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Is there a right not to be offended in one's religious beliefs?

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Introduction

This chapter explores the place of religion in Europe, which is the general theme of this volume, through the lens of European human rights law and the European Convention on Human Rights (ECHR) in particular. I will focus on the normative claim that freedom of religion requires respect for the religious convictions of believers when expressing oneself in public; or, put differently, the claim that there is a right not to be insulted in one's religious beliefs by the public expression of the views of others. This claim has been endorsed by the European Court of Human Rights in its judicial reasoning and is popular with many courts in Europe when reviewing criminal legislation that prohibits blasphemy, religious hate speech or the disparaging of (known) religious doctrines. The claim, if true, justifies the position that a liberal state may sanction or prevent the public expression of views for the reason that they offend, or are likely to cause offense to, religious convictions.

The claim has recently become the subject of much controversy and public debate, following the publication of the Danish cartoons and the subsequent riots around the world that resulted in the death of dozens of people. Various legal proceedings were initiated at national level complaining that the publication violated the right to freedom of religion of Muslims. Religious organizations called for stricter regulation of speech that offends religious doctrine. Meanwhile many liberal politicians, intellectuals and lawyers defended fiercely the freedom to publish cartoons and condemned

I am grateful to the participants of the EUI Conference on religion in the European Public sphere in May 2008 and to my respondent, Lorenzo Zucca, for very helpful comments and criticisms. I would also like to thank Stuart Lakin, Virginia Mantouvalou and Camil Ungureanu for their comments on earlier drafts of this chapter.

regulation as a violation of free speech. The debate is still raging and it is typically cast in terms of what the appropriate balance is between freedom of expression on one hand and freedom of religion on the other.

My aim in this chapter is to challenge the claim that there is a right not to be offended in one's religious beliefs in so far as such a right serves as a prima facie ground for restricting freedom of expression. If this challenge is successful, then the need to balance freedom of expression and freedom of religion in cases of religiously offensive expression evaporates. The argumentative strategy employed here is to show that there is a reason for the state not to protect religious convictions from offense, instead of showing that there are reasons (e.g. about the value of free speech) that, on balance, outweigh the reason to protect religious convictions. The choice of strategy is not accidental, as it is motivated (and is entailed) by some general theses about the nature of rights in law and political morality. Nor is the choice of strategy a matter of pure terminology: the claim that there is no right not to be offended in one's religious beliefs is not equivalent normatively to the claim that such a putative right loses in its competition with the right to freedom of expression.

The chapter is structured as follows. I begin in section 1 with some preliminaries that will help sharpen the normative claim under consideration. Section 2 provides a critical account of where the European Court's case law stands on the issue. My aim is to challenge the European Court's assumption that there is a right not to be insulted in one's religious beliefs which conflicts with, and must be balanced against, the right to free speech. I argue that balancing is warranted only if such a right exists and that the European Court begs an important question by resorting so quickly to the vague test of balancing free speech with religious freedom. In section 3 I discuss an argument which figures in the European Court's case law and which is based on the distinction between speech that contributes to public debate and speech that does not. I argue that this distinction fits nicely with a process-based understanding of democracy, which would afford political speech greater protection than religious or artistic expression. The Court's argument, however, does not justify the protection of religious beliefs *qua religious beliefs*, nor does it explain why there is a legal right not to be offended in one's beliefs in general, let alone in one's *religious* beliefs. In section 4 I advance an understanding of democracy and liberal equality that shows why there is no right to be insulted in one's religious beliefs in public space. In section 5 I conclude that in the absence of such right, the European Court's balancing methodology obscures an important matter of principle.

1 Religious offense and reasons for action

The claim that the state has a reason to sanction or prevent expression that offends religious convictions must be spelt out. This is because the claim is elliptical: it does not fully specify the fact(s) that grounds the reason. This is perfectly normal. Reasons for or against a particular action, including state action, are often stated in an elliptical fashion. Usually we do not cite all the facts that figure in the explanation or the justification of an action, but we focus on some of them depending on the context and the audience.[1] When we ask, for example, why the police shot a suspect dead, we may cite some but not necessarily all of the many facts that explain their action: the suspect was under surveillance; he ignored the police order to stop; he was about to board the train; he appeared to be armed with explosives; it was the only way to stop him boarding the train; and so on and so forth. The same applies to justificatory reasons. When we ask whether the police were justified in shooting a suspect dead, we may cite some but not necessarily all of the many facts that justify their action: the suspect posed an imminent threat to the public; there was at the time no other, non-lethal, means of protecting the public; there was no prior point in time at which the police could have intervened; and so on and so forth.

Of each of these many facts, seen in isolation, we may say that they are reasons that justify (or normatively support) the action. For example, the fact that the suspect was armed with explosives and was about to board a crowded train was a reason for the police to shoot him. But it is a further question whether the action in question is *all things considered* justified; this is the case if, and only if, other relevant facts obtain: for example, that the police were properly trained to respond to such situations or that the surveillance operation had been properly planned and executed. Moreover, there are facts that, seen in isolation, necessarily fail to justify a particular action: that the suspect was a member of an unpopular ethnic minority was no reason for the police to shoot him. When such inappropriate considerations motivate the acting agent, they might even taint the justifiability of the action, even though they do not directly constitute a reason against the action. So we might say that, for any possible action, there are some facts that ground reasons in favor of it, facts that ground reasons against it and facts that provide no ground either way.

