay very much to stop B’s behavior and the mental externality would have only a small effect in the cost-benefit calculation. But in fact people do care, it seems, and this is not unreasonable. We care about all kinds of things that do not affect us directly. That is the essence of the abstract justice and morality that we are all taught from a young age. It is as reasonable for me to care about whether you are sodomizing inside your house as whether you are dying of hunger there. In each case, morality makes me care about something without personal material harm.

Suppose my neighbor is torturing a cat in his front yard. On a fine summer day, he sets up a table, ties down a cat, and starts cutting pieces off of it a little at a time. The cat shrieks horribly, and I complain. My sadistic neighbor agrees that he has infringed on my comfort, so he puts a gag on his next victim before he starts. The shrieks have stopped, but the sight is still horrible, and I complain again. Muttering about nosy neighbors, he tells me he will move his operations down to his basement. When I still object, he tells me the story of the old lady and the boys. Is he in the right?

When we think behavior is wrong, we think it is wrong regardless of whether we witness it personally. Indeed, that is the surest sign that we think it is wrong rather than merely offensive. I would hate to see a surgeon at work. Indeed, though I held my wife’s hand during her Caesarean, I did not try to look over the curtain at what was happening. But I did not think the operation was immoral. The cat torturer was being both offensive and immoral when he tortured the cat in his front yard, but he is still being immoral when he does it in his basement. As his neighbor, I
would pay less to stop the torture in the basement than the torture in the yard, but I still mind it.

It is not creepy to care what somebody does in private. There are any number of activities which we consider immoral and care about whether they are public or private. To be sure, many of these are activities which hurt other people, and not just cats. When you murder tramps in your basement, I am outraged because you are hurting the tramps. But why should I care about that, any more than about sodomy? I am not a tramp, so I am in no danger. Yet I do care.

The most piercing illustration of how we care about other people’s business may be in our very feelings about government interference in private affairs. Even if you are not homosexual yourself, you may well feel outrage at the thought that the government would regulate homosexual behavior, particularly if it is behind closed doors. But why are you outraged? The law will not affect you directly. You will not even observe its operation. You are outraged only because you feel that the law is unjust, in exactly the same way as the person who thinks sodomy is immoral is outraged when such behavior is permitted.

The surplus of the person offended by anti-sodomy laws is just as valuable as that of the person who supports them, of course, and should be figured in along with that of the people who actually wish to engage in sodomy. But unless we wish to step in and make the moral judgements ourselves of whether it is immoral for the government to restrict liberty for the sake of surplus maximization and whether sodomy is immoral, we should treat the different willingnesses to pay the same.

It is, of course, worth returning to the point that each of does in fact have our own moral judgements and will act on them. If we could agree in advance to

*The Problem of Process*

This does raise knotty issues because of our concern about process as well as outcome. Suppose Smith would be indifferent between a situation in which Morski does not burn the American flag and one in which Morski does burn the American flag, but the government collects 100 dollars from Morski and gives it to Smith. We would like to say that Smith’s cost from the flag burning is 100 dollars, and say that burning maximizes surplus if Morski would pay at least 100 dollars to do so.

If, however, we actually gave Smith the choice between on the one hand no money and no flag burning and on the other hand 100 dollars paid by Morski and the flag being burned, Smith might reject that choice. The end result is the same, but now the flag has not only been burned, but Smith has given his approval to it being burned; he could have prevented it, but he has not and so might be called the cause of the burning. Whether he should rationally feel worse about the burning or not, we can well imagine that he does, and would require more than 100 dollars in compensation—let us say 200 dollars for concreteness.
This looks as if it denies consequentialism, but that is not quite so. In the first case, the outcome was a flag burned without Smith’s approval; in the second case it is a flag burned with his approval. Smith has violated his own moral rule in the second case, and naturally feels worse than if it is someone else who violated it.

But consider a third case. Smith has the decisive vote in an election. One candidate supports the right to burn flags, but also would give a 100 dollar tax cut to Smith and a 100 dollar tax raise to Morski. The other candidate would preserve the status quo of a ban on flag burning. Would Smith vote for the tax-cut candidate?

A vote for the tax-cut candidate means that Smith has allowed Morski to burn the flag in exchange for 100 dollars, but the causality is less clear than when Morski paid Smith directly for the privilege. No one voter is decisive (unless Smith is the only voter), so Smith shares the causality with the other voters on the winning side, each of whom could have changed the result by a unilateral switch. Or Smith might appeal to the Doctrine of Double Effect, which says that if a good act (the tax cut) which is the main motivation has a bad side effect (the flag burning) that is not necessarily part of the bad side effect, then the good act is moral.\textsuperscript{25} It is hard to say how a typical person would react, but for concreteness let us say that in fact Smith would require a tax cut of 120 dollars to vote to allow flag burning in this third case.

