CHALLENGING THE LIBERAL SETTLEMENT

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Within two weeks of the Danish cartoon-provoked riots, an Austrian court sentenced the "revisionist" historian David Irving, a person well known in European neo-Nazi circles, to three years imprisonment under a law that prohibits denial of the Holocaust. It is quite inevitable that those two events should be considered together. One forthright response is that the suppression of Danish cartoonists and the suppression of Holocaust-deniers are both wrong, because freedom of expression is a value that defeats all compromise, always. A second possible (but I think unusual – or not usually avowed) response is that free expression is of no significant value to begin with, so that nothing important stands in the way of suppressing any objectionable views or images at all, if they cause offense. A third response is that one or other of these events – mocking Muhammad, denying the Holocaust – may rightly attract coercive response, but for context-specific reasons. That is the response that I want to discuss here: can one hold a background belief in free expression, but also believe that there should be contextually-justified exceptions to it? Such a position is very common, and, because of its evident moderation, politically tempting. But what amounts to a justifiable exception? Are there good reasons for them? Or are sentences that typically begin "I believe in free speech, but..." no more than bloodless equivocations?

The starting-point for discussion of freedom of expression in western countries is what I shall term – anachronistically – "the liberal settlement." In the early modern period, European societies had their fill of religious wars, and eventually came to adopt beliefs and practices that secured peace by decoupling religious and political claims from one another. As Locke (among many others) argued, if states can legitimately impose religion, then churches will be obliged to compete for control of states if they are to survive, justifying their claims on the basis of non-negotiable principles that make reasoned political coexistence impossible. ("Every church is orthodox to itself," he wrote.) So the solution is that no one's religion should be imposed, and hence a basic condition of citizenship is that each must accept the other's freedom to practice. This is of course to compress a long and complex story and to suppress many qualifications and exceptions, as well as to short-circuit the various rival high-level justifications that liberal political philosophers have offered for arriving at the goal of toleration. But some form of the liberal settlement is the taken-for-granted basis for the belief that

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before political contestation takes place – before we decide, that is, who is to win and who is to lose – a scheme of protective rights takes some important liberties of individuals and groups off the table so that they are not placed at risk. And the freedom to express one's beliefs – religious or otherwise – is generally taken to be among the most basic of those liberties. A settlement originating in religious pacification comes to inform a general view about the boundary between state power and personal entitlement.

In discussions of that view, there are several standard objections to the liberal settlement, two of which happen to be precisely relevant to the two recent cases under discussion. The first is that even a liberal political order is not only a scheme of general rights: it also embodies a particular community with a particular history that leads it to hold particular values. That fact may be celebrated, as an indispensable source of solidarity; but on the debit side of the solidarity ledger, it must also be noted that particular community values may exclude minorities in diffuse or indirect ways that are not adequately captured by the idea of rights-violations. The second is that the liberal settlement reflects something peculiar to the early-modern European case, that is, a form of religious culture that – however internally divided it may have been – made possible a more painless separation between private and public realms than other religious cultures can easily tolerate; for other religious cultures make more of the need for public observances. Both of these objections lead to a serious principled case for modifying (some) rights as they have been classically understood.

The first objection relates to the Irving case in Austria. To those who hold "communitarian" views of political society it is important that societies acknowledge their heritage, good and bad, in the course of understanding their identity. In a famous essay, Alasdair MacIntyre argued that each of us must learn our place in our national narrative, for otherwise, "I will not understand what I owe to others or what others owe to me, for what crimes of my nation I am bound to make reparation."[1] On such a view, it is morally indispensable that those societies whose history includes participation in genocide, for example, should take particular note of that past; it is indispensable not only for understanding one's identity, but also to taking steps to avert the recurrence of past atrocity, and to announcing the determination to do so. And on such a view, then, it could be right for Austria (but not for every state, for not all states have equivalently compromised pasts) to criminalize expression that tends to revive genocidal beliefs. The idea of a general right to free expression should then give way to the particularity of national community and its moral demands in relation to its past.

