Is Freedom of Expression a Universal Right?

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The title of my Essay asks a question. If one were to go by the Universal Declaration of Human Rights[1] and the International Covenant on Civil and Political Rights[2]—or by John Rawls's *A Theory of Justice*[3] and other quotidian works of liberal political and moral philosophy—the answer to the question is a resounding "yes." Indeed, in the constellation of cherished liberal rights, freedom of expression is surely one of the brightest, if not the brightest, of its stars.

Despite that impressive testimony to its status as a universal right, I have concluded that freedom of expression is not a universal right. I reached this conclusion almost a decade ago after two decades of searching in vain for arguments that would support the opposite conclusion.[4] I had always regarded myself as a strong supporter of freedom

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1. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). Article 19 states, "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."

2. International Covenant on Civil and Political Rights art. 19, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1967; ratified by the United States June 8, 1992).

3. JOHN RAWLS, A THEORY OF JUSTICE 221–28 (1971).

4. *See generally* LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? (2005) (arguing that "there are always good consequentialist reasons to be wary of

of expression, so it pained me greatly to conclude that freedom of expression did not have the secure backing of being a universal human right.

Before getting to what I see as the practical implications of my negative conclusion, I will give a brief description of how I, reluctantly, reached it. In the early 1980s, Paul Horton and I were asked to write an essay reviewing Frederick Schauer's excellent book *Free Speech: A Philosophical Enquiry*.[5] We concluded, after surveying the various rationales for free speech that Schauer canvassed, that according to none of those rationales was free speech in any way distinctive.[6] To the extent each rationale supported free speech, it supported freedom to engage in other activities besides free speech. And each rationale supported somewhat distinct, although overlapping, types of speech.

Despite our negative conclusion in that review essay about finding a distinctive free speech principle, I continued thereafter to search for one. Nevertheless, about a decade later, I concluded that a sizeable component of free speech jurisprudence—the so-called time, place, and manner and other incidental regulations of speech—was completely unprincipled and could never be rendered principled.[7] I defined this component as including all governmental acts that are not aimed at preventing the communication of a message because of the content of that message but that have an effect on the communication of messages. In other words, it theoretically includes all laws, and failures to enact laws, other than content regulations that have message effects—effects on what gets said, by whom, to whom, and with what effects.

And which laws fall into this class? I argued that *all laws do*. Laws that are directed specifically at speech activities—such as laws requiring permits to stage demonstrations to allay traffic and safety concerns, laws preventing pamphleting because of litter concerns, laws prohibiting sound trucks because of noise concerns, and laws prohibiting posting signs because of aesthetic concerns—clearly fall into this class. But so, too, do laws that are not specifically aimed at speech activities. The trespass laws prevent *A* from putting his graffiti on the side of *B*'s house without *B*'s consent, even if the side of *B*'s house is an excellent location for *A* to get his message to his intended audience. The law of theft

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government suppression of expression" but that "such justifications . . . will vary from place to place and from time to time").

5. FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982).

6. Lawrence Alexander & Paul Horton, *The Impossibility of a Free Speech Principle*, 78 NW. U. L. REV. 1319, 1322, 1357 (1983) (book review).

7. Larry A. Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 HASTINGS L.J. 921, 923, 932 (1993).

prevents *C* from commandeering *D*'s printing press to get his message out, even if *C* does not have the resources to buy his own printing press. These examples can be multiplied almost without limit.

Indeed, once we proceed down this road, we can see that laws that seem quite removed from speech concerns—the laws of property, tort, contract, and crime, administrative regulations, and the tax laws—have enormous message effects. For they together affect the distribution of resources, which in turn affects who says what, to whom, and with what effect. Put differently, the entire corpus juris, and every alternative corpus juris, will have profound speech effects.