In the spirit of surplus maximization, we should take Smith’s views on causality and blameworthiness as given in our cost-benefit calculations, and ask what situation we are actually analyzing. If we are acting as a social planner making the decision directly, then we are in the first situation, where Smith has no decision to make, so the cost of the flag burning is just 100 dollars. If we are in the second situation, where Smith himself must make the decision about whether to allow Morski to burn the flag, the cost is 200 dollars. The social planner has no decision to make then, of course. But we can take the story up a level, and ask who should make the decision whether to allow flag burning. Clearly, it should be the social planner, not Smith. Letting the social planner make the decision is like reducing the amount of machinery needed to produce a product: it reduces the cost of flag burning. If, for example, Morski’s value for flag burning is 300 dollars, the flag will be burned whoever makes the decision, but the cost would be 100 dollars greater if Smith makes it. If Morski’s value were only 150 dollars, then if Smith makes the decision, he will forbid the burning, but if the social planner were to make it, he would allow it and Morski and Quinn would each end up with surpluses of 50 dollars.

There are, of course, practical difficulties with giving the social planner control. First, he does not know the individuals’ values as well as they do themselves. Second, he might maximize his own surplus rather than that of Morski and Smith.

Democracy is a way around both problems. It requires individuals to allocate their votes just

as one might allocate a money budget. Smith cannot have both the tax cut and the ban on flag burning; he must decide which is more important to him. And it cuts the social planner out of the process.

Why, is it worth thinking about surplus maximization at all, then, if we cannot rely on social planners? One answer is that it helps us reach the conclusion that democracy is a good institution. Again, we take the problem up a level, to ask which institutional arrangement is best given the goal of surplus maximization. We would conclude that a court-ordered system of moral regulation would not maximize social surplus, particularly if the judges made no pretense of having that as their goal.

A second answer is that some people actually do want to maximize social surplus, and they are interested in what does so in particular situations. These people include scholars and coffee-hour debaters who are merely playing at being social planners, so their recommendations are uncorrupted by self-interest. It also includes anyone who is trying to sell their advice to an audience that accepts surplus maximization as a legitimate goal.

These questions are actually not special to morals regulation. They apply equally well to any kind of economic policy advice. Consider, for example, the idea that import quotas reduce surplus. Economists can show that import quotas generally hurt consumers more than they help producers. A surplus-maximizing social planner should allow free trade. But of course we are not governed by a social planner, but by a democratic government, or perhaps some other form of government. The economist’s policy advice is nonetheless useful. Many people are altruistic to the extent that they will oppose import quotas once they understand that they hurt more than they help. Or, if not altruistic, some may be ashamed to argue publicly for a position that their benefit is more important than someone else’s cost. Other people are part of the consumers who do not realize how much they are being hurt until the analysis reveals the extent of the quota’s effect. And the analysis also may reveal a way to make the transfer of wealth from consumers to producers more efficient. Economists recommend import tariffs instead of quotas, for example, because tariffs raise revenue that would otherwise end up as profits to foreign producers, and a tariff can be designed to leave domestic producers as well off as if a quota were in place instead.

Other Applications

Ideological externalities abound, and they are able to explain much as the result of surplus maximization. Guido Calabresi and A. Douglas Melamed use them to explain the prohibition of selling oneself into slavery.26 Even if such a transaction is fully voluntary, with the seller, an adult, accepting a large sum of money to help his relatives in exchange for becoming the slave of a temperate and kind new owner, other people might be offended either by seeing the slave at work under compulsion, by knowing that slavery is present in their society, or by the bare fact that

slavery is legal in their country. All these feelings can be quite separate from concern for the slave himself, concern which better comes under the heading of sympathetic or altruistic externalities.

An important application is to criminal law generally. Our conventional explanation for why robbery is illegal is protection of property rights. If we allow robbery, then people will expend their energies in unproductive stealing of existing goods or protecting of them from being stolen rather than in producing new goods. That is a good explanation, but the ordinary person will say we make robbery illegal and punish robbers because robbery is wrong. Not just deterrence, but retribution is a reason for punishment. Most people feel bad about unpunished crime, and good when a criminal is punished. They see it as fitting and proper that a criminal spend time behind bars, and they would be willing to pay for it even if they could be assured that he would never commit another crime.

At the Nuremberg Trials, prominent Nazis were tried for crimes against humanity, including the extermination of Jews and the use of forced foreign labor in German factories. Deterrence was a small motive. These men could never repeat their crimes, but perhaps other potential war criminals would learn from their example. Far more important was retribution. If Herman Goering were to go free, millions of people would be outraged. This outrage is right and proper, it seems to me. If we are indifferent to great crimes, we are less human. But regardless of whether that is so, I and other people would be displeased if Goering had escaped the consequences of his deeds. As it happened, he committed suicide before the trial finished, which itself creates dissatisfaction. He would not have been sentenced worse than death, but we are denied the pleasure of having punished him, which for some reason is greater than the pleasure of his suicide (which in turn exceeds what we would have felt had he committed suicide before the war ended, or simply died of a heart attack). Part of retribution is the utility of justice having been carried out– the positive reward of a duty well done. This is why we do not feel as unhappy with Joseph Stalin’s lack of punishment for his own misdeeds as we would have if Goering had survived to die of old age. We were not able to try Stalin, and so cannot be blamed for miscarriage of justice. We would have felt satisfaction if we had been able to punish him, but we escape guilt from not punishing him.