When making up for past injustices competes with responding to present injustice, the communitarian case is not always very compelling. It is, at least, incomplete, for familiar questions arise about priority: don't the living come first? But in the case of issues such as this, where no distributive matters are involved, the communitarian claim it is surely at its strongest: the recognition given to wrongs suffered by one group does not have to be subtracted, somehow, from what may be due

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[1] Alasdair MacIntyre, "Is Patriotism a Virtue?" in Ronald Beiner, ed., *Theorizing Citizenship* (Albany: State University of New York Press, 1995) at 224.

to some third party. There are objections, certainly, but they seem to be of a different and less abstract order. It is one thing to memorialize, something else to criminalize, and legal suppression may simply not be a good idea. There is an important view that legal prohibition is a society's most solemn denunciation of some evil; but nothing in that "expressive" view of law, even, shows either that every evil should be suppressed or that evils cannot be denounced in alternative ways, sometimes more productively. Whether or not criminal law is a productive or counter-productive way of striking at the evil in question is a matter for careful and balanced consequentialist reasoning; and the balance needs to tip solidly in favour of suppression before the use of law can be justified. So while in principle there may be good reasons to modify rights in light of historically-based communitarian imperatives, they may not be available in the Irving case. That is not because freedom of expression is a sacred cow: it is because the importance of coming to terms with history, though weighty, does not motivate the reasonable use of criminal law.

The second objection draws upon the fact that while early-modern Catholics and Protestants were willing to fight each other to the (cruel) death, they were, nevertheless, clearly within the same theological family. The settlement that accommodated them successfully may meet with less success outside the family, if it reflects some features specific to Christian doctrine. And, one might argue, the settlement lends itself well to religious forms that can accept public neutrality if that is the price of private freedom. Now one can hardly say that public neutrality is a necessary outcome of Christian belief, for, after all, no liberal settlement would have been called for in the first place if the various elements of Christian Europe had not persistently sought public supremacy, by violent means. (If you think Christian communities make no demanding public claims, consider Calvin's totalitarian rule over Geneva: or the New England Puritan communities of Hawthorne's Scarlet Letter.) But one can certainly say that Christian doctrine contains some resources that make public neutrality possible – "Render unto Caesar..." So, can a political settlement based on those resources be fairly imposed on other religious cultures?

It is important to raise this question because the liberal settlement, as described above, is defective; or else my account of it was defective; for while some rights, or all rights sometimes, may keep things off the political agenda, the political agenda may sometimes comprise nothing other than the contested interpretation of rights. Having a right may sometimes amount not to having absolute protection for an interest, but only to an entitlement to have one's interest treated with due seriousness. That is because lists of rights are compelling only to the extent that they express intuitively compelling interests; and with few exceptions – such as interests in not being subjected to purely random brutality of one kind or another – interests carry intuitively compelling power only if abstractly stated; their abstractness enables them to cover ranges within which everyone will intuit compelling instances, and so can generalize from these to others within the range. And in the process of application, abstractly stated rights will need to be connected to concrete circumstances in ways that will obviously invite disagreement. Law textbooks teem with examples of the porous meaning even of specific rights claims. One has no right to bring a wheeled vehicle into a park: does that mean that a

municipality cannot bring a tank – definable, rather, as a tracked vehicle – into the park as a war memorial? One has no right to sleep in a railway station: does that mean one has no right to lie down in a railway station, awake but with one's eyes closed, for long periods? And if the meaning of rights pertaining to relatively concrete terms such as "wheels" or "sleep" require interpretation, consider what burden of interpretation must rest on a right to, say, equality under the law.

The value of rights forces us back constantly to explore and assess the moral point that makes them compelling. That process is an especially important one in societies undergoing demographic change, as a result of which taken-for-granted interpretations of the point of rights may tend to be brought under stress, as different cultural backgrounds bring different sets of background expectations into play. Moreover, since the enforcement of rights is exactly the point at which state power meets personal behaviour, it is especially likely that challenges to prevailing political conceptions will take the form of challenges to the established meaning of rights. In fact, lacking majority power by definition, minorities may be able to mount challenges only by attacking that meaning – in the courts or in the streets. So it is not only unjustifiable, it is unfaithful to the very point of rights to remove them from the table of public discussion in a society in which interpretative viewpoints are shifting in ways that continually bring their practical meaning into question. And if a conflict-resolving settlement has been reached on the basis of interpretative viewpoints that latecomers cannot share, it cannot rightfully claim the allegiance of latecomers without condemning them to (temporally-based) second-class citizenship.