And here is what is problematic for any theory of freedom of expression about the fact that all laws, and all alternative laws, will have profound message effects: if one wishes to claim that a particular law violates a right of freedom of expression, it will not be sufficient merely to show that the law negatively affects one's ability to communicate effectively one's message to one's intended audience. For if that law is excised, its excision will have negative message effects on others even if its excision has positive message effects on you. And even if adjudicators could, contrary to fact, trace the causal implications for messages of having one set of laws rather than an indefinite number of other possible sets of laws, they would then have to evaluate all those competing message effects. And how would they do this while remaining properly neutral with respect to the content of messages?

Any conception of freedom of expression at its core requires that government be neutral with respect to its evaluation of the content of messages. A government that says, "We respect the freedom to express any idea we regard as true or valuable but not the freedom to express ideas that we regard as false or harmful" would be rightly regarded as hostile rather than friendly to freedom of expression. Stalin, Hitler, and Mao could have subscribed to that version of freedom of expression.

Freedom of expression calls for evaluative neutrality on the part of the government with respect to messages. However, no court—which, after all, is an arm of the government—can appraise the message effects of laws and the alternatives to those laws without violating evaluative neutrality. For the court is never confronted with a law that has negative message effects on someone but that does not have positive message effects on others—or, to put it differently, the invalidation of which would not have negative message effects on others. So a court will always have

message effects on both sides of the equation and no evaluatively neutral way to adjudicate between them.

I published this negative conclusion about the relation between freedom of expression and incidental regulations of speech—what Laurence Tribe called "track two" regulations[8]—in 1993.[9] But that left open Tribe's track one regulations, regulations aimed at the content of messages.[10] Was there a tenable theory supporting a right not to have one's communications penalized because of the content of the message communicated? If there were a universal right of freedom of expression, it would have to be found in the domain of content regulations.

I find it useful to think about content regulations by asking what harm the government is trying to prevent when it penalizes communications because of the content of the messages conveyed and what is the causal process by which the content of the messages is supposed to produce that harm.[11] Typically, content regulations fall into two harm-causing categories. The largest category is those regulations where the harm the government is attempting to prevent can be prevented only by keeping the audience from receiving the message.[12] Once the audience receives the message, either the harm has occurred—because the harm just is the receipt of the message by the audience—or else the harm will likely occur through mechanisms that the government cannot control. I call these message-related harms "one-step harms" because they are effectively produced in one step: the speaker or writer communicates the message to the audience, and harm occurs immediately on receipt of the message or through further acts of the audience that the government cannot legitimately or effectively forbid. Therefore, the only way for the government to prevent the harms from occurring is by preventing the communication.

What are examples of content regulations aimed at preventing one-step harms? Here are some: laws protecting military secrets from reaching foreign enemies; laws protecting confidential information or private information; laws protecting persons against libel and slander—the audience that hears defamatory statements and believes them will take actions that harm the one libeled but that government cannot forbid; laws protecting property interests in speech—copyright and trademark laws; laws aimed at protecting the interest in fair trials; laws protecting trade secrets; laws enforcing contracts regarding messages; laws protecting

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8. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2, at 792 (2d ed. 1988).
9. *See* Alexander, *supra* note 7, at 923, 960–62.
10. TRIBE, *supra* note 8, § 12-2, at 791.
11. *See* ALEXANDER, *supra* note 4, at 55–56.
12. *See id.* at 55–66.

against offense or emotional trauma; laws penalizing harmful deceptive statements; and laws against making illegal threats.

The other category of content regulations consists of those laws penalizing messages that cause harms in two steps.[13] The first step is the communication of the message to the audience. The second is the audience responding to that message by committing harmful acts. What is significant about these two-step harm regulations is that the government can penalize the audience's actions at the second step. If the audience is not legally responsible—it consists of children or the insane—then, as with defamation, the government can penalize only the first step, the communication. Nonetheless, because penalizing the second step will not always deter the audience, the government will be tempted to interdict the first step, the communication of the inciting message.

