

## **Free Speech and the Limits of Tolerance: The Case of David Irving**

On November 11, 2005, British historian David Irving was detained in the southern Austrian province of Styria while en route to Vienna to deliver a talk to a group of rightist students. Austrian authorities arrested Irving on an outstanding warrant that dated from 1989, when the historian had made two speeches in Austria that were alleged to deny the existence of gas chambers at the Auschwitz concentration camp. Under a 1947 Austrian law, the *Verbotgesetz*,<sup>1</sup> “whoever denies, grossly plays down, approves or tries to excuse the National Socialist genocide or other National Socialist crimes against humanity in a print publication, in broadcast or other media”<sup>2</sup> can be sent to prison for up to ten years. At his trial on February 20, 2006, Irving pleaded guilty and was sentenced to three years in an Austrian jail. Both parties intend to file appeals, with Irving hoping for an early release and the Austrian prosecutors seeking a longer sentence.

The case of David Irving, though admittedly extreme, provides a useful opportunity to examine the workings of European free speech protections. At the heart of the case is the question of where to draw the lines on free speech, and how to defend such decisions. Put another way, the Irving case both provides a stark example of the limits on the tolerance for free expression among many quarters in Europe, and illustrates the willingness of free speech advocates to defend a figure like Irving despite their nearly universal abhorrence of his views. If anything has emerged thus far from the Irving trial, it is that free speech

in Europe, as elsewhere, is still a highly contentious issue. This essay has four sections. The first is a brief background on David Irving. The second examines the historical foundations of the concept of free speech. The third analyzes the two sides of the debate over free speech that ensued in Europe following Irving's arrest in Austria, and the final section is a brief conclusion.

### **Background on Irving**

Beginning with his 1963 book, *The Destruction of Dresden*, David Irving made a name for himself as a dedicated rightist historian who focused on Nazi Germany during the Second World War. In *Dresden*, Irving held that the Allied bombardment of the German city was “the worst single massacre in European history.”<sup>3</sup> His 1967 book, *The Destruction of Convoy PQ-17*, contended that a British captain was responsible for the loss of his charges' lives when the convoy he commanded was attacked en route to the Soviet Union during the war; the book had to be withdrawn from circulation in 1970 after the British officer sued Irving for libel.<sup>4</sup> Irving's most important—and controversial—work was the first volume of his two-part biography of Hitler, called *Hitler's War*. The book stirred considerable controversy for its positive portrayal of Hitler and moreso for its contention that the Nazi leader knew nothing of the Holocaust until late 1943, and had no part in ordering the systematic destruction of Europe's Jews.<sup>5</sup> Following *Hitler's War*, Irving built up a reputation as a public speaker, attending rallies and events that often drew neo-Nazis.<sup>6</sup> Irving's renown grew when, in 1983, he discredited as fakes a series of purported “Hitler diaries” published in the German newsmagazine *Der Stern*.

In 1994, the U.S. academic Deborah Lipstadt named Irving as a leading Holocaust denier in her book, *Denying the Holocaust: The Growing Assault on Truth and Memory*. Irving responded by suing Lipstadt and her publisher for libel in British courts. The trial concluded in 2000, with Irving and his repute as a historian highly discredited: Not only had Irving been forced to testify that he allowed himself “author’s license” in relaying certain historical events, but he was also shown to have mistranslated key terminology (despite his fluency in German) in his writings.<sup>7</sup> As Lipstadt’s lawyer noted at trial, “All your little fictions, your little tweaks of the evidence all tend in the same direction—exculpation of Adolf Hitler.”<sup>8</sup> The presiding judge, in deciding against Irving’s motion, called Irving a “liar,” a “falsifier of history,” an “anti-Semite,” and a “racist.”<sup>9</sup> Over the years, Irving’s questioning of the extent of the Holocaust also got him expelled from Austria, Australia, Canada, Germany, Italy, and South Africa, and led to his being barred from consulting the German state archives.<sup>10</sup>

Irving left the trial with a bruised reputation and major debts from legal expenses which he sought to recoup by signing on for more speaking engagements at which he promoted his back catalog of books; by 2002 he was bankrupt. This was partly what brought him back to Austria in November 2005, the trip that resulted in his arrest. Leading up to his trial, much to the embarrassment of Austrian officials, Irving claimed to have located two of his books (*PQ-17* and *Hitler’s War*) in the library of the Austrian prison where he was being held.<sup>11</sup> At the trial, in which Irving plead guilty to violating the Austrian law, the historian also issued a sort of mea culpa, claiming that he now acknowledged the existence of the Holocaust, having had the chance in the early 1990s to consult some of

Nazi strategist Adolf Eichmann's personal papers.<sup>12</sup> But the change of heart seemed calculated to influence his sentencing, as Irving had continued to deny the existence of gas chambers at Auschwitz, for instance, long after reading Eichmann's writings.

