Symposium:
An Ocean Apart? Freedom of Expression in Europe and the United States

Foreword:
Freedom of Expression: "Precious Right" in Europe, "Sacred Right" in the United States?

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The freedom of expression is perhaps not the most basic freedom—freedom of movement being the most basic freedom and of utmost importance as it determines and precedes all others—but it is certainly the foremost modern freedom. To freely speak one's mind, represent one's viewpoint, defend one's opinions, communicate one's ideas—including "those that shock, offend, or disturb"[1]—without fear for life, liberty, or possessions, but with peace of mind and a firm certainty of freedom from government harassment, is a freedom that humanity has only recently enjoyed. Protection for this freedom scarcely arose before the revolutions of the eighteenth century.

Freedom of expression was born from the upheavals caused by the sixteenth-century reformation. The birth of this right is credited to the Protestants—those who, as their name indicates, dared to protest and reclaimed the right to dissidence. Inseparable from the freedoms of thought and religion, the right to expression is the landmark freedom of modernity. It goes hand-in-hand with the affirmation of self, the rise of the individual in the social domain, and the liberation of an acting and thinking self freed from the paternalism of society. The right to expression is the preeminent Western freedom.

Though the freedom of expression is closely related to religious freedom, its legal recognition occurred much later. In England, legal recognition of free expression was first realized in the 1689 Bill of Rights, but it only provided for free speech within the confines of Parliament.[2] In the eighteenth century, Anglo-Saxon empiricism gave it new life while the spirit of the Enlightenment gave it extraordinary growth by fighting against blasphemy laws and defending freedom of the press. The French Revolutionaries established that "[t]he free communication of thoughts and opinions is one of the most precious of the rights of man," and that "[e]very citizen may therefore

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1. Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 23 (1976).

2. English Declaration of Rights, 1 W. & M., sess. 2, ch. 2 (1689) (Eng.) ("That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.").

speak, write, and print freely, if he accepts his own responsibility for any abuse of this liberty in the cases set by the law."[3] Around the same time, the young American republic, united in "a more perfect union" by their newly ratified Constitution, adopted ten amendments, deemed the Bill of Rights, to calm the apprehensions of government tyranny. The first of these ten amendments provided that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[4]

Though the concept may indeed be the same on both sides of the Atlantic, there nonetheless exists a substantial difference between the texts. While the French Declaration and all of the international human rights treaties of the twentieth century,[5] including the European Convention on Human Rights,[6] recognize that the law can

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3. THE DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN art. 11 (1789) (Fr.). The "thoughts and opinions" of the Declaration of Rights mirror Hume's dual categorization of mental perceptions. Hume aimed to distinguish thoughts or ideas, which he argued were the least lively of our perceptions, from impressions, which are born of feelings and form our opinions. DAVID HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING AND SELECTIONS FROM A TREATISE OF HUMAN NATURE 62–64 (The Open Court Publ'g Co. 1907) (1758). This dual categorization partitions men into two worlds: learned people who have ideas because they think and reflect, and other people who have only opinions or prejudices because they are less reflective, more instinctive, and more inclined to content themselves with impressions.

4. U.S. CONST. amend. I.

5. *See* Organization of American States, American Convention on Human Rights art. 13, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (stating that "[e]veryone has the right to freedom of thought and expression," and that the exercise of this right "shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law" to respect certain interests); International Covenant on Civil and Political Rights art. 19, Dec. 16, 1966, 999 U.N.T.S. 171 (stating that "[e]veryone shall have the right to freedom of expression," but that the exercise of this right "carries with it special duties and responsibilities," and "may therefore be subject to certain restrictions"); Universal Declaration of Human Rights, G.A. Res. 217A, arts. 19, 29, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) (stating that "[e]veryone has the right to freedom of opinion and expression," but also that "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").

6. Article 10, Freedom of expression, states:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
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> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4,

place limits on freedom of expression, the American text categorically rejects this possibility with two words—"*no law*"—that ostensibly suffer no discussion. It appears as though, while the French Revolutionaries made freedom of expression a "precious right," the Americans wanted from the beginning to make it a "sacred right," indicating from the outset that across the Atlantic this freedom would be of a more fundamental nature than in Europe.[7] The reality is less simple. If in 1789 James Madison—the author of the Bill of Rights—could place an absolute prohibition on Congress to enact any law that would restrict freedom of expression, it is because the prohibition concerned only the federal government, solidly signifying that the regulation of this freedom was within the jurisdiction of the federated states. And the states regulated freedom of expression through common law and legislation. In 1925, the Supreme Court extended the precepts of the First Amendment to the states, finding that they applied to the states by incorporation through the Due Process Clause of the Fourteenth Amendment; thus, the prohibition of laws restricting freedom of expression applied to the states as well.[8]