Here are examples of content regulations in the two-step harm category: laws against solicitation, incitement, and advocacy of crimes; laws against uttering "fighting words"; prohibitions on speaking where the audience is turning hostile toward the speaker or toward others; publication of dangerous information, such as "how to be a hit man," "how to build an atomic bomb," and "how to crack a safe," et cetera; and dramatizations or broadcasts that induce copycat crimes or reckless behaviors.

With these categories of content regulations in mind, what should one conclude about whether there is a tenable principle that demands that government refrain from content regulation because content regulation violates a human right?

Take the one-step harm category of content regulations. To say that those content regulations violate a human right of freedom of expression is tantamount to saying that intellectual property is illegitimate; that one has no right against defamations or legitimate expectation that private information about oneself will not be publicized; that one has no right not to be deceived about what one buys or about hazards one may encounter; that the clients of doctors, lawyers, and priests have no right that their communications to these auditors will not be revealed; and so on. However, if government can legitimately protect people from these one-step harms, then it can legitimately engage in the content regulation that is the necessary means for that protection.

Nor will "balancing" these harms against the freedom of expression interests of the speakers and their audiences salvage a right of freedom

13. *Id.* at 66–80.

of expression. For there is no way *consistent with evaluative neutrality* for any governmental body, be it a legislature or a court, to balance these competing interests. How important is it that a lawyer be able to reveal to the public a confidential communication by a client that he had committed a felony when that client is now a candidate for public office? Does it depend upon how much this will hurt his candidacy? How relevant *you* believe this is to his fitness for office? How much *you* agree or disagree with his politics? How much this will affect other clients' faith in the confidentiality of their discussions with lawyers, and how important *you* believe that is?

Things might appear rosier for a right of freedom of expression when we move to content regulations aimed at two-step harms. After all, in these cases, the government can attempt to prevent the harm by threatening the audience with sanctions and leaving the first step, the communication of the provoking message, unregulated. Even if this option is less effective than penalizing both steps, it is available and leaves the expression of the message alone.

Indeed, perhaps the most successful theories for a right of freedom of expression focused almost entirely on these two-step harm examples.[14] The basic premise was that the audience had a right to hear information and arguments and then decide whether to engage in the harmful acts, and the speakers had, as a corollary, a right to present the audience with the information and arguments. Government could not presume that a responsible audience would misuse the information or be persuaded by arguments to commit harmful acts. Such a presumption would violate the right of the audience to autonomy.

However, even this narrow right of freedom of expression, which extended only to a small class of content regulations, did not withstand analysis. First, many communications that might provoke or incite illegal acts by a legally responsible audience were not confined to a legally responsible audience. The audience might contain persons who were insane, who were below the age of responsibility, or who were outside the government's jurisdiction and thus immune to threats of punishment.

Second, even where the communication is directed solely at legally responsible adults, immunizing it from governmental regulation would have quite sweeping consequences. The ordinary crime of solicitation is a content regulation based on a two-step harm, and it is no defense for the solicitors that the solicitees—the contract killers—can be held legally responsible if they commit the crimes solicited. And there is no principled

14. *See* Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 209–13 (1972); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 355–57 (1991).

line between ordinary criminal solicitations and "mere advocacy" of illegal behavior. Moreover, mere likelihood that the message will or will not result in an illegal act is (1) irrelevant in the case of ordinary criminal solicitation and (2) unrelated to the principle of audience autonomy. It suggests a right to advocate crime only when the advocacy will be ineffective—a decidedly odd right.

Third, if one held a maximalist conception of the right of the responsible audience to assess the truth and value of all messages and not have the government prevent it from doing so, the one-step harm regulations of defamations and deceptions would be impermissible.[15] For the audience would have the "right" to hear the speaker's defamation of Jones or his claim that the Bridge of San Luis Rey is safe to walk on, and punishing the speaker to prevent his communicating those messages to the audience would be violative of this right. Nor could this right be cabined by exempting false statements of "fact" from its scope and protecting only false statements of "opinion" or "value."[16] For statements of opinion or value have persuasive force only if they imply brute facts or "facts" about what are proper inferences to draw. So if the claims of opinion or value are false, they rest on false facts or improper inferences. A maximalist rendering of audience autonomy therefore undermines laws protecting persons from defamations and deceptions.

