The Economics of Desecration: Flag Burning and Related Activities

(*The Journal of Legal Studies*, (June 1998) 27: 245-270 (lead article))

September 24, 1997

Eric Rasmusen

ABSTRACT

When a symbol is desecrated, the desecrator obtains benefits while other people incur costs. Negative externalities are intrinsic to desecration, suggesting a case for government regulation if the costs exceed the benefits. The case for restrictions is especially strong because of the impracticality of Coasean bargaining and the possibility of efficient lawbreaking. In addition, desecration reduces the incentive for the creation and maintenance of symbols, which, like other goods, need property-rights protection for efficient production.

Indiana University School of Business, Rm. 456, 1309 E. 10th Street, Bloomington, Indiana, 47405-1701. Office: (812) 855-9219. Fax: 812-855-3354. Email: Erasmuse@indiana.edu. Web: Php.indiana.edu/~erasmuse.

I would like to thank F. Buckley, Lynn Fisher, David Friedman, Bruce Kobayashi, William Landes, John McGinnis, Eric Posner, Richard Posner, Richard Steinberg, and seminar participants in political economy at Columbia University, law at George Mason, and the the Indiana University Workshop in Political Theory for their comments, and participants in the Econlaw discussion list for the on-line discussion that stimulated this paper.

I. INTRODUCTION

One might think that desecration is a matter for the theologian, not the economist. Consider, however, its definition:[1]

> Desecrate:
>
> 1: to violate the sanctity of: profane
>
> 2: to treat irreverently or contemptuously, often in a way that provokes outrage on the part of others.

Part 1 of the definition is indeed beyond the economist's scope. Part 2, however, brings desecration down to the level of the effect on onlookers, rather than on God or the desecrator's soul. When one person does something that another would pay to prevent, there is a negative externality, and externalities are something about which economists have expertise. We know that in the presence of externalities, unregulated self-interested behavior is inefficient. Economic theory helps determine which policies provide efficient incentives, balancing the conflicting desires of the people involved. It can do this just as easily for desecration as for pollution, international trade, or the tax laws.[2]

This article will offer a new approach to thinking about statutes against flag burning, the desecration law that has been most discussed in recent years. In the 1989 case of *Texas v. Johnson*, the U.S. Supreme Court invalidated a Texas statute criminalizing flag burning.[3] Before and after that decision, much has been written

[1] Webster's Ninth New Collegiate Dictionary, First Digital Edition, NeXT Computer Inc. and Merriam Webster, Inc., 1988, 1992.

[2] The economic approach has already been applied to a number of other free speech issues. See, besides the literature on copyright and trademark, R.H. Coase, The Economics of the First Amendment: The Market for Goods and the Market for Ideas, 64 Am. Econ. Rev. Proc. 384 (1974); Richard Posner, Free Speech in an Economic Perspective, 20 Suffolk U. L. Rev. 1 (1986); Peter Hammer, Note: Free Speech and the 'Acid Bath': An Evaluation and Critique of Judge Richard Posner's Economic Interpretation of the First Amendment, 87 Michigan L. Rev. 499(1988) ; Daniel Farber, Free Speech without Romance: Public Choice and the First Amendment, 105 Harvard L. Rev. 554 (1992); Kathleen M. Sullivan, Free Speech and Unfree Markets, 42 UCLA L. Rev. 949 (1995); Richard Posner, The Economic Analysis of Law, 4th edition, chapter 27 (1992); Richard Epstein, Property, Speech, and the Politics of Distrust, 59 U. Chi. L. Rev. 41 (1992). None of these discuss desecration, but they do consider the problem of information production and dissemination under different legal regimes.

[3] Texas v. Johnson, 491 U.S. 397 (1989).

on the constitutionality of desecration laws, but the present article will focus on the somewhat neglected issue of the law as public policy.[4]

Since flag burning has been the focus of public discussion, I will use it as a running example. I will refer to persons wishing to desecrate as "desecrators" and persons opposing the action as "venerators". Section 2 will set up the basic cost-benefit calculation and the idea of mental externalities. Section 3 will discuss the special feature of malice. Section 4 treats of desecration as the harming of created goods, which raises questions of intellectual property. Section 5 distinguishes desecration from speech and vice. Section 6 analyzes the results of mistaken policy, Section 7 examines whether actual statutes could be motivated by efficiency concerns, and Section 8 addresses various objections.

II. THE EFFICIENCY CALCULUS

A. A Simple Example of Wealth Maximization

Let us start with a simple example: desecration of a private symbol.[5]

> 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 which 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

[4]For entry into the law review literature, see John Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harvard L. Rev. 1482 (1975) ; Frank Michelman, Saving Old Glory: On Constitutional Iconography, 42 Stanford L. Rev. 1337 (1990); and Sanford Levinson, Freedom: Politics: They Whisper: Reflections on Flags, Monuments, and State Holidays, and the Construction of Social Meaning in a Multicultural Society, 70 Chicago-Kent L. Rev. 1079 (1995).

[5]Government symbols such as the U.S. flag raise additional issues, similar to those raised by government property generally, of who has use rights and who has the standing or duty to protect the property from damage.

it. The good is not the flag itself, which belongs to Jones, but the right to burn the flag. Usually, the law bundles together various rights to do things with a material object—to use it, sell it, destroy it, or desecrate it— but the issue before us is whether the usual bundling is efficient in this context.

Let us suppose that X = \$3,000 and Y = \$500. Efficiency then requires that Jones refrain from desecrating the flag, because aggregate social surplus is \$2,500 higher when the flag is not burned.

If there were no difficulties in buying and selling the good, the efficient result would be achieved by the market regardless of how the law allocated the initial property right. If the law allowed Jones to burn the flag, and to sell his right to burn it, then he would sell that right to Smith for an amount between \$500 and \$3,000.[6] If the law prohibited Jones from burning the flag without Smith's permission, then Smith would offer to sell his permission for \$3,000 and Jones would reject that offer. Either way, the flag would not be burned, an example of the Coase Theorem at work.[7]

The assumptions of the Coase Theorem are unlikely to be satisfied here, however. Four problems arise.

1. Information. Smith and Jones must bargain over the price of the permission to burn the flag. Since the harm and benefit from burning the flag are both emotional, Jones is unlikely to have a good estimate of Smith's pain, X, and the Smithians are unlikely to have a good estimate of Jones's pleasure, Y. This will lead to posturing for bargaining advantage and the usual inefficiencies of bargaining under asymmetric information: delay and possible lack of a completed bargain even when gains from trade exist.[8]

2. Bitterness. If the Smithians are sufficiently unhappy over the very act of conducting negotiations on this topic, that unhappiness might be worth more than \$3,000 to them. The same might be true for Jones. In either case, bargaining could not attain the efficient outcome. Even if the disutility of bargaining were smaller, uncertainty over how much disutility each party suffers would compound the information

[6] Note the importance of alienability of the right to burn flags. If the law makes flag burning an inalienable right, the outcome might not be efficient.

[7] Ronald Coase, The Problem of Social Cost, 3 J. L. & Econ. 1 (1960).

[8] For elaboration of the problem of asymmetric information, see Chapter 11 of Eric Rasmusen, Games and Information, 2d Ed., (1994) and the references therein.

problem.

3. Free Riders. The Smithians are a group, and the prevention of flag burning is a public good for them. Each Smithian would like to free ride on the other Smithians, paying nothing and letting the others pay Jones not to burn the flag. Institutions such as clubs and churches try to address this kind of free rider problem, but they lack the coercive power of government. The government could force each Smithian to contribute to Jones's payment, but Smith cannot, except by expelling members from his organization.[9]

4. Hold-Outs. Suppose that the legal rule is that not only Jones but any of a large number of people have the right to burn the flag. Even if each of them has only a small benefit, each can impose the entire cost of $3,000 on the Smithians. Unless the Smithians can negotiate with the desecrators as a group, any individual desecrator has a strong incentive to wait until the others have sold their rights to the Smithians, after which he can bargain using the threat of imposing the entire $3,000 cost on them.