The desire for retribution might be viewed as a form of malice, since it is pleasure in the unhappiness of someone else, the punished criminal. When someone engages in retribution or revenge, he is giving up some of his wealth in order to reduce the utility of someone else. The desire for revenge is as much a part of reciprocity as gratitude is, and we all sympathize with revenge, even if Christianity criticizes it. The desire for retribution is more unselfish, a part of the desire for justice, and someone who lacks it seems less a good citizen, less interested in the public good. He does derive utility from the disutility of another, but but only an economist would condemn the willingness to give up part of one’s wealth for unselfish principle.

*Mental Externalities: Sympathetic*
Let us say that a sympathetic externality results when the action of A affects B’s happiness through his psychological identification with A. To the extent that one builds community, such identification is inevitable and desirable, but it does create externalities that make restrictions on individual freedom efficient.\textsuperscript{27} I take the term from Adam Smith’s less well-known book, \textit{The Theory of Moral Sentiments}, which is largely about sympathy, which he explains as follows:

As we have no immediate experience of what other men feel, we can form no idea of the manner in which they are affected, but by conceiving what we ourselves would feel in the like situation. Though our brother is on the rack, as long as we ourselves are at our ease, our senses will never inform us of what he suffers. They never did, and never can, carry us beyond our own person, and it is by the imagination only that we can form any conception of what are his sensations. Neither can that faculty help us to this any other way, than by representing to us what would be our own, if we were in his case. It is the impressions of our own senses only, not those of his, which our imaginations copy. By the imagination we place ourselves in his situation, we conceive ourselves enduring all the same torments, we enter as it were into his body, and become in some measure the same person with him, and thence form some idea of his sensations, and even feel something which, though weaker in degree, is not altogether unlike them.\textsuperscript{28}

For a sympathetic externality to arise, it is not necessary that A believe B shares his tastes. If A does not like cheese, he cringes as he observes B eat Velveeta, even though he can deduce that B must actually like the stuff. Whether the analogy is correct or false, A would be willing to pay B something to induce him to abandon his perverse pleasure—although he might not be willing to pay him much.\textsuperscript{29} Indeed, the idea of human dignity may have its origin in the principle of sympathy: A dislikes seeing B or any other human engage in debased behavior because he himself feels soiled as a result.

The idea of the sympathetic externality has a positive value in explaining criminal law. Why is rape a serious crime, even nowadays, when adultery and fornication are not? Mental externalities are an answer. Rape often inflicts physical harm, of course, and, like robbery, it creates fear of injury, but its high penalty cannot be justified on those grounds. These grounds are the same as those which justify the banning of pornography or homosexuality—subjective disgust. It is just that liberals, somehow, do not tolerate rape and do tolerate homosexuality. Some punishment for rape is certainly justified on the grounds of forcible violation of another

\begin{footnotes}
\item[27] As James Stephen puts it, “Complete moral tolerance is possible only when men have become completely indifferent to each other— that is to say, when society is at an end.” \textit{supra}, note ??, at 149.
\item[28] Adam Smith, \textit{The Theory of Moral Sentiments} (1759), p. 47.
\item[29] As Smith notes, “We sometimes feel for another, a passion of which he himself seems to be altogether incapable; because, when we put ourselves in his case, that passion arises in our breast from his imagination, though it does not in his from the reality. We blush for the impudence and and rudeness of another, though he himself appears to have no sense of the impropriety of his own behavior; because we cannot help feeling with what confusion we ourselves should be covered, had we behaved in so absurd a manner.” Smith, \textit{supra} note ??, at 51.
\end{footnotes}
person’s rights, but not a severe punishment. The same goes for hate crimes such as cross-burning. Why not just punish them with ordinary statutes? (if no problem of needing to justify federal enforcement is needed).

Mental Externalities: Altruistic

A different sort of externality is when A’s behavior does not affect B directly, but B does care about what happens to A in some way. If A acts to reduce his own utility, B is hurt too, if B is an altruist. This may not be because A’s utility is lower, but because of some other kind of effect on A—his health declines, or he becomes more likely to be damned. B cares about A’s welfare, and is grieved when that welfare, defined by B’s definition, not A’s, declines.

This is close to the idea of the sympathetic externality. It differs because here B’s utility depends not on A’s actions (and consequent sympathetic feelings of B) but on A’s feelings. A may recognize that B cares only about the present, and so does not mind drinking himself to death, but A may care about B’s future well-being nonetheless. This is probably an offshoot of Smithian sympathy—A is more likely to care for B if B is related or has a similar appearance—but it is subtly different. Sympathy creates the bond, but is not needed to sustain it.