Finally, government has limited resources; this means that although it may theoretically prevent crimes by threatening the audience, as a practical matter, its limited resources will often be more efficiently employed by directing them at the communication of the provoking messages. Hostile audience cases are good examples. The police may not have enough personnel and material resources to stop a riled audience from going on a deadly rampage. Stopping the speaker from riling the audience may be the only feasible option. Indeed, sometimes, as, for example, with a sleeper cell of terrorists awaiting a coded message signaling "attack," the government will not know *who* the audience is and will know only who is trying to send that audience a message.

I concluded that there was no principle supporting a human right of freedom of expression, even if restricted to content regulation, and even if further restricted to content regulation predicated on a two-step harm.[17]

15. *See* ALEXANDER, *supra* note 4, at 68–71.
16. *Id.* at 70–71.
17. *Id.* at 80–81.

Moreover, and even more significantly, I concluded that there was a reason why there could not be such a principle, a reason that went beyond freedom of expression and placed in doubt the principled backing of other iconic liberal rights, such as those of freedom of religion and freedom of association.[18] Any political morality must avoid self-effacement. That means that no political morality can place a positive value on acts that contravene it or that threaten to contravene it. Liberalism can place a positive value only on acts that are consistent with liberalism. And liberals thus cannot place a positive value on antiliberal speech, religion, or association. These liberal freedoms—speech, religion, association—require evaluative neutrality. Just as it is a parody of freedom of expression to have freedom to express orthodoxy but not heterodoxy, so too is freedom of religion a parody when the freedom is restricted to orthodoxy. *But liberalism cannot be evaluatively neutral about itself or about the rights it protects.* It cannot be neutral about antiliberal speech, religion, or association; it must view these negatively. Thus, there is a paradox at the heart of liberalism: liberalism requires, but cannot embrace, evaluative neutrality.

This was a painful conclusion for me, for I desperately wanted to discover a principled basis for a coherent and robust notion of freedom of expression, and freedom of religion and association as well. Nonetheless, I found that I was stymied by this liberal paradox at every turn.

If there is no human right of freedom of expression, where does that leave matters with respect to freedom of expression? I concluded in my book on the subject—and I stand by that conclusion—that there are good arguments for legally protecting freedom of expression in circumscribed domains.[19] Those arguments will have an indirect consequentialist structure. They will aver that a legal requirement that government adhere to content neutrality within certain regulatory domains will likely produce better consequences, however determined, than if government is allowed to restrict expression in that domain based on the messages conveyed.

Like all indirect consequentialist arguments, those for specific domains of content neutrality will be highly speculative. Moreover, they will be time and place specific. As I argued,

> [T]he amount and types of freedom of expression that produce good consequences will vary with the form of government, the degree of political stability, the level of wealth, the state of technology, the general level of education, the culture,

18. *Id.* at 147–81.
19. *Id.* at 191–92.

> the structure of the news media and other media of expression and communication, and numerous other factors.[20]

The expression that Australia should permit in 2012 will probably differ, perhaps considerably, from the expression Malawi should permit, and both will probably differ from the expression Greece should permit.

Freedom of expression—a content-neutral, hands-off governmental approach to expression—has much to commend it even if it is not a universal human right. Democratic government requires that citizens be decently informed about government's actions, and governments are not particularly trustworthy when it comes to refraining from suppressing valid criticisms of it. Some degree of freedom of expression undoubtedly contributes to knowledge that is useful to consumers and producers in the marketplace, to scientific and technological progress, to artistic accomplishments, and to our functioning as responsible moral agents.

On the other hand, freedom of expression can produce various "bads" as well as these "goods." Its messages can defame, intrude on privacy, disclose secrets and confidences, violate property rights in content, deceive, threaten, incite, offend, and so on. And its nonmessage aspects can create traffic snarls, litter, noise, trespasses, intrusions into personal space, and many, many more harms.

