2019

Economic Perspectives on Free Speech

Daniel Hemel

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In Frederick Schauer and Adrienne Stone (eds), *Oxford Handbook of Freedom of Speech* (OUP forthcoming)

The metaphor of a 'marketplace of ideas' has long pervaded discussions of free speech in and beyond the United States.[1] For early scholars of law and economics (L&E), the similarities and differences between the metaphorical marketplace for ideas and literal markets for goods and services were subjects of much attention. Aaron Director—the University of Chicago law professor who helped to found the L&E movement but rarely reduced his own ideas to writing—devoted one of his few published papers to the contrast between the laissez-faire approach to speech and command-and-control regulation of other markets in mid-twentieth century America.[2] Ronald Coase, Director's colleague at Chicago and ultimately a Nobel laureate, took up the topic of free speech several times over the course of his long career[3] and—like Director—questioned the justifications for differential regulatory treatment of the 'market for goods' and the 'market for ideas'. Richard Posner, the intellectual successor to Coase and Director, grappled with the subject in the first edition of his field-defining 1973 book *Economic Analysis of Law* and in subsequent editions,[4] as well as in later lectures, articles, and monographs.[5]

More recently, however, while the law and economics movement has flourished, economic analysis of free speech has lagged. Although L&E has branched out from its traditional emphasis on private law to topics such as criminal law, judicial behavior, and agency structure, free speech has faded from its focus. Free speech-related papers are a rare sight at the largest

* Assistant Professor of Law and Ronald H. Coase Research Scholar, University of Chicago Law School; dhemel@uchicago.edu.

[1] Stanley Ingber, 'The Marketplace of Ideas: A Legitimizing Myth' [1984] Duke LJ 1.

[2] Aaron Director, 'The Parity of the Economic Market Place' (1964) 7 J of L & Economics 1.

[3] R H Coase, 'The Federal Communications Commission' (1959) 2 J of L & Economics 1; R H Coase, 'The Market for Goods and the Market for Ideas' (1974) 64 American Economic R 384; R H Coase, 'Advertising and Free Speech' (1977) 6 J of Legal Studies 1.

[4] Richard A Posner, *Economic Analysis of Law* (1st edn, Little, Brown & Co 1973); Richard A Posner, *Economic Analysis of Law* (9th edn, Wolters Kluwer 2014).

[5] Richard A Posner, 'Free Speech in an Economic Perspective' (1986) 20 Suffolk U L Rev 1; Richard A Posner, 'Richard T Ely Lecture: The Law and Economics Movement' (1987) 77 American Economic R 1; Richard A Posner, *Frontiers of Legal Theory* (Harvard UP 2004) 62-94.

L&E conferences[6] and in the pages of the most prestigious L&E journals, and the empirical turn in L&E scholarship has largely overlooked free speech as a subject.

The leanness of the L&E literature on free speech should not be understood to imply that economics has little to say on the topic. Perhaps most significantly, the 'new information economics'[7] for which George Akerlof, Michael Spence, and Joseph Stiglitz won the Nobel prize in 2001 carries profound implications for free speech—implications noted by a handful of legal scholars[8] but not exhaustively explored. The new information economics challenges the faith in free markets reflected in the writings and thinking of early law and economics scholars, and—though less directly—the faith in a free marketplace of ideas reflected in much of US First Amendment jurisprudence. It suggests that under certain circumstances, the regulation of speech not only can protect individuals and societies from speech-related harms but also can promote speech itself.

This chapter provides an introduction to the economic analysis of free speech,[9] with special attention to the new information economics perspective. Section 1 critically summarizes the small L&E literature on free speech. Section 2 offers an overview of the new information economics. Section 3 applies insights from the new information economics to free speech subjects.

1. The Economic Analysis of Free Speech: A Critical Review

[6] The 2019 annual meeting of the American Law and Economics Association, for example, featured 186 papers on a wide range of subjects ranging from corporate law (21 papers) to contract law, criminal law, and tax law (12 each), but only one paper on a free speech topic (by the author of this chapter).

[7] Joseph E Stiglitz, 'Information and Economic Analysis: A Perspective' (1985) 95 Economic J 21, 34.

[8] See Albert Breton and Ronald Wintrobe, 'Freedom of Speech vs. Efficient Regulation in Markets for Ideas' (1992) 17 J of Economic Behavior & Organization 217; Jean-Michel G Josselin and Alain Marciano, 'Freedom of Speech in a Constitutional Political Economy Perspective' (2002) 29 J of Economic Studies 324; Cass R Sunstein, 'Informing America: Risk, Disclosure, and the First Amendment' (1992) 20 Florida State U L Rev 653; and Rebecca Tushnet, 'It Depends on What the Meaning of 'False" Is: Falsity and Misleadingness in Commercial Speech Doctrine' (2007) 41 Loyola L Rev 227.

[9] In a recent book, Judge Guido Calabresi—who introduced this author as a student to the L&E approach—develops a distinction between 'Economic Analysis of Law' and 'Law and Economics'. The former 'uses economic theory to analyze the legal world'; the latter 'begins with an agnostic acceptance of the world as it is' and 'then looks to whether economic theory can explain that world, that reality'. Guido Calabresi, *The Future of Law and Economics: Essays in Reform and Recollection* (Yale UP 2016) 2-3. In the economic analysis of law, as Henry Smith puts it, 'the methodological traffic is all one way—from economics to law'. Henry E. Smith, 'Complexity and the Cathedral: Making Law and Economics More Calabresian' (2019) 48 European J of L & Economics 44, 45. Calabresi's call for two-way methodological travel is well taken, and this chapter seeks to highlight ways in which economic analysis and free speech law can inform each other. The chapter does not, however, adhere to Calabresi's nomenclatural distinction between 'economic analysis of law' and 'law and economics', as many of the arguments and ideas considered here straddle the line that Calabresi draws.

A. The Early Years

Economic analysis of free speech arguably started with Adam Smith's *Wealth of Nations* in 1776,[10] but the modern L&E movement's engagement with the subject began in the wake of World War II, with Aaron Director's 'The Parity of the Economic Market Place'. That paper, presented at the University of Chicago Law School in 1953 and reprinted in the *Journal of Law & Economics* eleven years later, set the course for much of the L&E literature on free speech that would follow.

