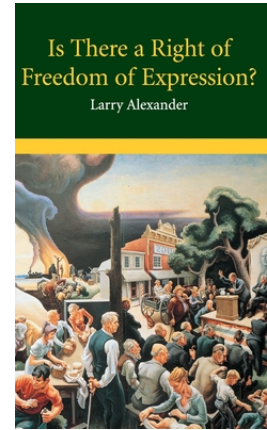


24.150 Liberalism, Toleration, and Freedom of Speech, Fall 2023

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In this provocative book, Larry Alexander offers a skeptical appraisal of the claim that freedom of expression is a human right. He examines the various contexts in which a right of freedom of expression might be asserted and concludes that such a right cannot be supported in any of these contexts. He argues that some legal protection of freedom of expression is surely valuable, though the form such protection will take will vary with historical and cultural circumstances and is not a matter of human right.

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what are 'human rights'?

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.

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

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*Text from Alexander's book unless on colored background or it's otherwise obvious

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THE UNIVERSAL DECLARATION of Human Rights

ARTICLE 1 — All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

ARTICLE 2 — Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether this territory be an independent State, a trust, a non-self-governing territory, or under any other form of association.

ARTICLE 3 — Everyone has the right to life, liberty and the security of person.

4. No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

5. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

ARTICLE 6 — Everyone has the right to recognition everywhere as a person before the law.

ARTICLE 7 — All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

ARTICLE 8 — Everyone has the right to an effective remedy by the competent national authorities for acts violating the fundamental rights granted him by the constitution or by law.

ARTICLE 9 — No one shall be subjected to arbitrary arrest, detention or exile.

ARTICLE 10 — Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him.

ARTICLE 11 — 1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had the opportunity to defend himself.

2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

ARTICLE 12 — No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

ARTICLE 13 — 1. Everyone has the right to freedom of movement and residence within the borders of each state.

2. Everyone has the right to leave any country, including his own, and to return to his country.

ARTICLE 14 — 1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.

2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

ARTICLE 15 — 1. Everyone has the right to a nationality.

2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

ARTICLE 16 — 1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights in marriage, during marriage and at its dissolution.

2. Marriage shall be entered into only with the free and full consent of the intending spouses.

3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

ARTICLE 17 — 1. Everyone has the right to own property alone as well as in association with others.

2. No one shall be arbitrarily deprived of his property.

ARTICLE 18 — Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion insofar as it does not conflict with public order and morality.

ARTICLE 19 — Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without restriction and to seek, receive and impart information and ideas through any media and regardless of frontiers.

ARTICLE 20 — 1. Everyone has the right to freedom of peaceful assembly and association.

2. No one may be compelled to belong to an association.

ARTICLE 21 — 1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

2. Everyone has the right of equal access to public service in his country.

3. The will of the people shall be the basis of the authority of government; this will shall be expressed by periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

ARTICLE 22 — Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

ARTICLE 23 — 1. Everyone has the right to work, in the choice of employment, in just and favourable conditions of work and to participate in the progress of society.

2. Everyone, without any discrimination, has the right to equal pay for equal work.

3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplementary benefits, if necessary, by means of social legislation.

4. Everyone has the right to form and to join trade unions for the protection of his interests.

ARTICLE 24 — Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

ARTICLE 25 — 1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, old age, disability, widowhood, ill health or other lack of livelihood in circumstances beyond his control.

2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

ARTICLE 26 — 1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and vocational education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

3. Parents have a prior right to choose the kind of education that shall be given to their children.

ARTICLE 27 — 1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

ARTICLE 28 — Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

ARTICLE 29 — 1. Everyone has duties to the community in which alone the free and full development of his personality is possible.

2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

ARTICLE 30 — Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms herein proclaimed.

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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.

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whose right?

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.

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Are any of these plausible 'human rights' as explained by Alexander?

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 thoughts, freedom of expression would arguably be implicated, *even though there is no speaker of any sort.*

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convincing?

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S and A

perhaps we have a right to read a monkey- (or chatGPT-) authored text [A but no S]

but perhaps we also have right to express our 'subversive thoughts' in a diary that no one will read [S but no A]

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chapter 7

Truth

I. Consequentialist Theories of Freedom of Expression

One family of theories attempts to justify a right of freedom of expression by pointing to various good consequences that such a right will bring about. The most often invoked good consequences of this sort that freedom of expression is supposed to produce are truth, autonomy, and virtue. I take up these three consequentialist goods in turn.

