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BOOK REVIEW

Review of Larry Alexander, *Is There a Right of Freedom of Expression?*, Cambridge and New York: Cambridge University Press, 2005

It is a rare book that challenges the foundations of an entire body of law and virtually all the scholarship surrounding it. Larry Alexander's *Is There a Right of Freedom of Expression?* is such a book. Given the prevalence, in the legal profession, as well as in the academy, of the assumption that there must be a sound philosophical basis for a right to free speech, even if we do not (yet) know what that is, just to ask the question posed in the title is a little audacious. To answer, as Alexander does, [spoiler warning!] that there is no human right to freedom of expression is both daring and courageous. It is also provocative – in the best sense of the word – as I discovered when I assigned this book, to excellent effect, in an advanced philosophy seminar on free speech.

I do not want to give the misimpression that Alexander considers freedom of expression to be a liberty unworthy of protection. On the contrary, in his book's epilogue, ''Muddling Through: Freedom of Expression in the Absence of a Human Right,'' Alexander argues that there are good reasons for governments not to suppress speech: it's just that the existence of a human right to freedom of expression is not one of them. Indeed, one senses that Alexander's political positions on free speech would be best supported by a defense of free speech absolutism. But Alexander has too keen an analytical mind and too much intellectual integrity to bend his theory to the practical demands of any political doctrine. Instead, he follows his rigorous reasoning to its logical conclusion – a thoroughgoing, and thoroughly defended, free speech scepticism.

Few contemporary legal theorists working in the analytic, that is Anglo-American, tradition are sceptical about a right to free speech, or even very much in doubt about what it entails. In contrast to those in critical legal studies – or its offshoots – and those influenced by postmodern theory, analytic legal theorists, along with analytically trained political and moral philosophers, tend to take a cluster of traditional liberal rights – for example, rights to free speech, freedom of religion, and freedom of association – to be human rights. In particular, the free speech clause of the First Amendment – "Congress shall make no law abridging the freedom of speech" – is typically taken to be the articulation of a legal right grounded in a fundamental (moral) human right, rather than a piece of positive law which may or may not be justified. Contemporary U.S. legal theorists debating free speech issues argue that the First Amendment, when interpreted correctly, clearly supports their position. Virtually no theorists question whether the First Amendment is morally justified to begin with.[1] But if the right to free speech is to be considered as something other than simply the series of cases that the courts have decided, then it must be grounded in something – it must have a foundation of some sort.

If the free speech clause of the First Amendment is interpreted to mean that speech is to be granted special protection not accorded to other forms of conduct, then a free speech principle, distinct from a principle of general liberty, must be posited and must receive a distinct justification. Such a principle must hold that speech is special, in the following way, as articulated by Frederick Schauer: "Under a Free Speech Principle, any governmental action to achieve a goal, whether that goal be positive

[1] Three notable exceptions are Mary E. Becker, "The Politics of Women's Wrongs and the Bill of 'Rights': A Bicentennial Perspective," in Geoffrey R. Stone, Richard A. Epstein, and Cass R. Sunstein, (eds.), *The Bill of Rights in the Modern State* (Chicago: University of Chicago Press, 1992), pp.453–517; Robin L. West, "Constitutional Scepticism," in Susan J. Brison and Walter Sinnott-Armstrong, (eds.), *Contemporary Perspectives on Constitutional Interpretation* (Boulder, CO: Westview Press, 1993), pp. 234–258; and Stanley Fish, *There's No Such Thing As Free Speech – And It's a Good Thing, Too* (New York: Oxford University Press, 1994).

or negative, must provide a stronger justification when the attainment of that goal requires the restriction of speech than when no limitations on speech are employed."[2]

To state what a free speech principle requires is not to state that such a principle is justified. In more recent writings, Schauer evinces a certain amount of scepticism about whether a distinct principle of free speech *can* be defended. In a 1993 article, he concludes that we should reject the hypothesis that speech, as a class, causes less harm than non-speech conduct, and notes that this conclusion "puts more pressure on the positive arguments for a free speech principle, and perhaps no such argument will turn out to be sound."[3]

As early as 1983, Alexander argued, in an article co-authored with Paul Horton,[4] that such a free speech principle was impossible (or, rather, that it was impossible to come up with a justification for such a principle). One way to argue this – the strategy Alexander adopted in that early article – is to examine each of the alleged justifications of a free speech principle in turn and show why each fails to work. This is the approach Alexander takes in Chapter Seven of this book, which critiques the main defenses of free speech – both consequentialist and deontological – and concludes that "we do not have in hand a tenable general theory of freedom of expression." (146)

A defense of a free speech principle must explain why speech is special – in the sense that the harm principle doesn't apply in the case of speech, or applies with less force than in the case of all other forms of human conduct. Many theorists have argued that one thing or another – the desirability of truth, say, or the need for a well-functioning democracy – provides the foundation for a right to free speech. This kind of argument proceeds as follows: We value x. The right to free speech is essential for (or at least instrumental in) the achievement of x. Therefore, we

[2] Frederick Schauer, *Free Speech: A Philosophical Enquiry* (New York: Cambridge University Press, 1982), pp. 7–8.

