

Is There a Right of Freedom of Expression?

Larry Alexander



Is There a Right of Freedom of Expression?

Larry Alexander

University of San Diego



CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo

Cambridge University Press
40 West 20th Street, New York, NY 10011-4211, USA

www.cambridge.org
Information on this title: www.cambridge.org/9780521822930

© Larry Alexander 2005

This book is in copyright. Subject to statutory exception
and to the provisions of relevant collective licensing agreements,
no reproduction of any part may take place without
the written permission of Cambridge University Press.

First published 2005

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication Data

Alexander, Larry, 1943–

Is there a right of freedom of expression? / Larry Alexander.

p. cm. – (Cambridge studies in philosophy and law)

Includes bibliographical references and index.

ISBN 0-521-82293-9 (alk. paper : hardback) – ISBN 0-521-52984-0 (alk. paper : pbk.)

I. Freedom of expression – United States. I. Title. II. Series.

KF4770.A946 2005

342.7308'5–dc22 2004054579

ISBN-13 978-0-521-82293-0 hardback

ISBN-10 0-521-82293-9 hardback

ISBN-13 978-0-521-52984-6 paperback

ISBN-10 0-521-52984-0 paperback

Cambridge University Press has no responsibility for
the persistence or accuracy of URLs for external or
third-party Internet Web sites referred to in this book
and does not guarantee that any content on such
Web sites is, or will remain, accurate or appropriate.

Acknowledgments

In the process of writing this book, I have accumulated a number of debts, which I want to acknowledge gratefully here. Earlier iterations of many of the central arguments of the book were presented at the Conference on the Changing Face of Constitutional Interpretation at Hastings College of the Law in 1993; at the Symposium on Human Rights Protection in Melbourne, Victoria, Australia, in 2001; at the Constitutional Theory Conference at Vanderbilt University Law School in 2003; at the Constitutional Law Conference at the University of Virginia School of Law in 2003; and at faculty workshops at Arizona State University College of Law, Hastings College of the Law, Loyola–Los Angeles Law School, and the University of San Diego School of Law. Much of Chapter Eight was presented at the Conference on Religious Arguments Regarding Public Policy in a Liberal Democracy at the University of San Diego School of Law in 1992 and at the Conference on Liberalism and Illiberal Groups at the University of San Diego School of Law in 2001. I am grateful for the comments and criticisms I received at those events.

Much of the material in this book was anticipated in my prior writings. Chapter Two draws heavily from “Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory,” 44 *Hastings L. J.* 921 (1993). Chapter Three draws heavily from “Rules, Rights, Options, and Time,” 6 *Legal Theory* 337 (2000). Chapter Four is drawn in part from “Freedom of Expression as a Human Right,” in *Protecting Human Rights*, T. Campbell, J. Goldsworthy, & A. Stone, eds. (2003). Chapter Seven expands on sections of “The Impossibility of a Free Speech Principle” (co-authored with Paul Horton), 78 *Northwestern University Law Review* 1319 (1983), and “Freedom of Speech” in R. Chadwick, ed., *Encyclopedia of Applied Ethics* (1997). Chapter Eight draws heavily from “Liberalism, Religion, and the Unity of Epistemology,” 30 *San Diego L. Rev.* 763 (1993), and “Illiberalism All the Way Down: Illiberal Groups and Two Conceptions of Liberalism,” 12 *Journal of Contemporary Legal Issues* 625 (2002). I thank the publishers for their permission to draw liberally from these pieces.

Finally, I would like to thank my colleagues at the University of San Diego School of Law and my dean, Dan Rodriguez, who provided intellectual help and moral and financial encouragement; Frederick Schauer, who, in this as in so many areas of common interest, has laid much of the foundation for my work, illumined many of the paths, and given his assistance as a good friend and intellectual companion; Elaine Alexander, Steve Smith, and Stanley Fish, each of whom has been influential in this project; my student research assistants, Robert Booher, Rebecca Byrne, Shauna Durrant, and Jacinda Lanum, who did excellent work; my secretaries, Sarah Moore and Justine Phillips, who rendered tireless and excellent stenographic assistance; and my excellent copy editor, Norrie Feinblatt, and indexer, Carolyn Sherayko. As always, one must stand on very tall shoulders in order to see above the trees.

Introduction

The title of this book asks a question. The aim of the book is to answer it.

Part One, the first three chapters, lays the foundation for the inquiry. Chapter One takes up two questions: What kind of thing is a “human right” and what kinds of activities come within the scope of freedom of expression? It provides an answer to the first question, and it eliminates some possible answers to the second.