First, other people may care about my welfare. This is related to paternalism, but not the same, since paternalism can be motivated by my own good directly instead of this indirect effect. I might vote for paternalism in general, knowing it is for my own good. If other people care, that provides extra reason for the regulation. This must be treated carefully, though, as a numerical example can show. It is not the case that just because other people care about my possibly being addicted to heroin that we should increasingly favor a marijuana ban. We must also remember the adverse effects of such a ban.

Let us think about a law to ban person A from using marijuana. With probability P the law will increase A’s utility by 200, because it will help him with his self-control, and with probability (1-P) it will decrease his utility by 50, because using marijuana is actually the right decision for him. Person A will favor this law if the probability P is greater than one-fifth using the calculation that the critical value P* is such that P*200 = (1-P*)50 so P* = .2. This is the solitary-person justification for paternalism.

What if we add a second person, B, whose utility changes by .3 of whatever amount person A’s utility changes? That will not affect the result of the surplus calculation. Now with probability P the law will increase total surplus by 200 + (.3)(200) = 260 and with probability (1-P) it will decrease total surplus by 50 + (.3)(50)=65. Solving P*260 = (1-P*)65 shows that P* = .2. As before, the law increases surplus if P is greater than one-fifth and not otherwise.

Thus, the fact that people care about other people is not enough to justify paternalistic laws by itself. If their caring is specifically a caring about another person’s surplus in the sense we are using it in this book—the other person’s satisfaction of wants—then altruism adds to both the
possible gain and the possible loss from regulation.

Altruism does favor regulation if it helps to spread administrative costs. Suppose that we add a cost of 50 of enforcing the marijuana law. In the one-person economy, that changes the cost-benefit calculation to a net benefit of \(-50 + P(200) - (1-P)(50)\) and the critical value becomes .4. In the two-person economy, the net benefit becomes \(-50 + P(260) - (1-P)(65)\) and the critical value is about .35. Regulation becomes more attractive and yields positive surplus even if the probability marijuana is harmful is only .35 instead of .4.

A critical assumption in that calculation was that adding the second, altruistic, person did not increase the enforcement cost. If the second person were subject to the same temptations as the first, it seems reasonable that enforcement costs would double too, keeping the cost-benefit calculation the same. But not all people are identical. Parents are not tempted the same way as children. When we add the mother’s concern to the child’s cost and benefit of marijuana, we strengthen the case for regulation. Nor do all adults have weak wills. If adults with normal wills care about those who are weak, the extra utility from paternalistic regulation may come to exceed the cost even when it would not for the weak-willed alone.

Another way in which people care about my utility is if it changes drastically enough because of a bad decision. People may not care about my lost pleasure from not being able to use marijuana, but care a lot about my unhappiness if I let it dominate my life to the extent of shutting out personal relationships and career success. People may not care about my unhappiness in having to go to school to learn to trade, but they might care a lot about my life’s opportunities being limited because of illiteracy.

Why should people care so asymetrically about large and small utility changes? Perhaps because they care about what they can feel, and they cannot sympathize with small changes. Some altruism is not altruism per se, but is like the sympathy of Adam Smith’s Theory of Moral Sentiments, a feeling awaked in ourselves by imagining how we would feel in circumstances similar to another’s. It takes stimulus to open our imaginations thus, and small things may not be sufficient.

**Malice**

Malice is one term that might be used for negative altruism, and malice shows the difference between sympathy and altruism more cleanly. Sympathy would cause A to shudder at B’s pain; malice causes him to delight in it— perhaps even at the same time as he is involuntarily shuddering from sympathy.

Malice is a difficult form of utility for cost/benefit analysis. It seems repugnant, and we rebel at policies which encourage it. I suspect that this is because malice, while a good for the malicious person, is invariably accompanied by disutility for someone else, and we generally do think that the malicious person’s utility exceeds the other person’s disutility. Public feeling does
favor certain kinds of malice. When it was discovered that Alger Hiss was a Russian spy, for example, and left public life in disgrace, most Americans thought that it served him right. When Dean Atcheson said that he felt sorry for him and “would not turn his back on Alger Hiss,” the public response was outrage that Atcheson would feel sorry for someone who had betrayed him. People seem to find malice (used in my sense) acceptable when inspired by the disutility of wrongdoers, even though they find it unacceptable when inspired by the disutility of someone innocent. This implies that the feeling is not considered bad in itself—only when it would lead to bad actions such as the infliction of pain on the innocent.

So perhaps it would make more sense to distinguish malice from justice. Malice would refer to utility from the disutility of someone independent of their actions, while justice would refer to a utility from the disutility of someone else that would not exist save for those actions. Of course, the other side of justice is utility from the utility of someone who is rewarded for his actions.