B. Regulation as a Solution

The failure of the Coase Theorem makes desecration a natural subject for government regulation and suggests why it has traditionally been a part of criminal law. Desecration should be regulated for the same reason as pollution: one person is inflicting a cost on another without compensation, and bargaining is impractical. 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.[10]

[9] A similar problem could arise on the side of the desecrators. If there were many people who would derive utility from the act of desecration even if they did not commit it personally, desecration might be underprovided.

[10] The externality is real rather than pecuniary, as when a spillover occurs because A's action causes prices to change in a way that affects B. When A bids up the price of babysitters and thereby makes B pay more for babysitting, A has inflicted a negative pecuniary externality on B, but no inefficiency results, because A and the babysitters gain more than B loses. If, however, A burns a flag in a way that offends B, A has inflicted a real externality on B, because B's disutility is not mediated by a price change. The difference is not whether the effect is material or mental, but whether it is mediated by price changes. See Richard Epstein, The Harm Principle—And How it Grew, 45 U. Toronto L. J. 369, 374 (1995). The law early recognized the difference between real and pecuniary harms; see Keeble v. Hickeringill (1707), reported in 103 ER 1127 (1809), in which dictum suggested that a new school was entitled to attract pupils away from an old one in the course of ordinary competition, but not by use of intimidation, and NAACP v. Claiborne Hardware Co.,

Air pollution and flag burning both create externalities. The difference is that the desecration externality is a direct effect on the mind of the venerator on hearing of the event, rather than a physical effect on some material object which then affects his mind. Let us distinguish between the two effects by calling them mental externalities and physical externalities.

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.[11] Jones will say that the Smithians' disutility is illegitimate in a free country, and the Smithians will say that Jones's pleasure from desecration is sinful. The economic approach allows for an objective analysis that depends on the empirical facts rather than special pleading. In the Smith-Jones example, desecration should be banned, but only because of the particular numbers chosen. If the evidence showed that Jones would pay not $500, but $5,500 to burn the flag, the conclusion would change. Rather than assuming the answer—that the policy is legitimate or illegitimate— economics relies on how well the policy serves to satisfy human wants.[12]

393 So. 2d 1290 (Miss 1980), 458 U.S. 886 (1982), where a major issue was whether a black boycott of white merchants was voluntary or enforced by intimidation.

[11]Ronald Coase has this explanation for judicial hostility to expressive, but not economic, regulation: "Self-esteem leads the intellectuals to magnify the importance of their own market. That others should be regulated seems natural, particularly as many of the intellectuals see themselves as doing the regulating. But self-interest combines with self-esteem to ensure that, while others are regulated, regulation should not apply to them." Coase (1974), *supra*, note 2. He suggests treating both markets alike, the inspiration of the present article: "My argument is that we should use the same *approach* for all markets when deciding on public policy. In fact, if we do this and use for the market of ideas the same approach which has commended itself to economists in the market for goods, it is apparent that the case for government intervention in the market for ideas is much stronger than it is, in general, in the market for goods." Id., at 389.

[12]The contrary view—that some desires are illegitimate—is usually associated with a religious view of the world, but it is not restricted to religion. One of its most influential proponents is John Stuart Mill, who rejects the legitimacy of mental externalities and criticizes those "who consider as an injury to themselves any conduct which they have a distaste for, and resent it as an outrage to their own feelings, since a person's taste is as much his own peculiar concern as his opinion or his purse." John Stuart Mill, On Liberty, Chapter 4 (1859). Mill does, however, reject some tastes—tastes concerning other people's behavior. If he were a more consistent utilitarian, he would consider moral feelings as legitimate as immoral behavior. For a discussion of Mill's thought on this issue , see Chapter 2 of C. L. Ten, Mill on Liberty (1980) and Keith Hylton, Implications of Mill's Theory of Liberty for the Regulation of Hate Speech and Hate Crimes, 3 U. Chicago L.

To explore this point further, ponder the following examples:

1. The factory's sulfur dioxide harms my trees, reducing my property value.
2. The factory's sulfur dioxide harms my lungs, requiring medical care.
3. The factory's sulfur dioxide tickles my throat, making me feel bad.
4. The factory's noise bothers me.
5. The factory's smokestack emits steam, which is harmless but looks ugly to me.
6. The factory burns a flag, offending me.

Items one through four are physical externalities, while five and six are mental. But what is the difference between them all?[13]

In the original story, the Smithians lost $3,000 and Jones gained $500 from desecration. Picking those numbers determined the welfare-maximizing policy, and if they had been reversed, desecration would be efficient. Is it really possible to measure the costs and benefits?

Measurement is a problem, but it is not special to the mental externalities involved in desecration. Any public goods creates the same problem.[14] When the government decides between selling public land or keeping it as a national park, citizens disagree about the costs and benefits, either because personal values differ or because of differing estimates of common values.[15] Those citizens opposed to the park

School Roundtable 35 (1996). A briefer discussion, with special reference to tort, can be found in Richard Epstein, Harm Principle, *supra* note 10 at 372. In another work, Epstein makes the point that allowing outsiders' offense to contractual provisions would greatly increase the uncertainty over whether agreements could be enforced, and states his preference for these externalities to be put in the Roman law category of *damnum absque injuria*—harm without legal injury. Richard Epstein, Forbidden Grounds (1992) at 415. In the context of desecration, criminal law is more appropriate than tort, both for specificity and to reduce the costs of measuring injury in particular cases.

[13]For one long and interesting philosophic attempt to distinguish between them, see Joel Feinberg, The Moral Limits of the Criminal Law, Volume 2: Offense to Others (1985). For a critique of economists' reluctance not to treat all externalities equally, see chapter 10, A Second Look at Externalities, of Steven Rhoads, The Economist's View of the World (19xx).

[14]Desecration is a public good in the sense of being nonexcludable (other people besides the desecrator cannot be blocked from experiencing changes in utility as a result of his action) and nonrivalrous (creating a utility effect on other people does not incur extra costs). It is different from a conventional public good in that some people's utility from it is positive and some negative.

[15]Law and politics often need to discover which tastes are predominant. We legislate requiring

will tend to under-report their benefits from the park in public debate, and those who support the park will exaggerate their benefits. The valuation may be difficult, but we do not eliminate national parks just because the costs are easier to monetize than the benefits.[16]

The political process provides a way for citizens to demonstrate the extent of their utility or disutility of desecration, a form of bidding for laws.[17] If desecration law is allowed to stay a political question, citizens show their preferences by the intensity of their political effort.[18] Political effort is subject to the same free rider problems as Coasean bargaining between groups. In particular, smaller, concentrated, and organized groups would have a political advantage. In the Smith-Jones example, Jones, being an individual, would have an advantage over the Smithians, and might successfully lobby against a desecration law even if it were efficient. Nonetheless, the political process does provide some empirical evidence of the strength of preferences, and is no less useful here than for deciding on taxing or spending.[19]

---

strip mine reclamation because we judge that on average, people prefer to see reclaimed land. We cannot say that this preference is the only rational one. People from Illinois are willing to drive far to see the Badlands in South Dakota, which are not dissimilar to eroded strip mines. Reportedly, the Mount Lyell Mining and Railway Company of Queenstown, Tasmania tried to clean up an area devastated by acid rain from its copper smelter, but the government stopped it from planting seeds and fertilizing. The bare hills are the town's main tourist attraction, even attracting artists who wish to paint them, and restoration would be undesirable. See John Kohut and Roland Sweet, Dumb, Dumber, Dumbest: True News of the World's Least Competent People (1996) at 79.

[16]For a collection of articles discussing the problems of valuing public goods, see the Fall 1994 issue of *J. Econ. Perspectives*, and, in particular, Paul Portney, The Contingent Valuation Debate: Why Economists Should Care, 8 J. Econ. Perspectives 3 (1994).

[17] It has been common historically for majority symbols to be protected from desecration, but not minority symbols. Such laws may well be justified as efficient. A discussion that shows the age of this utilitarian argument can be found in Christopher Tiedeman, A Treatise on the Limitations of the Police Power in the United States (1886) at 168-69 (see *infra* at note 50).