Chapter Two focuses entirely on the second question. Its task is to exclude from freedom of expression all laws that incidentally affect what gets said, by whom, to whom, and with what effect – that is, laws that have “message effects” but that are not enacted *because* of their message effects, so-called Track Two laws. I conclude that the scope of freedom of expression is confined to laws passed with the purpose of affecting messages.

In Chapter Three, I digress somewhat to point out some curious consequences that follow from a jurisprudence focused on government’s purposes in enacting laws rather than on those laws’ effects. In particular, a focus on purpose may invalidate laws whose message effects are more benign than those of laws not enacted for their message effects and thus untouched by a right of freedom of expression.

Part Two is primarily concerned with laws enacted for the purpose of affecting messages. Chapter Four takes up laws intended to suppress messages that cause harms that the government is otherwise permitted to attempt to prevent (Track One laws). Some laws are aimed at messages that cause such harms immediately upon the messages’ receipt by the audience – for example, laws penalizing revelations of secrets, breaches of confidences and contracts not to disclose, publication of “private” facts, infringements of copyrights and other intellectual property rights, threats of illegal action, and inflictions of offense or other emotional upsets. Other laws are aimed at messages that cause harm through inducing the audience to act in ways harmful to others or to itself – for example, laws against fraud, misrepresentation, libel, “fighting words,” incitement, and solicitation. I conclude that with respect to all the Track One laws, no

principled lines exist to demarcate areas where a right of freedom of expression might apply – short of the extreme and unpalatable position of exempting all of Track One from regulation.

Chapter Five takes up another class of laws enacted to affect messages, namely, those that represent government speech or private speech that the government wishes to promote through monetary or regulatory subsidies (Track Three laws). The difficulty here is that once it is admitted, as it surely must be, that government must be permitted to speak on behalf of its policies, it becomes difficult to locate any line that would limit government speech or speech subsidies.

Chapter Six takes up some miscellaneous areas of freedom of expression: the expression and affiliations of governmental employees; protection of speakers from audience reprisals; regulation of broadcasting; freedom of expressive association, anonymous speech; and private regulation of speech. Each of these areas turns out to be analyzable in terms of one of the “tracks” identified in Chapters Two, Four, and Five.

Part Three takes up theoretical perspectives on freedom of expression. Chapter Seven surveys the standard theories, both consequentialist and deontological, that are offered to justify a right of freedom of expression – theories invoking the pursuit of truth, the maximization of autonomy, the promotion of certain virtues, a putative deontological right to assess reasons, and the requirements of democratic decision-making. I find all of the standard theories inadequate to the task.

Chapter Eight then analyzes and diagnoses the cause of the previous chapters’ failures to justify a right of freedom of expression. The problem at the heart of the enterprise is that a human right of freedom of expression demands “evaluative neutrality” by the government. But evaluative neutrality cannot be normatively justified without producing a paradox: no normative theory can be evaluatively neutral regarding its own demands. It cannot be epistemically “abstinent” and thus fail to know what it otherwise must claim to know. I show how this paradox applies, not only to freedom of expression, but also to two other pillars of liberal theory, freedom of religion and freedom of association.

In the Epilogue, Chapter Nine, I conclude the book by asking what freedom of expression might look like if we were to abandon any attempt to ground it in some pre-political human right. I argue that there are always good consequentialist reasons to be wary of government suppression of expression, particularly those forms of Track One suppression aimed at expression that causes harm only when the audience acts harmfully in response to the message. Particular rights against such laws can be given indirect-consequentialist justifications; but such justifications and therefore the specific content of those rights will vary from place to place and from time to time. This is the most we can justify in terms of a right of freedom of expression.

Contents

Acknowledgments page ix

Introduction xi

PART ONE DEFINING HUMAN RIGHTS AND DELIMITING THE SCOPE OF FREEDOM OF EXPRESSION

- 1 Preliminaries: What Is a Human Right, and What Activities
Implicate Freedom of Expression? 3
- 2 Freedom of Expression and Regulations that Affect Messages
But are Not Enacted for That Reason 13
- 3 The Puzzles of Governmental Purpose 38

PART TWO THE CORE OF FREEDOM OF EXPRESSION: GOVERNMENT REGULATIONS AND ACTS TAKEN TO AFFECT MESSAGES

- 4 The Core of Freedom of Expression: Regulations of Conduct
for the Purpose of Affecting Messages Received 55
- 5 Track Three: Government Speech and Subsidies of Speech 82
- 6 Miscellaneous Regulations of Expression 103

