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Gustav III and *The Masked Ball*: Different Approaches to Freedom of Expression

In 1858 Giuseppi Verdi composed an opera which he originally entitled *Gustav III.* Its plot was a fictionalized version of the 1792 assassination of King Gustaf III of Sweden. You have never seen or heard that opera, because the censors in Naples and Rome banned its performance. It contemplated the unspeakable—regicide, the killing of a king. For the censors of the mid-nineteenth century there were concepts that could not be discussed in public. Killing a king—any king—was one of them.

Verdi was not to be deterred. He changed the locale, from Sweden to America, and he changed the victim, from the king of Sweden to the colonial governor of Boston. These two changes satisfied the censors and the revised work became famous the following year as *Un Ballo en Maschera, (The Masked Ball).* Now, 150 year later, King Gustav is again sometimes portrayed as the victim, although the unfortunate governor of Boston frequently still takes the part.

A quarter century before Verdi composed his masterpiece a French playwright, Eugène Scribe, wrote a play featuring the story of Gustav. Daniel Auber composed an opera based on the story, which he also called *Gustav III*. They were more fortunate than Verdi, because there was no censorship of the work in France. The Auber opera was quite successful until it was overtaken by the splendor of Verdi's work.

A word about poor King Gustav may be in order. He reigned from 1771 to 1792. He was a nephew of Frederick the Great of Prussia. Like his uncle, he sought to promote science, literature, and the arts and lively conversation about them. He established the Swedish Academy and built

the Stockholm Opera. He also tried to reestablish the absolute power of the monarch, seeking to undo the political liberties that had been recognized in Sweden earlier in the eighteenth century. He was shot at a masked ball by a group of noblemen and died 13 days later of an infection of the bullet wound. Unlike the protagonist in Verdi's story, he was not having an affair with another man's wife.

By Gustav's time Swedish law already recognized a limited freedom of the press. The *Tryckfrihetsförordningen,* enacted by his predecessor in 1766, was one of the first explicit protections of freedom of the press in the world, although the scope of its protection was limited. As an enlightened despot, Gustav welcomed discussion and debate about almost everything that wasn't political—but he continued to prohibit speech that was critical of the government or of the faith. On some matters, the public should not be misled.

One can wonder whether, if he had been living when Verdi wrote his magnificent opus, Gustav's love of grand opera would have led him to applaud the performance or his desire for autocratic control would have led him to ban it.

Verdi's problems in producing an opera that featured regicide may serve as a touchstone for the central issue of this paper. Are there thoughts that dare not be discussed or published? Are there ideas that are "too outrageous to mention"? European and American legal thought differ on this issue. European political and legal thought assumes that the wise state should protect foolish individuals from the most extreme of unsound ideas. Outrageous ideas, like regicide in the 19th century or genocide today, are beyond the pale. Some ideas, like denial of the existence of the Holocaust or disparagement of protected groups of people, are today thought to be so clearly wrong that their expression is prohibited in some countries. American polticial and legal though, in contrast, suggests that the foolish state should not prevent wise individuals from reaching their own sound conclusions. For Americans the remedy for bad speech is more speech to counter it. In the United States, the police must allow a Nazi demonstration to parade through the streets of a predominantly Jewish community[1]; they must allow a Ku Klux Klan rally to preach

[1] *Collin v Smith* 478 F2d 1197 (7th Circuit Court of Appeals), review denied 439 US 916 (1978).

their hideous racial hatred,[2] so long as it does not actually move someone physically to harm others.

There are multiple sources for this difference. European political thought is based on a more communitarian philosophy, the American is based on a more individualistic one. In Europe the promotion of a common culture is a major responsibility of government, encompassing education, artistic endeavors, and at one time even religious belief. In the United States, cultural affairs and arts are at best poor stepchildren of government support, and religion and the state have long been separated. Culture is left to grow or wilt on its own. Good ideas will flourish; bad ideas will simply fade away.

Much of European constitutionalism is also based on the supremacy of the national legislature. American constitutionalism is based on the supremacy of the constitutional rules. In their rebellion against absolute monarchs, the European people put trust in their elected representatives. Actions approved by the national legislature reflect the popular will. So in Europe restrictions on freedom of expression cannot be imposed by an executive decrees, but they can be enacted based on legislation enacted by the parliament. American constitutionalism distrusts the legislature as much as it distrusts the executive, so it makes freedom of expression an absolute. Europeans replaced the absolute king with the legislature. Americans replaced the absolute king with the law. Despite these differences, in most actual cases both American and European law would usually reach the same conclusion about most issues involving freedom of expression. They would only differ with respect to the "hard cases."