Director's approach to the subject of free speech starkly contrasts with the increasingly formal and empirical thrust of L&E scholarship today. 'Bearing in mind the danger of generalization without empirical investigation', Director writes, 'it may nevertheless be asserted with some confidence that among intellectuals there is an inverse correlation between the appreciation of the merits of civil liberty—including freedom of speech—and the merits of economic freedom'. Director continues: 'Lacking empirical data for this generalization, I must resort to intellectual pride as partial proof.' Director then seeks to explain the dichotomy between the intellectual class's attitude toward free speech—'the only area where laissez faire is still respectable'—and its embrace of government intervention into markets for goods and services.[11]

Director quickly sets aside one possible explanation: that the freedom of speech is enshrined in the First Amendment while immunity from economic regulation is nowhere codified in the US Constitution. The 'preference' for free speech over free markets, he says, 'goes beyond' such 'constitutional considerations'. Director then offers two additional explanations for the contrast. The first focuses on the self-regard of intellectuals. 'Everyone tends to magnify the importance of his own occupation and to minimize that of his neighbor,' Director writes. Intellectuals, he hypothesizes, have elevated their own occupation (speech, broadly defined) over the trades and businesses plied by others (producing and selling goods and services). The second explanation, according to Director, is the 'undue importance attached to discussion as a method of solving problems'. In Director's view, ordinary people rely on economic arrangements to address the principal problems in their lives more than on politics. Market exchange thus merits at least the same status as political speech.[12]

[10] On the role of speech in Smith's *Wealth of Nations*, see Andreas Kalyvas and Ira Katznelson, 'The Rhetoric of the Market: Adam Smith on Recognition, Speech, and Exchange' (2001) 63 R of Politics 549.
[11] Director (n 2) 5.
[12] ibid 5-9.

A striking aspect of Director's essay is that there is almost nothing in it that the contemporary legal economist would recognize as economic analysis. There is no examination of supply and demand or of prices or incentives. It is an exercise is normative political theory without even the appearance of social science. Nonetheless, Director makes an important intellectual move that guides later L&E analysis of free speech. By breaking down the distinction between the marketplace of ideas and markets for goods and services, Director nudges later L&E scholars toward applying the tools they use in the economic analysis of traditional markets to the study of speech.

Following Director's first foray, other important figures in the L&E movement took up the subject of free speech as well. The British-born Coase, who had written a monograph on the British broadcasting monopoly before moving to the United States, came to consider free speech-related questions in his study of the US Federal Communications Commission published in the *Journal of Law & Economics* in 1959. While that article is best known for Coase's proposal to allocate radio frequencies by auction, the article also includes an extensive discussion of the free-speech implications of the FCC's then-existing licensing regime. 'The situation in the American broadcasting industry is not essentially different in character from that which would be found if a commission appointed by the federal government had the task of selecting those who were to be allowed to publish newspapers and periodicals in each city, town, and village of the United States,' Coase observes. 'A proposal to do this would, of course, be rejected out of hand as inconsistent with the doctrine of freedom of the press.'[13]

Unlike Director's 1953 paper, Coase's 1959 article is very much an economic analysis—though without many of the technical accoutrements that one might expect to find in much L&E scholarship today. The economic analysis and the free speech analysis are, however, split. The overall structure of Coase's argument is as follows: (1) A discretionary licensing regime is not necessary to allocate scarce spectrum resources among competing claimants; and (2) given that discretionary licensing is not necessary, the free-speech constraints imposed by the then-current regime are difficult to justify. The first step of that argument entails an economic analysis of the price mechanism as a solution to the problem of scarcity; the second step requires little engagement with economics at all. Coase's 1959 article thus illustrates the potential utility of applying economic analysis to free speech-related issues, but not the power of economic analysis of speech itself.

[13] Coase, 'The Federal Communication Commission' (n 3) 7.

Coase returned to the subject of free speech in a 1973 address to the American Economics Association.[14] The address traversed much of the same terrain as Director's 1953 paper (crediting Director throughout). Coase concludes: [15]

> We have to decide whether the government is as incompetent as is generally assumed in the market for ideas, in which case we would want to decrease government intervention in the market for goods, or whether it is as efficient as it is generally assumed to be in the market for goods, in which case we would want to increase government regulation in the market for ideas.

Concerned that his remarks had been misinterpreted as an argument for greater regulation of speech, Coase elaborated on his AEA address in an article in the *Journal of Legal Studies* three years later.[16] While again questioning the notion that freedom of speech outranks freedom of economic exchange in the hierarchy of values, Coase emphasizes that his argument does not depend on relative rankings. '[E]ven if the market for ideas were more important, it does not follow that the two markets should be treated differently,' Coase writes. If we assume that government intervention in the market of ideas would be bad, and therefore that the market of ideas—because of its importance—ought to be shielded from intervention, 'why deny the same advantages to those whose welfare depends on the lesser market, the market for goods?' And if we think 'that the government is competent to regulate and is so motivated to do so properly, with the result that regulation enables the market to work better', then why not extend that benefit to the market for ideas as well? Coase does not hide his own view as to which of these two alternatives—greater government regulation of the marketplace of ideas or less government regulation of markets for goods and services—is preferable: '[T]hat regulation makes things worse or, at the best, makes very little difference, seems to be the usual finding of studies which have been made in areas ranging from agriculture to zoning, with many examples in between.'[17]

Coase's central insight—that parallel arguments apply to the regulation of economic markets and speech—resonates more than four decades later. His analysis, however, yields relatively few concrete implications for free speech jurisprudence. Coase believed that some 'balancing' of speakers' interests against the general welfare was 'inevitable'—and desirable. Near the end of his essay, he writes: [18]

[14] Coase, 'The Market for Goods and the Market for Ideas' (n 3).
[15] ibid 390.
[16] Coase, 'Advertising and Free Speech' (n 3).
[17] ibid 4-5.
[18] ibid 32.

> [I]t is reasonable that First Amendment freedoms should be curtailed when they impair the enjoyment of life (privacy), inflict great damage on others (slander and libel), are disturbing (loudness), destroy incentives to carry out useful work (copyright), create dangers for society (sedition and national security), or are offensive and corrupting (obscenity).

He does not, though, say much more on how judges should balance the conflicting interests of speakers and society in any of these areas.