PART THREE THEORETICAL PERSPECTIVES ON FREEDOM OF EXPRESSION

- 7 General Justifying Theories of Freedom of Expression 127
- 8 The Paradoxes of Liberalism and the Failure of Theories
Justifying a Right of Freedom of Expression 147

EPILOGUE

9	Muddling Through: Freedom of Expression in the Absence of a Human Right	185
	<i>Index</i>	195

PART ONE

DEFINING HUMAN RIGHTS AND
DELIMITING THE SCOPE OF
FREEDOM OF EXPRESSION

Preliminaries

What Is a Human Right, and What Activities Implicate Freedom of Expression?

I. What Are Human Rights?

As the title of this book reveals, my project is to ascertain whether freedom of expression, properly conceived, is appropriately regarded as a “right,” or more precisely, as a “human right.” Most of the book will be devoted to asking which of various conceptions of freedom of expression is the most eligible for that status and what range of activities will it protect. This chapter, however, takes up, albeit briefly, the question of what makes anything a “human right.” In other words, what is the conception of a human right that frames my inquiry regarding freedom of expression?

A. *Human Rights as Moral Rights*

When one claims a “human right,” what kind of claim is one making, and how might one justify it? The kind of human rights claim I am interested in is one that equates a human right with a moral right that exists apart from any particular legal or institutional arrangement, national, ethnic, or religious identity, tradition, or historical circumstance. Allen Buchanan and David Golove put it this way:

By definition, human rights are those moral entitlements that accrue to all persons, regardless of whether they are members of this or that particular polity, race, ethnicity, religion, or other social grouping.¹

Put succinctly, a human right is a moral right that can be validly invoked by any person² at any time or place.

¹ Allen Buchanan and David Golove, “The Philosophy of International Law,” in *The Oxford Handbook of Jurisprudence and Philosophy of Law* (J. Coleman and S. Shapiro, eds., 2002): 868–934, 888. See also Joel Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* 85 n. 27 (1970); Joel Feinberg, *Social Philosophy* 84 (1973).

² I leave aside the question of whether minors, the insane, and the feeble-minded and senile have the same panoply of human rights as ordinary adults.

Human rights as moral rights entail obligations on others. The obligations can be negative ones – obligations to forbear from actions that impede a liberty protected by the moral right or that threaten some good, such as life or property, protected by the right. Alternatively, the obligations can be positive ones requiring those subject to them to provide others with specific goods or services. A right to freedom of expression is normally thought at its core to entail the negative obligation that *government* not penalize the exercise of a certain liberty or set of liberties. (Which liberty or liberties are protected by the moral right will be explored throughout the remainder of the book.) Nevertheless, the right of freedom of expression is sometimes deemed to place negative obligations on at least some non-governmental actors.³ And it is sometimes invoked to support positive obligations (almost always on governments) to provide persons with means (for example, media outlets) and capacities (for example, information and education) for expressing themselves.⁴

Some might argue that I have mischaracterized human rights by deeming them to be moral rights. They would contend that human rights are legal rights established by international treaties and conventions or by customary international law. Thus, Article 19 of The Universal Declaration of Human Rights provides that “Everyone has the right to freedom of opinion and expression.”⁵ And Article 19 of the International Covenant on Civil and Political Rights, section 2, declares that “Everyone shall have the right to freedom of expression.”⁶ As this argument would put the matter, it is these international conventions, and the subscription thereto by the nations of the world, that create and define the right of freedom of expression. The human right of freedom of expression is a posited, dateable legal right, not a timeless moral right that preexists the instruments of international law.

³ Buchanan and Golove assert that some private actors are potential violators of human rights, although, in making that assertion, they do not have freedom of expression specifically in mind. See Buchanan and Golove, *supra* note 1, at 888.

⁴ See Owen M. Fiss, “Free Speech and Social Structure,” 71 *Iowa L. Rev.* 1405 (1986); Cass R. Sunstein, “Free Speech Now,” 59 *U. Chi. L. Rev.* 255 (1992).

⁵ The full text of Article 19 is as follows:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

⁶ The full text of Article 19 is as follows:

1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in the foregoing paragraph carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall be such only as are provided by law and are necessary, (1) for respect of the rights or reputations of others, (2) for the protection of national security or of public order (“*ordre public*”), or of public health or morals.