Both the European and American approaches have influenced the evolution of international instruments for the protection of human rights, especially the International Covenant on Civil and Political Rights. The text of that covenant nevertheless largely reflects the European approach. Despite the fact that the two approaches almost always reach the same result in fact, the theoretical difference has led to reservations in the United States ratification of the Covenant. It seems unlikely that this tiny, but fundamental, difference can be bridged. So while the Covenant may be influential in establishing common minimum standards, it will almost certainly not become the standard applicable in the United States.

[2] *Brandenburg v Ohio* 395 US 444 (1969).

Some historical background

The protection of freedom of expression did not appear as a legal doctrine until early in the eighteenth century. Earlier documents of a constitutional nature said little or nothing about it. *Magna Carta* (1215) is concerned with the property rights, the rights of the nobility and with procedural matters, but not with protection of expression. The English *Bill of Rights* (1689) only protected the freedom of speech within the Parliament and the right to petition the government.[3] It contained no general protection of free speech for the public.

Indeed, the Swedish *Tryckfrihetsförordningen* (1766) was one of the earliest steps to protect freedom of expression, but it only protected the printed word and did so largely through procedural means. In Gustav's time, it still allowed criminal prosecution of blasphemy and of criticism of the government.

The real impetus for broader protection of freedom of expression came from the revolutionary countries, France and the newly independent American colonies. But even there the support was initially muted. In France, the *Declaration of the Rights of Man and the Citizen,* adopted in 1789, reached the protection of expression only in its 11th article, and gave only a limited rights It provided

> La libre communication des pensées et des opinions est un des droits les plus précieux de l'homme; tout citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l'abus de cette liberté dans les cas déterminés par la loi.

Note the final clause. The framers of the Declaration protected the right of free expression against any restrictions in the existing law, but they put complete trust in the legislative branch to craft new limits. The legislature could determine what was an abuse and simply prohibit it by enacting a law. There was no external constraint on its right to limit speech. Much of European constitutional development was based on curbing executive and monarchical power through a requirement of legislation, rather than on creating an absolute right for the people. The legislature, after all, represented the people.

In the American colonies at the time, freedom of expression was likewise frequently relegated to the end of any charter of liberties. While

[3] Bill of Rights, 1 W&M c 2.

it was included in many of the post-revolutionary constitutions of the new states, it was frequently tempered with an explicit recognition of the liabilities and responsibilities of the speaker.

Indeed, the original text of the United States Constitution contained no protection for freedom of expression at all. The authors appeared to believe that such a protection would be unnecessary since the new central government's powers were largely economic. It was only after delegates to some of the state conventions hesitated to ratify the new fundamental law because of this failure that amendments were promised. They took the form of the Bill of Rights, now the first ten amendments to the Constitution.

Here, again, the record is equivocal. In the proposed amendments submitted to the states, freedom of expression was only the third proposal. Two other proposed amendments, relating to the compensation of legislators and the number of members of the House of Representatives, were listed before it, but were rejected by the ratifying bodies. So the protection of speech and press moved forward from the third position on the list to become the First Amendment. In modern times, that precedence has sometimes given it a preeminence and greater authority than other provisions of the Constitution.

Freedom of expression in American law

The basic text protecting freedom of expression in American law is the First Amendment. It is surprisingly simple. Its full text says:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[4]

This simple text has created a broad protection for expression of all kinds. Its text imposes limits on Congress, but most of its protections have been extended to all branches of state and local governments.[5] One justice of the Supreme Court took this language very literally. Justice Hugo Black frequently stated that when the Constitution said that Congress could make "no law" restricting freedom of expression, it meant exactly what

[4] U.S. Constitution, Amendment I.

[5] *Gitlow v New York* 286 US 652 (1925).

it said. For him even a very reasonable law would be unconstitutional.[6] Legal doctrine has not gone so far.