B. Posner and the *Dennis* Formula

Just as Coase was returning to the subject of free speech in the 1970s, one of Coase's colleagues at the University of Chicago Law School, Richard Posner, was developing his own 'economic model' of free speech. Posner included a short chapter on free speech in the first edition of his influential volume *Economic Analysis of Law* in 1973 and expanded upon it in subsequent editions. Posner further fleshed out his model in a pair of lectures in 1986—one at Brown University and one at Suffolk University—which formed the basis of an article in the latter institution's law review.[19] By that time, Posner was himself a federal judge on the US Court of Appeals for the Seventh Circuit.

In that article, Posner proposes to 'give the free-speech icon an acid bath of economics'.[20] From an opinion by his own judicial hero, Learned Hand, who served on the federal bench for more than a half-century, Posner derives the '*Dennis* formula' (so named for the case, *United States v Dennis*, in which Hand supposedly intimated its elements). As stated by Posner, the formula instructs courts to permit the regulation of speech if and only if:

$$V + E < P \times L(1 + i)^n,$$

where V is the value to society of suppressed information, E represents the 'legal-error costs incurred in trying to distinguish the information that society desires to suppress from valuable information', P is the probability of harm if the speech in question is not suppressed, and $L(1 + i)^n$ is the loss to society from allowing the harmful speech, discounted to present value at the prevailing interest rate i.[21] Posner then applies this formula to questions ranging from defamation to obscenity to copyright law's fair-use doctrine.

[19] Posner, 'Free Speech in an Economic Perspective' (n 5).
[20] ibid 7.
[21] ibid 8.

Posner's formula has spawned many pages of critical commentary, including an insightful 1988 note by then-law student (now law professor) Peter Hammer.[22] Hammer observes that Posner's algebraic formula amounts to a complicated statement of a straightforward proposition—'that a restriction on speech should be upheld if the benefits of suppressing the speech outweigh the costs'. In Hammer's view, this 'cost-benefit statement is true by definition' once 'one accepts . . . that speech is not an absolute value'. Put differently: 'It is little different from saying that the judge should always make the correct decision.'[23] Michael Rushton, writing nearly two decades later, makes a similar point. Posner's formula, Rushton remarks, simply states that judges should uphold speech restrictions if and only if the 'cost of suppressing expression' is less than 'the probable cost of allowing the expression'. In Rushton's view, '[t]he inequality offers nothing very controversial'.[24]

Upon further inspection, however, Posner's formula reveals itself to be much more than a tautology—and far from an uncontroversial statement. Posner, Hammer, and Rushton all assume that once one rejects the premise that free speech is an absolute right (ie, once one recognizes that there will be some cases in which the freedom of speech ought to be abridged), the obvious alternative is to uphold speech restrictions if, by the judge's own lights, the benefits of suppressing speech outweigh the costs. That is a plausible position, but it is not the only plausible position. A middle ground between free speech absolutism and the cost-benefit standard embodied in Posner's *Dennis* formula is 'weighted balancing'—essentially, cost-benefit analysis with a 'heavy thumb on the scale' in the speaker's favor.[25] 'Weighted balancing' might be used to 'smoke out' improper legislative motives[26] or to honor a constitutional commitment to free speech 'without imposing . . . a straitjacket that disables government from responding to serious problems'.[27] In algebraic terms, the weighted balancing approach would suggest that courts should uphold speech restrictions only if $V + E <<< P \times L(1 + i)^n$, or—in English—if the costs of suppressing speech are significantly less than the expected benefits. The 'strict scrutiny' doctrine in US First Amendment law—whereby a speech restriction will survive judicial review only if it is narrowly tailored to achieve a compelling government interest and does so by the least restrictive means possible—arguably reflects this 'weighted balancing' view.[28] So-called 'intermediate scrutiny'—which requires an important government interest and a substantial

[22] Peter J Hammer, 'Note: Free Speech and the "Acid Bath": An Evaluation and Critique of Judge Richard Posner's Economic Interpretation of the First Amendment' (1988) 87 Michigan L Rev 499.
[23] ibid 510.
[24] Michael Rushton, 'Economic Analysis of Freedom of Expression' (2005) 21 Georgia State U L Rev 693, 709.
[25] Adam Winkler, 'Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in Federal Courts' (2006) 59 Vanderbilt L Rev 793, 803.
[26] ibid 805.
[27] ibid 803.
[28] Richard H Fallon, Jr, 'Strict Judicial Scrutiny' (2007) 54 UCLA L Rev 1267, 1306-08.

relationship between the speech restriction and that interest—is arguably another type of weighted balancing, though with a somewhat lighter weight.

The mirror-image position is plausible as well. The fact that a legislature has enacted a speech restriction presumably reflects its own calculation that the benefits of suppressing speech exceed the costs. One might argue that a court should displace the legislature's judgment only if it is quite sure that the legislature is wrong—that is, only if, in the court's view, $V + E >>> P \times L(1 + i)^n$. 'Rational basis' review in American constitutional law arguably reflects this latter version of weighted balancing: there is a heavy thumb on the scale in favor of a provision's constitutionality, and a court will strike down a statute only when the balance tips overwhelmingly against the legislature. Interestingly, while the US Supreme Court applies strict scrutiny, intermediate scrutiny, and rational basis to speech restrictions of different varieties, US free speech law never allows judges to engage in the unweighted cost-benefit analysis that Posner advocates.

Importantly, Posner's perspective on free speech and the economic perspective on free speech should not be seen as one and the same. As Rushton notes, '[t]he essence of Posner's approach is *balance*'—weighing the benefits of speech suppression against its costs.[29] Balancing, however, is not the only prescription that one might derive from economic analysis. Categorical rules (eg, an absolute prohibition on viewpoint discrimination) may enhance welfare overall even if they sometimes produce peculiar results.[30] Posner's perspective is '*an* economic perspective' but certainly not the only economic perspective on the subject.

C. After the 'Acid Bath'

Posner's 1986 article is not the last effort at an economically informed framework for free speech analysis. Daniel Farber's widely cited 1991 *Harvard Law Review* article attempts a similarly general economic theory of free speech.[31] Farber succinctly summarizes his theory in a single paragraph: [32]

> [B]ecause information is a public good, it is likely to be undervalued by both the market and the political system. 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

[29] Rushton (n 24) 715-16.
[30] See, eg, Louis Kaplow, 'Rules Versus Standards: An Economic Analysis' (1992) 42 Duke LJ 557.
[31] Daniel A Farber, 'Free Speech Without Romance: Public Choice and the First Amendment' (1991) 105 Harvard L Rev 554.
[32] ibid 555.

protection for information-related activities. This simple insight explains a surprising amount of First Amendment doctrine.