[18]The Rehnquist dissent in Texas v. Johnson, 491 U.S. 397, 435 (1989) has this flavor: "Surely one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people—whether it be murder, embezzlement, pollution, or flag burning. Our Constitution wisely places limits on powers of legislative majorities to act, but the declaration of such limits by this Court 'is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case.' Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 128, 3 L.Ed. 162 (1810) (Marshall, C.J.). Uncritical extension of constitutional protection to the burning of the flag risks the frustration of the very purpose for which organized governments are instituted."

[19]John Stuart Mill regards "the selfishness of the public, with the most perfect indifference, passing over the pleasure or convenience of those whose conduct they censure, and considering only their own preference" (Mill, On Liberty, chapter 4 (1859)). As with any policy, from tax law to smoking regulations, some group must lose from desecration policy, and it is not clear why the injustice would be greater with symbol protection than with property protection, or why the general rule should be that minority opinions should outweigh majority opinions. The argument for Mill's position would

III. DESECRATION AS MALICE

Let us now add a detail to our story of Jones and the Smithians: Jones's motive is malice: he dislikes the Smithians, and wants to see them unhappy.

Malice helps with the measurement problem. A reasonable empirical generalization is that the utility of the malicious party is less than the disutility of his victim – that rarely would he be willing to pay more to perform the malicious act than the victim would pay to prevent it. Malice is a secondary effect, an echo weaker than the original sound. This kind of judgement is universal in criminal law.[20] We believe that the thief values the television less than the owner, the murderer values killing less than the murdered person values life, and the rapist values his pleasure less than the victim values her pain. Otherwise, theft, murder, and rape could be efficient ways of minimizing transaction costs.[21]

In addition, malice, because it ineluctably couples one person's utility with another's disutility, channels resources into rentseeking efforts to carry out the involuntary transaction or to avoid it. Conceivably, malicious actions are still efficient, but because they transfer utility, rentseeking costs must be added to production costs.[22]

---

have to be that (a) the political process does not sufficiently protect minority interests by allowing intensity of preferences to affect outcomes, and (b) the disutility of the minority from regulation generally exceeds the utility of the majority.

[20]It also puts in an occasional appearance in civil law. Under the common law, for example, if someone gave advice to a friend not to employ a certain doctor out of concern for the friend, the doctor had no action against him. If, however, he gave the advice out of malice against the doctor, the doctor could sue. Oliver Wendell Holmes, Privilege, Malice, and Intent, 8 Harvard L. Rev. 1 (1894). "...a malicious motive in the defendant may make an act which would not be wrongful without the malice, a wrongful act when done with malice." Mogul Steamship v. McGregor, 21 Q.B. 544, 608 (1889).

[21]An example of misapplication of this kind of reasoning, relevant because it does try to tie together mental externalities with theft, is John Stuart Mill's statement in Chapter 4 of On Liberty that "...there is no parity between the feeling of a person for his own opinion, and the feeling of another who is offended at his holding it; no more than between the desire of a thief to take a purse, and the desire of the right owner to keep it." The purse is a private good, valuable only to one person at a time. The opinion is probably more important to its holder than to any other one person, but it is much less clear that the holder would pay more to hold it than a large number of other people combined would pay for him to abandon it.

[22]This idea that malicious actions create rent-seeking costs has long been applied to the economic analysis of intentional torts. See chapter 6, Intentional Torts and Damages, of William Landes and Richard Posner, The Economic Structure of Tort Law (1987). It is one answer to the paradox of the efficient malicious rape proposed by Gary Schwartz, Economics, Wealth Distribution, and Justice, 1979 Wisc. L. Rev. 799 (1979) (that the rapist may derive great utility precisely from forcing a woman,and would pay more than the woman would pay to prevent the rape.). I prefer the simpler answer that experience suggests that few, if any, such rapists exist.

Malice helps explain why public policy differentiates between different kinds of symbols. Flags have long served to increase altruism towards fellow citizens, especially in wartime. Soldiers are spurred to take extra risks to prevent flags from being captured. Armies incur real costs to use flags in this way; soldiers of special ability are chosen to carry flags, which means they cannot carry weapons. Dying in battle to defend the flag against capture, however, loses some of its allure if teenagers back home can wear the flag on the seat of their pants. A similar argument justifies encouraging desecration of malicious symbols, or even government bans on them. The swastika, for example, has very little use as a positive symbol, but considerable strength for malicious purposes.[23]

Malice is by no means a necessary element of desecration. Eric Posner has suggested to me the following hypothetical that turns the idea on its head. A white Alabaman erects a Confederate flag in his yard for the sole purpose of outraging his black neighbor, who responds by burning it down. The venerator is malicious, while the desecrator just wants to eliminate an eyesore. Yet laws are general rules made to fit average cases, and it is fair to say that malice plays a prominent part in desecration generally.

IV. DESECRATION AS PROPERTY DESTRUCTION

A. Symbols are Created and Maintained

"Desecrate" is a transitive verb. Something must be there to be desecrated. From whence comes this something? –It is a produced good, created at a positive cost. Just as a car is produced from steel, labor, and energy, a symbol is created from the time and emotional commitment of the venerators. Just as fewer cars will be produced if a tax is imposed on car companies, so fewer symbols will be produced if desecration is allowed.

Consider the origin of the Smith flag. Suppose that the Smithians' cost of turning a piece of cloth into the sacred flag was $10,000 in design costs, time spent venerating

[23] Section 86(I)(4) of the German Penal Code is "Prohibition of Distribution, Production and Importing of Goods Used to Propagate Nazi Ideology," as cited in Bernhard Bleise, Freedom of Speech and Flag Desecration: A Comparative Study of German, European and United States Laws, 20 Denver J. International Law and Policy 471, 472 (1992). The ban would be considered unconstitutional in the United States, but would surely have helped Germany had it been in force in 1930.

the cloth, and energy in teaching its meaning to their children. In return, they receive $12,000 in benefit from the flag through group solidarity and pleasure in worship.

By the time of the desecration, the $10,000 is a sunk cost, irrelevant to short-run decisions. If desecration were illegal, the Smithians' net payoff would be $2,000 ($12,000 - $10,000) and Jones's would be $0. If desecration were legal and unforeseen, the Smithians' net payoff would be -$1,000 ($12,000 - $10,000 - $3,000), and Jones's would be $500. As before, welfare is maximized by banning desecration, and if it is not banned the regretful Smithians will have a negative payoff.

But if the government has a policy of allowing desecration, groups like the Smithians will revise their calculations in the long run. If the Smithians had foreseen that desecration would be legal, they would not have gone to the expense of creating the flag in the first place. The payoffs would then have been $0 for the Smithians and $0 for Jones. Comparing the payoffs under the two policies of toleration and prohibition of desecration yields the striking result that nobody is helped by toleration. Jones's payoff is zero either way, and the Smithians strictly prefer the ban. The Smithians are less happy and Jones no happier as a result of desecration's legality.

The feature of diminished production of symbols is insidious because it is an absence. A society that tolerates desecration will have fewer symbols, but it may not realize why. By not allowing anything to be kept sacred, it may lose the very idea of sanctity.[24]

Perhaps even more important than symbol creation is symbol maintenance. If besides the cost of creating the symbol, costs must be incurred to maintain its effectiveness, then in the long run the legality of desecration will lead to the elimination of the symbol's power as it gradually depreciates.[25]

[24]John McGinnis points out a paradox here. If desecration becomes commonplace, it may lose both its offensiveness to venerators and its usefulness to desecrators. Thus, the long-run effect could be neutral for the venerators and negative for the desecrators, who no longer can obtain publicity, but could, at the price of the criminal penalty, while desecration was illegal. At the same time, the venerators have still suffered a loss— the utility they could have derived from veneration if the symbol's value had remained intact. This is analogous to measuring the effect of the OPEC oil price increases of the 1970's. After ten years, the higher price was much less painful to consumers, but only because they had incurred the costs of substituting from oil to capital and alternative energy sources.

[25]New arguments or ideas are different from new symbols in this respect. A good argument is actually strengthened by the lack of success of counterarguments, and its supporters correspondingly heartened. Supporters of a symbol, however, rarely derive pleasure from its desecration.