American constitutional doctrine requires the government to satisfy a very high threshold to justify the punishment of any expression based on its content or argument. In *R.A.V. v City of St. Paul,* the Supreme Court declared that "Content-based regulations are presumptively invalid."[7] The *strict scrutiny standard* effectively prohibits virtually all *content-based* restrictions on freedom of expression. If a restriction on speech is based on the content of that communication, it must serve a compelling public purpose *and* it there must be no less restrictive means of accomplishing that purpose.[8] While this standard would appear to leave a loophole, it is an exceedingly tiny one. In another context the strict scrutiny rule has been described as "fatal in fact" to all governmental regulations that fall within its scope. Thus a government cannot prohibit protests disrespectful of a foreign government in front of its embassy,[9] or political picketing in front of a home,[10] or access to sexually oriented websites.[11]

In order for a content-based regulation on expression to be upheld, some other element must be present. The state can regulate expression that poses an imminent danger of grave harm, particularly grave physical harm, to others.[12] The mere communication of bad ideas is not enough to warrant governmental interference with the expression. Restriction is permitted only in a few other situations—and in each of them there is an additional substantive hurdle that the government must satisfy in order to justify its interest in suppressing the communication.

Incitement of others to imminent action may be punished if the action will occur in the near future and the danger it poses is grave. Oliver Wendell Holmes described this in 1919 when said that the law could prohibit someone from falsely shouting "Fire!" in a crowded theater.[13]

[6] *Konigsberg v State Ba*r 366 US 36 (1961) (dissenting opinion). His views led him to refuse to examine the evidence in cases involving obscenity, since, for him, all obscenity laws were restrictions on expression.

[7] 505 US 377 382 (1992).

[8] *Turner Broadcasting v FCC* 512 US 622 (1994).

[9] *Boos v Barry* 485 US 312 (1988).

[10] *Carey v Brown* 447 US 495 (1980).

[11] *Reno v American Civil Liberties Union* 321 US 844 (1997), *Ashcroft v. American Civil Liberties Union* 542 US 656 (2004).

[12] *Brandenburg v Ohio* 395 US 444 (1969).

[13] *Schenk v United States* 249 US 47, 52 (1919).

He articulated a "clear and present danger" test, in which he allowed the punishment of one who created a clear and present danger of substantive evil that the state is allowed to prohibit. The limiting factors here were to be found in the two adjectives attached to the test. The harm had to be "clear"; it could not be speculative. It also had to be "present"; it had to happen almost immediately.

A generation later, the Supreme Court modified this test in *Dennis v. United States,*[14] which involved the prosecution of leaders of the Communist Party during the early years of the Cold War. Quoting Judge Learned Hand from the Court of Appeals, it more carefully articulated the principle.

> In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.[15]

Again, however, the evil had to be a substantive harm, not simply the propagation of an idea.

The modern form of the test can be found in *Brandenburg v. Ohio*, in which the court said:

> "[the] mere abstract teaching [of] the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." A statute which fails to draw this distinction impermissibly intrudes upon the freedoms granted by the First and Fourteenth Amendments.[16]

The test requires imminent harm, a likelihood of producing illegal action, and an intent to cause imminent injury. In *Brandenburg* the speech was made at a recruiting meeting for the Ku Klux Klan, a racist organization which has a long history of persecuting black citizens and other minorities. The meeting was conducted with a burning cross, hooded members of the order, and other indicia of the Klan. The speech, however, was simply a call on others to join its membership. No physical attacks on members of minority groups were planned that evening. There was no immediate physical threat to others. Advocacy of ideas is protected, but incitement to immediate action is not.

[14] 341 US 497 (1951).
[15] *Id* at 510.
[16] *Brandenburg* (n 12) at 448 (1969)

In sum, in the United States speech is punishable only when it amounts to the incitement of imminent physical action that would itself be punishable. So the agitator who incites members of a crowd to throw rocks through windows may be punished, even though he does not himself throw a rock, but the speaker who argues that some violent action is necessary in the future may not be punished. The test seems to be whether the speaker is indirectly controlling the physical actor's conduct. That test is very hard to satisfy.

In a few areas, the Supreme Court has also interpreted the Constitution as permitting limited restrictions on freedom of expression, but it has always done so with remarkable care. Two significant limitations are built into each of these exceptions. First, only regulation of a narrow sector of possible expression is permitted. Even collectively, these areas could not be used to reach political speech. Second, even if the speech falls within one of these categories, the state must satisfy a high standard to justify its action, even though it is not the strict scrutiny required to allow content-based restrictions. Space limitations permit them to be reviewed here only briefly.

