

III. The Blessing and Bane of the Liberal Democratic Tradition

One of the important virtues of liberalism – and, by extension, a liberal democratic polity – is that, in theory at least, it acknowledges the diversity of human goods and ends. A liberal democratic polity seeks to accommodate within its social order a recognition of this diversity and to enable the realization of differing ends. A liberal democratic polity will therefore include among its important goals the fostering of – or at least a decision not to inhibit – the diversity of ways in which humans can flourish. No doubt there will be limits or at least challenges to such support – when, for example, the form that human flourishing appears to take requires the suppression of others’ flourishing (what is sometimes referred to as the paradox of liberalism). Even so, there will be the recognition and promotion of a broad range of human possibilities along with the conditions for their social and associational realization.

The acute challenge that liberalism poses is of incompatible diversity or at least of diversity in tension. Although we commonly see such tensions at the individual level – say, between the libertarian and social democrat – these tensions may also be manifest at a macro-level. One country’s liberal democratic tradition may develop in one direction whereas another liberal democratic polity may develop in a different direction. Consider, for example, the contrast between the US and the Netherlands, or the even greater contrast between both of these countries and India. These differences may manifest themselves not only with respect to, say, forms of governance and social institutions but also in the traditions of understanding that underpin shared values, such as those of liberty, autonomy, privacy and dignity.

There is no guarantee, even, and perhaps especially within liberalism, that central concepts will be understood in exactly the same way. Liberals are themselves divided on this. There are those who are committed to the univocity of liberalism’s central concepts but who recognize diversity in the ways in which they may be realized. However, there are others who see the diversity reaching to its core concepts, liberalism itself being seen as at best an overlapping consensus of traditions.¹

It is this latter challenge that we must confront in this study, for although the polities with which we will be concerned – primarily those of the US and the EU but also those of Australia and India, albeit to a much lesser extent – can

1 See P.F. Strawson, “Social Morality and Individual Ideal”, *Philosophy* 36 (January, 1961): 1–17.

reasonably be characterized as liberal democratic, their traditions have diverged in important ways that have come to a head in the response to international crime and global terrorism.

The possibility of intractable diversity within liberalism has long exercised its theorists. In 1956, W. B. Gallie published his influential essay on the essential contestability of many – perhaps most – social concepts, and then in 1987 John Rawls, in response to objections made to his classic political treatise, *A Theory of Justice* (1971), published his paper on the idea of an overlapping consensus. Here we summarize a few of the main contentions of these two papers to illustrate some of the challenges created by the liberal commitment to diversity.

First, Gallie.² In his original paper, Gallie argued that many and perhaps most concepts employed in social life are not merely contested, but “essentially contested”. He gives as examples art, democracy, social justice, religion and championship, but other writers have added to the list with medicine, education, music, liberty, power, rule of law, rhetoric, security, the Christian tradition, justice, academic freedom, privacy and so on. It would not be too much of an exaggeration to claim that almost any social concept that is likely to be of importance to us will be contested, though whether it is contested in Gallie’s sense remains to be seen. Gallie articulates and develops several conditions that will qualify a concept as “essentially contested”. They include the following:

1. They are *appraisive*. That is, although they characterize an activity, they are also normative characterizations. “Art” is not simply a human activity but one that we value. “Disease”, on the other hand, is something we disvalue. What constitutes art or a disease will depend on the kinds of normative considerations that we allow to inform our understanding of each. Similar claims might be made about privacy or security. To characterize a matter as private is not simply to identify it but also to indicate certain claims that are made on us – that we respect and not intrude on what is deemed private. Security no less implies the appropriate provision or protection of that which is valued.