Taking these various goods and bads of freedom of expression into account, are there any defensible conclusions one can reach about whether a right to freedom of expression should be legally protected, and if protected, what its scope and limits should be? Here are some highly tentative answers.

First, with respect to incidental—nonmessage-related—restrictions of expression, I believe it would be desirable social policy for economically advanced countries to ensure the existence of a wide variety of cheaply accessible media and perhaps some media open to all speakers, such as the Internet. There are problems of getting the correct balance between having too many speakers, which causes either cacophony or cascading, and having too few, which results in the exclusion of worthwhile messages. And the right balance might also depend on whether the messages are political, scientific, artistic, cultural, or commercial. Moreover, courts are not well equipped to do this balancing. Legislatures are better equipped, although they may be less trustworthy than courts.

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20. *Id.* at 186.

With respect to protecting messages that cause one-step harms, one must ask whether those harms are violations of deontological side constraints or whether those harms are merely harms from a consequentialist standpoint. If it is the former, then any legally constructed right of freedom of expression that protects messages that cause those harms is unjustified. For given the absence of a moral right of freedom of expression, we have a right on only one side of the balance, the side of the one harmed by the message. As an example, some believe that intellectual property rights are natural—prelegal—moral rights.[21] If that is correct, then expression that violates intellectual property rights in the message expressed violates prelegal property rights but is not itself the exercise of a prelegal right.

When the one-step harms are not themselves violations of deontological rights, then we are left with purely consequentialist balancing. Note that this cannot be case-by-case balancing focused on each token of expression. Rather, for a domain of freedom of expression to exist, we must have a domain of evaluative equality among messages within that domain, which means that the consequentialist balancing will be wholesale not retail, rule-consequentialist rather than act-consequentialist. For retail, case-by-case, token-not-type, act-consequentialist balancing does not treat expression of messages as distinct from other acts.

So, for example, the requirement of lawyer-client confidentiality most plausibly has an indirect consequentialist justification. To ask whether freedom of expression should legally trump lawyer-client confidentiality is not to ask whether some particular token of violation of that confidentiality can be justified by *its* consequences. Rather, it is to ask whether the practice of protecting those confidences as a whole produces better consequences than its absence, which would allow lawyers to reveal those confidences in their communications to others.

The problem in constructing this kind of indirect consequentialist balance is that we cannot know in advance what kind of information will be lost to the public if lawyer-client confidentiality is maintained and what kind of information will be gained if it is not. And if we did know, our assessment—and thus the assessments of legislatures and courts—would be partisan rather than evaluatively neutral. But even if we omit

21. *See* Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1535 (1993) ("When the limitations in natural law's premises are taken seriously, natural rights not only cease to be a weapon against free expression; they also become a source of affirmative protection for free speech interests."); *see also* Jon M. Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 CORNELL L. REV. 1278, 1295–97 (2003) (attributing Locke as the source for the view that copyright is a form of natural right).

the latter concern, the former concern remains. What information is lost or gained by tinkering with the protections of reputation, privacy, secrecy, confidentiality, intellectual property, sensibility, and so on is completely unknowable.

Two-step message harms are a somewhat different matter. Let me quote from the final chapter of my book on the subject:

> In Chapter Four we sought in vain for a principled justification that would neither insulate all expression of this type from legal suppression nor insulate none of it. The line-drawing the courts in various countries have engaged in to distinguish advocacy from incitement, solicitation, and "fighting words," or ordinary accounts of criminal activity from how-to-books on crime, or false statements of "fact" from false expressions of "opinion" or "value," were, I argued, ultimately without principled foundations.
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> Nevertheless, even in the absence of principled lines of demarcation, much less the foundation provided by a human right, there are good reasons to carve out some domain where government is prohibited from suppressing messages because the content of those messages is false, deceptive, or otherwise likely to cause audiences to engage in harmful conduct. Surely, and particularly in democracies, messages that are critical of the government and its policies should be protected to some extent, even if the government regards them as dangerously false or misleading. Even with a defense of truth permitted, prosecutions for seditious libel run the risk of deterring accurate criticisms of the government along with false or misleading ones. And even though we cannot in advance of receiving those messages assess whether the number and value of deterred accurate messages—remember, we are dropping the evaluative neutrality constraint—outweigh or are outweighed by the number and *dis*value of the suppressed ones, there are dangers in giving the government power to suppress criticism on grounds that it is false or misleading and dangerous. Government may not act in good faith, but may try to cover up its misdeeds and embarrassments; and even adjudicative processes may not reveal all such cover-ups. And even if government does act in good faith and goes after only those messages that it sincerely believes are false or misleading or dangerous, it will quite naturally tend to overestimate the dangers of such messages, to devalue the benefits for public awareness and debate of even misguided criticisms, and to misassess the accuracy of those criticisms.
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> Moreover, even if government is correct about the falsity and danger of the messages, it may underestimate the negative indirect consequences of suppression. Suppression may impede valuable enterprises out of which the erroneous criticisms of government emerged: for example, the quests for social and natural scientific truth, or for moral and religious truth. Suppression may infantilize the population and stunt its moral and intellectual virtues (an essentially Millian point). Perhaps even more importantly, suppression is frequently ineffectual or worse. It may draw attention to and make martyrs of the dissenters, glamorizing and spreading rather than suppressing their ideas. It may drive criticism and dissent underground, which breeds resentment, alienation, and conspiracy. It is frequently better to

allow dissent and know who the dissenters are than to suppress it and have dissent circulate in secrecy.

These are a few of the consequentialist arguments that can be marshaled against suppression of speech that might mislead audiences about the probity, justness, or wisdom of the government and its policies and induce the audience to commit harmful acts, ranging from subversion and criminality to replacing good governors with bad ones. Many of those arguments apply in some measure to suppression of false or deceptive messages beyond those critical of the government, and even beyond politics. Thus, there are reasons *not* to suppress false and misleading scientific claims, religious claims, cultural claims, moral claims, and even medical claims and commercial claims. In the United States, the First Amendment has been invoked to protect false and misleading scientific, religious, cultural, and moral claims but not to protect false and misleading medical or commercial claims. The somewhat perverse result is that because they are subject to penalty if false or misleading, we do—and can, justifiably—rely on the latter claims; on the other hand, because they are immune from government sanctions, the former claims are regarded as likely to be dishonest or baseless and thus unreliable.

One commentator has characterized the consequentialist considerations for freeing up some speech that might be suppressed because of two-step harms in the following way:

> First, being able to speak our minds makes us feel good. True, we tailor our words to civility, persuasion, kindness, or other purposes, but that is our choice. Censors claim the right to purge other people's talk—all the while insisting that it is for our own good.
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> Second, much censorship appears irrational and alarmist in retrospect because the reasons people choose and use words are vastly more interesting than the systems designed to limit them. It's not hard to make a list of absurdities—I'm particularly fond of a rash of state laws that forbid the disparagement of agricultural products—but simplistic explanations and simple-minded responses are as dangerous as they are ditzy. In one of the few places that postmodern theory and common sense intersect, it is obvious that the meaning and perception of words regularly depend on such variables as speaker and spoken to, individual experience and shared history, and the setting, company, and spirit in which something is said. To give courts or other authorities the power to determine all this is, to put it mildly, mind-boggling.
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> Third, censorship is inimical to democracy. Cloaking ideas and information in secrecy encourages ignorance, corruption, demagoguery, a corrosive distrust of authority, and a historical memory resembling Swiss cheese. Open discussion, on the other hand, allows verities to be examined, errors to be corrected, disagreement to be expressed, and anxieties to be put in perspective. It also forces communities to confront their problems directly, which is more likely to lead to real solutions than covering them up.
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> Fourth, censorship backfires. Opinions, tastes, social values, and mores change over time and vary among people. Truth can be a protean thing. The earth's rotation, its shape, the origins of humankind, and the nature of matter were all once widely understood to be something different