In contrast to accounts of free speech that 'celebrate the Romantic ideals of self-expression and self-realization', Farber characterizes his account as a 'very *un*romantic understanding of the First Amendment's protection of free speech'.[33] His 'economic theory of free speech places no special intrinsic value on self-expression',[34] though it often lands in the same place as theories that do.

Farber's analysis, while illuminating in important respects, also poses a number of puzzles. He perceptively observes that, in a free market, the output of information will likely fall below the socially optimal level because the producer of information cannot collect payments from all who benefit from it. The unresolved question, though, is why the public good attributes of information should lead to less rather than more regulation. As Kathleen Sullivan notes in response to Farber's argument: 'Public goods are precisely those that the government does not leave to markets but produces or subsidizes itself.'[35] Governments do not respond to the public-good aspect of national defense by deregulating it; they respond by providing it. The public good aspect of free speech would, likewise, justify government funding for speech rather than a laissez-faire approach. Yet sometimes free speech doctrine leads to *restrictions* on free speech subsidies—a perverse outcome if the problem that free speech protection seeks to solve is, as Farber posits, information undersupply. Farber himself acknowledges the apparent paradox.[36] Sometimes courts strike down government subsidies because the government has selectively subsidized speech advocating certain viewpoints but not others.[37] In such cases, the legislature may 'respond[] by eliminating the subsidy altogether', likely leading to a 'lower level of information' than if free speech doctrine had not intervened.[38]

Comparison of information to other public goods further underscores the peculiarity of the First Amendment's laissez-faire approach if information production is the underlying goal. Vaccines against infectious diseases such as measles are clear public goods. The US Food and Drug Administration heavily regulates vaccines so that individuals can have confidence in their safety. We take the opposite approach to political speech—which, according to Farber, is a public good as well—even though regulation might give individuals greater confidence in the truth value of political information. In other cases, governments boost the production of public goods through mandates: homeowners must shovel the sidewalks outside their homes in a snowstorm,

[33] ibid.
[34] ibid 582.
[35] Kathleen M Sullivan, 'Free Speech and Unfree Markets' (1995) 42 UCLA L Rev 949, 960.
[36] Farber (n 31) 572.
[37] See, eg, *Legal Services Corp v Velazquez*, 531 US 533 (2001).
[38] Farber (n 31) 572.

motorists must turn on their headlights at night, and so on. Yet explicit speech mandates often run afoul of the First Amendment compelled speech doctrine in the United States.

While Farber's essay aims to arrive at a general theory of free speech protection through economic analysis, several other writers in the L&E tradition have sought to apply economic insights to a number of specific free speech-related issues, including desecration laws, hate speech laws, and libel and slander laws. Eric Rasmusen and Eric Posner both analyze laws against desecration from an economic perspective. Rasmusen observes that laws against desecration—such as flag-burning bans—address the negative 'mental externalities' that symbol desecrators impose upon symbol venerators. He adds that allowing desecration will reduce incentives to create and maintain new symbols. For these reasons, he concludes that US Supreme Court decisions striking down flag-burning bans were mistaken.[39] Eric Posner offers a contrasting view. He notes that laws mandating flag veneration may reduce the value of the signal that veneration sends, because everyone (regardless of patriotism) must venerate the flag. Alternatively, a law punishing flag desecration may enhance the value of desecration as a commitment mechanism for members of a 'deviant subcommunity' because desecrators—by breaking the law—'reduce the value of their opportunities outside their group' and 'thus enhance their trustworthiness within the group'. Given the 'complexity of predicting the effect of a flag-burning ban on behavior and beliefs', Posner expresses skepticism toward the 'claim that a law against flag burning would have any predictable effect that would be socially desirable'.[40]

Other important work in the economic analysis of free speech has focused on hate speech laws. Dhammika Dharmapala and Richard McAdams take up that subject, beginning from the assumption that perpetrators of hate crimes seek esteem from others who share their worldview. Speech can convey information about what actions will generate esteem. Restrictions on hate speech can reduce the availability of information about which actions will be esteem-generating. Dharmapala and McAdams consider several ways in which this uncertainty may affect the behavior of potential perpetrators. For example, if potential perpetrators are risk-averse, then uncertainty about the amount of esteem associated with hate crime commission will reduce the incentive to commit such crimes in the first place. This might strengthen the case for laws against hate speech, though the authors emphasize that their model 'highlights only one factor that fits within a comprehensive cost-benefit analysis of speech regulation'.[41]

[39] Eric Rasmusen, 'The Economics of Desecration: Flag Burning and Related Activities' (1998) 27 J of Legal Studies 245.
[40] Eric A Posner, 'Symbols, Signals, and Social Norms in Politics and the Law' (1998) 27 J of Legal Studies 765, 780-81.
[41] Dhammika Dharmapala and Richard H McAdams, 'Words That Kill? An Economic Model of the Influence of Speech on Behavior (with Particular Reference to Hate Speech)' (2005) 34 J of Legal Studies 93, 132.

A number of scholars have analyzed the tort of defamation (ie, libel and slander) from an economic perspective, including Nuno Garoupa,[42] Oren Bar-Gill and Assaf Hamdani,[43] David Acheson and Ansgar Wohlschlegel,[44] Yonatan Arbel and Murat Mungan,[45] and this author with Ariel Porat.[46] All these authors note that liability can have a 'chilling effect' on true speech because potential speakers will worry about the litigation costs of potential lawsuits as well as the prospects that fallible courts will hold them liable. Bar-Gill and Hamdani emphasize that defamation liability also encourages publishers to invest more heavily in verifying factual statements. Arbel and Mungan, as well as Porat and I, highlight the effect of defamation liability on listeners' beliefs. When talk is cheap—when there is no liability for false statements—then audiences may ascribe less credibility to the statements they hear and read. Arbel and Mungan argue that the effect of liability on audiences undermines the case for defamation law, because defamation law—rather than protecting the victims of defamation—'*amplifies* the pernicious effect of false allegations'.[47] Porat and I acknowledge that defamation law potentially amplifies harms to victims but also emphasize that defamation law also can facilitate communication by enhancing the credibility of speech. (Section 3 returns to this subject.)