Lack of awareness that symbols are produced goods also makes short-run cost-benefit calculation misleading. Suppose that Jones's benefit from desecration is not $500 but $5,000, while the Smithians' cost of desecration remains at $3,000. The short-run calculation yields a clear policy recommendation: allow desecration. But the long run effects are the same as before. Allowing desecration results in no flag being created and the payoffs of both Jones and the Smithians are $0. Thus, it may happen that even if the short run cost-benefit calculation does *not* work out in favor of the venerators, desecration should still be prohibited.

Incorrect short-run calculations are all the more dangerous because under our political institutions, distortions arise whenever there is a tradeoff between short run and long run. The simplest problem is that the judge or politician may not realize that the short-run benefit has a long-run cost. More unavoidably, he receives a share of the short-run benefit, but does not pay the long-run cost. In the present context, toleration of desecration may have short-run advantages, depending on the cost-benefit calculation and the tastes of the policymakers, but long-run costs. Elected officials clearly have strong incentives to favor short-run considerations, but so do judges, who by striking down laws against desecration can feel good about themselves and the individual desecrators before them. The losers, in the short run, are the venerators, who may be large in number but are represented in the courtroom only by prosecutors. In the long run, fewer symbols will be created, and everyone may lose. Future generations, however, are not present in the courtroom.

B. Trademark Protection

In *Smith v. Goguen* , Justice White wrote:[26]

> The flag is a national property, and the Nation may regulate those who would make, imitate, sell, possess, or use it. ... There would seem to be little question about the power of Congress to forbid the mutilation of the Lincoln Memorial... The flag is itself a monument, subject to similar protection.

The difficulty is that symbols are denied the protection granted to other kinds of property, including other forms of intellectual property. I can trademark a symbol, but that only protects against other people using that symbol and pretending it was authorized by me. I cannot copyright it, which would prevent other people from copying it without my consent. *A fortiori*, I cannot control its use. A liberal

[26] Smith v. Goguen, 415 U.S. 566, 587 (1974).

poet can refuse to sell a license to conservative Rush Limbaugh to recite his poem, but the Smithians in my story cannot refuse Jones the right to desecrate their symbol. That inefficiency results should not be surprising. Unless symbols, like books and inventions, have intellectual property protection, they will be underproduced. The government grants monopolies on the use of patented and copyrighted goods to their creators even though this infringes on the freedom of everyone else because the monopoly encourages creation of the goods.

A trademark is a symbol which a business uses to convey its identity to others. Violation of trademark, like desecration, is abuse of a symbol, resulting in degradation of the value of the symbol and reduced incentive for the symbol's creation and maintenance. A crucial difference, however, is that the harm prohibited by trademark law is limited to mistaken perceptions rather than to all injury to the symbol.[27]

If Jones pretends he is a Smithian using their symbol as part of his pretence and brings ridicule on the group, the resulting harm is akin to trademark violation but distinct from desecration. Jones uses fraud to convince the public of a certain view of the Smithians. Even if this view happened to be accurate, the law frowns on fraud, as ordinarily having inefficient results. This wrong is distinct, however, from desecration, which involves no fraud, and harms the Smithians directly rather than through its effect on third parties. Thus, trademarking their symbol would do venerators little good against the distress of desecration.

C. Copyright Protection

Why not accord something like copyright protection to symbols? –The problem is that symbols are created and distributed differently from books. The cost of creating a book is incurred early, maintenance is cheap, the identity of the creator is clear, and, most importantly, the books are sold. Symbols have maintenance costs, the identity of those who care about them is less clear, and they have no price tags. The harm from infringement of the property right is not lost sales, but direct disutility. As a result, the dollar value of the loss may be hard to measure, making determination of damages costly in civil litigation. Ownership of the symbol, which in effect means standing to sue for copyright infringment, would also be a problem, since venerators may not be a single organized group and might, indeed, be a substantial fraction of

[27] A federal court has held that the U.S. flag does not even have trademark protection. Parker v. Morgan, 322 F. Supp 585 (1971).

the nation's population. All of these make it difficult to apply copyright protection to symbols.[28]

Even if it applied, however, copyright protection would not prevent desecration. The law does not recognize servitudes on chattels —restrictions on the use of personal property imposed by the seller on the buyer.[29] Such restrictions are allowed only in land transfers. The first sale doctrine of copyright is an example: a book or video seller cannot restrict resale or rental. What the venerators of a symbol require, however, is precisely a restriction on its use by people who buy a copy of the symbol.[30]

D. The Tort of Misappropriation

The common law and statutes of some states (including Illinois and New York) recognizes the tort of misappropriation, which is commonly traced to the 1918 case of *International News Service v. Associated Press*.[31] As Robert Denicola says, " 'Misappropriation' proved a convenient reference when no other principle of unfair competition law would serve to alleviate the perceived injustice of defendant's enrichment at plaintiff's expense. In its wake the case has left a collection of decisions as diverse as any accumulated under a single common-law label."[32]

[28]The focus in copyright law is on lost sales, but issues similar to desecration's do arise, when, for example, someone publishes a shoddy rewrite of an author's work. The French term *droit morale* applies to the rights of creators to restrict misuse of their work. American copyright law is almost entirely restricted to pecuniary rights, although this is not generally known. I have found, for example, that even law professors are commonly dismayed to learn that when they sign away the copyright a law journal is free to publish their articles anonymously. But courts have recognized moral rights using other doctrines such as unfair competition and tort. See Roberta Kwall, Copyright and the Moral Right, Is an American Marriage Possible? 38 Vanderbilt L. Rev. 1 (1985); Henry Hansmann and Marina Santilli, Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis, 26 J. Legal Stud. 95 (1997). Even the European right of integrity, however, which regulates mutilation of art, focuses on protecting the artist's reputation for producing art as he intended it rather than on protecting his feelings. See Hansmann and Santilli, at 99-100.

[29]See Hansmann and Santilli, pp. 100-102, and their further discussion of *droit morale* as division of property rights in an object.

[30]Some hope exists in this direction, however. It has long been the case that sellers of information have been allowed to restrict its dissemination. See Chicago Board of Trade v. Christie Grain & Stock Co., 198 U.S. 236 (1905) (upholding a contract forbidding dissemination of grain prices).

[31]International News Service v. Associated Press, 248 U.S. 215 (1918). For a discussion of the merits of this decision as public policy, see Richard A. Epstein, International News Service v. Associated Press: Custom and Law as Sources of Property Rights in News, 78 Va. L. Rev. 85 (1992). Note also the Brandeis dissent, which criticizes the creation of intellectual property rights by judicial fiat after Congress had decided not to do so.

[32]Robert Denicola, Institutional Publicity Rights: An Analysis of the Merchandising of Famous Trade Symbols, 62 N.C.L. Rev. 603, 628 (1984).

What the doctrine seems to center on is unjust enrichment. One person incurs costs in creating something of value that another person uses for personal gain. In *INS v. AP*, INS collected and printed news that AP read and reprinted elsewhere. A more typical case is *Bi-Rite v. Button Master*, in which a button company representing various singers sued another company for selling buttons with their pictures.[33] It is unclear whether it is unfair competition or unjust enrichment that is at the heart of the doctrine. In *Board of Trade v. Dow Jones*, Dow Jones was allowed to prevent use of its stock index in futures trading, even though Dow Jones did not intend to use the index in this way itself.[34] In either case, the goal is to encourage production of intellectual property otherwise unprotected by the law. The doctrine has not, however, been applied in ways that would cover desecration. The leading cases all involve commercial exploitation, and they do not involve servitudes in chattels. The closest that misappropriation has approached desecration is in cases where commercial symbols are linked to immorality– cocaine and pornography, for example.[35] But these cases have been decided on grounds of consumer confusion and trademark dilution, not misappropriation. The logic behind the doctrine may apply to desecration, but so far the doctrine has not.

V. DISTINGUISHING OTHER ACTS FROM DESECRATION

Before going on to consider how actual policies address the problems of mental externalities, malice, and symbol creation, it may be useful to pause to distinguish between desecration and similar acts with which it might be confused.