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One common justification advanced on behalf of freedom of expression is that such freedom is instrumental to the discovery of truth. Freedom to disseminate new information and to criticize prevailing views is necessary for eliminating misconceptions of fact and value.

The real problem with this justification is not in what it assumes about the nature of truth but in what it assumes is the best procedure for obtaining truth. In domains in which obtaining truth is the principal value – for example, in legal proceedings – expression is regulated and circumscribed. Even in the area of scientific inquiry, professional journals refuse to publish claims that the editors believe are not properly substantiated, and faculties and laboratories refuse to employ those who hold what in the opinion of the faculties and laboratories are outlandish views.

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The corollary of the proposition that some freedom of expression in some environments is conducive to discovering some truths that are worth the harms that the expression causes is that in many instances freedom of expression may lead to error rather than truth, even in the long run, or that the long run may be too long given the harms the expression causes in the short run. And not all truths are equally important.

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1. 'All regulations, and all failures to regulate, produce different environments, and each environment reveals some truths and obscures others.' What truths does Alexander think are obscured in a 'free speech absolutist' regulatory environment? (If you can't tell, what would you guess he thinks?)

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Freedom of expression thus promotes the search for some truths and impedes the search for others; and in the former cases the truths at issue will sometimes be worth the costs of the expression and sometimes not. The promotion of truth cannot provide the basis for a general right of freedom of expression. At most, it can support specific (and not unbridled) rights of freedom of expression in certain types of environments.

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if the task is to give a consequentialist justification of someone having a right of free expression in every possible case, that is a tall order!

a weaker idea is that 'free speech absolutist' regulations have better consequences than any feasible more restrictive alternative

has Alexander shown that this idea is wrong?

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Virtue

Some have argued that the most cogent justification for a right of freedom of expression is that it is conducive to the cultivation of certain virtues that are essential to the success of liberal democracy. In particular, freedom of expression leads to development of tolerant attitudes towards others' beliefs as well as to becoming thick skinned about critical, insulting, and offensive statements. Tolerance and a thick skin are in turn vital to life in a modern pluralist democracy, with its competing visions of the Good, its differing standards of civility, and its competitive economy and politics. Without a high incidence of tolerant attitudes and thick skins among their citizens, pluralist societies would be riven with civil strife and could not maintain their liberal democratic character. Freedom of expression assists in the development of these essential virtues, or so the argument goes.

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Freedom of Expression as Concomitant to Democratic Decisionmaking

Perhaps one of the most popular justifying theories for the right of freedom of expression posits the right as the necessary concomitant to democratic governance. The democratic theory of freedom of expression comes in several forms, but I shall reduce them to two: the general theory, which derives a right of freedom of expression from the democratic necessity of an informed citizenry; and the public discourse theory, which derives a right of freedom of expression from the requirement of an unregulated "public discourse" in forming the public opinion on which the legitimacy of democratic decisionmaking is based.

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Democratic Paradox?

The democratic argument for freedom of expression leads to a paradox. ... freedom of expression is thought to oppose and trump democratic decisionmaking, at least when that decisionmaking produces laws that infringe on freedom of expression. Therefore, the value of democratic decisionmaking will appear on both sides of the issue whenever a democratically enacted law is claimed to infringe the right of freedom of expression. On the one hand, that value is on the side of striking down the law because freedom of expression is the corollary of democracy. On the other hand, that value is also on the side of upholding the law, which presumably represents the democratic will. In a democracy, striking down democratically enacted laws in the name of democracy – which is how the democratic argument portrays the right of freedom of expression – is surely paradoxical.

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Public Discourse Theory

According to this theory, the democratic will is legitimate only if it reflects "public opinion." And the latter is a legitimate basis for the democratic will only if it is formed under conditions of freedom. This does not mean, however, that all expression must remain unregulated. Rather, what is necessary is that expression that is part of public discourse – the exchange of ideas that forms public opinion – be left free of Track One censorship and be regulated on Track Two only if adequate alternative channels of communication are available.

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Track One: regulation because the message is false, defamatory, incitement, hate speech, etc.
Track Two: regulation that is indifferent to the message, e.g. time/place/manner restrictions

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2. Public Discourse Theory argues: 'The democratic will is legitimate only if it reflects public opinion. And the latter is a legitimate basis for the democratic will only if it is formed under conditions of freedom.' Alexander objects to the 'arbitrariness in specifying what lies within and without public discourse.' Do you agree? Can you think of a non-arbitrary place to draw the line?

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