Justice—even in its negative aspect—is desirable. Not only does it provide us with an incentive to punish, a useful incentive if punishments are costly, but it also is good directly, as a source of utility. If bad thing X is going to happen to Smith anyway, it raises surplus if I enjoy X. With simple malice, on the other hand, we don’t want bad thing X to occur. If it will anyway, my enjoyment of it will create surplus. But the danger of bad incentives for me is great. This even applies to my incentives when I do not cause X, because I might not ameliorate it. I will not cause even if I enjoy the plight of those whose loved ones are washed to sea, but I might be less willing to fund good weather warnings.

Thus, I think we should weight the utility from malice and justice equally with other kinds of utility. We should, however, incorporate the second-order disutility that someone may feel from seeing the malicious person enjoy themselves.

Mental Externalities: Aesthetic

So far actions and people have been the subject of the mental externalities under discussion. Other mental externalities exist which for lack of a better term I will call aesthetic. These frequently arise in environmental regulation. Conservationists like forests and deserts to be preserved in their ancient state and they are willing to override the preferences of other people and the maximization of material production to achieve this goal.\footnote{Recall that maximization of material production is not the same as “wealth maximization,” a term of art which takes into account the dollar value of non-material goods. See Richard Posner “Utilitarianism, Economics, and Social Theory,” pp. 48-87 of The Economics of Justice, Harvard University Press, 1983.} There is something special about a 1,000-year-old tree, a feeling that is hard to justify, but very real in its effect upon utility. Whether that feeling is strong enough to justify sacrificing ten thousand dollars of high-quality wood to it is an empirical question.

Social customs or institutions can have the same dignity of age, the same aesthetic appeal. This is almost completely unrecognized currently. People who would shudder if a 100-year-old
Manhattan warehouse is crushed by a wrecking ball or a 50-year-old desert tortoise by a jeep will cheer when a 1,000-year-old tradition bites the dust. Yet the appeal of all three is similar. Indeed, from an aesthetic point of view,

It is delightful to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more delightful if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Social conservation requires people, not animals, plants, or rocks to remain in a certain natural position, but we give people more options to move or object than we give to creatures lower on the evolutionary scale. Indeed, zoning requirements for architectural preservation or neighborhood “feel” already force people into cultural modes they would otherwise disfavor. And social conservation is less likely to be tainted by rent-seeking, since social preservationists often must to live in the society they constrict, whereas lovers of forests need only visit them on weekends.

3 Education, Altruism, Malice, and Guilt

Does the state have a role in educating taste or instilling morals? Earlier, in connection with the market failure of poor information, I discussed the state’s role in educating an individual’s taste for the sake of that one individual. Here, I will discuss education which changes a person so as to help others.

I would argue that the government cannot escape this role. By what it mentions and what it ignores, by what its laws forbid and what they allow, by what is taught in school and what is not a government shows what the rulers think is important. If the government is purely democratic and it makes frequent mention of God, that shows that the voters believe in God, or at least

31 Till this century public policy was not kind to buffalo or redwoods either. In a hundred years, we may see wild-eyed conservationists desperately trying to save the pitiful remnants of American culture, just as they currently are trying to save the last of the old-growth forests.

32 Others have different tastes; this quotation is, of course, a well-known passage from Oliver Wendell Holmes, corrected by replacing the word “revolting” with “delightful; “The Path of the Law,” Harvard Law Review 10: 457, 469 (1897) . See also the admiring cite to Holmes by Justice Blackmun in his dissent in Bowers v. Hardwick, 478 U.S. 186, 199 (1986) . But it is not only one’s affection or distaste for tradition that matters: elsewhere in the books I argue argue that even those with neutral tastes should give the benefit of the doubt to ancient laws.

33 Are there Chinatown ordinances, maintaining those neighborhoods?

34 Aesthetics may be involved in both tradition and diversity, which are separate goals but similar in their elusiveness. On tradition, see also the text at note ??.

35 Traditions are harder to restore than the enviornment, too. It only takes 250 years to grow an oak tree.

36 Preserving culture is preserving a public good for future generations. So discounting enters here also. The future will be rich enough not to need more materical goods, but they will want good institutions. Might they say: “You have bequeathed us the snail darter, and we are grateful. But why couldn’t you bequeath us another of your precious belongings—the family?”
think that believing in God is good. If the government is democratic with judicial veto, and the
government forbids prayer in schools, that conveys the message that the voters or judges do not
think that God is important.

We have just discussed mental externalities, and they will and should cause government to
care about tastes. In general, each of us would like others to share his morality and aesthetic. To
be sure, if nobody else likes houses on hills and I do, I will be able to buy a house on a hill more
cheaply. There are negative pecuniary externalities to other people having my taste for goods in
fixed supply. But if others share my taste for houses with lawns in front, I will have a greater
selection of them from which to buy and a more beautiful view when I walk around my town. If
others share my morality, I will see less offensive behavior and have an easier time educating my
children in it.

There is a marketplace of moralities, a part of the marketplace of ideas. Can one argue
about moralities? Of course. We do it all the time. Even within a particular moral code, how one
is to behave is not always clear. Whether if my father commits murder, I should cooperate in
prosecuting him (the subject of Plato’s *Euthyphro*) is a hard question, and I might both welcome
debate and be swayed by it, even if I am a convinced Greek Orthodox Christian throughout. But
in addition, we debate fundamental moralities; I might switch from being Christian to being
Moslem if you are persuasive enough.