One situation arises when expression is combined with some other form of physical activity, such as burning a flag in public to emphasize one's opposition to the government or to some government policy[17] or the wearing of an armband to show solidarity with some political position.[18] Here the Supreme Court has adopted a four-part test. A government regulation of the accompanying conduct can be upheld only (a) if it is within the general constitutional power of the government, (b) if it furthers an important or substantial governmental interest, (c) if that interest is unrelated to the suppression of expression, and (d) if the incidental restriction on freedom of expression is no greater than essential to the furtherance of the interest.

The Supreme Court has also limited First Amendment protection for advertisements and other forms of commercial speech. Under the modern form of that rule, speech that is primarily proposing a commercial transaction may be subject to regulation as provided in another four-part test, that asks: (a) Is the advertising false or deceptive or proposing illegal activities (in which case it may be regulated)? (b) Is the restriction justified by a substantial government interest? (c) Does the regulation directly advance

[17] *Texas v Johnson* 491 US 397 (1989).

[18] *Tinker v Des Moines Independent School District* 393 US 503 (1969).

that interest? and (d) Is it narrowly tailored to the purpose identified?[19] Advertisements for illegal activities can be prohibited; deceptive advertisements may be punished.[20] The remaining three elements, however, place a much heavier burden on the state to justify its regulation than they would need to satisfy to justify ordinary regulatory action. First, it must fall within a narrow category of commercial activity. Second, it must meet a heightened, albeit not a strict, scrutiny by showing a "substantial," rather than merely the "legitimate" governmental interest that is required for most public regulation. These are terms of art; the increase in the standard is significant. Some conduct that could be prohibited if it did not contain expressive content may not be prohibited if it is communicating an idea. The regulation must "directly" advance that interest; the addition of the adverb makes the test more strict than normal. The final element of the test, the requirement that it be "narrowly tailored" to the public need, is far more strict than the usual test which only requires that it be "related" to the public need.

Two other limitations on free expression involve sexually-oriented material. The first deals with obscenity, again a very narrow class of material. The government may prohibit the display or possession of obscene sexual materials. The Supreme Court has ruled that obscenity is unprotected expression, but has narrowly defined obscenity. The definition of obscenity can be found in *Miller v. California.*[21] A three part test is used: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value. These standards mean that only a narrow range of work can be limited under this standard. It must appeal to sexual instincts, as parts (a) and (b) require. Indeed, part (b) limits the coverage of this exception solely to the depiction or description of sexual conduct. It also contains an exception protecting any works with literary, artistic, political or scientific or literary merit. Because community stan-

[19] *Central Hudson Gas & Electric Co. v Public Service Commission* 447 US 557 (1980), as modified by *Board of Trustees v Fox.* Fox 492 US 469 (1989).

[20] *Pittsburg Press v Pittsburg Commission of Human Rights* 413 US 371 (1973).

[21] 413 US 15 (1973).

dards have changed significantly over the years, only a very narrow body of work is now subject to restriction under this heading.

Expression that invokes sexual interest, but which does not reach the level defined by the test for obscenity, is thus part of protected speech. In some instances, children were used as models or actors in the production of such material. Congress and the states have prohibited the exploitation of children in this way. While the government could rely on the child labor laws to protect against this exploitation, that approach was frequently ineffective. Legislators, both state and federal, have extended the limitations to prohibit the sale, purchase, or possession of this material, on the theory that these activities contribute to the abuse of children in its production. The Supreme Court has upheld these laws on the theory that they are not related to the suppression of expression, but rather to the protection of the juveniles who were employed in the production of the material.[22] Note that, unlike the case of true obscenity where the law is attempting to protect the morals of the viewer, the moral interest being protected here is that of the child who participated in the making of the sexually suggestive production. Modern technology poses a problem for this line of cases, because it is now possible to produce virtual images without using any actual children. If no children are actually involved in the production of the item, the rationale for exceptional treatment disappears and only the much narrower obscenity category would seem to apply.[23] Here again, the law is permitting regulation, but only within a very narrowly defined category of cases.