The emergence of behavioral economics opens up new frontiers for economic analysis of free speech law. Christine Jolls, Cass Sunstein, and Richard Thaler briefly consider the subject of prior restraints on speech in their field-defining 1998 article laying out a 'behavioral approach to law and economics'. Jolls and her coauthors hypothesize that court orders generate 'endowment effects', causing the party that obtains the order to attach a particularly high value to the entitlement conferred. The judicial hostility to prior restraints, Jolls and her coauthors suggest, can be justified as an effort to prevent prosecutors from experiencing an endowment effect after they obtain an injunction against speech. If such injunctions were allowed, prosecutors might place excessive value on enforcing those injunctions even if subsequent information suggested that the enjoined speech ought not be criminalized.[48] More recently, Jolls analyzes visual

[42] Nuno Garoupa, 'Dishonesty and Libel Law: The Economics of the "Chilling" Effect' (1999) 155 J of Institutional & Theoretical Economics 284; Nuno Garoupa, 'The Economics of Political Dishonesty and Defamation' (1999) 19 Intl R of L & Economics 167.

[43] Oren Bar-Gill and Assaf Hamdani, 'Optimal Liability for Libel' (2003) 2 Contributions to Economic Analysis & Policy 1.

[44] David J Acheson and Ansgar Wohlschlegel, 'The Economics of Weaponized Defamation Lawsuits' (2018) 47 Southwestern L Rev 335.

[45] Yonathan A Arbel and Murat Mungan, 'The Case Against Strict Defamation Laws' (2019) U of Alabama Legal Studies Research Paper No 3311527 <https://ssrn.com/abstract=3311527> accessed 3 November 2019.

[46] Daniel Hemel and Ariel Porat, 'Free Speech and Cheap Talk' (2019) 11 J of Legal Analysis 46.

[47] Arbel and Mungan (n 45) 6.

[48] Christine Jolls, Cass R Sunstein and Richard Thaler, 'A Behavioral Approach to Law and Economics' (1998) 50 Stanford L Rev 1471, 1497-98, 1517.

elements in legally required communications—such as graphic warning labels on cigarette packages—through a behavioral lens.[49]

The rise of behavioralism is one—but not the only—'revolution' in economics that has occurred since the early days of L&E. The 'new information economics', discussed presently, is another discipline-redefining development. As the next two sections will seek to show, the implications of the new information economics for the study of free speech are particularly far-reaching.[50]

2. The New Information Economics

The 'new information economics' is not exactly new anymore. It began, by most accounts, a half-century ago with George Akerlof's 1970 article 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism'.[51] Akerlof argues that under conditions of information asymmetry, low-quality goods can drive high-quality goods out of the marketplace. In these cases, either government intervention or private intervention can increase welfare. He illustrates this point with an extended example involving second-hand automobiles. Akerlof imagines that used-car owners know whether their vehicles are bad cars ('lemons') or good cars (which later literature refers to as 'peaches'). Buyers, however, have no way of knowing whether any given car is a 'lemon' or a 'peach'. They therefore are willing to pay a price reflecting the average quality of used cars on the market—higher than the price of a lemon, but less than the price of a peach. Lemon-owners are very willing to sell their bad cars for that price, but peach-owners are unwilling to sell their well-maintained cars for substantially less than they are worth. Ultimately, the only used cars on the market will be the lemons. That is, '[t]he "bad" cars tend to drive out the good'.[52]

Akerlof refers to this phenomenon as 'adverse selection' and notes examples in markets for insurance, labor, and credit. He then identifies a number of institutions that can counteract

[49] Christine Jolls, 'Debiasing Through Law and the First Amendment' (2015) 67 Stanford L Rev 1411. For another perspective on free speech informed by behavioral economics, see Paul Horwitz, 'Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment' (2003) 76 Temple L Rev 1, 26-48.

[50] Other contributions to the economic analysis of free speech include Clifford G Holderness, Michael C Jensen and William H Meckling, 'The Logic of the First Amendment' (2000) Harvard Business School NOM Unit Working Paper No 00-01 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=215468> accessed 3 November 2019; and Fred S McChesney, 'A Positive Regulatory Theory of the First Amendment' (1988) 20 Connecticut L Rev 355. For another review of the economic literature on free speech, see Hugo M Mialon and Paul H Rubin, 'The Economics of the Bill of Rights' (2008) 10 American L & Economics Rev 1, 6-15. For an economically informed analysis of the social (rather than legal) regulation of speech, see Glenn C Loury, 'Self-Censorship in Public Discourse: A Theory of "Political Correctness" and Related Phenomena' (1994) 6 Rationality & Society 428.

[51] George A Akerlof, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' (1970) 84 Q J of Economics 488.

[52] ibid 489.

the effects of quality uncertainty. Guarantees are one example. A seller may, for example, warrant that a car is a peach and be held liable for damages if it turns out not to be. Another example is reputation. 'Brand names', he observes, 'give the consumer a means of retaliation if quality does not meet expectations', as 'the consumer will then curtail future purchases'. A third is licensing (or certification). A license to practice medicine or law—or a professional degree from a prestigious institution—operates as a certification of proficiency. Akerlof notes that '[t]he high school diploma, the baccalaureate degree, the Ph.D., even the Nobel Prize, to some degree, serve thus function of certification' as well.[53]

Tens of thousands of later papers in economics and other fields cite and build on Akerlof's elegant model. Of particular note, Michael Spence's 1973 essay on 'signaling' posits that educational degrees can serve to distinguish high-quality job applicants ('peaches') from low-quality applicants ('lemons') if the cost of a degree is negatively correlated with productivity (ie, if it is cheaper for a high-quality applicant than for a low-quality applicant to earn a degree).[54] Joseph Stiglitz, among others, has identified 'screening' as an alternative to 'signaling'.[55] An employer may, for example, 'screen' potential employees by offering contingent contracts that require an employee to pay a fine if it turns out that she has overstated her ability. Stiglitz notes that such screening occurs 'in a slightly modified form' relatively routinely: 'Individuals accept low wages while they prove themselves; the low wages today are compensated for by high wages later if they do prove themselves', and '[i]f they do not, the difference between the low wages and what they could have obtained elsewhere acts as a fine'.[56] The difference between 'signaling' and 'screening' is that signals are transmitted by the better-informed party (in Spence's case, the employee who knows that she is highly productive and obtains a degree to show it) while screens are set by the less-informed party (in Stiglitz's case, the employer who seeks to distinguish high-quality and low-quality workers).[57]