Just as some scientific ideas– for example, that uranium can produce electric power– win out
at both the individual and the government level, so will some moral ideas. In the United States
there was disagreement over whether racial discrimination was moral or immoral in the 1940’s; by
2000 the anti-discriminators had won a clear victory in the moral realm, however much
disagreement remained about the role of government. People are still free to advocate
segregation, but the government is partisan in the debate, both in public proclamations and in
what is taught in schools.

Some judges in the United States deny that morality is a legitimate support for a law, e.g.
the dissenting Justices Ginsburg, Stevens, Souter, and Breyer in *Gonzales v. Carhart* 550 U.S. __

> Ultimately, the Court admits that ”moral concerns” are at work, concerns that
could yield prohibitions on any abortion. See ante, at 28 (” Congress could . . .
conclude that the type of abortion proscribed by the Act requires specific regulation
because it implicates additional ethical and moral concerns that justify a special
prohibition.”). Notably, the concerns expressed are untethered to any ground
genuinely serving the Governments interest in preserving life. By allowing such
concerns to carry the day and case, overriding fundamental rights, the Court
dishonors our precedent. See, e.g., Casey, 505 U. S., at 850 (” Some of us as
individuals find abortion offensive to our most basic principles of morality, but that
cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code.”); Lawrence v. Texas, 539 U. S. 558, 571 (2003) (Though "[f]or many persons [objections to homosexual conduct] are not trivial concerns but profound and deep convictions accepted as ethical and moral principles,” the power of the State may not be used "to enforce these views on the whole society through operation of the criminal law.” (citing Casey, 505 U. S., at 850)).

This is special pleading. These judges themselves hold strong views that abortion and homosexuality should be permitted behavior and racial discrimination prohibited, not to mention bans on such things as murder and fraud; they just do not call these moral views, but fundamental rights. When these judges say that a state law prohibiting homosexuality is illegitimate, but so is a state law preventing cities from granting special protection to homosexuals (see Romer v. Evans, 517 U.S. 620 (1996)), they are supporting homosexuality, they are expressing moral views, whatever they may say. It is not just that they are libertarians who oppose state regulation of behavior.

Whatever the motivations of particular judges, surplus maximization supports a government role in morality. Most people believe that racism is bad and want their government to say so. To be sure, agreement would not be less complete if the government kept out of the debate, but that would also take away a good part of the debate’s point. There is a prize to be won for victory in a morality debate in the form of government approval, and this gives more incentive for the debate, a public good since it provides information and ideas even to private people.  

The Encouragement of Altruism

Gordon Tullock points out that gift giving is super-efficient, because it benefits both the giver and the receiver.  If A gives B a dollar, the gift has benefited A by at least a dollar (or he would not have given it), and benefits B by exactly a dollar (or perhaps less, if B has scruples about accepting charity ). This suggests that altruism is a desirable taste, since it allows a given amount of wealth to generate more utility than if people are completely selfish.

Similarly, the law should usually discourage schadenfreude— the deriving of utility from the suffering of others. This emotion may, like expensive prisons, be useful as a deterrent to bad

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37A recent example of such a prize is the Governor of Michigan’s 2007 executive directive forbidding the state government from discriminating on the basis of “gender identity or expression”, e.g. whether a male employee has a sex-change operation or wants to wear a dress. This will help individual employees, but more importantly it expresses the government’s view that such behavior is moral and disapproval of it is immoral. “Transgendered workers gain rights Granholm orders on-the-job protection,” Detroit Free Press, November 22, 2007, http://www.freep.com/apps/pbcs.dll/article?AID=/20071122/NEWS06/711220364.

38xxx find cite; it is in a book. The Incoem Distribution book?

39This explains why it is sometimes inefficient to give cash. The giver may not get as much happiness from cash, and so although the gift of one dollar is worth one dollar to the receiver, it is worth less to the giver. If the giver gives a book, on the other hand, he can imagine the receiver using the book, and gets more than a dollar of utility out of it himself, even though the receiver gets less than a dollar of utility.
behavior, but it is an evil in itself.\textsuperscript{40} There may or may not be disagreement about what morals should be inculcated, but it is clear that some morals are more conducive to happiness than other. Stephen said of the British in India that “They have forced upon the people, utterly against the will of many of them, the principle that people of different religions are to live at peace with each other, that there is to be no fighting and no oppression as between Mahommedans and Hindoos, or between different sects of Mahommedans.”\textsuperscript{41} The British imposed the principle of tolerance as a check on external behavior, however, rather than making any serious attempt to change the inner man, and since Independence we have seen a resurgence of religious violence. In other cases, the desirability of certain tastes is less disputed, but human nature resists education.\textsuperscript{42}