A. Desecration is Not Speech.

The idea of mental externalities can be directly applied to offensive speech, and in a world of perfect information, efficiency would require that certain kinds of speech be prohibited. Practical difficulties arise because inefficient offensive speech lies on a continuum with efficient speech, and a line must be drawn somewhere. The line

[33]Bi-Rite Enterprises, Inc, v. Button Master, 555 F. Supp. 1188 (S.D.N.Y. 1983). As this case illustrates, the "right of publicity, " originating in Pavesich v. New Eng. Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905), is closely allied to the tort of misappropriation.

[34]Board of Trade v. Dow Jones & Co., 456 N.E.2d 84 (Ill. 1983).

[35]Coca-Cola Co. v. Gemini Rising, Inc., 346 F. Supp. 1183 (E.D.N.Y. 1972) (the cocaine case). Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200 (2d Cir. 1979) (the *Debbie Does Dallas* case).

can be drawn, however, and U.S. law does restrict many kinds of political speech—loud midnight harangues in residential neighborhoods and infringement of copyrighted material, for example. Banning desecration is a restriction of the same kind, balancing the possible benefits of improved political communication against the costs of mental externalities and symbol destruction.

Speech in general lacks the special features of desecration. Offensive speech may be malicious, but its offensiveness may also be purely accidental. Two members of the same organization may say things to communicate between themselves that would be offensive to outsiders, but without any desire to publicize their speech. Political speech is usually directed not at the target of its criticism but at neutral, persuadable parties, whereas desecration is more designed to offend than to persuade. Nor does offensive speech generally destroy a produced good, unless it destroys an idea, which we usually consider a benefit of free speech rather than a cost. Some speech may be directed at destroying a symbol, to be sure, but that is distinguishable from speech in general and is the kind of speech prohibited in the Uniform Flag Act discussed later in this article.

Much of what is offensive in speech is its content, the ideas it conveys. Ideas are much more likely to confer a benefit to society than are the particular methods of communicating them. Desecration, while sometimes meant to convey an idea, has the substitute of simple speech. Saying that I am opposed to the Vietnam War may not be as effective as if I burnt a flag and then made my statement, but the content is the same. The idea can still be expressed, even if I cannot get as much attention as if I burnt a flag, tortured a kitten, spent money to buy television coverage, or were allowed to subpoena listeners. The marginal social return from increasing the number of ways in which ideas can be communicated is decreasing, so a comparison of the costs and benefits naturally leads to some ways being allowed and some prohibited.

Two purposes of constitutions are (1) to limit the actions of the government and (2) to prevent those in power from continuing to remain in power against the will of the people. Limitations on the government's ability to restrict political speech further both purposes. Political speech, even if unpopular, generally has positive externalities because of information generation and transmission, even if particular examples spread misinformation.[36] Allowing the government to distinguish which

[36]For an explanation of free speech as a public good, see Daniel Farber, Free Speech without

speech is to be allowed may or may not yield too much discretion to those in power, depending on which distinctions are allowed, but it is much easier to distinguish speech from desecration.[37]

B. Desecration is Not Vice

The idea of mental externalities applies naturally to vices such as sodomy, prostitution, and drug abuse. Someone, for example, who smokes crack cocaine inflicts negative mental externalities on friends, family, and even total strangers if those persons would be willing to pay something to prevent his smoking. This provides a justification for regulation, though it must be balanced against the benefit to the smoker. The issues of whether the various parties' willingnesses to pay truly represent their informed interest becomes more difficult, but the essential test remains the same.[38]

Like offensive speech, however, offensive conduct in general has important differences from desecration. The issue of symbol production does not arise, and malice is unimportant, both of which tend to make regulation harder to justify than in the case of desecration. On the other hand, regulation of offensive conduct also lacks some of the problems of regulation of speech. Positive externalities are less important, since drug use, unlike speech, offers no benefits to anyone but the drug user. Definitions are also easier; speaking offensively is less concrete than smoking cocaine. Offensive acts in general thus present much more difficult questions than desecration even in a utilitarian framework. A similar analysis based on mental externalities could be undertaken, but each activity would have to be approached on its own merits.

VI. THE CONSEQUENCES OF MISTAKEN POLICY

Romance: Public Choice and the First Amendment, 105 Harvard L. Rev. 554 (1992).

[37] The classic article on the distinction between political and other speech is Robert Bork, Neutral Principles and Some First Amendment Problems, 47 Indiana L. J. 1 (1971).

[38] This has already been noted, even by those who think that conventional regulation fails the test. Richard Posner has said that "There is nothing in principle to qualify disgust, even when irrational (and revulsion against incest is not irrational), from counting as an external cost to which a polity dedicated to economic efficiency should pay heed." (Richard Posner, Sex and Reason (1992) 202, which goes on to suggest that much of sexual morality is based on misinformation.) David Friedman discusses the legality of heroin, and concludes that although a ban might be efficient in most of the United States, the most efficient outcome would be legality in some locales, such as New York, and illegality in others. David Friedman, The Machinery of Freedom, 2nd edition, 128 (1989). See also Richard Epstein & Eric Rasmusen, Debate on Social Regulation, Harvard J. Pub. Pol. (1998).

One of the most important considerations in setting policy is the cost of mistakes. This is familiar in pollution and antitrust regulation. Rigid quantity restrictions on air pollution emissions can be extremely costly if the wrong limit is chosen. Environmental damage results from lax limits and economic losses from tight limits. Alternative policies such as pollution taxes or generous standing to sue the polluter can reduce the cost of government mistakes.[39] Antitrust regulation provides numerous examples where interventions by an omniscient and benevolent government would be beneficial but where laissez faire is the best policy for realistic governments. There is widespread agreement that antitrust laws against bid-rigging in auctions are good policy, even conducted by an imperfect government, but few economists recommend price controls in concentrated markets, even though theory suggests that unregulated prices will be inefficiently high. They realize that actual government intervention is unlikely to be the same as ideal government intervention.

Measurement of the costs and benefits of desecration is difficult enough that the government might well err on the side of either prohibition or toleration. Moreover, either alternative is unlikely to achieve the correct outcome in every situation, since desecration will sometimes be efficient and sometimes inefficient. Recognizing that we are fallible and that any policy simple enough to implement will be suboptimal in some cases, what can we say about desecration law? Continuing with the Smith and Jones example, let us consider four policies—Strict Prohibition, Mild Prohibition, Mild Toleration, and Strict Toleration.

> Strict Prohibition. Desecration is banned: If Jones burns the flag, he will be executed.
>
> Mild Prohibition. Desecration is banned: If Jones burns the flag, he will be fined $1,000.
>
> Mild Toleration. Desecration is permitted: Jones may burn the flag. If Smith forcibly stops him, Smith will be fined $1,000.
>
> Strict Toleration. Desecration is permitted: Jones may burn the flag. If Smith tries to stop him, Smith will be executed.

Laws do not ban crimes; they merely impose penalties on them. The citizen can weigh costs and benefits and still undertake the activity. Strict Prohibition would presumably deter desecration and Strict Toleration would deter private punishment

[39] The classic article on losses from mistakes in pollution policy is Martin Weitzman, Prices vs. Quantities, 41 Rev. Econ. Stud. 477 (1974).

of desecration, but the two mild policies would allow for efficient violation of the law.[40]

To illustrate efficient violation, let the venerators' utility cost from desecration always be \$3,000, but let the desecrator's benefit Y be sometimes \$500 and sometimes \$5,000. We will ignore the long-run issue of symbol production. Thus, the cost-benefit calculus goes both ways, and no single policy will always be right.

Strict prohibition will achieve the optimal result of no desecration if Y=\$500 but will be suboptimal if Y=\$5,000 because the desecrator's benefit from desecration would exceed the venerators' loss. Strict toleration achieves optimality if Y=\$5,000, but not if Y=\$500. Thus, the possibility of mistakes or of not being able to tailor the law to individual situations provides no reason for preferring one policy to the other.

Mild prohibition is more interesting. It will achieve the efficient outcome of no desecration if Y=\$500, because the desecrator is unwilling to incur a fine of \$1,000 to obtain a benefit of just \$500. It will also, however, achieve the optimal outcome of desecration if Y=\$5,000. In that situation, the desecrator will be willing to pay the fine of \$1,000 to obtain the benefit of \$5,000. Moreover, since the penalty is a fine, a transfer rather than a social cost, the only loss to society is the transaction cost of imposing the fine. The fine itself just transfers wealth from the desecrator to the government. Thus, mild prohibition is an attractive policy if the empirical magnitudes of cost and benefit are unclear.