Despite the large and growing literature inspired by Akerlof's initial article, one passage in 'The Market for "Lemons"' has gone almost entirely unexplored. Akerlof notes that under conditions of asymmetric information, governmental or private institutions can intervene to enhance welfare. He then writes: 'By nature, however, these institutions are nonatomistic, and therefore concentrations of power—with ill consequences of their own—can develop.'[58] Only a

[53] ibid 499-500.
[54] Michael Spence, 'Job Market Signaling' (1973) 87 Q J of Economics 355.
[55] Joseph E Stiglitz, 'The Theory of "Screening" Education, and the Distribution of Income' (1975) 65 American Economic R 283.
[56] ibid 292.
[57] See John G. Riley, 'Silver Signals: Twenty-Five Years of Screening and Signaling' (2001) 39 J of Economic Literature 432, 443-444.
[58] Akerlof (n 51) 488.

few subsequent papers—and none in mainline economics journals—have sought to make sense of this remark.[59]

Competition is 'atomistic' when markets are characterized by large numbers of small sellers who lack market power. Akerlof appears to be saying that the institutions that can resolve adverse selection problems necessarily *will* have market power. In the used car context, CarMax buys up old vehicles and stakes its reputation on its claims about quality. In the licensing context, JD and MD degrees signal proficiency only because not everyone can get one—or, at least, not everyone can get one from an accredited medical school or law school. The Liaison Committee on Medical Education and the American Bar Association are near-monopolies in the US medical and law school contexts. Warranties—which are another way for sellers to address information asymmetries—do not depend upon private-sector monopolies or oligopolies, but they do depend upon courts. We can think of courts as monopolists (or, perhaps more accurately, oligopolists[60]) in the market for warranty enforcement. In all of these contexts, the solution to the adverse selection problem results in the aggregation of power in the hands of institutions that are sheltered from market competition. The implications of these power concentrations in the speech context will be considered below.

3. On Liberty and Lemons

The canonical papers by Akerlof, Spence, and Stiglitz all focus on information asymmetries in markets for goods and services. Their insights apply equally, though, to information asymmetries in the market for information itself. We might imagine speakers as 'sellers' and listeners as 'buyers', with falsehoods as 'lemons' and truths as 'peaches'. In general (though not always), truths are more expensive to produce than falsehoods.[61] Listeners, we also generally assume, prefer truths.[62] Listeners, though, cannot easily distinguish truths from falsehoods

[59] See Glenn Fox, 'Asymmetric Information and Market Failure: A Market Process Perspective' [2016] J of Prices & Markets 11 <http://pricesandmarkets.org/wp-content/uploads/2016/11/Asymmetric-Information-and-Market-Failure-A-Market-Process-Perspective-by-Fox.pdf> accessed 3 November 2019; Mark Steckbeck and Peter Boettke, 'Turning Lemons into Lemonade: Entrepreneurial Solutions to Adverse Selection Problems in E-Commerce' in Jack Birner and Pierre Garrouste (eds), *Markets, Information and Communication: Austrian Perspectives on the Internet Economy* (Routledge 2003).

[60] Not only is there interjurisdictional competition among courts, but there is also competition between courts and private-sector arbitrators. The 'market for lemons' problem reappears in the market for arbitration services, where parties rely on the reputations of individual arbitrators and certification by bodies such as the American Association of Arbitration and the International Centre for Dispute Resolution.

[61] The costs of producing 'truths' are sometimes monetary and sometimes psychic. For example, a truth producer may have to incur the psychic costs of conveying information that clashes with her own values or worldview. A producer of falsehoods, by contrast, can avoid that cost by always saying what she finds ideologically congenial.

[62] Writing nearly three decades ago, David Strauss thought it a 'fair generalization that no rational person ever wants to act on the basis of a false statement of fact'—or, at least, any exceptions to this generalization 'seem too unusual and peripheral to implicate the basic institutional structure governing freedom of expression'. David

themselves. (If listeners already knew what was true and what was false, then speech would carry no informational value.) As the share of speech that is false rises, listeners will be willing to pay less for it (note that 'payment' here can refer to monetary payments such as magazine and newspaper subscriptions or to payments that take other forms, such as political support or esteem). Truthtellers, then, will be less willing to bear the high cost of producing truth given the low price. Bad speech will tend to drive out the good.

The previous paragraph's dystopian view of information markets is, to be sure, heavily stylized. We may today live in an ocean of 'fake news', but truth has not vanished from the earth. (Nor, for that matter, have high-quality used cars.) Starting from the stylized model, though, helps us identify the institutions that address information asymmetries in familiar information markets. Each of the institutions that Akerlof mentions—warranties, reputation, and licensing/certification—have analogues in the speech context.

A. Warranties and Liability

Warranties in information markets take several forms. Occasionally, a speaker will explicitly warrant that her statement is true and promise to pay a sum certain to anyone who proves her wrong. The canonical example is *Carlill v Carbolic Smoke Ball Co*, in which the manufacturer of a 'smoke ball' averred that its product could prevent viral infections and promised to pay £100 to anyone who used it as directed and contracted the cold or the flu afterwards. One Ms. Carlill did so, caught the flu, and sued. The court held that the manufacturer's 'prove-me-wrong' offer was a valid offer that Ms. Carlill accepted, resulting in an enforceable contract.[63] A well-known American analogue is *James v Turilli*, in which Rudy Turilli, the operator of a museum devoted to bank and train robber Jesse James, claimed that the outlaw had lived with Turilli in a house in Missouri until the 1950s. (James, by all other accounts, died in