That consideration would seem to shift the discussion from liberalism, understood as a regime of unassailable background rights, to democracy, understood as (in part) a regime in which rights become the subject of public agreement. But here it has to be said that some versions of democracy are no less unrealistic than a liberalism of literally unassailable rights would be – if anyone actually supports a liberalism of that kind. In an idealized version of democratic deliberation, participants would recognize when a basic right was at stake and shape their contributions in light of reasonable requirements of that right.[2] That requirement, however, while morally very sound, may overlook what we may term the asymmetrical character of (some) political disagreement; for participants may not agree that the issue is one of rights; or that, if it is, that the right in question is basic; or that only one right (basic or otherwise) is in play. They may, in short, frame the question before them in mutually incompatible ways – and then it is not clear that democracy can give us as legitimate an answer as it could when the participants all framed the question in the same way, so that the outcome could then be viewed as their considered answer to a common question. The democratic solution would just be a matter of counting heads. And if that is the way that public decisions are justified, why bother talking about rights in the first place? Just count heads and get on with it.

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[2] See Amy Gutmann & Dennis Thompson, *Democracy and Disagreement* (Cambridge: Harvard University Press, 1996).

I think there is a possible answer to the problem of asymmetry – to the fact that participants may frame the issue before them in different ways. The answer concerns the issue of stakes. It is in principle possible – though often politically difficult, of course – to establish what kind of stake each party has in the solution to an issue, and to measure their stakes. So, for example, it would be wrong, on this view, for an electorate that happened to contain a male majority to rule on the question of abortion, in which women have an obviously greater stake; it would be wrong for a majority indifferent to matters of headgear to compel Sikhs to remove their turbans, since they have a religious stake in the importance of wearing them; it would be wrong for a more-or-less-religiously indifferent majority to impose a common pause day so inflexibly that it violated the sabbatarian requirements of minorities. What one side has at stake has to be an issue if equality is not to be an entirely mechanical and unjustifiable value. The principle has to be modified, however, by another consideration. If majorities are to accept limits to the exercise of their power, they need to be given reasons; that some measure favoured by them would impede the important goals of minorities would amount to a reason against it; but the reason would weaken greatly if the minorities were able to pursue their essential goals in ways less offensive to majority objection. Whether or not they could substitute one sub-goal for another, then, while remaining committed to their main goal, would be an important consideration. So majorities could reasonably demand satisfaction on this point. An example: the UK government recently undertook to prohibit foxhunting, a sport that a majority of the UK electorate regards as cruel. Employing arguments (and tactics) that are more commonly associated with deprived alien minorities, the foxhunting crowd claimed that their traditional rural practices were being crushed underfoot by the cultural insensitivity of urban majorities, and that the traditional practice of foxhunting sustained important ends, such as local inter-class community, as well as contributing to the public good of pest control. Those are valid public arguments, but they are defeated if the same ends could be realized by means that the majority found acceptable: by hunts employing dragging (i.e. the use of artificial scent) in the first case, and by other means of pest control in the second. Minorities, then, can't hold majorities hostage by presenting non-negotiable demands, but must face the democratic possibility that their demands are open to amendment in light of democratically presentable values. Minorities may legitimately claim stakes, but majorities may legitimately demand reasons.

Coming closer to the case at hand, the much-discussed "headscarf affair" in France makes the point about stakes very well. No version of Christianity requires its adherents to wear things to disclose their faith to others. It is not, then, much of a burden on Catholics to require a secular educational milieu that includes a prohibition on religious symbols. It only inhibits optional behaviour. It is, obviously, more of a burden on young Muslim women who because of their own beliefs (or because of legitimate deference to their parents' beliefs) wish to cover their hair. They can, then, make a special claim based on this clear inequality. In reply, the state may rely on the French version of the liberal settlement: secular schooling marks the disengagement of public institutions that we accomplished in the 19th century. Or, the state may rely on some combination of this with a particularist historical claim: this is the French way, it's how we do things. But of course, either reply is wide open to the objection that the "we" is

exclusive unless settlements can be renegotiated in light of demographic changes that cause them to become unfair. That argument was employed by British Muslim groups in the other notable case of the recent past, the protests triggered by Salman Rushdie's novel, The Satanic Verses, protests that were in many ways a clear precursor to the Danish cartoon events. Uninhibited expression may be a British value, they objected, but the Britain that adopted it as a value was the Britain that existed before we came; and we need a say in determining what should be the values of the Britain that exists now that we are here.