What of mild toleration? It is not symmetric to mild prohibition. The key is what the venerators do when the desecrator burns the flag. If it is one venerator who suffers the \$3,000 loss, and Coasean bargaining works, he will offer the desecrator up to that amount, and desecration will occur only if it is efficient for it to occur. As Section 2 discussed, such bargaining is likely to fail. Consequently, the venerator's only option is self-help, i.e., to deter or prevent the desecration by violence.[41]

[40] In chapter 7 of *Economic Analysis of the Law* (4th edition, 1992), Richard Posner discusses various differences between intentional torts and crimes. Desecration illustrates one reason for criminalization that he does not discuss: an action may be classified as a crime rather than a tort if the harm is to a large group of people, so that transaction costs make private litigation especially costly.

[41] More than one reader has suggested that an alternative form of self help is for the venerator to retaliate by desecrating the desecrator's symbol. If such retaliation were credible and foreseen, the small-scale balance of terror would prevent desecration. Not everyone has a vulnerable symbol that they venerate, however, limiting the usefulness of retaliation.

Self-help has two costs.[42] First, the assault itself is costly, since the desecrator can fight back. Second, assault is a crime, and the assaulting venerator will be penalized by the government. If the penalty for assault is $1,000, which is less than $3,000, the venerator will carry out the assault, but he will carry it out regardless of whether the benefit to the desecrator is $500 or $5,000. If the penalty for assault is large, it will inefficiently deter assault that would prevent desecration, but if it is small, it inefficiently encourages assault and overdeters desecration. Worse yet, since assault has many more common motives than deterrence of desecration a mild penalty would induce an excessive number of assaults generally, even if the number connected with desecration became optimal. Thus, it is hard to use self-help as a check on mistaken toleration.[43]

If lawmakers make mistakes in the cost-benefit calculations or if the calculations turn out differently in different cases, a mild policy is better than a severe one because mild policies allow for efficient lawbreaking. Mild prohibition is an attractive policy because it allows the desecrator to desecrate if he is willing to pay a moderate price for the privilege, which signals that his benefit from desecration is unusually high. Mild prohibition is not symmetric because the efficient lawbreaking there would consist of illegal private penalties for desecration, a dangerous exception to the public monopoly on violence.

VII. ACTUAL STATUTES

Section 6 discussed one set of problems that arise in the implementation of government policy: laws that by miscalculation do not apply to all situations correctly. A different problem is presented by a government that is not seeking to maximize social welfare and uses arguments such as those made in this article to cloak efforts to satisfy the material or ideological desires of influential people. The earlier sections of this article have provided reasons for laws against desecration, but even if these reasons are valid in theory, are they just rationalizations in practice? I have suggested comparing costs and benefits, but have actual desecration laws been prompted

[42] There also may be a special benefit to the self-helper, since revenge is sweet.

[43] That state punishment of desecration would prevent this kind of self-help was one argument of the state of Texas in *Texas v. Johnson*. An obvious response is that criminal penalties for assault should prevent assault, but the argument of this paragraph is that such penalties are too severe: sometimes assault (or the threat of it) is efficient, a form of the privatization which we value in so many areas of former government activity.

instead by ideology or theology? The motive of the lawgiver is not directly important to the value of a law, but if the motive is wrong, the law is more likely to be crafted to reduce welfare rather than increase it.

Title 18 U.S.C. Section 700(a) says: "Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined not more than $1,000 or imprisoned for not more than one year, or both." This federal flag desecration law only dates back to 1967, but state laws are much older. In 1989, every state but Alaska and Wyoming had a statute prohibiting the burning of the flag[44], usually patterned after the Uniform Flag Act of 1917,[45] sections 2 and 4 of which look very much like intellectual property protection, prohibiting merchants from using the flag for advertising purposes. Indeed, the conduct at issue in the most important early Supreme Court case on flag misuse, *Halter v. Nebraska*, concerned a flag on a beer label.[46] Section 3 deals with desecration: "No person shall publicly mutilate, deface, defile, defy, trample upon, or by word or act cast contempt upon any such flag, standard, color, ensign or shield."

The Uniform Flag Act emphasizes the act of desecration rather than the intent. If someone burns a flag to call attention to his feelings about abortion, he has violated the statute, whatever his feelings about the flag. He can express the same opinion in a different manner and be exempt from prosecution. As in torturing a kitten to call attention to one's opinions, the offense is the act, not the content. The only exception is the "words or act" clause, but even this does not suppress any substantive opinions except about the flag itself, and the desecrator's scope for expression is no more limited than if the flag never existed. This was put well by Justice Stevens in his dissent in *Texas v. Johnson* :

> The concept of 'desecration' does not turn on the substance of the message the actor intends to convey, but rather on whether those who view the act will take serious offense. Accordingly, one intending to convey a message of respect for the flag by burning it in a public square might nonetheless be guilty of desecration if he knows that others–perhaps simply because they misperceive the intended message—will be seriously offended.
>
> ...

[44] Texas v. Johnson, 491 U.S. 397 , 428 (1989), where citations to the statutes can be found. For a history of state law, see Albert Rosenblatt, Flag Desecration Statutes: History and Analysis, Washington University Law Quarterly, 193 (1972).

[45] Proceedings of the National Conference of Commissioners on Uniform State Laws, 323-324 (1917).

[46] Halter v. Nebraska, 205 U.S. 34 (1907).

> It seems obvious that a prohibition against the desecration of a gravesite is content neutral even if it denies some protesters the right to make a symbolic statement by extinguishing the flame in Arlington Cemetery where John F. Kennedy is buried while permitting others to salute the flame by bowing their heads. Few would doubt that a protester who extinguishes the flame has desecrated the gravesite, regardless of whether he prefaces that act with a speech explaining that his purpose is to express deep admiration or unmitigated scorn for the late President.[47]

We still must worry whether laws against desecration have benefits greater than their costs, but the democratic process is admirably suited to deciding such policy questions. If many more people wish desecration to occur than are bothered by it, elected officials are unlikely to support laws against desecration. The issue is simple and public—whether the voter dislikes seeing the flag burned or not. Desecration is not like the corporate tax code, a complex maze where special interests can conceal actual government policy and policy can be determined by a few heavily interested parties. In the case of desecration, government failure is more likely to result in toleration than prohibition, since many voters support prohibition mildly and only a few—but those few overrepresented in the legal profession—strongly wish to permit it.[48]

The Texas statute struck down in *s Texas v. Johnson* was different. It said,

> § 42.09. Desecration of Venerated Object
> (a) A person commits an offense if he intentionally or knowingly desecrates:
> (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

[47] Texas v. Johnson, 491 U.S. 397, 438 (1989).

[48] See George Gallup and Frank Newport, Americans Back Bush on Flag-Burning Amendment, The Gallup Poll Monthly, June 1990, pp. 2-4. "There has been discussion lately about a constitutional amendment which would make it illegal to burn or desecrate the United States flag. Some people favor a flag-burning amendment because they say the flag is America's unique symbol and deserves constitutional protection from desecration. Others oppose a flag-burning amendment because they say burning the flag is a form of freedom of speech, no matter how offensive, which is protected by the Bill of Rights. Which of these two opinions comes closest to your own?" The two points of view were rotated. 66 percent favored the amendment, 29 percent opposed, and 5 percent had no opinion. Using the simpler question, "Do you think we should pass a constitutional amendment to make flag burning illegal or not?" in June 1990, 71 percent thought the amendment should be passed and 24 percent were opposed, up from 68-27 in June 1989. Support for the amendment was not concentrated in a few well organized groups, but almost without exception had a margin of support of at least 6 percent (and up to 56 percent) in every variety of sex, age, region, race, education, party, ideology, and income. (The one exception was the 8.5 percent of respondents who chose "None" for their religion, who opposed the amendment 48 to 46 percent.)