[1] See J. Raz, *Practical Reasons and Norms* (Oxford University Press, 1999), pp. 22ff. See also more recently his "Reasons: Explanatory and Normative," available at: www.papers.ssrn.com/sol3/papers.cfm?abstract_id=999869# (last accessed August 15, 2011).

It is of course difficult, if not impossible, to provide *ex ante* a full list of the facts that must figure in a complete account of the justifiability of actions. This is why we study reasons in isolation: we say that *other things being equal* this fact is a reason to perform that action and, other things being equal, this other fact is a reason against performing the same action. When, in real life, many of these facts obtain together, we seek to balance their weight either in order to act, or in order to assess *ex post facto* whether the act was justified. Only facts that can count as reasons for a particular action may be weighed in assessing that action's justifiability. It would be wrong, for example, to say that, in planning a shoot-to-kill operation, the fact that a suspect belongs to the same ethnic or religious group as known terrorists must be balanced against the fact that he does not appear to be carrying any explosives. Belonging to the same ethnic or religious group as known terrorists is not a fact that grounds a prima facie reason to shoot someone.

The preceding remarks help to sharpen the claim that is under scrutiny in this chapter. The claim is that the fact that some expression will cause offense to religious believers is, other things being equal, a reason for the state to sanction or prevent this expression. The claim is not just that offense serves as a source of reasons for action; the claim is more specific. It contains two crucial elements. First, the claim is that the fact that someone will be offended serves a source of reasons for *state* action, not (or not only) *individual* action. This is an important moral distinction, as not all reasons are agent-neutral.[2] Some reasons for action may apply to collective action or to states but not to individuals. And second, that *religious* offense grounds special kinds of reasons for state action, that are not co-extensive with reasons grounded by non-religious instances of offense (such as offending someone's football team).[3] It is the claim thus understood that, I will argue, fails to lend normative support to the sanctioning of expression that offends religious convictions.

I should note that part of the claim under scrutiny is that there is a *public* dimension to the notion offense, in the sense that religious offense

[2] On the distinction between agent-neutral and agent-relative reasons, see T. Nagel, *The View From Nowhere* (Oxford University Press, 1989).

[3] The claim that religious offense constitutes a special kind of offense can be easily attributed to courts that, like the European Court of Human Rights, read into the right to freedom of religion, the right not to be offended in one's religious beliefs by the public expression of the views of others. The special nature of religious offense is manifested in the fact that the Court takes prevention of religious offense to be an individual right, not simply a legitimate aim. It is also manifested in the fact that not all beliefs are taken by the Court to be worthy of protection against offense.

occurs mainly as a result of acts that take place in public or as a result of being exposed to information that the public has a legal right to receive. It cannot be said that someone is offended in his religious beliefs because he knows that his lesbian neighbors have sex in their bedroom. It follows that the right not to be offended in one's religious beliefs, if it exists, necessarily affects the way public space is organized and shaped as well as the way public goods, such as culture, are produced and distributed.

By showing that the claim under consideration fails, one has not thereby established that the sanctioning of expressions that offend religious convictions is never justified. One has merely neutralized one source of reasons in favor of restriction. There may be other facts that, other things being equal, ground reasons for the state to sanction expression that offends religious beliefs. For example, the fact that offending religious beliefs is very likely to lead to violence and death grounds a reason in favor of state sanctioning. The same applies to the fact that offending someone's religious beliefs is very likely to cause severe psychological distress or damage to that person.[4] In both these examples, the operative reason for the state sanctioning is the imminence of violence and of psychological harm, not the likelihood of religious offense. In other words, in these two examples the fact that someone was offended and the fact that he was offended in his religious beliefs are *incidental* to, and not *constitutive* of, the normative explanation of the justifiability of state action.

2 The right not to be offended in the case law of the European Court of Human Rights

The Court's position on speech that offends religious feelings originated in a series of cases decided in the late 1980s and the early 1990s. In the leading judgment of *Otto-Preminger-Institut* v. *Austria*,[5] the European Court upheld the seizure and forfeiture by the Austrian authorities of Werner Schroeter's film *Das Liebeskonzil* (1981) prior to screening. The film was based on a play by Oskar Panizza, written in 1894, which portrayed God, Christ and the Virgin Mary in an unfavorable light,[6] agreeing with the Devil to punish mankind for its immorality by infecting it with

[4] The risk of emotional harm is of course a necessary but not sufficient condition. Other conditions may include knowledge of the risk, whether the offense was direct and personalized, etc.

[5] Eur. Ct. H. R., *Otto-Preminger-Institut* v. *Austria*, 20 September 1994.

[6] According to the description of the Austrian courts, the film presented God as a "senile, impotent idiot," Christ as a "cretin" and Mary ("slutty Mary") as "a wanton lady."

syphilis. The treatment received by the original play was no better than that received by the film: Oskar Panizza was charged with ninety-three counts of blasphemy and was found guilty by the Munich Assize Court in 1895, serving a twelve-month sentence in prison. Jes Petersen, who edited a new edition of *Das Liebeskonzil* in 1962, also got in trouble with the German authorities, being charged with publishing pornographic writings. In 1985 Otto-Preminger-Institut, a small private cinema association in Innsbruck, announced a series of six showings. The cinema was known for its preference for experimental and progressive cinema and the screening was going to be open to the public upon the payment of a fee. Soon after the announcement, the Public Prosecutor, at the request of the local diocese of the Roman Catholic Church, made an application for the seizure of the film and charged the cinema's manager with the criminal offense of "disparaging religious doctrines" under section 188 of the Austrian Penal Code.[7] The criminal prosecution was subsequently discontinued, but the Regional Court upheld the seizure order and ordered the forfeiture of the film. Appeals lodged with higher courts in Austria were deemed inadmissible and the case reached the European Court of Human Rights in 1993.

