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?

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 person[2] 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 feebleminded 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 Teson, *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).

thoughts, freedom of expression would arguably be implicated, *even though there is no speaker of any sort*.[14]

C. Freedom of Expression As Implicated By the Purposes Behind, Rather Than the Effects of, Suppression

Let me elaborate on this last point – namely, that government's *purpose* for regulating, not *what* it regulates, is central to freedom of expression – for it is crucial. As I see it, there are the following possible principles for determining the scope of freedom of expression:

(1) Freedom of expression is implicated whenever "expressive conduct" is suppressed or penalized.
(2) Freedom of expression is implicated whenever conduct that is *intended* to communicate a message is suppressed or penalized.
(3) Freedom of expression is implicated whenever an audience is prevented from receiving a message.
(4) Freedom of expression is implicated whenever conduct intended to communicate a message is suppressed or penalized with the result that an audience is prevented from receiving the message.
(5) Freedom of expression is implicated whenever an activity is suppressed or penalized for the purpose of preventing a message from being received.

Now it is easy to see that principle (1) cannot possibly be true. Any conduct can "express" ideas, even if the one engaging in it does not so intend. Those observing or hearing about the conduct may form certain ideas as a result. If

[14] In suggesting that the right to freedom of expression is best thought of as belonging to the audience, I do not mean to imply that people have a right against the government or anyone else that they be spoken to or provided with information. If the right of freedom of speech ultimately belongs to the audience, it is in the form of a right not to be prevented from obtaining information or ideas that are available to it without coercing unwilling speakers.

In saying that freedom of expression is best thought of as a right of the audience, I also am not saying that speakers have no standing to object to having their speech suppressed. Frequently it will best serve the audience's right to hear if speakers are given a derivative right to speak. Indeed, in most cases where government interdicts a communication between a willing speaker and her audience, the speaker will be in the best position to assert the right to freedom of speech, both because the audience may be unaware of the attempted communication and because the audience's right depends upon the speaker's being willing to speak. (The right is not a claim right against the speaker that she speak.)

For a recent criticism of the proposition that freedom of expression is primarily a right of the audience and only derivatively a right of the speaker, see Roger A. Shiner, *Freedom of Commercial Expression* 203–10 (2003). Shiner, however, has a difficult time explaining away three United States Supreme Court opinions – Lamont v. Postmaster General, 381 U.S. 301 (1965); Kleindienst v. Mandel, 408 U.S. 753 (1972); and Stanley v. Georgia, 394 U.S. 557 (1969) – in which it was clear that the *speakers* had no right of freedom of expression. And he is justifiably troubled by such cases as Martin v. City of Struthers, 319 U.S. 141 (1943), and Board of Educ. v. Pico, 457 U.S. 853 (1982), both of which imply that the rights of speakers are derived from the rights of the audience to receive the speech.

principle (1) were true, then freedom of expression would be implicated by all laws and thus by both the laws that currently exist and all alternatives to those laws.

Principle (2), which focuses on the intent to communicate a message, is also implausible. I have already mentioned a counterexample, the dead author. But perhaps this example is unconvincing. One might argue, for example, that the dead author does have a right of freedom of expression that survives his death and prevents the suppression of his work.

So let us move beyond these examples and focus on a speaker who is alive, who is within whatever jurisdiction is relevant, and who intends to express an idea through the conduct that is suppressed. Let us suppose that Alan has the apartment next to Bertha. Bertha is ill and quite sensitive to noise, which impedes her recovery. Alan is rehearsing for a role in a play. Sometimes he reads his lines in a booming voice to practice projecting. He pays no attention to the ideas he is expressing, only to the quality of his vocalizations. At other times he practices his swordplay, also required for his part, by clanging a sword against a metal fixture. Both his reading and his swordplay disturb Bertha, who hears them only as noise, and who seeks to have Alan legally enjoined from rehearsing in these ways.

Now if Bertha succeeds in enjoining Alan's clanging his sword, surely Alan's freedom of expression is not implicated. The fact that he is rehearsing for a play is of no importance; he could have been training for a jousting tournament or just enjoying the sound of metal on metal.

Is Alan's reading his lines relevantly different from his clanging his sword? Even if he were intending to express some message, his only audience is Bertha, who neither hears the message nor cares about it. She hears only noise. From her perspective – and from Alan's – the line reading and the sword clanging are on a par. Therefore, if freedom of expression is not implicated by suppressing the swordplay, it is not implicated by suppressing the line reading. Freedom of expression would appear to require the presence of an audience capable of understanding the ideas the speaker intends to express.[15]

Now if Alan himself were formulating ideas in reading his lines aloud – if he were, in essence, his own audience – things might look different. That brings us to principle (3), which posits that freedom of expression is implicated whenever an audience is prevented from receiving a message. But principle (3) has the same vice as principle (1), namely, that it is virtually limitless. For people can derive ideas from almost anything. If the law prohibits driving 100 miles per

[15] *Cf.* Jed Rubenfeld, "The Freedom of Imagination: Copyright's Constitutionality," 112 *Yale L. J.* 1, 35 (2002): "[o]ne of the things the First Amendment centrally prohibits is a law that criminalizes the reading of books, including dead writers' books, and including the reading of books by persons for whom such reading is not an act of self-expression or self-realization. The expressive autonomy position does not do a very good job of telling us why the reading of a book should be paradigmatically – not secondarily – constitutionally protected."

hour, then we are not going to be able to form the idea of what it is like to drive that fast. If the law protects freedom of expression, we are not going to be able to form the idea of what the absence of legally protected freedom of expression would be like. All laws preclude certain courses of conduct and experiences. As a consequence, people will have different ideas in different legal regimes, and any legal regime will suppress some ideas, spawn others, and color all.

Before concluding that principle (5) – which focuses not on what is being regulated nor on the effect of the regulation, but on the purpose behind it – is the proper principle for delimiting the scope of freedom of expression, let us consider an alternative principle that combines principles (2) and (3). This principle – (4) – would hold that freedom of expression is implicated whenever conduct that is intended to communicate a message is suppressed or penalized with the result that an audience is prevented from receiving the message, even if the reason for suppressing or penalizing the conduct has nothing to do with the message(s) intended or received. This principle is definitive of what Laurence Tribe calls Track Two freedom of speech cases,[16] and it is the subject of Chapter Two.

D. The Core of Any Conception of Freedom of Expression: Evaluative Neutrality

To make my case that principle (4) is untenable and that principle (5) is correct, I need to assume something about the meaning of freedom of expression, namely, that at its core it requires regulators to abstain from acting on the basis of their own assessments of a message's truth or value. Whether that requirement is in the final analysis possible is a subject I leave for Chapter Eight. Here, however, it must be taken to be both possible and necessary. For we would not credit a regime with honoring freedom of expression if it announces that any ideas can be freely expressed so long as the government believes the ideas to be true and valuable. In other words, anything recognizable as a conception of freedom of expression must entail a requirement that government, at least in its capacity as regulator, maintain a stance of evaluative neutrality vis-à-vis messages. As Justice Robert Jackson put this point in *West Virginia State Board of Education v. Barnette*: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . matters of opinion. . . ."[17] In Chapter Eight I shall ask whether Justice Jackson's "fixed star" is illusory, but here I assume that any recognizable conception of freedom of expression requires it.

I wish to emphasize that I am not begging any questions by placing evaluative neutrality at the core of all conceptions of freedom of expression. For any inquiry

[16] Laurence H. Tribe, *American Constitutional Law* (2d ed. 1988) § 12–2, at 792.
[17] 319 U.S. 624, 642 (1943).