I think, however, that this argument, while in principle good, is one that runs out too quickly to deal effectively with issues of expression; for the "stakes" argument has its limits. What lends it force is the sense that we have more of an interest in the conduct of our own lives than anyone else does – a principle given its classical statement by J.S. Mill in On Liberty. Because of this, I can rightly complain when some requirement impedes my way of conducting my life even if it doesn't impede everyone's – it can become the basis of a special right. But exactly the same argument forbids the extension of our claims into the conduct of others' lives, for they can use the very same principle (we have more of an interest in our lives than you do) to reject them. It is one thing to demand exemptions enabling one's own conduct, something else to demand restrictions disabling others'.

Now expression, it is true, may not seem to fit quite easily into this distinction, for it is in one important way clearly different from simple cases of personal conduct. It has public consequences in that it creates a general climate in which everyone must live; and those who find the climate objectionable may claim, again rightly, that they are subjected to a burden that some others (those predisposed to indifference, for example) do not share. That claim gains political weight when accompanied by evidence of other burdens – majority prejudice, for example, or higher-than-average rates of unemployment: the claim to be burdened by objectionable expression will then form part of a larger complaint about exclusion and discrimination. And that larger complaint may very well be good. But the element that concerns expression weakens it, if we are at all concerned about good arguments. For a claim to control the public environment is not just a challenge to the liberal settlement: it is a challenge to any kind of political settlement at all. In a political society – as opposed to a theocracy – the public environment emerges (and changes) over time as the joint product of many contributions.[3] It is not a monopoly product, and its essentially unplanned character poses risks. Anyone can contribute to it, but one's contribution cannot consist of a claim to prevent others from contributing. That is exactly because the public environment affects everyone – as we have seen, the very point from which the best case for limiting expression starts. Just because it affects everyone, to exclude contributions to it is to imply a claim to privilege.

This discussion, then, acknowledges a case for contextualism – for modifying

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[3] See T.M. Scanlon, "The Difficulty of Tolerance" in David Heyd, ed., *Toleration: An Elusive Virtue* (Princeton: Princeton University Press, 1996) at 226-39.

or renegotiating rights in light of historical particularity, or in light of the unfair distribution of burdens that equal rights sometimes impose; but it also argues that the case fails in the context of rights of expression. That is, in part, because expression is part of the very process of renegotiation that – as burdened minorities rightly claim – is essential if schemes of rights are to retain their legitimacy: burdened minorities could not make their case for renegotiation without it. But what of another important issue, that of self-censorship? After all, much of the objection to the Danish cartoons was cast in terms of the objectionable use of rights, not to their very existence – and here we come back to another version of "I believe in free speech, but..." This version may rely on the perfectly sound distinction between having a right and being justified in exercising it: a right entitles you to do something, but doesn't justify your doing it. People quite often use rights, after all, in order to do things that are wrong under their protection. So might we say: cartoonists have a right to offend, but shouldn't? Of course we can say that, but saying it misses at least two important points. The first is that an essential part of having a right is having the discretion whether to use it or not, and unless we are willing to allow right-holders to exercise the discretion we ought to consider it wrong to extend rights to them in the first place. The second is that while we all, quite naturally, want individual right-holders to use their rights wisely and not to use them in order to do wrong, what opponents of offensiveness are effectively proposing is an informal control regime that, while stopping short of legal prohibition, inhibits the discretion of rights-holders by means of social pressure. That comes very close to hypocrisy. It would be more honest for those who propose this to say that freedom of expression is not really a basic value at all, but just one consideration that takes its chances along with many others, rather than paying it lip service while denying its consequences.