In its reasoning, the European Court made a series of important remarks in relation to expression that offends religious convictions. It noted that the state bears a responsibility to ensure the peaceful enjoyment of freedom of religion and that extreme ways of denying or opposing religious beliefs, like provocative portrayals of objects of religious veneration, may hinder the exercise of freedom of religion.[8] It noted further that freedom of expression carries with it duties and responsibilities, which may legitimately include "an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights."[9] Applying these principles to the case, the Court set up the legal question as one of conflict of rights: on one hand the right of the film institute to impart to the public controversial views and on the other hand the right

[7] Section 188 of the Penal Code reads as follows: "Whoever, in circumstances where his behaviour is likely to arouse justified indignation, disparages or insults a person who, or an object which, is an object of veneration of a church or religious community established within the country, or a dogma, a lawful custom or a lawful institution of such a church or religious community, shall be liable to a prison sentence of up to six months or a fine of up to 360 daily rates."

[8] *Otto-Preminger-Institut*, para. 47. Similar reasoning figures in the Court's earlier judgment in Eur. Ct. H. R., *Kokkinakis* v. *Greece*, 25 May 1993, para. 48.

[9] *Ibid*., para. 49.

of other persons to proper respect for their freedom of religion. The Court found that the aim of protecting the religious feelings of believers from offensive speech is not only a legitimate one for restricting speech (under the limitation clause in Article 10, para. 2 ECHR) but that it is also part of the right to religious freedom (under Article 9, para. 1 ECHR). It said:

> The issue before the Court involves weighing up the conflicting interests of the exercise of two fundamental freedoms guaranteed under the Convention, namely the right of the applicant association to impart to the public controversial views and, by implication, the right of interested persons to take cognisance of such views, on the one hand, and the right of other persons to proper respect for their freedom of thought, conscience and religion, on the other hand.[10]

When it came to balance the two rights, the Court deferred to the judgment of the Austrian authorities, which were "better placed" to decide what is offensive to the Roman Catholics who form the majority of the Tyroleans and what is required in order to protect their rights against attacks on their religious convictions. It found no violation of the association's right to freedom of expression.

In the later case of *Wingrove* v. *United Kingdom*, the applicant complained that the refusal by the British Board of Film Classification (BBFC) to grant a certificate for the short film *Visions of Ecstasy* (1989) amounted to a violation of freedom of expression. The film, directed by Nigel Wingrove, portrays St. Teresa of Avila having ecstatic visions of Jesus Christ and being engaged in acts of sexual nature astride the body of Jesus on the cross. The Court reasoned that the English law of blasphemy, which was the legal basis for the restriction, pursued a legitimate aim, which was to protect the right of citizens not to be offended in their religious beliefs. The Court cited, with approval, the decision of the British Board of Film Classification according to which the aim of the interference was to protect against the treatment of a religious subject in such a manner "as to be calculated (that is bound, not intended) to outrage those who have an understanding of, sympathy towards and support for the Christian story and ethic, because of the contemptuous, reviling, insulting, scurrilous or ludicrous tone, style and spirit in which the subject is presented".[11] The Court noted that this aim is also "fully consonant with the aim of the protections afforded by article 9 (art. 9) to religious freedom."

[10] *Ibid*., para. 55.

[11] Eur. Ct. H. R., *Wingrove* v. *United Kingdom*, 25 November 1996, para. 48.

When the Court moved to examine whether the interference with the director's right to freedom of expression was necessary, it repeated the *Otto-Preminger-Institut* dictum that there is a duty to avoid so far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profanatory. The Court granted again a wide margin of appreciation to the respondent state, as being in a better place to decide what counts as offensive to religious convictions. It added that the high degree of profanation that must be attained for an expression to constitute blasphemy under English law was an important safeguard against arbitrariness and ruled that there was no violation of the applicant's right to freedom of expression.

What are we to make of the European Court's reasoning in *Otto-Preminger-Institut* and *Wingrove*? The claim that there is a right not to be insulted in one's religious beliefs, which conflicts with freedom of speech, fits nicely with the European conception of rights. European courts employ what we may call the "balancing conception of rights": this is the idea, based on the wording of the European bills of rights, that fundamental rights, with a few exceptions, are not absolute; they are to be balanced against legitimate aims and/or other rights with which they may come into conflict. Courts view their task as one of performing a balancing test of assigning weight to the competing rights and legitimate aims.[12] In relation to free speech in particular, the approach of European courts is contrasted to the US doctrine of freedom of expression, which rejects content-based restrictions and balancing as detrimental to free speech.[13] The European Court of Human Rights is a balancer par excellence. Contrary to the US Supreme Court's approach of requiring the existence of very specific compelling governmental interests as a justified basis for limiting rights, the European Court is very generous in what it takes to be a legitimate aim and a protected interest, and proceeds fairly quickly to examine whether the limitation of the right is proportionate to the legitimate aim being pursued.[14] In examining whether the test of proportionality is met, it often grants a margin of appreciation to the respondent state, particularly when there is no consensus amongst contracting states.[15]

[12] See R. Alexy, *A Theory of Constitutional Rights* (Oxford University Press, 2002), Chapter 3.