### **A Brief Framework for Examining Free Speech**

One of the core rights enshrined in the liberal democratic systems that crept from west to east in Europe over several centuries is the right to free speech. Considered both a natural and a classic "negative" civil right, free speech entails a willingness both to permit individuals to express their views openly and to tolerate the expression of opinions that may fall outside of societal norms. Two of the most prominent philosophers associated with delineating the importance of the right to free speech are J.S. Mill and Voltaire. Mill saw freedom to express one's views as intrinsically connected to individual sovereignty, which consisted in part of the individual's inalienable right to "liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects...."<sup>13</sup> In his famous maxim, Voltaire eloquently describes the heart of the liberal commitment to free speech: "I may disagree with what you have to say, but I shall defend, to the death, your right to say it." Likewise, in his *Dictionnaire Philosophique*, Voltaire foresaw the potentiality for problems in his advocacy of free speech rights: "We have a natural right to make use of our pens as of our tongue, at our peril, risk and hazard."<sup>14</sup>

The right to free speech was heralded in the counter-monarchical revolutionary age of the late 18<sup>th</sup> Century, being prominently inscribed in both the U.S. Bill of Rights (Article 1)<sup>15</sup>

and the French Declaration of the Rights of Man (Article 11).<sup>16</sup> More recent and universalist treaties on civil rights and responsibilities, including the UN Universal Declaration of Human Rights (Article 19)<sup>17</sup> and the European Convention on Human Rights (Article 10)<sup>18</sup> have reasserted the right to free expression and have been widely ratified. While echoing the Universal Declaration, the European Convention's Article 10 goes some way toward defining the limits and refining the uses of free speech. It states that:

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

While the European Union member states are adherents of both the Universal Declaration and the European Convention, in practice, state-level law still overrides the specifics of the universalist tendencies. Despite strong commitments in principle to the notion of a right to free speech, states have historically also acknowledged the limitations of the doctrine: frequently, incitement to violence, hatred, and intolerance, as well as libel and slander, are all cited as improper uses of free speech undeserving of state protection. Similarly, a favorite philosophical prop for debating the limits and merits of free speech is the example of an individual who yells "Fire!" in a crowded theater.

In response to perceived potentiality for abuse of free speech, various European states have laws limiting free expression, from the French bar on the use of religious symbols in

public institutions to Austria's *Verbotgesetz*. Importantly, Austria's law is by no means unique; nine other European states (almost all of them formerly occupied by, or allied with, the Nazis) and Israel also have laws preventing the denial of the Holocaust on the books.<sup>19</sup> A similar limitation on "pure" free speech are libel laws, which are designed to protect individuals from the intentional maligning of their reputations by others. Britain is particularly noted for its strong libel laws, and Irving—as a Briton involved both as a plaintiff and defendant in British libel suits—must have been acutely aware of this fact.

In the case of Irving, then, the jurisdiction of state laws trumped continental and world universalist tendencies toward free speech. The conviction of Irving under the *Verbotgesetz* was illustrative of the continuing tension over both universal rights and the limits of tolerance for free speech in Europe.

### **A Continent Divided: Two Positions on Irving's Right to Speak**

As the Irving arrest and trial proceeded, the opinion pages of European papers and the chats of the intelligentsia filled with discussion of the case. In many ways, the trial provided a rich and intense space for debate. With Irving in the dock, Europeans had a singular distillation of many overlapping ironies and uncomfortable ideas: a revisionist historian who challenged accepted views on one of 20<sup>th</sup> Century Europe's most tender and tragic topics; a man who, while hailing from a chief Second World War ally, openly professed his admiration for Hitler and the Nazi movement; a former Nazi country known for its latent anti-Semitism trying an author under what could certainly be deemed a draconian law banning a certain type of expression; and the age-old discomfiture of a

society unintentionally but predictably making a martyr of a man that might better be left marginalized.

Also of note were two other important free speech tableaux that happened concurrently with Irving's trial: the flare-up over a Danish newspaper's publication of cartoons of the Prophet Muhammad that many Muslims found insulting and sacrilegious, and the legal proceedings against Turkish novelist Orhan Pamuk, whom Turkey accused of violating laws that prohibit discussion of the Turkish role in the 1915 Armenian genocide.