\textit{The Encouragement of Duty}

A person carries out an action from a sense of duty when he obeys a norm purely for the sake of obedience rather than personal gain. In the economic framework, this behavior is acknowledged but reclassified: the person carries out the action because the utility of doing his duty exceeds the disutility of that action. When one prefers death to dishonor, that is equivalent to saying that dishonor has lower utility than death. This is really just a matter of terminology, and the economist would agree that it is useful to have people in a society who have a strong taste for duty.\textsuperscript{43} Thus, regulations which encourage such tastes would seem to be useful.\textsuperscript{44, 45}

To summarize: the reasons for regulation of economic markets are often applicable to social interactions, where, in addition, a number of other reasons justify intervention. As with economic

\textsuperscript{40} This joke: When an American worker see his boss drive by in a Cadillac, he says: Someday, I too will drive a Cadillac like him.” When an English worker see his boss drive by in a Rolls Royce, he says: Someday, he too will take the bus like me.” The American’s attitude is better for economic growth.

\textsuperscript{41} Stephen, supra note ??, at 89.

\textsuperscript{42} We do not like malice–common law often discourages it. See the law of wills. Mencken: “Puritanism: The haunting fear that someone, somewhere, is having a good time.” A Book of Burlesques, (1920). Add to this section. In particular, does malice add to punishment in tort and criminal cases? Perhaps high liquidated damages in contract breach too, when dissipative— the pound of flesh. Spite fences. Racial, etc., discrimination motivated by animus.

\textsuperscript{43} George Mason proposed adding the power to enact sumptuary laws explicitly to the U.S. Constitution, because “No Government can be maintained unless the manners be made consonant to it.” His motion was defeated by a vote of three states to eight; James Madison, Notes of Debates in the Federal Convention of 1787, p. 488 (1840) W.W. Norton, 1987.

\textsuperscript{44} Possibly mention flag burning regulations here. We perhaps must educate people to hate to see flags burned, and once those preferences exist, we should not cause those people disutility by allowing flags to be burned.

\textsuperscript{45} Jefferson in notes on Virginia: “And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God? That they are not to be violated but with His wrath? ” Notes on Virginia, Query 18. But also: “... it does me no injury for my neighbor to say there are twenty gods or no God. It neither picks my pocket nor breaks my leg.” (query 17). A contradiction noted by George Will, Statecraft as Soulcraft: What Government Does, New York: Simon & Schuster, 1983, p. 71. See Washington’s Farewell Address, and cite up to Weber, note ??.

\textsuperscript{46} Here we have another paradox of game theory: we all may be better off if each of us would suffer mental anguish from engaging in fraud— because if we would suffer such anguish, we will avoid fraud.
regulation, we must worry about government failure as well as market failure, but this is an important enough topic to deserve a section of its own.

**Freedom of Speech**

Whenever there is regulation, there is restriction of freedom. That is as true of antitrust laws and pollution regulation as it is of banning pornography or blasphemy. But Westerners feel much more strongly that it is bad to restrict freedom of speech. Why?

There is an instrumental answer. Freedom of speech is important to innovation. If we knew that a person’s arguments against democracy were unsound, we might want to ban them, as offensive. But we don’t. Thus, we allow a marketplace of ideas.47

This works out particularly well because often the most useful speech is the most offensive. If the Emperor really has clothes, nobody minds if a lunatic says he does not. There is little temptation to ban his speech, and little harm if it were banned. But if the Emperor has no clothes, the little boy proclaiming his nakedness is both more useful and more offensive.

Of course, another kind of offensive speech is rude and ugly speech. There, the offense outweighs the usefulness, and it is right to regulate it. Everybody agrees to this with respect to sound amplifiers that make speech so loud that people cannot sleep. There is no difference in principle from obscenity or insult that is designed merely to cause offense and increase the attention that one person’s speech gets— at the expense of his milder competitors, I might add. See Rasmusen (1994) on flag desecration.

The same problems of weakness of will and poor information that plague social decisionmaking apply to political decisionmaking. They are one justification for constitutions and other mechanisms for slowing down lawmaking. Failure of decisionmaking gives no particular reason to have a constitution prohibit regulation of private behavior such as sodomy, drug use, or animal torture. It does give us a reason to guarantee freedom of speech. The problem is a little like addiction— suppressin an idea is an irreversible decision that a prudent man would not make but an imprudent one might. Viewed this way, freedom of speech does not have to be absolute. It is instrumental, a tool to allow unpopular ideas to survive and, if they are correct, to flourish. Advertising, pornography, indecency, and libel could all still be heavily regulated. The government could still be allowed to favor particular views, as, for example, government schools have always discouraged cigarette smoking with no attempt to give pro-smoking advocates equal time. We just want to avoid an “absorbing state” in which a mistaken idea gains ascendancy and is allowed no competition.

Coordination

At a formal ball, men dress in black and white only. If one of them were to deviate to gray, he would stand out from the crowd. Possibly, he wants that, and possibly everybody wants that, in which case we have prisoner’s dilemma. But equally likely everyone likes the effect of uniformity, and they value having some standard to which to adhere.