[13] R. Post, "Religion and Freedom of Speech: Portraits of Muhammad," *Constellations* 14(1) (2007), 72–90.

[14] On the relationship between the test of proportionality and that of strict scrutiny see R. Fallon, "Strict Judicial Scrutiny," *UCLA Law Review* 54 (2007), 1267.

[15] I have criticized the Court's deferential stance in my book *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, 2009), Chapters 5 and 6.

Now one thing we might say about *Otto-Preminger-Institut* and *Wingrove*[16] is that the European Court got the balance wrong, say because the limitation was actually disproportionate to the legitimate aim. Perhaps freedom of artistic expression should have prevailed in *Otto-Preminger-Institut*, when balanced against freedom of religion: the film was going to be shown to a paying audience in an art cinema that catered for a relatively small public with a taste for experimental films. It was seized and forfeited prior to screening and there was little evidence that it was going to cause indignation to the general public. Besides, it was very unlikely that a Tyrolean Roman Catholic would go and see the film without knowing what it was about. It appears that there were many other alternatives, less restrictive of the right, that the Austrian authorities could have employed in order to protect the feelings of Roman Catholics, such as requiring the cinema to put up a sign saying that Roman Catholics may find the film offensive. It is a plausible criticism to make that the European Court deferred too quickly to the judgment of national authorities, whereas it should have itself applied the principle of proportionality to the facts of this case.

Be that as it may, I would like to take a step back and make a different point, which is to question whether there is a right (or a legitimate aim) not to be insulted in one's religious beliefs by the public expression of the views of others *in the first place*. For if there is no such right, then there is no conflict with other rights, like free speech, and no need for any balancing exercise whatsoever. I want to suggest, not that there is something wrong with balancing per se, but that there is something wrong with what was balanced. This is not a trivial point. The balancing methodology necessarily presupposes the view that the things we balance are of some independent value. As it has been mentioned already, the things we balance must be *actual* moral reasons for the action in question, not some impermissible considerations. We should not balance freedom of speech against something that has no independent moral value. We do not, for instance, say that there is a free speech right to incite imminent violence that is to be balanced against the right to physical integrity of others. Rather, we say that there is a prima facie reason not to incite imminent violence. The European Court's position therefore must assume that there is a reason *for the state* to protect religious people from offense that

[16] As well as other similar judgments of the 1980s and 1990s like *Müller and others* v. *Switzerland* (1991) 13 EHRR 212 and *Handyside* v. *United Kingdom* (1979–80) 1 EHRR 737.

is of the same status as the value inherent in free speech. Put differently: if the Court's reasoning is sound, we must regret the loss of some value each time we weigh up free speech against the right not to be offended (or any other right), no matter which right prevails at the end of the balancing process. For example, when free speech prevails over the right not to be offended (say because the offense was not gratuitous or profanatory), we should regret the fact that someone was offended, and perhaps try to find ways to prevent this from happening again. This is inherent in the balancing of reasons. When I fail to keep my promise to meet you for lunch because I heard that a close relative just had an accident and I rushed to the hospital, I should regret that I canceled our lunch, apologize and make amends.

What would be the argument for the assumption that there is some value in protecting religious people from offense? It appears that European courts make this assumption unreflectively without considering whether it is justified. They move from the premise that there is a right to freedom of religion, to the conclusion that it is a legitimate aim for the state to regulate speech in order to protect the exercise of people's religious freedom. And they read a duty that is correlative to the right not to be offended into freedom of expression: in publicly expressing oneself, one must avoid, so far as it is possible, offending religious convictions. Once respect for religious feelings is recognized as a legitimate aim or a right, courts bring in the scales and the balancing begins.

Of course the political history of Europe (which of course is very different to the American one) is part of the explanation why this assumption is made unreflectively. Historically, refraining from offending the religious doctrines of others helped move from religious wars to religious tolerance and to foster a national identity as a means of promoting peace and stability. But explaining why this assumption (i.e. that there is value in protecting religious sensibilities) is made in Europe is not the same as justifying it. Pointing to the existence and long history of blasphemy laws in Europe – which have most often been used to protect the majority religion – is certainly not an argument. History is full of moral mistakes – not to mention atrocities – and Europe probably has the largest share of those mistakes. Nor is it a good argument to say that there is a right not to be insulted in one's religious beliefs in Europe because most Europeans have widely shared expectations that religiously offensive speech be restricted. For we do not normally accept that the exercise of fundamental rights is conditioned by what others – let alone the majority – takes or expects these rights to be. To have a right is to insist on being treated in a certain

way even if the majority would be better off if you were not treated in that way.[17] Nor, finally, can it be argued of course that we may limit speech on the grounds that there is only one true religion or that the majority has a right to impose its religion on everybody. Theocratic conceptions of free speech have no place in discussions, which assume, as this one does, the moral primacy of rights.

But you may think: is it not obvious that it is morally wrong deliberately to offend people's beliefs? Is it not obvious that there is a reason not to express views that one knows will upset others, by offending or insulting the beliefs they hold dear? Isn't this why it is called "offense," because it is an assault on people's personhood? What more needs to be said?

Recall that the claim we are considering is not whether it is wrong for individuals to offend someone's beliefs. The claim is whether it is wrong for us collectively, through state institutions and state action, to allow speech that offends religious convictions. And note that the intuitive appeal of the wrongness of individual action does not necessarily extend to state action. Just to give an example: it is clearly wrong for me to care the same about my children as I do about all children but it is not clearly wrong for the state to care the same about my children as it does about all children.