Interestingly, while across Europe the Danish cartoon caper elicited a broad and solidaristic defense of free speech rights including the right to publish offensive materials, and while Turkey's handling of the Pamuk case was watched by European decision makers and elites as an almost defining moment in Turkey's progress toward European Union readiness, the Irving trial was monitored with quiet reserve. Perhaps justifiably, there was a marked unease in Europe with the idea of coming to the defense of an author who admired the Nazis, challenged the extent of the Holocaust, and had been branded an anti-Semite, a racist, and a liar in a British courtroom.

Principled liberal commentators rose to the occasion early on, shortly after Irving's detention. For instance, Rod Liddle<sup>20</sup>, writing in *The Spectator*, and Eilis O'Hanlon<sup>21</sup>, writing in Ireland's *Sunday Independent*, both made note of the silence that emanated from many of the perceived guardians of free speech and other civil and human rights. Liddle noted that there were scant calls for the British government to summon the Austrian Ambassador after Irving's arrest, and that Amnesty International admitted it had

no plans to petition on behalf of Irving, despite the case to be made that he was a prisoner of conscience, the organization's specialty. O'Hanlon likewise chastised Human Rights Watch, Amnesty, International PEN, the Irish government, journalists, and the public at large over the lukewarm reaction to Irving's arrest, stating, "All prisoners of conscience are equal, but some are clearly more equal than others."<sup>22</sup>

In making these statements, commentators like Liddle and O'Hanlon harkened back to the Millian and Voltairian ideals of individual sovereignty and the inalienable right to express oneself. In response to the argument that few rushed to defend Irving because his views were abhorrent or might incite hatred, O'Hanlon countered that, "The other reason that the nature of David Irving's views is wholly irrelevant is that the tolerance of unsavoury opinions is the very test on which our alleged freedom of speech hinges."<sup>23</sup>

The contrary position rested on the clauses in free speech doctrine that defend open expression up to the point where it is harmful to others—which is frequently taken to mean an incitement to violence or hatred. In the Irving case, the intellectual basis of this position required the contention that there is a clear link between Irving's writings and the incitement to harm others. That is, the act of questioning the accepted (and well-documented) version of history, challenging the extent of the Holocaust, and obfuscating the trail to its intellectual authors—all this is equivalent to Holocaust denial and tantamount to reviving the hateful ideology of Nazism. Thus, Howard Jacobson<sup>24</sup>, writing in *The Independent*, could state: "Let's be plain—Holocaust Denial is Nazism in another guise." He continued: "Holocaust Denial is hate ideology in action—its aim is not the

propagation of a truth but the propagandising of that ideology. How far, then, we should accord it the respect owing to free-speech is moot.”

Christopher Orlet<sup>25</sup>, writing in *The American Spectator*, attacked other editorialists who asked why there was a rush to support Pamuk and the Danish newspaper behind the Muhammad cartoons, but not to defend Irving’s right to speak: “I suspect this has something to do with the fact that Pamuk is an intellectual, a prize-winning novelist and a gentleman, while Irving is a fraud, a fascist and a pinhead.” Orlet dismissed the idea that Irving’s free speech was being violated as “another fine example of Leftist logic” while sidestepping the clear genealogical roots of the position in Mill and Voltaire.

David Cesarani<sup>26</sup>, writing in *The Guardian*, took matters a step further, arguing that a paradigm shift occurred in the field of free speech with the advent of the internet: “The classic arguments for freedom of speech drawn from Voltaire and Mill are redundant” in the age of the internet, where dissemination of information is so simple. “Amid [the internet’s] anarchy, all that decent people can do is agree to reasonable limits on what can be said and set down legal markers in an attempt to preserve a democratic, civilized and tolerant society. The sentence on David Irving shows where the line is drawn.”

The *Yorkshire Evening Post* took a slightly different tack, arguing that “Irving—not an unintelligent man—knew what he was doing. He was using free speech not as a right but as a weapon, fully aware of its impact on Austrians, Jews and—once in court—on his own profile.” And so, in this analysis, Irving’s right to free speech ended at the point

where he began to use it as a weapon that could be swung against a group of people or used to rally another. But in a nuanced argument, the *Post* went on to note that free expression had been abused in the Danish cartoon case, too, as in both cases “it was thrown down as a gauntlet with insensitivity, irresponsibility and deliberate purpose to provoke reaction.”<sup>27</sup> Iranian officials also noted irony in the Irving case, claiming it showed the “Western paradox” on freedom of expression.<sup>28</sup> Iranian TV stated that “[T]his trial contradicts the European constitution and human rights laws, which are based on freedom of speech and expression.”<sup>29</sup>