Things could have remained such, and the United States Supreme Court would have controlled state laws restricting freedom of expression as effortlessly as it controlled similar federal laws, but this is not what happened. At the end of the 1930s and after the New Deal crisis, freedom of expression, and all the freedoms of thought protected by the First Amendment, became fundamental freedoms. Freedom of expression began to benefit from the same degree of protection that the Court had accorded, before its about-face in 1937, to contractual freedom.[9] This was a veritable revolution. Freedom of expression and freedom of religion—the two are inextricably intertwined—became the Court's favored freedoms, so to speak; freedoms with regard to which it had not lost any of its former powers, but rather gained power. If there is indeed one thing that we may currently say emerges from the frightful complexity of the Court's First Amendment jurisprudence, it is the following: the freedoms of thought in the United States rest entirely in the hands of the nine Supreme Court Justices. The same cannot be said of economic freedoms or political freedoms, but it is true for freedoms of the mind. This solidification of judicial power is a curious legacy of the New Deal crisis, which first seemed to have conquered the Supreme Court, but which now, seven decades later, we realize has only displaced the battlefield and has not diminished the Supreme Court's power to speak the law.

After the Second World War and the fall of the Iron Curtain, the United States brought to Europe the same respect for dissidence that the Court had imposed on the white majority in the United States, a majority who often oppressed racial minorities (African Americans, particularly in the southern states) and religious minorities (Jehovah's Witnesses). It was at this time that true democracy began to be defined as

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1950, 213 U.N.T.S. 221, 230.

7. Attaching the "precious right" qualification to the free communication of ideas and opinions is important. To say this freedom is a precious right means implicitly that it is not a sacred right, and that it can be limited, unlike freedom of opinion or freedom of conscience. *See id*. Man has total freedom over his ideas and his opinions; it is only the manifestation or the communication of them that can be regulated, with an exception for the expression of religious opinion (free exercise), which may only be limited for the necessity of public order. *Id.* at arts. 9, 10.

8. Gitlow v. New York, 268 U.S. 652, 666 (1925).

9. W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 392 (1937).

that which can withstand opposition—unlike single-party communist democracy, which eliminates it. The potential to express dissidence would soon mark the border between East and West.

In 1949, the year that marked the beginning of the cold war, the Supreme Court made freedom of expression the defining characteristic of true democracy, contrary to that of popular democracies. In *Terminiello v. Chicago*,[10] the Court declared:

> The vitality of civil and political institutions in our society depends on free discussion. . . . [I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.
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> Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.[11]

It was not long before the European Court of Human Rights followed the lead of the Supreme Court. In *Handyside v. United Kingdom*, regarded in many respects as the foundation of its jurisprudence on freedom of expression, the European Court proclaimed, addressing all the European states, that a democratic society is one that can withstand all expression without exception and welcome all information and all ideas, notably "those that offend, shock or disturb the State or any sector of the population. Such are the demands of . . . pluralism, tolerance and broadmindedness."[12] If indeed, as Jean-François Flauss would later say, freedom of expression is a "valued" freedom,[13] it is because it is a necessary condition for a democratic society.

Gradually, a judicial dialogue was established between the two banks of the Atlantic. In the 1989 case of *Texas v. Johnson*,[14] the Supreme Court, in holding that flag burning was a protected form of symbolic expression, declared that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[15] The "offensive or disagreeable" ideas in *Johnson* echo the ideas "that shock or disturb" in *Handyside*, and both are similar to ideas that cause "unrest, [or] create[] dissatisfaction with conditions as they are."[16] The two-voice choir sings so well in unison from both sides of the Atlantic that we would be tempted to complete Justice Brennan's opinion in *Johnson* with the phrase that closed the decisive paragraph of *Handyside*: "such are the demands of pluralism, tolerance and

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10. 377 U.S. 1 (1949).

11. *Id.* at 4.

12. Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 23 (1976).

13. Jean-François Flauss, *The European Court of Human Rights and the Freedom of Expression*, 84 IND. L.J. 809 (2009).

14. 491 U.S. 397 (1989).

15. *Id.* at 414.

16. Cox v. Louisiana, 379 U.S. 536, 551–52 (1965).

broadmindedness." That there are synergies between the United States and Europe on the subject of freedom of expression is evident. But there is not unconscious imitation, and each system has its particularities. Greatly simplified, there are two large differences that seem to separate the two continents' jurisprudence.