> from what we know today, yet those who challenged the prevailing faith were mocked and punished for their apostasy. Banning ideas in an attempt to make the world safe from doubt, disaffection, or disorder is limiting, especially for people whose lives are routinely limited, since the poor and politically weak are the censor's first targets.
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> Finally, censorship doesn't work. It doesn't get rid of bad ideas or bad behavior. It usually doesn't even get rid of bad words, and history has shown repeatedly that banning the unpalatable merely drives it underground. It could be argued that that's just fine, that vitriolic or subversive speech, for example, shouldn't dare to speak its name. But hateful ideas by another name—disguised as disinterested intellectual inquiry, or given a nose job like Ku Klux Klansman David Duke before he ran for governor of Louisiana—are probably more insidious than those that are clearly marginal.[22]

Let me close with a couple of examples. So-called hate speech—speech that disparages ethnic, racial, or religious groups—is generally prohibited in most Western countries but not in the United States, where it is constitutionally protected as a matter of freedom of speech. If we leave aside the one-step harm of offense and focus on the two-step harms of inciting others to violence or to discrimination against members of the disparaged groups, we can understand why some countries, given their history and culture, would be quite fearful of the effects hate speech might have. For example, think of Germany and anti-Semitic speech. On the other hand, in the twenty-first-century United States, the dangers of hate speech pale in comparison to the dangers of suppressing it. Suppression drives haters underground, where they may be more dangerous than if they were more visible. Suppression is frequently not evenhanded: disparagement of some favored groups is punished, but disparagement of other groups is not. Frequently, suppression of hate speech is an expression of power wielded by some groups over other groups rather than an expression of concern about violence or discrimination. Sometimes, suppression of hate speech is just partisan politics. In the United States, some groups have tried to label messages such as opposition to racial preferences as racist hate speech. And political correctness surely infects enforcement of hate speech laws. Consider the prosecution of Mark Steyn in British Columbia because of his book expressing political concerns over

22. ALEXANDER, *supra* note 4, at 191–93 (footnotes omitted) (quoting in part NAN LEVINSON, OUTSPOKEN 18–19 (2003)).

the ever-increasing percentage of Muslims in Europe.[23] So whether hate speech laws are a good or bad thing will undoubtedly vary with the country, its history, its culture, and its politics.

The same point can be made with respect to restrictions on culture-coarsening expression—pornography, violent video games, public profanity, and so forth. Culture coarsening is a real harm, and its baleful effects may even prove catastrophic. On the other hand, whether legal restrictions on expression that contributes to coarsening is a good idea will vary with the place, the time, the institutions, the current state of the culture, and so forth. Governments are generally pretty ham-fisted when it comes to defining culture-coarsening messages. The history in the United States of attempts to ban pornography is not reassuring. Other countries with other institutions may do a better job.

I close with how I closed my book on freedom of expression:

> There are many good reasons for governments not to regulate expression for the purpose of affecting messages, but that freedom of expression is a human right is not one of them. There is no human right of freedom of expression. Nor is there an indirect-consequentialist justification for a domain of freedom of expression . . . that is constant across time and place. Rather, there are indirect-consequentialist arguments that might justify the special treatment of expression, but that treatment will vary from place to place and from time to time. Justified rights regarding expression will always be limited, local, and based on hunches about consequences. That is not as grand and inspiring a basis for freedom of expression as deeming it to be a human right. It does, however, have the virtue of realism.[24]

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23. *See* Brooke Goldstein & Aaron Eitan Meyer, *"Legal Jihad": How Islamist Lawfare Tactics Are Targeting Free Speech*, 15 ILSA J. INT'L & COMP. L. 395, 404 (2009).

24. ALEXANDER, *supra* note 4, at 193 (footnotes omitted).