2 W.B. Gallie, “Essentially Contested Concepts”, *Proceedings of the Aristotelian Society* 56 (1955–56), 167–98 (also in *Essentially Contested Concepts and the Historical Understanding*, London: Chatto and Windus, 1964, ch. 8). The idea has also been taken up and discussed by others – e.g. A.C. MacIntyre, “The Essential Contestability of Some Social Concepts”, *Ethics* 84 (October, 1973), 1–9; Norman S. Care, “On Fixing Social Concepts”, *Ethics* 84 (October, 1973), 10–21; Steven Lukes, “Relativism: Cognitive and Moral”, *Proceedings of the Aristotelian Society*, Supp. Vol. 48 (1974), 165–89; A.P. Montefiore (ed.), *Neutrality and Impartiality: The University and Political Commitment* (Cambridge, UK: Cambridge University Press, 1975), Part I; John N. Gray, “The Contestability of Concepts”, *Political Theory* 5 (1977), 330–48; John N. Gray, “On Liberty, Liberalism, and Essential Contestability”, *British Journal of Political Science* 8 (1978), 385–402; Christine Swanton, “On the ‘Essentially Contestedness’ of Political Concepts”, *Ethics* 95 (July, 1985), 811–27; Andrew Mason, “On Explaining Political Disagreement: The Notion of an Essentially Contested Concept”, *Inquiry* 33 (1990), 81–98; William E. Connolly, *The Terms of Political Discourse* (Princeton, NJ: Princeton University Press, 1993).

2. They denote an *essentially complex* activity. What makes something a piece of music or a religion is not a single feature but a complex of features of varying importance, and it may be that not all are necessarily present if other features are present. One might be inclined to think that worship of a god is essential to a religion but in the case of certain other belief traditions this might be less important as long as other features are present. We do not usually deny that Buddhism is a religion, even though some of its main strands are nontheistic. Should Marxism also be seen as a religion? In the case of security we meet some of these complexities in the debate about whether (national) security is to be thought of in terms of territorial integrity or the integrity of a way of life, whether any threat to national security interests is, *ipso facto*, a threat to national security or whether an attack on a national symbol can be seen as an attack on the nation, and so on. No less complex is the idea of privacy, a chameleon-like concept that yields the possibility that what takes place in private is not therefore private.³
3. They are initially *variously describable*, and differences are likely among their users about the relative importance of different elements in the complex activity. This is clearly the case in matters of religion and art but applies equally when a broad enough group of people start talking about what philosophy or democracy is. Sometimes the gulf between Western and Eastern philosophy can seem pretty broad, almost unbridgeable. Those of us who still remember the DDR, the German Democratic Republic, know that what counts as democratic is a matter of contestation. Notions of privacy and security are not immune to such variations and, certainly in the case of privacy, such variability has been of critical importance.
4. They are *open ended* and subject to considerable modification in the light of changing times, and such modification cannot be predicted or prescribed in advance. What Gallie has in mind here are the historical changes to which such concepts are susceptible. What forty years ago was encompassed by the term “medicine” has changed, not merely because we have learned more about what does and what does not fulfill our criteria for medicine, but also because our criteria for what constitutes something as medicine have changed (consider acupuncture, homeopathy etc.). We see this in the discussion of (national) security in the shift from border security to a variety of challenges to a state’s equanimity, such as pandemics, economic crises and threats of war. Our conception of privacy has also evolved as our capacity to integrate information, previously considered as public, has grown.
5. Each party to a dispute *recognizes that its own use of the concept is contested* by those of other parties. To use an essentially contested concept means to

³ See S.I. Benn and G.F. Gaus, “Public and Private – Concepts in Action”, in *Public and Private in Social Life*, ed. S.I. Benn and G.F. Gaus (NY: St. Martin’s Press, 1983), 3–27.

use it against other users. To use such a concept means to use it aggressively and defensively. This was very clear in debates during the seventies over the (often feminist) slogan, “the personal is the political”, but it is also true in the case of terms such as “terrorism”, which can be used not only as a term of criticism but also to distinguish one’s own activity from that of terrorists. The ongoing conflict between Israelis and Palestinians is in part a contest of characterizations. What Israelis have often viewed as acts of terrorism Palestinians have characterized as acts of retaliation, and vice versa. Privacy is viewed rather differently by the United States and Europe. Members of the EU consider all personal data as private, accessible by others only under fairly stringent conditions. In the US, however, privacy is construed primarily as a shield against governmental intrusion, not against the data gathering and mining activities of commercial enterprises. In contrast with both the US and the EU, individual privacy in a developing country such as India is not a very high priority, whether *vis-à-vis* government or private sector intrusion. Even within a culture there may be variable recognitions. Arguably, the upper and middle classes in India are more likely to be concerned about individual privacy than the members of lower socio-economic groups. Although we have appealed unabashedly to “liberal values”, that which is deemed liberal is often spoken of disparagingly in the US political context, to the point where their advocates now often speak of themselves as “progressive.”