I do not find this argument persuasive. It is true that the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights are legal instruments, at least when nations subscribe to them, or when they become norms of customary international law. That point conceded, however, examination of the language of these documents reveals that they assume a preexisting right of freedom of expression to which they refer and declare to be henceforth a right under international law. In that respect, they are similar to the First Amendment of the United States Constitution, which itself refers to "the freedom of speech" as if the content and scope of that freedom is independent of and preexists the First Amendment itself.⁷

In any event, I am interested in determining whether there is, in fact, a universal moral right of freedom of expression to which these international and domestic legal instruments could be referring when they announce a legal right to freedom of expression, and if so, what its content and scope are. For if there is no such moral right, or if the moral right has a content and scope far different from what people imagine, this may have far-reaching consequences for how legal documents referring to freedom of expression or freedom of speech should be interpreted and for how we regard states whose treatment of expression differs from our own.

Interestingly, moral philosophers who have addressed this issue are divided. John Rawls, for example, who believes that freedom of expression is a liberty that a just *liberal* society must grant,⁸ does not list it among the human rights that the international community must honor.⁹ On the other hand, others argue that the human rights Rawls does recognize depend as an empirical matter on government's being democratic, which in turn they argue requires freedom of expression.¹⁰

B. The Grounding of Human Rights

If human rights are moral rights that impose obligations on others, how does one establish that a claimed moral right and its correlative obligations actually

⁷ The First Amendment of the United States Constitution reads in pertinent part: "Congress shall make no law . . . abridging the freedom of speech. . . ."

⁸ See John Rawls, *A Theory of Justice* 222–5 (1971). Rawls's elaboration of the right of liberty of expression and its limits is quite sketchy, and he does not provide a rigorous derivation of it from his "original position" construct. He appears to regard it as primarily an aspect of political liberty. And see John Rawls, *Political Liberalism* 340–56 (1993), where Rawls is much more explicit about the liberty's of expression being a liberty of *political* expression and adjunct to the right of democratic self-rule. Rawls's case for the liberty is highly pragmatic.

⁹ See John Rawls, *The Law of Peoples* 65 (1999). The human rights Rawls lists are the right to the means of subsistence and security, the right to freedom of conscience (freedom of religion and thought), the right to personal property, and the right to formal equality.

¹⁰ See, e.g., Allen Buchanan, "Justice, Legitimacy, and Human Rights," in V. Davion and C. Wolf, eds., *The Idea of a Political Liberalism: Essays on Rawls* (2000), 73, 87–8; Fernando Tesón, *A Philosophy of International Law* 118–20 (1998).

exist? For my purposes here, the following existence condition for a moral right should suffice: A has a moral right to X if there is a valid (correct) moral principle such that A has a valid claim that others provide A with X. If the moral right is a negative right, then X is forbearance from impeding or penalizing A's liberty or forbearance from transgressing or endangering A's life, property, or other interests. If the moral right is a positive one, then X is some good or service.

If the core of a right of freedom of expression consists of a negative liberty right against the government, then A has a moral right of freedom of expression if there is a valid moral principle such that A has a valid claim that government not penalize or impede in certain ways A's exercise of expressive liberty, appropriately defined. This moral principle, and the liberty right it generates, might be grounded on some feature of A, such as A's autonomy. Alternatively, the right might be grounded on the more general good consequences (for A and for others) that flow from its recognition and observance. The former grounding produces the type of right characteristic of deontological moral theories, whereas the latter produces the type characteristic of (indirect) consequentialist moral theories.

Buchanan and Golove survey what they regard as the most prominent justifications for human rights, remarking that the justifications are diverse but at the same time tend to converge.

Individual human rights are presented as (1) principles whose effective institutionalization maximizes overall utility, (2) as required for the effectiveness of other important rights, (3) as needed to satisfy basic needs that are universal to all human beings, (4) as needed to nurture fundamental human capacities that constitute or are instrumentally valuable for well-being or human flourishing, (5) as required by respect for human dignity, (6) as the institutional embodiment of a "common good conception of justice" according to which each member of society's good counts, (7) as required by the most fundamental principle of morality, the principle of equal concern and respect for persons, (8) as principles that would be chosen by parties representing individuals in a "global original position" behind a "veil of ignorance", and (9) as necessary conditions for the intersubjective justification of political principles and hence as a requirement for political legitimacy.¹¹

Some of Buchanan and Golove's human rights' justifications are clearly consequentialist in nature ((1) and (2)), others deontological ((5)), and the remainder could be either, depending upon their elaboration.