An argument is therefore needed to justify why peaceful, liberal democratic states, committed to constitutional protection of fundamental rights, should value the protection of religious feelings in regulating expression. This argument must be of the same kind as the argument in support of free speech, in the following sense: the value of protecting religious sensibilities must flow from, or at least be compatible with, the same cluster of values that justify the constitutional foundations of a liberal democracy. The argument must show that free and equal citizens, who hold very different ethical ideas about what life is good for them but who govern themselves collectively through democratic decision-making (as all ECHR members do), all have reason to accept special protection of religious feelings. Without such an argument, the balancing methodology, which assumes that there is such a value, must be seen as suspect and arbitrary.

3 Public debate and gratuitous offenses

Can such an argument be made? In *Otto-Preminger-Institut*, the European Court came close to offering one. It argued that one ought to "avoid, as

[17] R. Dworkin, "Rights as Trumps" in Jeremy Waldron (ed.), *Theories of Rights* (Oxford University Press, 1984).

far as possible, expressions that are gratuitously offensive to others and thus an infringement of their rights," as such expressions "*do not contribute to any form of public debate capable of furthering progress in human affairs*."[18] The distinction between gratuitous insults on one hand and provocative speech that contributes to public debates on the other, figures prominently in subsequent case law. Contrast the following two more recent cases on speech that offends religious beliefs: *I.A.* v. *Turkey*[19] and *Giniewski* v. *France*.[20]

I.A. v. *Turkey* concerned the fine imposed on a publishing company in Turkey for publishing a novel that contained blasphemous remarks about the Prophet Muhammad.[21] The Public Prosecutor charged the director of the publishing company with the offense of blasphemy against "God, the Religion, the Prophet and the Holy Book", under Article 175 of the Criminal Code. He relied on an expert opinion that had been prepared, at his request, by the Dean of the Theology Faculty of Marmara University. The Court of First Instance, having received a second expert opinion by a committee of professors, convicted the applicant to two years' imprisonment and a fine. It commuted the prison sentence to a fine, so that the applicant was ultimately ordered to pay a total fine of 3,291,000 Turkish liras (equivalent at the time to 16 United States dollars).

When the case reached the European Court Human Rights, the Court – following the same principles as in *Otto-Preminger-Institut* – upheld the conviction as a proportionate limitation to freedom of expression. It found that the case concerned not only comments that offend or shock, or a "provocative" opinion (which are generally protected) but also "an abusive attack on the Prophet of Islam." Given that "believers may legitimately feel themselves to be the object of unwarranted and offensive attacks", the Court held that there was a "pressing social need" to restrict the publication of the book. It found that the 16-dollar fine was a proportionate restriction of the applicant's freedom of expression.

The Court did find a violation of freedom of expression by contrast in the case of *Giniewski* v. *France*. The case concerned the publication of a newspaper article in which the author criticized the 1993 papal encyclical

[18] *Otto-Preminger-Institut*, para. 49 (emphasis added).

[19] *I.A.* v. *Turkey*, Judgment of 13 September 2005, Application no. 42571/98.

[20] *Giniewski* v. *France*, Judgment of 31 January 2006, Application no. 64016/00.

[21] The book contained the following passage: "Some of these words were, moreover, inspired in a surge of exultation, in Aisha's arms … God's messenger broke his fast through sexual intercourse, after dinner and before prayer. Muhammad did not forbid sexual intercourse with a dead person or a live animal."

"The Splendour of Truth" for containing principles of the Catholic religion that, on his view, are tainted with anti-Semitism and contributed to the Holocaust. The author, a respectable figure who had sought in all of his work to promote a rapprochement between Jews and Christians, was found guilty of the offence of publicly defaming a group of persons on the ground of membership of a religion. He was ordered to pay damages to the religious association that brought the action of public defamation and to publish, at his expense, the court ruling in a national newspaper. The European Court found a violation of freedom of expression on the grounds that the author's conviction did not meet a pressing social need.

The Court distinguished *Giniewski* from *Otto-Preminger* and *I.A.* on the grounds that in the former case the publication was neither gratuitously offensive (as in *Otto-Preminger*) nor insulting (as in *I.A.*). It emphasized that:

> the applicant sought primarily to develop an argument about the scope of a specific doctrine and its possible links with the origins of the Holocaust. In so doing he had made a contribution, which by definition was open to discussion, to a wide-ranging and ongoing debate without sparking off any controversy that was gratuitous or detached from the reality of contemporary thought.[22]

The European Court's claim that what makes an expression worthy of state protection is the contribution it makes to a public debate that is capable of furthering progress fits nicely with what we may call a process-based conception of democracy. It is the idea that democracy – which is a doctrine about how political power should be exercised – cannot allow the censoring of any competing view, no matter how implausible, about politics. For the legitimacy of the democratic process depends on allowing all people, upon whom the outcome of this process will be coercively enforced, to express their views about what that outcome should be. This conception of democracy would condemn the censoring of *political* views but it would not furnish a reason to protect provocative expressions about non-political aspects of our lives that are not subject to a collective and rational discussion. The conception is reflected in the European Court's case law, which has shown far greater willingness to protect political speech while upholding severe restrictions on religious and artistic expression. In *Wingrove* the European Court said that:

[22] *Giniewski* v. *France*, para. 50.