The first difference is related to the respective jurisprudential densities of the Supreme Court and of the European Court regarding freedom of expression. In the United States, freedom of expression is only discussed at the federal level. The freedom of expression in Wisconsin or California does not attract crowds of attention, and any interest that there would be in seeking a contribution to it does not seem to impose itself. In Europe, however, national concepts of freedom of expression unique to each state exist, as described by Eric Barendt[17] and Olivier Jouanjan.[18] The European Court of Human Rights has not yet standardized the states' laws, whereas the Supreme Court has federalized this freedom. How can this be explained? The reason lies in this simple fact: the judge's tools for control are not the same in Washington as in Strasbourg. The European Court leaves the European states a margin of judgment, while the Supreme Court concedes the American states almost none.[19]

Where European judges can evaluate the limits on freedom of expression by using "standards" enumerated in the European Convention,[20] American justices are bound—in carrying out exactly the same task of evaluation—by an iron law: "no law." In principle, no law may restrict the freedom of expression guaranteed by the First Amendment. Without workable standards, which do not exist textually and cannot be formulated by the Supreme Court without reviving the government of judges, the Supreme Court has been obligated—as described by Daniel Farber[21]—to impose categorical and rigid rules on the states, such as the requirement that regulations on free expression be content neutral or serve a "compelling state interest," which is rarely satisfied. With means of control such as these, the American jurisprudence manages to defend freedom of expression with an intransigence, one would almost dare say a fundamentalism, that is unknown in Europe.

The second difference, related to the first, is connected to the respective value of freedom of expression in the United States and Europe. In the United States, this freedom passes for an absolute; nothing seems able to limit it, beyond the certainty of

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17. Eric Barendt, *Freedom of Expression in the United Kingdom Under the Human Rights Act 1998*, 84 IND. L.J. 851 (2009).

18. Olivier Jouanjan, *Freedom of Expression in the Federal Republic of Germany*, 84 IND. L.J. 867 (2009).

19. Elisabeth Zoller, *The United States Supreme Court and the Freedom of Expression*, 84 IND. L.J. 885 (2009).

20. These standards are provided for in Article 10, section 2 of the European Convention on Human Rights, which authorizes states to regulate freedom of expression for reasons of "national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary." Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 221. The judges of Strasbourg review the interpretation of these standards by states.

21. Daniel A. Farber, *The Categorical Approach to Protecting Speech in American Constitutional Law*, 84 IND. L.J. 917 (2009).

public disturbance in the form of immediate violence on the part of the author. The most typical example involves the prominence given to national security, developed here in an historic fresco by Geoffrey Stone.[22] In Europe, however, it is not exclusively the sound and fury of guns, spilled blood, or the trespass to property that determines the limits of freedom of expression. The decisive point is that the exercise of this freedom involves "duties and responsibilities," as stated in the text of the European Convention (Article 10, section 2), and so it is a relative freedom.

The sharp division that this Kantian reserve induces between the two continents is visible to the naked eye. It explains why racist, xenophobic, and hateful discourse are, as Jeannine Bell laments, largely unpunished in the United States.[23] It is further illustrated by commercial advertising, which knows no other limits than (grossly) false advertising, and allows multinationals to increase their gigantic profits while using the resources of their right to freedom of expression to invalidate interfering advertising regulations. This strategy is similar, as C. Edwin Baker suggests, to the way the Supreme Court previously used contractual freedom to construct laws that limited entrepreneurial freedom so little.[24] The American doctrine struggles to find the meaning of this freedom gone wild, but there have been attempts by its most advanced critics, such as Susan Williams, to entirely reconstruct and rethink the doctrine in the context of new philosophies like feminism.[25] Conversely, in Europe, particularly France, where free expression adjusts to the imperatives of a more united—but, according to Americans, less free—society, freedom of expression is not merely an individual freedom; it can become a veritable social freedom in the business world with regard to employee freedom of expression, as demonstrated by Patrick Morvan.[26]

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22. Geoffrey R. Stone, *Free Speech and National Security*, 84 IND. L.J. 939 (2009).

23. Jeannine Bell, *Restraining the Heartless: Racist Speech and Minority Rights*, 84 IND. L.J. 963 (2009).

24. C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L.J. 981 (2009).

25. Susan H. Williams, *Feminist Theory and Freedom of Speech*, 84 IND. L.J. 999 (2009).

26. Patrick Morvan, *A Comparison of the Freedom of Speech of Workers in French and American Law*, 84 IND. L.J. 1015 (2009).

27. For the original French version, see LA LIBERTÉ D'EXPRESSION AUX ÉTATS-UNIS ET EN EUROPE (Élisabeth Zoller ed., 2008).