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Polluting Words: Is There a Coasean Case to Regulate Offensive Speech?
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Introduction

Economist Ronald Coase devoted an article in the 1974 edition of the *American Economic Review* to an idea he had observed to be common among his academic colleagues:

> (I)n the market for goods, government regulation is desirable whereas, in the market for ideas, government regulation is undesirable and should be strictly limited.

He found the idea strange because, as he argued in the paper, the two markets are not relevantly different. The case for regulation is no weaker in the market for ideas than in the market for goods. After all, it is usually easier for a consumer to know when ordinary goods are faulty than when ideas are bogus. Anyone can tell when a television doesn't work. It takes unusual dedication to figure out, for example, that Hegel was wrong when he said that "absolute form and absolute content [are] identical — substance is in itself identical with knowledge."

Coase hoped that devotion to consistency would inspire his peers to adopt a more skeptical attitude toward regulation of the market for goods. He got half of what he hoped for. Academics arguably have become more consistent, but rather than favor *laissez-faire* in the market for goods, they favor regulation in the market for ideas. This goes to show that consistency is not always something you should seek in your opponents.

Many professors are now keen to restrict the ideas their students hear; or, at least, they are willing to go along quietly with the enthusiasts for such restrictions. They do not seek to protect their students from the incoherent abstractions of 19th century German philosophers or from any other kind of intellectual error. Rather, they seek to protect them from encountering ideas that will offend them or otherwise make them feel uncomfortable, especially when the topics concern race, sex, sexuality, or some other aspect of "identity."

Universities are not national or state governments, of course. Their regulatory powers stop at the campus gates. But that doesn't change the point, which is that many academics appear no longer to believe that the benefits of a free market in ideas are worth the harms that accompany it.

Some outside of universities take the same view, not always drawing the line at private organizations being able to constrain the speech of those with whom they have voluntarily entered contracts. Rather, they want governments to protect consumers of ideas by restricting what can be said. Just as government regulation ensures that only cars meeting certain safety standards are offered for sale, so too should government regulation ensure that only ideas meeting certain safety standards are expressed.

Of course, the market for ideas is already constrained by some safety regulations. For example, an American may not advocate violence or other illegal activity when directed at "producing imminent lawless action." But beyond this and a few other constraints established by legislation and the courts—such as those entailed by defamation law—the First Amendment to the U.S. Constitution guarantees Americans the freedom to say all manner of harmful things. Some see this as a problem. For example, Richard Stengel, a former managing editor of *Time* magazine, argued in a 2019 *Washington Post* op-ed that the United States should follow the lead of other developed nations and develop a hate-speech law. Harvard University law professor Cass Sunstein proposed in his 2021 book *Liars* that speech deemed by the government to be false and harmful should lose its constitutional protection.

Section 230 of the Communications Decency Act of 1996, which protects "interactive computer services" from being treated as publishers or speakers of the content they host, is also becoming unpopular among those who worry about excessive freedom in the market for ideas. Some of its critics, usually from the political right, think it gives social media firms such as Facebook and Twitter too much freedom to indulge their political biases when moderating content. Other critics, usually from the political left, think it gives such firms too much freedom to host harmful content. Both President Joe Biden and former President Donald Trump have been critical of Section 230, if for very different reasons.

The fashion for private-sector speech prohibitions and proposals for more restrictive legal regimes agitate those who prize freedom of speech. It's a hot topic in newspaper columns and on talk radio shows. Organizations have even been established to defend free speech, such as the Free Speech Project at Georgetown University and the U.K.'s Free Speech Union.

But defenders of free speech are generally doing their job poorly. Too many merely assert that "you should not have a right not to be offended," when this is precisely what is at issue. Others follow the 19th century English philosopher John Stuart Mill and claim that being offended, or suffering hurt feelings more generally, does not count as harm. Again, most seem to simply take this for granted, offering no reason why the offended are unharmed.

The right way to understand harm is economic. Something harms someone if he would pay to avoid it. Since offense and other hurt feelings can pass this test, they can be genuine harm (Section 1). And since speech can cause this harm—and most people believe that legal restrictions on causing harm are generally justified—we have a *prima facie* case for the regulation of speech.

Indeed, standard economics seems to provide more reason to regulate speech than ordinary goods. If a new car is defective and harms its drivers, people will be reluctant to buy it and its producer will suffer losses. Because the same goes for most goods, regulations that impose product standards are arguably unnecessary (at least, for this reason). Suppliers already have good reason to make their products safe. Speakers, by contrast, often do not bear the cost of the hurt feelings they cause. In other words, hurt feelings are an "external cost" of offensive speech. When someone doesn't bear all the costs of an action, he tends to do it too much. That is to say, he does it even when the total social cost exceeds the total social benefit.

In his famous 1960 paper "The Problem of Social Cost," Coase showed that one party holding a legal right not to suffer the external cost of some activity—such as being disturbed by noisy neighbors—needn't stop it from happening. Nor would giving the neighbors the right to make noise guarantee that the noise continued. This is because, when certain conditions are met, the legally disfavored party will pay the favored party not to enforce his right (Section 2). When this happens, the outcome is efficient: in other words, it maximizes social welfare. Alas, the conditions for such rights trading are rarely met. When they are not, the initial allocation of rights determines the outcome. Which party's interests should be protected by law therefore depends on who can avoid the harm at the lower cost. The efficient outcome will be produced by giving legal protection to the party facing the higher cost.

Coase's conditions for trading rights aren't met in the case of offensive speech (Section 2). We must therefore consider the costs faced by the offenders and by the offended when trying to avoid the offense. This appears to favor speech restrictions. After all, being offended is expensive, keeping your mouth shut is cheap, and each offensive speaker usually offends many hearers. For these reasons, Coasean analysis would seem on first impression to favor revisions to Section 230 that oblige social media platforms to be more assiduous in their moderation of offensive content. A post that would offend millions of the platform's users can be removed at a low cost to the platform.

But that is merely a first impression. In this paper, I argue that the Coasean case for legal restrictions on offensive speech collapses when confronted with three facts: that being offended is often a masochistic pleasure; that most of the offensive speech that concerns would-be censors occurs on privately owned platforms; and that the proposed restrictions would impose large costs on society. Neither the First Amendment nor Section 230 of the Communications Decency Act should be weakened to remove protection for offensive speech.

Before answering the *prima facie* Coasean case for restrictions on offensive speech, however, we need to appreciate its force, which begins with recognizing that offense can be a real harm.

Read the full white paper here.

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