> Whereas there is little scope under Article 10 para. 2 of the Convention for restrictions on political speech or on debate of questions of public interest, a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion.[23]

And indeed much offensive expression does not inform, nor intends to inform, nor is perceived as informing any ongoing public debate. By wearing a T-shirt with the stamp "Jesus loves you but only as a friend," one hardly contributes to a rational debate about religion or homosexuality. Provocative and satirical portrayals of religious objects or doctrines need not contain any view about politics and culture and the role of religion in them. In fact, it is not accidental that offenses and insults in general typically do not convey a view that contributes to a rational debate. For often an expression is insulting precisely because it shows deliberate contempt for rational argumentation. When you burn a cross or the national flag, part of what you communicate is the view that the ideas of religion and national pride are not even worthy of rational discussion. You do not just think they are bad ideas, you think that they do not even qualify as ideas, as thoughts that are capable of being entertained, discussed, refuted and so on. They are more like material objects which, unlike ideas and concepts, cannot make demands on humanity's rational faculties. *That* is how low you think them. And it is this kind of contempt for rational argumentation that suffices to offend people: to be told that one's beliefs are not really beliefs is worse than to be told that one's beliefs are false, misguided, confused. It is to be told that one does not have the rational capacity worthy of a human being. Provocative expressions that offend someone's beliefs and that make no contribution to a rational debate can therefore be as much directed against the persons who hold those beliefs as they are against the beliefs themselves.

But still, to come back to our question: is there a right not to have one's beliefs and personality attacked in this manner? The distinction between speech that contributes to public debate and speech that does not (as well as the conception of democracy upon which it rests) may or may not be plausible. The principle upon which the distinction is premised, however, assumes, rather than grounds, a right not to be insulted in public space. Here is how the argument underlying the Court's reasoning goes: the

[23] *Wingrove* v. *United Kingdom*, para. 58. See also Eur Ct. H. R., *Lingens* v. *Austria*, 8 July 1986.

contribution to a public debate that is capable of furthering progress is what makes an expression worthy of state protection. We have reason to tolerate expressions that cause offense only in so far as they make a contribution to a public debate. But since offensive expressions typically do not, then the value of free speech gives no reason against restricting such expressions, while the value of preventing offense gives a reason in favor of restricting them. Note that the latter claim, which supports the restriction, is independent and separate from the first and it is still in need of argumentative support. All we have so far is an argument from speech that does not extend protection to offensive expression. But we have yet to see a positive argument to the effect that one has a right not to be offended in one's religious beliefs.

It is important to note, moreover, that the claim that there is a right not to be insulted in one's beliefs by provocative expressions that do not contribute to a public debate accords no special importance to religion as such. It just so happens that one way in which you can offend people is by insulting their religion. For it is possible to insult non-religious people and it is possible to insult religious people without insulting their religion. The category of gratuitously offensive speech that does not contribute to any public debate includes many expressions that have nothing to do with religion. Consider the expressions "Macs are camp" or "iPhones suck"; or consider the burning of the flag of Manchester United or the spitting on the British National Party logo. Such expressions and speech acts do not contribute to any public debate capable of furthering progress in human affairs. It is also possible that these expressions will cause offense to people who love Macs, iPhones, Manchester United or the BNP.

True, we know from experience that religious believers tend to get more agitated, disturbed and upset when their religion is insulted. But the question of the *degree* of one's reaction to an insult becomes relevant only if there is already a right not to be insulted in one's beliefs in the public space. Put differently: the claim that there something special about religious offense gets traction only if there is something special about offense, namely a right that collective force (the law) be used to sanction or prevent offense of beliefs in the public space. The conception of free speech put forward by the European Court of Human Rights only goes *half way* to justifying the position that a liberal state may sanction or prevent the public expression of views that offend religious convictions. The other half is provided by an assumed right not to be insulted in one's beliefs by the public expression of the views of others, which is still in need of justification.

4 Liberal equality and the value of the freedom to offend

So is there a right not to be insulted gratuitously in one's beliefs in the public space? I will argue, in this section, that we cannot make sense of such a right, at least not if we assume a half-decent theory of what rights are and what role they play in political morality.

Following the liberal tradition we may distinguish between the claim that something *is the right thing to do*, from the claim that others have *a right* that you do it, in the sense that they have a right that collective force be used against you if you don't.[24] Being faithful to your partner, not lying to your mother about skipping meals, not jumping the queue in the bank, stopping and chatting with your boring neighbor, remembering your friend's birthday and so on, are all "the right thing to do." Yet it does not follow that these people have a right that collective force be used to get you to do those things. Although my life will go better if I do those things – I will be a more sensitive human being, a nice guy to have as friend, a good neighbor – this is all my business and responsibility, not anyone else's and certainly not the state's. One should not move too quickly from the claim that it is right to treat people in a certain way to the claim that we collectively have a right to force you to treat them in that way. Cheating on one's partner is wrong; gratuitously cheating is even more wrong. But that does not entail that the state has a right to punish cheating. The state should not sanction behavior on the grounds that doing so will make me a better person or on the grounds that a particular way of life or conception of the good is superior to the one I currently have. Since it is my responsibility to decide that, and since we are all equals, the state should not take sides on whether the plan of life of some of us is ethically inferior to that of others.