Strauss, 'Persuasion, Autonomy, and Freedom of Expression' (1991) 91 Columbia LR 334, 336 & n.77. Subsequent years have led many to doubt that claim. See, for example, Michiko Kakutani, *The Death of Truth: Notes on Falsehoods in the Age of Trump* (Tim Duggan Books, 2018). Experimental evidence suggests that substantial numbers of individuals do seek out truth and update their beliefs accordingly, though results are heavily context-dependent. See, for example, Geoffrey L. Cohen, Joshua Aronson, and Claude M. Steele, 'When Beliefs Yield to Evidence: Reducing Biased Evaluation by Affirming the Self' (2000) 26 Personality & Social Psychology Bulletin 1151; Lisa Farman et al, 'Finding the Truth in Politics: An Empirical Validation of the Epistemic Political Efficacy Concept' (2018) 26 Atlantic J of Communication 1; Raymond James Pingree, Dominique Brossard, and Douglas M. McLeod, 'Effects of Journalistic Adjudication on Factual Beliefs, News Evaluations, Information Seeking, and Epistemic Political Efficacy' (2014) 17 Mass Communication & Society 615; and Axel Westerwick, Steven B. Kleinman, and Silvia Knobloch-Westerwick, 'Turn a Blind Eye If You Care: Impacts of Attitude Consistency, Importance, and Credibility on Seeking of Political Information and Implications for Attitudes' (2013) 63 J of Communication 432. In any event, the empirical claim that 'listeners prefer truths' is likely not essential to the case for greater speech regulation. If the claim turns out to be false, then the idea that an unbridled marketplace of ideas will bring truths to the top seems suspect from the start.

[63] [1893] 1 QB 256.

a shootout in 1882.) Turilli offered a $10,000 reward to anyone who could prove his claim wrong. James's daughter-in-law and grandchildren accepted the offer, established the falsity of Turilli's assertion, and sought to collect the reward. A Missouri court ordered him to pay.[64]

While the 'smoke ball' case and the Jesse James case are not the only examples, 'prove-me-wrong' offers remain relatively rare. In some cases, courts have refused to enforce them.[65] Daniel O'Gorman argues that prove-me-wrong offers 'are usually not supported by consideration and are therefore typically not enforceable as a unilateral contract'.[66] The US Court of Appeals for the Eleventh Circuit recently considered a defense lawyer's $1 million prove-me-wrong offer to anyone who could show that his client could have travelled from Atlanta's Hartsfield-Jackson airport to a murder scene as quickly as the prosecution's timeline alleged. A law student tried to take up the offer and recorded himself making the journey within the prosecution's twenty-eight-minute timeframe. The court refused to enforce the warranty. 'The exaggerated amount of 'a million dollars'—the common choice of movie villains and schoolyard wagerers alike—indicates that this was hyperbole,' the court said.[67]

Aside from explicit prove-me-wrong offers, another way that speakers effectively 'warrant' the truth of their statements is by speaking against a background of defamation liability. When defamation liability potentially applies, a speaker's reputation-damaging statement about another operates as a warranty that the statement is true and binds the speaker to pay damages if it turns out not to be. Defamation liability can thus enhance the credibility of speech, which then may boost the price that listeners are willing to pay and encourage more true information to be generated. Ariel Porat and I have termed this the 'warming effect' of defamation, in contrast to the better known 'chilling effect'. Defamation law's 'chilling' and 'warming' effects cut in opposite directions, and the net effect of defamation on the quantity of speech is therefore ambiguous. Porat and I conclude that US Supreme Court case law on defamation—which, in the name of free speech, significantly limits the scope of liability—may be counterproductive if the goal of the First Amendment's free speech clause is to facilitate speech.[68]

Warranties and liability do not, importantly, avoid Akerlof's concerns regarding 'concentrations of power' produced by institutional solutions to asymmetric information. Instead, they vest courts with the concentrated power to decide what statements are true and false for purposes of prove-me-wrong offers and defamation. 'Ill consequences' will follow, as

[64] *James v Turilli*, 473 S W 2d 757 (1971).
[65] See, for example, *Cudahy Junior Chamber of Commerce v Quirk*, 165 N W 2d 116 (1969).
[66] Daniel P O'Gorman, '"Prove Me Wrong" Cases and Consideration Theory' (2015) 23 George Mason L Rev 125, 125.
[67] *Kolodziej v Mason*, 774 F 3d 736, 741 (2014).
[68] Hemel and Porat (n 46) 66-72.

Akerlof warns, if courts are biased against particular viewpoints. As we shall soon see, though, the alternatives to judicial speech regulation will entail power concentrations of a different sort.

B. Reputation

Reputation is, as noted by Akerlof, an alternative institution for addressing quality uncertainty. It is perhaps the mechanism most often used for quality assurance in the marketplace for information and ideas. We in the United States rely on the *New York Times*, the *New Yorker*, and National Public Radio to provide accurate information about national and world events. We trust the *New England Journal of Medicine* for health information and *Consumer Reports* for product information. Each of these institutions stakes its reputational capital on the information that it publishes. We trust these institutions because we believe they have implemented rigorous verification processes and because they have a lot to lose if they get facts wrong.

Reliance on private-sector institutions with high reputational capital poses problems of its own. Sometimes, the institutions in which we place our trust fail to live up to their reputations for accuracy. Consider, for example, the *New York Times*' publication of what its editors later described as 'misinformation' regarding the development of weapons of mass destruction by Iraqi dictator Saddam Hussein.[69] Apart from inaccuracies (which are inevitable in at least some instances, even if the Iraq weapons-of-mass-destruction one was not), reliance on high-reputation institutions results in the 'concentrations of power' of which Akerlof warned. The publisher and editors of the *New York Times*—and their counterparts at other high-reputation institutions—exert enormous influence over intelligent discourse and informed thought. Even if the people who occupy these roles are for the most part talented and well-meaning, we may nonetheless be concerned about the control over information markets exercised by individuals who are neither democratically elected nor broadly representative of the backgrounds, viewpoints, and concerns of the general population.

The discussion here highlights the tradeoff between liability and reputation in information markets. Liability—whether in the form of warranty enforcement or defamation law—allocates authority to courts to distinguish fact from fiction. Reliance on reputation makes institutions with high reputational capital the arbiters of truth. The tradeoff is, as Akerlof emphasizes—ultimately unavoidable when consumers (whether of goods and services or of information and ideas) cannot readily ascertain quality.

[69] Editorial, 'From the Editors; The Times and Iraq' *New York Times* (New York, 26 May 2004) 10.