Prospects for establishing a human right of freedom of expression are best if the moral right is a negative liberty right of a deontological, not indirect consequentialist, nature. Indirect consequentialist arguments supporting freedom of expression are likely to be successful only in limited and particularistic ways

¹¹ Buchanan and Golove, *supra* note 1, at 889 (footnotes omitted).

that fail to establish a human right as I have defined it. This is a point I shall come back to at various places in the book.

I shall also briefly consider in Chapter Two and again in Chapter Six the proposal that the moral right underpinning freedom of expression imposes positive obligations on government to provide minimal or equal means to communicate. My consideration is brief because I believe that a positive moral right to the means for (effective) communication can be quickly dismissed as implausible, if not incoherent. Moreover, devastating criticisms of such a vision of freedom of expression have been well presented by others.¹²

For most of the book I shall assume that the duty-bearer of the obligation correlative to the right of freedom of expression is the government. For freedom of expression is almost always invoked – especially in human rights arguments – against governmental actions, not actions taken by nongovernmental actors. Government, however, is merely the agent of those who have delegated to it the authority to interfere with others' liberties, so that government qua government is just a shorthand for those natural persons whose policies are being effected. That might suggest that the human right of freedom of expression is a right against natural persons rather than a right against the government. Nonetheless, although I endorse the reductionist view of the government that this suggestion reflects, I do think that government as the producer and alterer of laws and legal statuses is central to the right of freedom of expression. I shall therefore throughout the book treat freedom of expression as a right that the government not pass and enforce certain laws or take certain actions qua government. In Chapter Six, however, I shall consider specifically how freedom of expression claims might apply to the acts of nongovernmental actors.

II. What Activities Implicate Freedom of Expression?

In this section I shall make the following points: First, freedom of expression covers all media of communication. Second, a human right of freedom of expression is most plausibly a right of the potential audience of the expression, not a right of the speaker. And third, freedom of expression is implicated by government's purposes in suppressing expression rather than by the effects of suppression. This last point will merely be introduced here but defended fully in Chapter Two.

A. *Freedom of Expression and the Variety of Media of Expression*

Freedom of speech, which is often used synonymously with freedom of expression, has always been thought to cover more than what is literally speech, that is, spoken language. For example, no one disputes that it covers written

¹² See, e.g., Martin H. Redish, *Money Talks* (2001).

language as well as spoken language. Moreover, it is difficult to see how it could be withheld from sign language, pictographs, pictures, movies, plays, and so forth; and, indeed, the legal protection afforded freedom of speech in countries such as the United States has been extended to all of these media of communication and expression, as well as to abstract artistic and musical performances. Usually, then, freedom of *speech* refers to – and is frequently referred to as – freedom of expression or freedom of communication.

It is commonplace to distinguish between “speech” and “symbolic speech.” As the previous paragraph should make clear, however, that distinction is illusory. All speech employs symbols, whether they be sounds, shapes, gestures, pictures, or any other medium. There is thus no such thing as nonsymbolic speech; there is only speech that employs symbols that are less or more conventional. The same point also applies to any purported distinction between speech or expression and “conduct” or “action.” All expression requires conduct of some sort, and any conduct can be communicative. The conclusions to be drawn are that freedom of speech or expression should be thought of as freedom of communication, and that there are no *a priori* limits on the media of communication that such freedom encompasses.¹³

B. Freedom of Expression as the Right of the Audience

It is most natural to think that if there is a right of freedom of expression, it must be the right of the speaker. Thus, when the government threatens speaker S with punishment if he attempts to give certain information or express certain opinions to audience A, we are tempted to regard this as a violation of S’s right to freedom of expression.

On the most plausible accounts of why freedom of expression should be protected, however, it is A whose right is violated whether or not S’s freedom of expression is also violated. For assume that S is the author of a book and is now dead. He has no freedom of expression now. If A’s government is violating anyone’s rights by prohibiting the dissemination of S’s book, it is A’s (the audience’s) rights. Or if one imagines that S possesses a right of freedom of expression during his lifetime, which right extends to acts of suppression of his works after he dies, imagine that S is a young child, or better yet, the thousand monkeys on typewriters, who manage (accidentally, of course) to bang out *Das Kapital*, which government wishes to suppress because of its subversive potential. In such a case, the only moral objectors – the only possible victims of a moral rights violation – would be A. Likewise, if A’s government prohibited A from watching sunsets because it feared A would be inspired to have subversive

¹³ For a similar conclusion, see Jed Rubenfeld, “The First Amendment’s Purpose,” 53 *Stan. L. Rev.* 767, 788 (2001).