[3] Frederick Schauer, "The Phenomenology of Speech and Harm," *Ethics* 103 (1993), p. 653.

[4] Lawrence Alexander and Paul Horton, "The Impossibility of a Free Speech Principle," *Northwestern University Law Review* 78 (1983), pp. 1319–57.

must posit the right to free speech and design social structures (constitutions, laws, public policies) to protect and possibly even foster it.

Alexander presents each of the consequentialist defenses of free speech found in the literature and explains why it should be rejected. He notes, in addition, that the difficulty with *any* consequentialist strategy for defending free speech is that it opens the way for restrictions on speech, should such restrictions turn out, ultimately, to promote the good desired to a greater extent than a regime of free speech could. As Stanley Fish points out, in a 2002 article, if you have any answer to the question 'What is the First Amendment *for*'? "you are necessarily implicated in a regime of censorship"[5] – if not an actual regime, then a possible one, at the ready to be instituted should circumstances turn out to require it. For the record, Alexander and Horton make this point in their 1983 article in noting that the attempt to justify free speech as an independent principle "necessarily entails the linkage of speech and free speech with more basic values. 'Free speech is justified because …' – what comes after the 'because' inevitably will link free speech with something else, usually more basic, and thus will destroy free speech's independence."[6]

Those theorists not wanting their defense of the right to free speech to be hostage to empirical fortune in this way must consider the right to be intrinsically valuable or constitutive of a broader intrinsically valuable right, such as a right to autonomy or moral independence. Alexander examines such deontological accounts as well and argues, again persuasively, that they fail to show why speech is special.

If this chapter is more restrained (with a more modest conclusion) than the original article on which it was based, this may be because Alexander has since developed even more compelling arguments against there being *any* possible grounds

[5] Fish, Stanley, "The Dance of Theory," in Lee C. Bollinger and Geoffrey R. Stone, (eds.), *Eternally Vigilant: Free Speech in the Modern Era* (Chicago: University of Chicago Press, 2002), p. 199.

[6] Alexander and Horton, pp. 1355–1356.

for a free speech principle.[7] One argument, first elaborated in his 1993 article "Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory,"[8] is developed in Chapter Two of this book. (The other argument – concerning a paradox of liberal neutrality – is found in Chapter Eight. More on this later.) Using terminology introduced by Laurence Tribe,[9] Alexander distinguishes between Track One laws, defined as "laws intended to suppress messages that cause harms that the government is otherwise permitted to attempt to prevent" (xi), and Track Two laws, defined as "laws that have 'message effects' but that are not enacted *because* of their message effects." (xi)[10] Although it may seem harsh to fault Alexander for taking up terminology Tribe introduced, I wish he had used different labels for these two forms of free speech jurisprudence. The talk of tracks is not intuitive (for this reader, anyway), and it's confusing that Track Two is presented and discussed first. It would be more in keeping with common parlance to refer, instead, to content-based versus content-neutral laws. However, this would be, for Alexander, to invoke a distinction without a difference, since, on his account, no free speech laws are content-neutral in any interesting sense.

Free speech theorists have traditionally treated content-based and content-neutral laws very differently, on the

[7] The seeds of these arguments were already present in the 1983 article, in which Alexander and Horton wrote: "'Speech,' we contend, does not denote any particular set of phenomena. Everything, including all human activities, can 'express' or 'communicate', and an audience can derive meaning from all sorts of human and natural events. Moreover, 'speech' is regulated and affected by regulation in a multitude of different ways and for a multitude of different reasons. Finally, with respect to any value, 'speech' both serves and disserves that value in an indefinite variety of ways and degrees. Considering these points, it would be truly amazing if 'freedom of speech' really did have a coherent and independently justifiable principle all its own." Alexander and Horton (1983, p. 1322)

[8] Larry Alexander, "Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory," *Hastings Law Journal* 44 (1993), p. 921.

[9] See Laurence H. Tribe, *American Constitutional Law* (2nd ed. 1988) §12–2, p. 792.