> 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, a Texan may legally burn an American flag, if nobody cares, but not his own church, if that would seriously offend a member of the general community. The harm prohibited is the unhappiness of observers, not the effect on patriotism or morality. Whether this statute is justified on efficiency grounds 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 all before he can engage in desecration, or be willing to pay the penalty for a class A misdemeanor.[49]

The idea that the law functions to protect believers against annoyance, rather than God against blasphemy is not new. Tiedeman's 1886 treatise on the police power of government says,[50]

> If the laws against blasphemy rested upon the admission by the law of the 'divine origin and truth' of the Christian religion, they would fall under the constitutional prohibitions, which withdraw religion proper from all legal control. Blasphemy is punishable, because, as already stated, it works an annoyance to the believer and an injury to the public.... In order than an utterance or writing may be considered a legal blasphemy, it must be accompanied by malice and a wilful purpose to offend the sensibilities of Christians.

Even clearer is the opinion in *State v. Chandler*, which says, [51]

> The common law adapted itself to the religion of the country just so far as was necessary for the peace and safety of civil institutions; but it took cognizance of offenses against God only when, by their inevitable effects they became offenses against man and his temporal security.

The laws and courts prior to 1989 did not justify anti-desecration laws on the basis of ultimate truths, but on human utility. These laws were not anomalous, but,

[49] Under the Texas act, desecration is not illegal if nobody finds out about it, something irrelevant to desecration viewed as violation of the sacred. The Uniform Flag Act could be interpreted the same way because of its adverb publicly modifying the conduct banned. A Maine court dismissed a case because the desecration occurred in the defendant's home rather than in a public place. State v. Peacock, 138 Me. 339 (1942).

[50] Tiedeman, *supra* note 17 at 168-69. Similarly, Justice Story wrote of religion in Vidal v. Girard's Exrs., 43 U.S. 127 (1844), "it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public."

[51] State v. Chandler, 2 Harr. 553. (Del. xxx)

like commercial laws, had utilitarian goals.

VIII. OBJECTIONS

In this last section I will address various objections that might be made to desecration laws.

A. Objection One: A better solution is to change the venerators' preferences.

Since mental externalities arise from the tastes of the venerators, one solution is to change their tastes. The venerator's harm is all in his mind, so why not change his mind?

This argument is reasonable and has analogies in physical externalities. The most efficient solution to a neighbor's noisy parties might be earplugs, and the most efficient solution to smoke in a restaurant might be for non-smokers to patronize a different restaurant, both being ways that the injured party eliminates his injury more cheaply than the injurer could. In the context of desecration, however, preference-changing has two special problems, even if we suppose that the cost of changing preferences is low.

First, ending the offensiveness of desecration cannot be done without diminishing the usefulness of the venerated symbol. If the believer no longer cares if the cross is defiled, the cross cannot be as potent a symbol. Thus, changing a preference of this kind is costly. It is like wearing earplugs because my neighbor's loud parties prevent me from listening to soft music on my stereo.

Second, if the venerator no longer cares about desecration, the desecrator loses his benefit from it. The motives of attention-getting and malice both disappear; nobody gets media attention by burning Kleenex. Thus, the preference-changing solution hurts the desecrator as well as the venerator.

Both problems are special to desecration and further distinguish it from offensive speech and action. The argument that the offended person can change his tastes has more strength when applied to offense caused by a neighbor's cocaine use, because the person who is displeased by those two things does not so obviously lose something

by changing his preferences. The person who engages in them does not need the disutility of someone else as a foundation for his own utility.

The possibility of preference-changing is a legitimate consideration, however, and raises its own counter-argument: changing the desecrator's preferences instead. If he can be conditioned or persuaded to derive greater utility from substitute activities or to suffer internal disutility from desecration, he will stop desecrating. We must ask whose preferences are the more easily changed, and if ease of changing is inversely related to intensity of the preferences and the number of people involved, this solution takes us back to the same calculations as the original efficiency calculus.

B. Objection Two: Some people have preferences against desecration laws, and the cost-benefit calculus should take them into account.

Some people would be displeased by the ban on desecration regardless of whether anyone were ever prosecuted, or even whether anyone ever wished to desecrate. As a separate matter, they might be displeased by the punishment of desecrators. I will call these second-order preferences, since they are preferences not over the actions of the venerators and desecrators, but over the actions of the government with respect to desecration. These preferences are worth considering, because the number of people who oppose desecration laws is certainly much greater than the tiny number of actual desecrators.

Second-order preferences fit into the utilitarian framework and should be fully counted. Their existence, however, does not go very far towards resolving the policy question. The obvious difficulty is that other people have opposite second-order preferences. They would be pleased by the ban on desecration, regardless of whether anyone ever wanted to burn a flag. Such people seem to be a large majority of the general population, as the Gallup poll cited earlier shows.

Moreover, second-order preferences are relatively easy to change in the long run. A preference for sacred symbols cannot be changed without the loss of a source of utility. A preference for not having desecration laws, however, can be replaced with a preference for desecration laws by appropriate education, and people will be no less happy. It seems that second-order preferences should therefore be given less deference than direct preferences.

C. Objection Three,: Desecration has positive as well as negative externalities.

I have focussed on the negative externalities from desecration, but are there positive ones too? Do third parties benefit when Jones burns the flag? If so, this must be included in the cost-benefit calculus.

When Jones burns the flag to convey his position on abortion, third parties may be glad that he has done so, because they find his message worth listening to and better than whatever they would have done with their attention instead. If this is common, however, the citizens will not favor laws against desecration, since they will find desecration a helpful aid in forming their political views.

If Jones is not allowed to desecrate, on the other hand, the positive externalities from communication of ideas may actually increase rather than diminish. There are two substitution effects.

First, Jones will substitute to some other activity if desecration is closed off to him. He has a choice of many ways to try to communicate his ideas. If he chooses desecration, he has reduced his use of some other method, and if desecration is banned, he will shift to that other method, which may help the public more even though Jones prefers desecration. To the extent that rational discourse is better than desecration and that Jones shifts to rational discourse, public debate will be improved.

Second, the public substitutes between different kinds of listening. If desecration is banned, they will turn their attention elsewhere, from Jones burning a flag to Doe making a speech. The viewers may not prefer the speech, but it may make them better citizens than watching desecration.[52] Desecration is a flashy trick that allows Jones more exposure for his views, capturing attention not by the quality of his ideas, but by the vigor with which he expresses them.[53]

[52] An extreme form of this is illustrated by the Phoenix sheriff's policy of allowing only a few TV shows, including CNN, the weather channel, and Newt Gingrich's series, "Restoring American Civilization" in his jail cells. The undoubted effect of this policy was to induce prisoners to subsitute from entertainment to political (or at least meteorological) education. As one prisoner said, "Who cares about Newt. We want Baywatch." But Baywatch was closed off as an option. Paul Giblin, Overcrowded jail gets tents, tough discipline, Agence France Presse, September 27, 1996.

[53] Bad speech driving out good is one example of how allowing more speech may reduce the informedness of the public. Another is libel: speech that is not only distracting, but false. In an attempt to minimize the effect on political speech, the law criminalizes this when the falsehood is about private individuals, but not when it is about public individuals. An interesting problem to which the idea of mental externalities could be applied is group libel, as in the Illinois law against

In addition, there may be positive externalities from the symbols that desecration damages. A common argument against flag desecration is that the flag serves to focus patriotism and increase public-spiritedness. These are positive externalities, which accrue not just to the venerators but to anyone in the country. Positive externalities from private symbols are less clear, but they exist to the extent that private organizations using symbols provide public goods, and we commonly do think that religious and political organizations do have positive externalities.

D. Objection Four: Desecration laws may be fine in theory, but can be abused by biased prosecutors and judges.

Any statute that provides penalties can be abused if there is cooperation between prosecutors and judges. If there is a law against desecration, innocent people can be charged with violating it and harassed with investigations or punished after the state manufactures false evidence.