Houses are the same way. If all houses on a block have mowed lawns, that looks nice. If none have mowed lawns, that has its appeal too. But half mowed and half unmowed is worse than either extreme.

If the situation is truly one of coordination, all that is needed is for everyone to know the standard, and it will be self-enforcing.

Manners, and even language, are this way. Saying “Thank you” is a convention for showing appreciation, but the convention might be “Thank you very much” instead. We like knowing what social signals we are sending, so we value coordination.

We also coordinate on what movies we watch and what books we read. It is good to have seen the same movies and read the same books, because then we can cite incidents and characters from them to people we meet. We have a common culture.

There are mixtures of coordination and conflict. The Battle of the Sexes is the best-known example. I might want us both to read Dickens, and you want both of us to read Proust, but both of us want to have a book in common. Regulation might prevent us from coming into conflict.

Language laws can help for this reason, preventing a struggle for which language will become dominant. Note, however, that if coordination is really the issue, then no regulation is needed to maintain an equilibrium; if a language cannot maintain itself, then people must not really value coordination so much.

Trade Across Generations

Suppose Smith, living in the present, wants to kill and eat the last whooping crane, which will hurt Jones, who will live in the future. Smith’s benefit is $100, and Jones’s loss in 100 years is $900. Can the market resolve this problem?

It can if Smith, who controls the crane now, can sell it to his younger contemporary Brown in exchange for $400 of effort from Brown, and Brown then sells it to Jones.

This does put the present generation in the envious position of owning the world’s resources. Suppose the present generation were entirely selfish, and decided to consume their entire wealth before they died. Unless the younger generation buys it from them, they will consume the entire capital stock. They will let all the factories run down, let the roads go out of repair, pump out and burn all the oil reserves, and end funding for schools and universities. The younger generation can buy some of the capital stock, because the young people at least own their own
labor, but the absence of bequests means that they will be left very poor. A dismal outcome.

But there is no market failure. This is purely a problem of income distribution. The present generation is rich and the next generation is poor. Naturally, without altruism the present generation will consume more, but surplus is being maximized.

The outcome is dismal for the same reason it is dismal in the hypothetical case when one selfish person owns the entire world’s wealth. Surplus maximization departs from utility maximization.

When one person owns the entire world’s wealth, he will voluntarily give up much of it because of the inefficiency of slavery. He can get more out of everyone else’s labor if he uses carrots as well as sticks, and since labor is the source of so much of wealth, he will have to reduce his share if he wants to increase his quantity of wealth. Suppose I have two slaves, one of whom can make 14 shoes per hour but one of whom can make only 10. There is some minimal utility level a slave must reach in order not to prefer suicide or flight. If I set wages and living conditions so that the slaves can reach that level, here are my options.

I could threaten to kill the slaves if they produce less than 10 shoes, and they will each produce 10.

I could threaten to heavily punish the slaves if they produce less than 14 shoes, and execute them if they produce less than 10. One slave will produce 14, and the other 10. I will have to punish him, and in order to prevent suicides, I will have to give higher wages to both slaves. (I can’t just give a higher wage to the producer of 10, because that would then nullify the incentive effect of the punishment.)

I could promise to reward a slave who produces 14 shoes, and execute a slave who produces less than 10. One slave will produce 14, and the other 10. I will have to give the reward to the slave who produces 14.

Note that the third method is actually the cheapest. I only have to reward one slave, instead of increasing wages to two to make up for punishment. When one person owns everything, sticks aren’t useful— he has nothing to take away from the slave. The slave-owner must resort to carrots.

But why is slavery so full of sticks in practice, then? The answer is market failure. The owner cannot make a legal contract with his slave to pay him more. If he does, he can always take the reward back. And in fact the owner’s use of sticks is hampered too. He cannot be legally required to carry out his threat to punish a slave, and if it costs the owner some effort to punish, he would prefer to skip the punishment once the damage is done.

Thus, gross inequities in wealth distribution will tend to diminish in a competitive market with property rights and contracts. Smaller inequities will remain, but it is not clear that a utilitarian would want to eliminate them in a second-best world given the need to maintain
incentives. If you tax the talented, you diminish their effort.

What about gross inequities in wealth distribution across time, the intergenerational problem? Why doesn’t an old man sell someone else the rights to his house and all his property after his death in exchange for an annuity, a payment each year he remains alive? The answer lies in family feeling, altruism, and care for reputation. Parents do care about their children’s well-being. Thus, they leave bequests. People do care something about others, and if they are wealthy, this can easily outweigh desire to increase their own consumption further. And people care about their reputations. Again, a rich man may prefer to very publicly leave his money to a museum rather than consume slightly better wine each day. If there were no family feeling, altruism, or reputation concern then surplus maximization would not approximate utility maximization so well; as it is, the approximation is close enough that it is not clear utility maximization would recommend different policies in this world we live in.