American constitutional law also protects freedom of expression by placing strict limits on the law of defamation. If the plaintiff is a public official or public figure, he or she must show that the defendant utters the defamatory statement with knowledge that the statement was untrue or with reckless disregard of its truth, a standard that is almost impossible to meet.[24] Criminal prosecutions for defamation are also subject to the same stringent limitations, at least as regards the defamation of public officials and public officials and public figures.[25] America is a rough-and-tumble place in which verbal brawls are seen as normal. This standard is in sharp contrast to that prevailing in some parts of Europe,

[22] *New York v Ferber* 457 US 747 (1982).
[23] *Ashcroft v Free Speech Coalition* 535 US 234 (2002).
[24] *New York Times v Sullivan* 376 US 254 (1964) and subsequent cases.
[25] *Garrison v Louisiana* 379 US 64 (1964).

where the authors and editors of newspapers may be found criminally or civilly liable if they publish material that contains some untrue element. The European law generally gives greater weight to the right of the individual to protect his reputation and honor, while the American law gives precedence to the right of the speaker to comment on a public official or public figure.

European standards

Space does permit a close examination of European standards. Suffice it to say that European law permits much broader impingement on freedom of expression. A few examples can be briefly mentioned.

In some European countries denial of the Holocaust is a criminal offense. There have been a few widely publicized prosecutions. Holocaust denial makes no more sense than a claim that the earth is flat, but should the proponents of such absurdity be imprisoned—or ridiculed? The justification for such a ban seems to ride on the notion that those whose families were harmed or killed in the Holocaust will suffer emotional harm as a result of the mere words, but it is sometimes articulated in terms of a fear of a resurgence of future Nazi movements.

In other countries legislation prohibits speech that is merely offensive to others. In come countries there are laws prohibiting insults directed at foreign heads of state. In Sweden there has been a prosecution of a minister of religion for a sermon suggesting that homosexual conduct is wrong, because such a statement disparages individuals on the basis of their sexual orientation. The Swedish Supreme Court eventually overturned that conviction. Should the government punish beliefs—however wrongheaded—or should it concentrate its police actions on wrongful conduct? It is on issues like this that the American and European approaches diverge.

Another evidence of the difference is the much greater use of defamation litigation as a tool in political controversies. The European view is that legal process must be available to vindicate personal honor. The American view, discussed briefly above, is that one who enters the political fray or the public view must accept the "rough and tumble" of that debate, and that the law intervene only in the case of the most egregious falsehoods.

In sum, it seems clear that Europeans are more prepared than are Americans to suppress dissenting views on some controversial topics because of their emotive impact on other individuals.

Do International Standards Provide a Common Basis?

Can the standards provided in international instruments, such as the International Covenant on Civil and Political Rights,[26] provide a basis for a common view of such standards? The Covenant was concluded in 1967 and took effect nine years later. It was not ratified by the United States until 1992. The United States' hesitation was based in large part on the differences articulated above. Even when the United States did ratify the Covenant in 1992, it placed significant reservations and other limitations on its applicability, precisely because of its different approach. Even though those differences are present only in a miniscule fraction of the actual issues, they are so fundamental that they probably cannot be bridged.

Protection of freedom of expression is recognized in articles 19 and 20 of the Covenant. Article 19 provides:

> 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 of 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 paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

After recognizing freedom of expression in its first two paragraphs, the third paragraph of article 19 places obligations and restrictions on the communicators. Its first provision permits national law to continue to provide for liabilities of the press and other speakers for defamation and privacy invasions, even if the expression in question involved political or social controversy. This is much more restrictive on expression than the corresponding rules of *New York Times v. Sullivan*.[27] The second part of

[26] 999 UNTS 171.

[27] See above, note 24.

the exception allows the state to legislate to prohibit free expression in a broad range of situations: (a) national security, (b) public order (*ordre public)*, (c) public health and (d) morals. National security is a term that has elastic meaning, and could be used to argue that criticism of any national military activity was a danger to national security. The United States government once tried to use that argument to try to suppress the publication of the Pentagon Papers which revealed some of the decision-making leading to involvement in the Viet Nam War, but was unsuccessful in the Supreme Court.[28] The French concept of *ordre public* is very expansive and could probably justify a much broader range of curtailments of freedom of expression than the content-neutral rules of the First Amendment would allow. The permission of restrictive measures to protect public morals is clearly much broader than the very limited regulation of obscenity that is allowed under the Supreme Court's interpretation of the First Amendment.

The exceptions provided in article 20 of the Covenant are even more troubling. It provides:

> 1. Any propaganda for war shall be prohibited by law.
> 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

While war propaganda and racial and religious intolerance are reprehensible, there is a vast difference between overcoming them with more pacific or tolerant speech and simply suppressing them by the brute force of the legal system. Arguing against them, even ridiculing and disparaging them, is the way foreseen by the drafters of the American Bill of Rights. As is frequently said, "the remedy for bad speech is more speech." The European way is use the police and the prosecutor to suppress the debate. Article 20 clearly follows the European model.