Now, is gratuitously insulting people's beliefs by publicly available expressions found in books or films one of those activities that are my business and not the state's? We might think that it is not, since public insults are neither a personal (intimate) activity nor take place in private. Like littering and driving dangerously, expressions that offend beliefs may adversely affect the lives of others in the public space. And they might do so to a far greater degree than in the case of the boring neighbor who realized that you have been trying to avoid him. Deliberately and gratuitously

[24] See T. Nagel, "Personal Rights and Public Sphere," *Philosophy and Public Affairs* 24(2) (1995), 83–107. The discussion in this section draws heavily on Nagel's views in that article.

insulting religious doctrines may make the lives of the people who believe in them less enjoyable; they might become upset, disturbed or alienated from their fellow citizens. Words and images can upset and frustrate. Would it not be appropriate if we, collectively, decided to prevent so much frustration, caused simply because some people take pleasure in gratuitously provoking such frustration?

Consider for a moment, however, what constitutes religious offense. It is the disparaging of the doctrines, symbols or figures of a religion. Such doctrines, symbols and figures have value primarily within a particular conception of the good life and primarily for the people who believe in it. Offense, in other words, is subjective: not in the sense that there is no truth of the matter as to *what* offends (or is likely to offend) someone – this is objective; nor in the sense that there is no truth of the matter as to whether the belief that is under attack is worth holding, because it may well be; rather, in the sense that the subject matter of the beliefs belongs to the sphere of *partiality*: others are not expected to have found, or contemplated, or discovered whatever value exists in the object of those beliefs. This is because the good life is rich and multifaceted: there are not only many ethical values whose pursuit makes one's life better; there are also many ways in which the same value can be pursued. It is each person's responsibility to explore and choose both which ethical ideas to pursue and how to pursue them. Just like the atheist is not expected to have found the value in a religious way of life, the believer is not expected to have found the humorous value in religious jokes. It follows, therefore, that the state cannot force people into discovering particular ethical ideas, let alone particular interpretations of those ethical ideas.

Moreover, what counts as an insult depends on the interpretation of the conception of the good life that each one chooses to follow. As we know from the history of religion, even people of the same religion may find each other's interpretation offensive. A homosexual Christian need not find the statement "Jesus was gay" insulting. He is actually likely to be offended by Christians who find that statement blasphemous. This point further suggests that expressions we take to be offensive to our beliefs may well be part of a valuable way of life, like the pursuit of art or humor. In fact humor, like that found in the Danish cartoons, is – for those who are able to see it – precisely a function of them being provocative and insulting; they would not be humorous if they were not provocative. This is also why satirical blasphemy is often committed by people who believe in the very religion they satirize. Indeed, if you are a believer, you should hope that God has a sense of humor. And we can generalize from the

examples of art and humor to say that something ethically valuable is likely to be involved in expressions that insult, provoke or offend beliefs others hold. There are many valuable things to learn about human nature for example, from watching Schroeter's *Council of Love* or Wingrove's *Visions of Ecstasy*: why is depicting holy figures in sexual activities a taboo for monotheistic religions? What is the relationship between religious faith and sexual morality? Undoubtedly, the aesthetic quality of blasphemous books or paintings varies immensely, but if provocation is constitutive of a valuable form of art, then we cannot punish people for trying to produce it.

Moreover, it makes no difference that offenses may be gratuitous and deliberate, making no contribution not only to a public debate but also to art. Insulting religious doctrines – through burning crosses, writing heretic books, publishing cartoons – is a way of expressing one's *own* conception of the good life that may well have value. To paraphrase Thomas Nagel's remark which he makes in relation to sadistic and masochistic fantasies: it is not that blasphemers are delighted by the same thing that revolts believers; it is something else, that we do not understand because it does not fit into the particular configuration of our imagination.[25]

So if there is ethical value in expressing oneself in a way that offends others' beliefs, then banning those expressions amounts to prioritizing one valuable ethical ideal over another. It amounts to using collective force in order to force some individuals to abandon one ethically valuable practice (provocative art) for the reason that others find it objectionable. And such use of collective force cannot be squared with the requirement that the liberal state treat people as free and equal agents, who are responsible for choosing their own ethical ideals.

It might be objected that the cost of the restriction on provocative expression is nowhere near that borne by religious believers who are offended. Some might argue that, for a great number of religious believers, changing or revising their ethical life so as to cope with public offense to their religion is simply not possible and that those who offend by contrast can still pursue what they deem valuable in other ways. It seems to me, however, that it is a mistake to view religious beliefs as an accident that has befallen upon people. Religious beliefs are not inseparable from a person's agency. An atheist is a religious zealot who has read Darwin and a religious zealot is an atheist who

[25] *Ibid.*, p. 105.

has read the Bible. It would be disrespectful of the rational agency of believers to assume that their religious convictions are unshakable, not subject to change.

In a liberal democracy, moreover, all citizens should have the opportunity to participate as equals, not just in voting and expressing their views about how we should be governed, but also in the forming of *public culture*. Public culture includes much more than public opinion about politics and the regulation of expression. It includes what clothes and lifestyles one sees in the streets, what products are fashionable to own, what books one finds in the bookshops, what music we are exposed to, what jokes one feels comfortable to tell and so on. It is fair that, in a liberal democratic state, public culture is shaped organically, as the result of the millions of (cultural, aesthetic, ethical) choices that all of us make every day. But it is not fair that the government deliberately regulates or assumes control of public culture on the grounds that some ethical or aesthetic ideas are wrong – as it does when it prohibits religiously offensive speech. If most of us like wearing T-shirts with the Danish cartoons or with the phrase "Jesus loves you but only as a friend" or "Fuck the BNP," then that is the public culture we are entitled to have. Nobody has a right for the government to intervene in public culture so as to make it more to her liking. Why should religious believers be an exception? As Ronald Dworkin puts it: "in a genuinely free society the world of ideas and values belongs to no one and to everyone."[26]

Conclusion

I have argued in this chapter that the European Court's argument, that gratuitous offenses do not contribute to any debate, does not justify a right not to be offended in one's religious beliefs. Nor is there an independent ground for justifying such a right – quite the opposite: the morality of human rights, as egalitarian constraints on the use of collective force provides strong reasons against recognizing such a right. It follows that in cases of expressions that offend religious beliefs, there is no need to balance free speech against freedom of religion: other things being equal, free speech prevails without any competition with other values.