Proponents of Irving’s right to speak were also bothered by the seeming paradox noted by the *Yorkshire Evening Post* and Iranian commentators, among myriad other sources. As Terence Blacker points out, “Writers and intellectuals have, doubtless through gritted teeth, been obliged to speak up for him.”<sup>30</sup> These commentators were uneasy about the precedent the Irving trial had set, and the slippery slope toward an acceptance of the Orwellian idea of thought-crimes. As Orwell himself had said, echoing Mill and Voltaire, “If liberty means anything at all, it means the right to tell people what they do not want to hear.”<sup>31</sup>

With this thought as a point of departure, several writers questioned the continuing existence of laws preventing Holocaust denial. While all being careful to state that they disagreed strongly with Irving’s arguments, these commentators felt worse things could result from persecuting his speech. Thus, *The Independent* commented that “[L]aws restricting free speech are not the way to deal with Holocaust denial. As a private citizen,

Mr Irving is entitled to believe what he pleases, however deluded or unsubstantiated that may be... To prosecute Holocaust denial is the start of a slippery slope that ends in the proscription of all dissent.”<sup>32</sup>

Likewise, Deborah Lipstadt, the U.S. academic unsuccessfully sued for libel by Irving, was quick to advocate for Irving’s release: “Rather than on grounds of compassion, I support Irving’s release for ideological and strategic reasons. Laws against Holocaust denial contravene the notion of free speech. Although I am not a free-speech absolutist, I have never been comfortable with censorship. The recent debate about the publication of the Danish cartoons depicting Muhammad has given added meaning to that stance. If one outlaws Holocaust denial, one can outlaw such cartoons. If one outlaws such cartoons, one can outlaw what Shiites say about Sunnis... Simply put: there is no end to the matter.”<sup>33</sup>

One final danger that defenders of free speech in the Irving case identified is that, by persecuting Irving for his writings, he was being set up to play the role of a martyr for the far right and Nazi apologists and enthusiasts. As Matthew Rojansky<sup>34</sup> commented in the *International Herald Tribune*, “Hounded for the unthinkable crime of publishing false history, David Irving appears almost heroic as he stands up to censorship, fines and imprisonment, making him a kind of martyr for neo-fascist groups.” And as Antony Beevor snapped, “Surely it is better to deal with Irving’s preposterously heroic self-image by ridicule than by encouraging his grotesque martyr-myth.”<sup>35</sup>

At the core of these views is a belief not only in the importance of free speech, but also in the ability of reason to triumph over irrationality. Thus, the advocates of free speech, in defending Irving's right to speak, profoundly believe in the necessity to confront and refute his views, rather than censoring them through laws that contravene free speech and should perhaps be obsolete in a democratic, contemporary Europe. As *The Independent* put it, "[M]inds are changed not by persecuting those who hold inconvenient views, but by exposing them to experience and to facts."<sup>36</sup> Similarly, Lipstadt has said "I am not happy when censorship wins, and I don't believe in winning battles via censorship... The way of fighting Holocaust deniers is with history and with truth."<sup>37</sup>

### **Conclusion**

After the verdict in his trial was announced, Irving was quick to point out some of the uncomfortable ironies of his case. "I come from a free country and I'm not going to let anybody silence me. Freedom of speech is the right to say things that others object to," said Irving. He continued, "The freedom of speech is also the right to be wrong. That has been taken away from me."<sup>38</sup> Irving went on to call himself a political prisoner.

Despite the views of those who hold that the Irving case drew clear boundaries around protected speech, the dilemma over the limits of tolerance for individual expression remain. As opponents of censorship and the Holocaust denial laws note, there is no shortage of unpopular views, and no acceptable way to fully impede their distribution. As European observers are no doubt realizing, locking Irving away has done little to quiet him, and if anything, the trial has given him a newfound renown. Perhaps the gravest

irony in the entire Irving affair is that, much as his idol Hitler once did, he now sits in a jail cell, a prisoner of conscience, writing his memoirs. The working title for Irving's autobiography is *Irving's War*. Hitler's was *Mein Kampf*.