These restrictions show that, in the eyes of the drafters of the Covenant, there are subjects and arguments that are simply unmentionable—just as regicide was in 19th century Italy. If you ignore those topics, and suppress any mention of them, they are supposed to go away. This is, of course, a vain hope. The Italian censors didn't stop regicide by banning an opera. Modern laws prohibiting the advocacy of genocide have not stopped those who would engage in ethnic cleansing.

[28] *United States v New York Times* 403 US 713 (1971).

While the United States participated in the drafting of the Covenant, it withheld ratification for a quarter century, in large part due to these two provisions. When it did ratify the document, it did so with significant reservations and other limitations. The political forces behind those reservations, largely the leadership of the press and other liberal elements, make it highly unlikely that there would be strong support for acceptance of the international standards as the internal law of the United States.

In its 1992 ratification of the Covenant the United States interposed five reservations, five understandings, four declarations and a proviso, an unusually large set of limitations.[29] The first declaration in the instrument of ratification limits the application of the Covenant in American law. It provides:

> That the United States declares that the provisions of article 1 through 27 of the Covenant are not self-executing.

This rather arcane statement has a simple meaning. In the United States treaties are ordinarily part of the supreme law of the land.[30] This declaration reverses that presumption. Even though most of the Covenant (except for those parts on which reservations have been filed) has become an international obligation of the United States, it has not become part of the internal law of the United States. In practical effect it means that the provisions of article 19(3), authorizing more restrictive legal measures against some forms of expression than are presently in force in the United States is inapplicable in the internal law of the United States.

The Supreme Court is unlikely to consider or apply Covenant standards in its interpretation of freedom of expression issues either for formal reasons (i.e., the declaration that the Covenant is non-self-executing) and for jurisprudential reasons (i.e., its increasing reluctance to cite foreign precedents). In a recent decision, it severely limited the effect that international instruments can have in domestic law.[31] Given that double barrier, it seems highly unlikely that Covenant standards will be incorporated into the interpretation of American protections of freedom of expression. The accumulated doctrine of the First Amendment will be applied instead.

[29] The text of the limitations and the Senate Committee report can be found at 31 ILM 645 (1992).

[30] U.S. Constitution, article VI, paragraph 2.

[31] Medellin v Texas, 552 US 491 (2008).

In addition, the first reservation provides:

> That article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.

This effectively eliminates article 20 from the United States' obligations under the Covenant. Almost everything required by article 20 is prohibited by the Constitution. This reservation was insisted upon by an unusual coalition of liberal and conservative forces. Liberal elements of the press were appalled by the content-based limitation article 20 potentially placed on their ability to discuss topics of their choice. They were concerned that it undermined the basic principles of the First Amendment. Protection of First Amendment rights is a matter of high principle for American journalists. At the same time, conservatives, always suspicious of international obligations, wished to be cautious about any binding international agreement that might impair constitutional freedoms. If the issue were to be raised again, that same unusual coalition would probably reemerge. It is unlikely that this reservation will be withdrawn or modified in the foreseeable future.

Some have argued that the Covenant has become customary international law. There may be some basis for this argument with respect to provisions as to which there has been no dissent in the international community, but it is unsustainable in the case of those provisions which have sparked the kind of reservation given above. In light of the American reservation, article 20 does not have the broad acceptance necessary to create customary international law.

The lone proviso additionally makes this point. It provides:

> Nothing in this Covenant requires or authorizes legislation or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.

The proviso simply reemphasizes the point that, in case of a conflict between the Covenant and the United States Constitution, the Constitution will prevail in American law.

Conclusion

The standards articulated in the Covenant will not become a common global standard for the protection of freedom of expression. At least from the American perspective the protections afforded by article 19 are not sufficient, and the requirements of article 20 are objectionable. The Covenant provides minimum standards, but American law provides a broader and more robust protection for the speaker. That protection comes at a cost. The American standard presumes a society in which a more robust form of debate takes place.

It is important to reemphasize that in almost all cases, both the Covenant and the First Amendment would reach the same result. But in those few cases in which they would differ, the First Amendment would provide a broader protection of speech and press.

King Gustav would probably not have approved of the libertarian approach of the United States toward these issues. His was an Old World view, trying to reestablish an *ancien regieme*. The United States a more rough-and tumble New World place that does not accept that approach.