C. Licensing and Certification

Licensing and certification are the last set of institutional responses to the 'market for lemons' problem that Akerlof considers, and here too, there are information market analogues. Journalism degrees might be thought of as certificates of truth-seeking proficiency, though at least in the United States, journalism degrees have not come to play the same certification role that the JD, MBA, and MD do in law, business, and medicine (respectively). Journalism awards such as the Pulitzer Prize serve an ex post certification function. The Federal Communications Commission's 'fairness doctrine' formerly required radio and television stations—as a condition for their licenses—to provide accurate coverage of opposing views,[70] though the commission later concluded that 'the fairness doctrine chills speech' and therefore abandoned it in 1987.[71]

Licensing and certification play larger roles in some other information markets. Since December 2017, the Independent Press Standards Organisation (IPSO) in the United Kingdom has maintained an optional licensing system for newspapers and magazines. IPSO members must adhere to an 'Editor's Code', which sets forth standards related to accuracy and respect for personal privacy. Individuals can complain to IPSO about inaccurate reports, privacy invasions, and other code violations. If IPSO finds that a member publication has violated the Editor's Code, it can require the publication to print a correction and impose a fine of up to £1 million. (The kitemark can thus be understood as both a certification and as a warranty.) Publications that are members of IPSO can carry the organization's 'kitemark', a symbol that denotes adherence to the Code. IPSO has sought to educate the British public about the meaning of the kitemark through advertisements with slogans such as 'FAKE NEWS NOT WELCOME WHERE YOU SEE THIS MARK.'[72]

Most newspapers and magazines in the United Kingdom have signed up to the IPSO certification regime. Illustrating the substitutability between reputation and other institutions for addressing quality uncertainty, however, the *Guardian*, *Independent*, and *Financial Times*—three of the British newspapers with the highest reputational capital—have opted not to join.[73] A sympathetic understanding of these newspapers' choices is that they believe they can overcome the 'market for lemons' problem on the basis of their reputational stores without the additional

[70] See *Red Lion Broadcasting Co v Federal Communications Commission*, 395 US 367 (1969).
[71] *Syracuse Peace Council v Federal Communications Commission*, 2 FCC Rcd 5043, 5057 (1987).
[72] Charlotte Tobitt, 'Press Regulator IPSO Launches Newspaper Ad Campaign To Say "Fake News Is Not Welcome" in Its Members' Publications' *Press Gazette* (London, 30 April 2018) <https://www.pressgazette.co.uk/press-regulator-ipso-launches-newspaper-ad-campaign-to-say-fake-news-is-not-welcome-in-its-members-publications> accessed 3 November 2019.
[73] Independent Press Standards Organisation, 'Complaints' (*IPSO*, 2018) <https://www.ipso.co.uk/faqs/complaints> accessed 20 October 2019.

credibility that IPSO membership potentially brings. A more cynical view is that they see IPSO's kitemarking system as a threat to their own oligopolistic power in the market for trustworthy news.

D. Signaling and Screening

The emergent state of affairs in the United Kingdom—with most publications making use of certification and a handful resting on reputation—can be analyzed in 'signaling' and 'screening' terms. A regime of opt-in liability potentially can 'screen' speakers who know more about their own type than the regulator does. The IPSO system in the United Kingdom is binary (opt-in or opt-out), but we also could imagine multiple levels of liability, with speakers who know themselves to be more accurate opting for higher liability levels. Each level would be associated with a mark or other designation that serves as a 'signal' of quality. Ideally, the system would result in what the new information economics describes as a 'separating equilibrium': the highest quality speakers ('peaches') would opt into the highest level of liability; the lowest quality speakers ('lemons') would opt for the lowest level; and speakers of the intermediate quality type (call them 'melons') would opt for more liability than the lemons but less than the peaches.

Signaling and screening efforts do not always result in separating equilibria, however. Speakers of different types may opt for the same level of liability—a phenomenon known in the literature as a 'pooling equilibrium'. For example, purveyors of 'fake news' as well as high-reputation speakers both might opt out of the regulatory regime—the former because they are worried about liability, the latter because they think they can convey information credibly without the boost from certification. High-reputation speakers might even have an incentive to disrupt separating equilibria because effective signaling and screening may erode the value of reputational capital.

The potential role of law as a facilitator for signaling and screening in markets for information is a subject that merits additional investigation, and the discussion here is exploratory rather than exhaustive. The key points are (a) that one size need to fit all,[74] (b) that multiple liability levels with an option for speakers to choose among them might have information revelation benefits, and (c) that designing a menu of liability options that produces a separating equilibrium among speakers will require much thought—and perhaps a certain amount of trial and error as well. Such a system could go some way toward deconcentrating power in the market for information, as both courts (or as in IPSO's case, an industry self-

[74] Breton and Wintrobe say that 'the *same* set of regulations' must 'be consistently applied to all statements' in 'any ideas market'. Breton and Wintrobe (n 8) 220. The discussion here (and the experience in the United Kingdom) illustrates that this is indeed not the case.

regulatory organization) and high-reputation private institutions that remain outside the regulatory regime will be competing power centers. Truly atomistic competition in the marketplace of ideas, though, likely remains an impossibility, as Akerlof foresaw from the outset.

Conclusion

The law and economics literature on free speech has, for the most part, seen law as an obstacle to a robust market for information and ideas. L&E scholars have not advocated a completely laissez-faire approach to speech, but they generally have characterized the tradeoff as between more speech, on the one hand, and legal protection against speech-related harms, on the other. Richard Posner's *Dennis* formula and Daniel Farber's celebration of the First Amendment as a subsidy for speech exemplify this perspective.

The new information economics suggests a different view. Knowledge asymmetries between producers and consumers make the market for information and ideas potentially a 'market for lemons'. Law can address that asymmetry—for example, by imposing liability on purveyors of falsehoods—but at the cost of courts turning into arbiters of truth. The alternative is for law to recede and reputation to play a more prominent role, though only at the cost of concentrating power in high-reputation private-sector institutions. Perhaps the best that law can do is to offer different options to different speakers, permitting some to rely on their own reputational capital while allowing others to enjoy the enhanced credibility that liability brings. A system that gives speakers the opportunity of *un*free speech—that is, the option to engage in talk that is not cheap—may, in the end, do more to promote a robust marketplace for information and ideas than a system in which all speech is free.