This is an argument to be considered when enacting any statute, but desecration laws are less dangerous than most. If officials wish to persecute someone, they have a vast array of tools available, including regulatory agency investigations for violating labor, environmental, and land-use regulations, the planting of evidentiary drugs or stolen goods, and prosecution for vaguely defined crimes such as disturbing the peace, assault, and civil rights violations which allow immense prosecutorial discretion. The marginal contribution of desecration laws is small.[54]

IX. CONCLUDING REMARKS

Daniel Farber says in his article on public choice theory and the First Amendment that [55]

> The crucial insight of public choice theory is that, because information is a public good, it is likely to be undervalued by both the market and the political system. n8

racial defamation upheld by the U.S. Supreme Court in Beauharnais v. Illinois, 343 U.S. 260 (1952).

[54]My claim could be refuted if it could be shown that desecration laws were frequently used for harassment during the 80 years they were in force. At least one case does exist. In 1920, a Montana man was intimidated by a hostile crowd into saying insulting things about the American flag, and sentenced for a term of 10 to 20 years hard labor. He made a habeas corpus appeal to federal court, but lost despite the court's sympathetic opinion. Ex parte Starr, 263 F. 145 (D. Mont.1920). This is a horrifying case, but its rarity indicates that desecration statutes were not a favorite tool of oppressive state governments.

[55]Daniel Farber, Free Speech without Romance, *supra* footnote 36 at 555.

> Individuals have an incentive to "free ride" because they can enjoy the benefits of public goods without helping to produce those goods. Consequently, neither market demand nor political incentives fully capture the social value of public goods such as information. Our polity responds to this undervaluation of information by providing special constitutional protection for information-related activities. This simple insight explains a surprising amount of First Amendment doctrine.

Desecration is a public bad parallel to information's public good. Although the insights that desecration has negative externalities and discourages symbol production cannot explain the First Amendment doctrine of the 1990's, it can explain much of traditional legislation. When a symbol is desecrated, the desecrator obtains benefits, while those who venerate the symbol incur costs. The economic approach asks whether the benefits exceed the costs. I conclude that they usually do not. Desecration is often motivated by a desire to reduce the utility of others, which is usually inefficient. Moreover, symbols, like other produced goods, need property-rights protection. If desecration occurs, people have less incentive to create and maintain symbols. Laws against desecration are a good way to provide this protection, given the likely failure of the Coase Theorem and the possibility of efficient law-breaking.

The ideas of mental externalities and malice have application to public policy beyond desecration. In Section 5, I distinguished offensive speech and behavior from desecration because they, unlike symbols, do not involve produced goods. Regulation of these sources of negative externalities may still be efficient, however, and deserves theoretical and empirical analysis from the economic point of view. We may find that many traditional laws and customs in social regulation can be explained as efficient responses to market failure.

The thrust of this article is not so much that desecration laws are desirable as that they can be desirable and are fully as legitimate as other regulations. Every law hurts some people and helps others, and desecration laws are no exception. The political arena, however, is the place to decide the net benefits, just as much for desecration laws as for import tariffs or income tax rates, and no citizens should be privileged to have their preferences trump those of the rest of the electorate.

REFERENCES

Bleise, Bernhard (1992) "Freedom of Speech and Flag Desecration: A Comparative Study of German, European and United States Laws," *Denver Journal International Law and Policy,* (Spring 1992) 20 : 471-491.

Bork, Robert (1971) "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal* , 47:1-35.

Coase, Ronald (1960) "The Problem of Social Cost," *Journal of Law & Economics,* (October 1960) 3: 1-44.

Coase, Ronald (1974) "The Economics of the First Amendment: The Market for Goods and the Market for Ideas," *American Economic Review Papers and Proceedings*, 64: 384-xxx.

Denicola, Robert (1984) "Institutional Publicity Rights: An Analysis of the Merchandising of Famous Trade Symbols," *North Carolina Law Review* (April 1984) 62: 603-xxx.

Ely, John (1975) "Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis," *Harvard Law Review*, (March 1975) 88: 1482-1508.

Epstein, Richard (1992a) *Forbidden Grounds*, Cambridge, Mass. : Harvard University Press, 1992.

Epstein, Richard (1992b) "International News Service v. Associated Press: Custom and Law as Sources of Property Rights in News," *Virginia Law Review*, (February 1992) 78: 85.

Epstein, Richard (1995) "The Harm Principle—And How it Grew," *University of Toronto Law Journal* , (Fall 1995) 45: 369-417.

Richard A. Epstein (1992) "Property, Speech, and the Politics of Distrust," *University of Chicago Law Review* 59: 41-xxx.

Richard Epstein and Eric Rasmusen (1998) "Debate on Social Regulation," *Harvard Journal of Public Policy* (1998)

Farber, Daniel (1992) "Free Speech without Romance: Public Choice and the First Amendment," *Harvard Law Review*, (December 1991) 105: 554-583.

Feinberg, Joel (1985) *The Moral Limits of the Criminal Law, Volume 2: Offense to Others*, Oxford: Oxford University Press, 1985.

Friedman, David (1989) *The Machinery of Freedom*, 2nd edition Lasalle, Illinois: Open Court Publishing Company, 1989.

Gallup, George, Jr. and Frank Newport (1990) "Americans Back Bush on Flag-Burning Amendment," *The Gallup Poll Monthly*, June 1990.

Hammer, Peter (1988) "Note: Free Speech and the "Acid Bath": An Evaluation and Critique of Judge Richard Posner's Economic Interpretation of the First Amendment," *Michigan Law Review*, (November 1988) 87: 499-536.

Hansmann, Henry and Marina Santilli (1997) "Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis," *Journal of Legal Studies*, (January 1997) 26: 95-144.

Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary,101st Cong., 1st Sess. (1989)

Holmes, Oliver Wendell (1894) "Privilege, Malice, and Intent," *Harvard Law Review* 8: 1-14.

Hylton, Keith (1996) "Implications of Mill's Theory of Liberty for the Regulation of Hate Speech and Hate Crimes," *University of Chicago Law School Roundtable*, 3:35-xxx.

Kohut, John and Roland Sweet (1996) *Dumb, Dumber, Dumbest: True News of the World's Least Competent People*, New York:Plume, 1996.

Kwall, Roberta (1985) "Copyright and the Moral Right, Is an American Marriage Possible?" *Vanderbilt Law Review* (January 1985) 38:1-97.

Landes, William and Richard Posner (1987) *The Economic Structure of Tort Law*, Cambridge, Mass. : Harvard University Press, 1987.

Levinson, Sanford (1995) "Freedom: Politics: They Whisper: Reflections on

Flags, Monuments, and State Holidays, and the Construction of Social Meaning in a Multicultural Society," *Chicago-Kent Law Review*, 70:1079-xxx.

Michelman, Frank (1990) "Saving Old Glory: On Constitutional Iconography," *Stanford Law Review*, (July 1990) 42: 1337-1364.

Mill, John Stuart (1859) *On Liberty*, David Spitz, ed., New York: Norton, 1975.

Portney, Paul (1994) "The Contingent Valuation Debate: Why Economists Should Care," *Journal Economic Perspectives*, (Fall 1994) 8: 3-17.

Posner, Richard (1986) "Free Speech in an Economic Perspective," *Suffolk University Law Review*, 20:1.

Posner, Richard (1992) *Sex and Reason*, Cambridge, Mass: Harvard University Press, 1992.

Rasmusen, Eric *Games and Information: An Introduction to Game Theory*, 2nd edition, Oxford: Blackwell Publishers, 1994.

Rhoads, Steven (19xx) *The Economist's View of the World*, Cambridge: Cambridge University Press.

Rosenblatt, Albert (1972) "Flag Desecration Statutes: History and Analysis," *Washington University Law Quarterly,* (Spring 1972) 1972:193-237.

Schwartz, Gary (1979) "Economics, Wealth Distribution, and Justice," *Wisconsin Law Review* 1979: 799-xxx.

Sullivan, Kathleen (1995) "Free Speech and Unfree Markets," *UCLA Law Review* 42: 949-xxx.

Ten, C. (1980) *Mill on Liberty*, Oxford: Clarendon Press, 1980.

Tiedeman, Christopher (1886) *A Treatise on the Limitations of the Police Power in the United States*, St. Louis: The F.A. Thomas Law Book Co., 1886.

Weitzman, Martin (1974) "Prices vs. Quantities," *Review of Economic Studies,* 41: 477-91.