[10] Alexander adds a third track to Tribe's original two: "Track Three consists of all the governmental acts that provide aid to a particular viewpoint but that in themselves do not appear to restrict anyone's liberty" (82).

assumption that the message effects of the former would always be wide-ranging and typically violative of individual liberties, whereas the message effects of the latter would be negligible or nil. The most original (and, I predict, most influential) of Alexander's many contributions to the free speech literature is his compelling argument that ostensibly content-neutral laws regulating speech (for example, those long-considered-to-be-innocuous time, place, and manner restrictions) can affect the messages received as much as – or even more than – the allegedly much more pernicious content-based laws.

Alexander goes even further than this in arguing that "all laws [not just laws explicitly concerning speech] affect what gets said, by whom, to whom, and with what effect … "(17) and this deals the final, fatal blow to any attempt to ground a defense of a free speech principle in a theory that purports to distinguish speech from conduct – or laws restricting speech from laws restricting non-speech conduct.

Although Alexander's book could well have ended with Chapter Seven (since he had already presented sufficient grounds for accepting his conclusion), he continued with Chapter Eight on "The Paradoxes of Liberalism and the Failure of Theories Justifying a Right of Freedom of Expression." I do not consider this chapter redundant, however, since it presents a persuasive diagnosis of "the cause of the failure to find a cogent and defensible principle justifying and delimiting a right of freedom of expression." This failure, according to Alexander, is "part and parcel of the failure of liberalism to provide a justification for tolerating illiberal views – which toleration is for many definitive of liberalism." (147) Alexander presents a convincing argument that "liberalism as governmental non-partisanship (neutrality) towards religion, associations, and expression is an impossibility." (147) As Alexander notes, many other theorists have addressed the paradoxical nature of liberalism insofar as it applies to freedom of religion and freedom of association, but, "with the exception of Stanley Fish, no one seems to have noticed that the same paradox infects that third

liberal bulwark, the right of freedom of expression." (148)[11] The gist of this paradox is that "[i]f liberalism is the correct political philosophy, then it cannot attach value to messages that undermine it, just as[,] if freedom of expression is valuable, advocacy of its abolition cannot be." (175)

By the end of this book, Alexander has undermined the very foundations of U.S. free speech jurisprudence. But one senses that he is not very happy about this remarkable accomplishment. One gets the feeling that he'd now like to be able to start afresh, like Descartes on day two of *The Meditations*, by, in Alexander's case, rebuilding the traditional liberal free speech edifice on a firmer foundation. But the best he can do, in good conscience, is to argue that there remain some rule-consequentialist considerations in favor of protecting at least some speech in at least some circumstances. But this, as Alexander concedes, yields, at most, a very weak defense of free speech.

The fact that Alexander's theorizing leads him to accept a conclusion that does not serve his more pragmatic purposes gives a kind of Kantian credibility to his account: it is clear that reason, and not inclination, is what motivates his conclusion. And it is very difficult to find fault with his reasoning. It is not clear, though, why Alexander still thinks we should act *as if* there is a right to free speech, even after he has argued so persuasively that no such right exists. Why, one wonders, doesn't his philosophically-based scepticism about free speech lead him to the normative scepticism of Becker, Fish, and West?

In an article published in the same (1983) journal volume as Alexander and Horton's groundbreaking article, Schauer notes the "intellectual ache … shared by many people now engaged in the process of trying to explore the theoretical foundations of the principle of freedom of speech. As we reject many of the classical platitudes about freedom of speech and engage in somewhat more rigorous analysis, trying to discover why speech – potentially harmful and dangerous, often offensive, and the instrument of evil as often as of good – should be

[11] See Stanley Fish, *There's No Such Thing As Free Speech – And It's a Good Thing, Too* (New York: Oxford University Press, 1994).

treated as it is, our intuitions about the value of free speech, solid as they may be, are difficult to reconcile with this analysis. The ache, it seems to me, is caused by the fact that although the answer to 'Must speech be special?' is probably 'Yes', the answer to '*Is* speech special?' is probably 'No'.[12]

After arguing, for 192 pages, that the answer to the question "*Is* speech special?" is most definitely "No," it is somewhat puzzling that Alexander concludes his book by quoting, with approval, five paragraphs from an article decrying government censorship on traditional liberal grounds: although it makes us feel good, censorship tends to be "irrational and alarmist;" it is "inimical to democracy," it backfires, and it "doesn't get rid of bad ideas or bad behavior." (192–193)[13] For reasons Alexander himself gives, however, these problems are not peculiar to government restrictions on speech as opposed to non-speech conduct. But the intuition that speech *must* be special is hard to shake, so it is understandable that, nearly twenty-five years later, the ache is still there.

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[12] Frederick Schauer, "Must Speech Be Special? *Northwestern University Law Review* 78 (1983), pp. 1284–1306.

[13] Nan Levinson, *Outspoken* (2003), pp. 18–19.