[26] R. Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press, 2006), p. 89.

We must take care to distinguish the claim that there is a right not to be insulted in one's religious beliefs from two very different arguments. The first argument we have touched on already. It is that it is justified to restrict speech, not just religiously offensive speech but any kind of speech, which is likely to lead to imminent violence. This argument expresses a true moral principle, but it does not ground a right not to be insulted in one's religious beliefs; for the restriction is allowed only in order to avoid *violence*, not in order to protect the religious feelings of believers. The principle applies to speech that offends religion as much as it applies to shouting falsely "fire!" in a crowded theatre.

The second argument draws on the claim that allowing certain expressions (e.g. hate speech or pornography) reinforces patterns of discrimination which in turn cause harm against disadvantaged or minority groups, in the sense that there is a causal link between the use of such expressions and the resulting harm. Prohibiting such expressions may be a way of preventing the injustice and/or compensating the victims. This second argument claims that the just distribution of resources (employment, income, health care etc.) is obstructed or delayed by private conduct that is encouraged by public expressions of hate and offensive speech. This second argument is based on valid egalitarian reasons: we collectively have a duty to ensure that public goods are distributed in an egalitarian way. But the argument carries the burden of showing that there is a clear and direct causal link between allowing religiously offensive speech and inequalities in the distribution of important social goods. It also carries the burden of showing that there is no alternative means, less restrictive of speech, to combat these inequalities. In any case, however, this argument is not one that draws on the right not to be insulted in one's religious beliefs either: the reason for restricting speech is not to prevent offense but rather to promote distributive justice.

It is worth noting that both the above arguments would require the courts to scrutinize restrictions on rights in order to make sure that there is a direct causal link between the expression and the resulting distributive injustice or physical harm. Indeed, the European Court applied a similar test in the recent case of *Ollinger* v. *Austria*,[27] which concerned the prohibition of an assembly that the applicant had intended to hold on All Saints' Day in commemoration of the Salzburg Jews murdered by the SS

[27] Eur. Ct. H. R., *Ollinger* v. *Austria*, 29 June 2006. This case bears strong similarities to the famous *National Social Party of America* v. *Village of Skokie* 432 U.S. 43 (1977) case of the United States Supreme Court.

during the Second World War. The assembly would take place at the same time as an assembly of Comradeship IV in memory of the SS soldiers killed in the Second World War. The Court found the restriction disproportionate, and a violation of freedom of assembly, partly on the grounds that the planned assembly was likely to be peaceful and without incidents of violence. It is also useful to note in passing that the test of a clear and present danger and its variations need not be seen as a form of balancing between conflicting rights. The requirement that there be a close causal link between restricting a right and preventing harm may stem from the need to ensure that legitimate reasons (such as prevention of harm) are not used as a *pretext* for the pursuit of illegitimate purposes. This is a judicial task that is very different to the balancing methodology: it consists in finding diagnostic tests that *"smoke out" illegitimate reasons*.[28] It is not a form of judicial reasoning that presupposes the view that rights, properly understood, conflict and that balancing involves a compromise between two independently valuable goals.

In the landmark *Handyside* v. *United Kingdom* judgment, the European Court of Human Rights declared that free speech protects "not only 'information' or 'ideas' that are favorably received or regarded as inoffensive or as a matter of indifference, but also those that shock, offend or disturb the State or any sector of the population".[29] In *Otto-Preminger-Institut*, the Court qualified this principle by arguing that the right to express ideas that offend does not encompass a right to insult gratuitously the religious beliefs of others. It has maintained this position ever since. Three dissenting judges in *Otto-Preminger-Institut* disputed the existence of a right to protection of religious feelings. They argued that:

> it should not be open to the authorities of the State to decide whether a particular statement is capable of "contributing to any form of public debate capable of furthering progress in human affairs"; such a decision cannot but be tainted by the authorities' idea of "progress."[30]

Sixteen years later, perhaps most Europeans are still very reluctant to accept that the law should grant no protection to (their) religious beliefs as such and that it should permit blasphemy. I have argued in this chapter that the European Court of Human Rights has very good reasons to accept it and no reasons not to. In *I.A.* v. *Turkey*, the Court held that a

[28] On the idea of smoking out illegitimate reasons, see Fallon, "Strict Judicial Scrutiny," pp. 1308–12.

[29] *Handyside* v. *United Kingdom*, para. 49.

[30] Joint Dissenting Opinion of Judges Palm, Pekkanen and Makarczyk.

16-dollar fine was a proportionate limitation of the applicant's right to publish a book that contained blasphemous passages. But if nobody had a legal right not to be offended by that book, then there should not have been, as a matter of principle, any limitation of the applicant's right on *that* basis. What if the fine was only 16 dollars? For what the human right to free speech can afford, it was 16 dollars too many.