## Notes and Works Cited

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- <sup>1</sup> The law's name is cited in: *Irish Times* "Irving Trial Raises Awkward Questions" Feb 18 2006. The article reports the *Verbotgesetz* originated in 1946, but most sources date it from 1947. I have used the latter date.
- <sup>2</sup> The quotation from the Austrian law is in: Oleksyn, Veronika (AP). "Former Adversary of Emory Prof Gets Three Years in Austrian Prison for Holocaust Denial" *Fulton County Daily Report*. Feb 20 2006.
- <sup>3</sup> *The Destruction of Dresden* quotation cited on BBC "Timeline: David Irving's Battles" Available at: <http://news.bbc.co.uk/2/hi/europe/4720452.stm>
- <sup>4</sup> Connolly, Kate. "Nazi Historian Irving Finds His Books in Austrian Jail Library" *Daily Telegraph*. Dec 2 2005.
- <sup>5</sup> BBC "Timeline..."; Connolly "Nazi Historian..."
- <sup>6</sup> *Irish Times* "Irving Trial..."
- <sup>7</sup> *Irish Times* "Irving Trial...". Lipstadt, Deborah "Attack the Lies, But Let The Liar Speak" *The Times*. Feb 17 2006.
- <sup>8</sup> Lipstadt's lawyer quotation cited in *Irish Times* "Irving Trial..."
- <sup>9</sup> Lipstadt "Attack The Lies..."
- <sup>10</sup> Linden, Martha. "Historian Denied Holocaust Horror" *Birmingham Post*. Feb 21 2006. BBC "Timeline..."
- <sup>11</sup> Connolly "Nazi Historian..."
- <sup>12</sup> Oleksyn "Former Adversary...". *The Independent* "Free Speech, Responsibility, and the Right to Dissent" Feb 21 2006.
- <sup>13</sup> J.S. Mill quotation from "On Liberty" available at: <http://www.utilitarianism.com/ol/one.html>
- <sup>14</sup> Voltaire quotation from *Dictionnaire Philosophique* available at: <http://www.ifla.org/faife/litter/subject/speech.htm>
- <sup>15</sup> U.S. Bill of Rights (Article 1) states: 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.
- <sup>16</sup> French Declaration of the Rights of Man (Article 11) states: The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law.
- <sup>17</sup> The UN Universal Declaration of Human Rights (Article 19) states: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."
- <sup>18</sup> The text of the European Convention on Human Rights available at: <http://www.hri.org/docs/ECHR50.html>
- <sup>19</sup> With Austria, ten other states have Holocaust denial bars: Belgium, the Czech Republic, France, Germany, Israel, Lithuania, Poland, Romania, Slovakia, and Switzerland. Cited in BBC "Countries with Laws Against Holocaust Denial" Graphic available at: <http://news.bbc.co.uk/2/hi/europe/4757506.stm>
- <sup>20</sup> Liddle, Rod. "Let Irving Speak" *The Spectator*, Dec 3 2005.
- <sup>21</sup> O'Hanlon, Eilis. "Our Freedom of Speech Hinges on Tolerance" *The Sunday Independent*, Dec 4 2005.
- <sup>22</sup> O'Hanlon "Our Freedom..."
- <sup>23</sup> O'Hanlon "Our Freedom..."
- <sup>24</sup> Jacobson, Howard. "May Those Who Deny the Holocaust Rot in Prison, For They Defame Its Victims" *The Independent*, Feb 25 2006.
- <sup>25</sup> Orlet, Christopher. "Drawing the Line" *The American Spectator Online*, Jan 13 2006.
- <sup>26</sup> Cesarani, David. "There is no martyrdom in this pathetic denouement: The Austrian courts have done the world a favour in exposing David Irving as a noxious opportunist and a coward" *The Guardian*, Feb 22 2006.
- <sup>27</sup> *Yorkshire Evening Post* "Irving Used Free Speech as Weapon of Hate" Feb 21 2006.
- <sup>28</sup> Deutsche Presse-Agentur "Iran: Holocaust denier's prison sentence shows 'Western paradox'" Feb 21 2006.
- <sup>29</sup> BBC Monitoring of Report by Iranian TV "Holocaust Writer's Trial Against Human Rights, EU Constitution—Iranian TV" Feb 20 2006.

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<sup>30</sup> Blacker, Terence. “The Price We Pay for Freedom of Speech” *The Independent*, Jan 24 2006.

<sup>31</sup> Orwell quotation cited in Blacker “The Price...”

<sup>32</sup> *The Independent* “Free Speech...”

<sup>33</sup> Lipstadt “Attack the Lies...”

<sup>34</sup> Rojansky, Matthew. “Europe Doesn’t Get Free Speech; Double Standards” *International Herald Tribune*, Feb 25 2006.

<sup>35</sup> Beevor, Antony. “It’s Better to Ridicule This Liar Than Make Him a Martyr” *Daily Mail*, Feb 22 2006.

<sup>36</sup> *The Independent* “Free Speech...”

<sup>37</sup> Lipstadt quotation cited in Beevor “It’s Better to Ridicule...”

<sup>38</sup> Irving quotations relayed in Hall, Allan. “Why I Will Carry On Speaking My Mind, By Irving” *Daily Mail*, Feb 23 2006.