6. Such concepts must be derived from an *original exemplar* (or exemplars) whose authority is acknowledged by all the contestant users of the concept. This condition is required to ensure that we are dealing with a single concept and not two or more distinct or confused concepts. Nobody disputes that a Rembrandt painting is art or that Christianity is a religion. Few would dispute that what happened on 9/11 was a terrorist act or that the proliferation of nuclear weapons by other countries is likely to constitute a challenge to national security. The problems arise as we move out from acknowledged cases to more problematic ones – say, to Ron Hubbard’s scientology in the case of religion, or to the British area bombing of Dresden during World War II or the atom bombing of the cities of Hiroshima and Nagasaki in the case of terrorism.
7. Use of these concepts requires the probability or plausibility of the claim that the continuous competition for acknowledgment among contesting users enables the original exemplar’s achievement to be sustained and/or developed in optimum fashion. The contestation does not split the original exemplars of the concept from ongoing inclusion or from conceptual evolution. What is contested is how that evolution is to be appropriately constructed. So it is with security and many other social concepts – an overlapping of underlying considerations that has evolved in somewhat divergent ways.

Gallie's position has not gone unchallenged. Nor, according to some writers, is it altogether clear what Gallie's exact thesis is or is intended to reflect. Is he saying that concepts such as security are characterized by multiple and evaluatively-charged criteria and that there is no settled priority among them? Is he saying that terms such as security arise within and express particular and competing moral positions or outlooks? Is he arguing that there is no way of extracting oneself from some particular normative position so that one can, *sub specie aeternitatis*, determine one account to be better than others? It would take us too far afield to explore and seek to resolve these possibilities at any length. (Swanton offers a useful overview.) Our point here is simply that Gallie's thesis helps to provide some understanding of the problems that we encounter as we seek to articulate an account of security and other concepts that will be central to our discussion: privacy, autonomy and identity. Definitions do not simply precede justificatory discussions – to some extent they already embody and reflect them.

Now, Rawls.⁴ In *A Theory of Justice* Rawls argued for the priority of justice as a principle of social organization, a principle that he subsequently articulated in terms of a number of other principles arrived at through the artifice of what was called "the original position", a strategy designed to devise social principles untainted by the particularities of their collective architects. Rawls later came to accept that the strategy he devised and the principles at which he arrived were not as immune from partisan values as he had hoped. Contributing to this was the liberal recognition of diversity of ends and of the justificatory structures grounding them. The diversity is too deep for Rawls's original strategy to work as it was intended.

And so, in a later development of his position, Rawls argues that stability within a liberal society may be achieved not because of shared principles derived from reflections on an original position, nor from some general and comprehensive moral doctrine, but from an overlapping consensus in which a sufficient core of political principles is shared, albeit grounded in diverse frameworks or comprehensive doctrines. Rawls argues that the political conception of justice that constitutes this overlapping consensus will have three features. It will first of all be a moral or normative conception tailored explicitly to the basic political, social and economic institutions of society (whether or not it can later be extended more broadly to international relations⁵). Second, the principles constitutive of this overlapping consensus will not be derivable from or be articulations of a general and comprehensive moral or political doctrine such

4 John Rawls, "The Idea of an Overlapping Consensus", *Oxford Journal of Legal Studies*, 7, no. 1 (1987): 1–25. The material was later incorporated into his *Political Liberalism* (1993).

5 Clearly, however, the possibility of extending a political conception of justice to relations between states is of importance to the present study. For discussion at the level of interstate relations see Thomas Pogge, *Realizing Rawls* (Ithaca, NY: Cornell University Press, 1989), Part III.

as utilitarianism, for it is precisely about such general and comprehensive doctrines that liberal democratic societies are pluralistic. Such pluralism is endemic to liberal democracies. Third, the political conception of justice will be formulated “in terms of certain fundamental intuitive ideas viewed as latent in the public culture of a democratic society.”⁶ By means of this strategy, Rawls hopes (though without guarantee) that the resulting conception of justice will garner the support of an overlapping social consensus. It is not Rawls’s purpose here to argue for the relevant substantive principles, though he offers his own conception of “justice as fairness” as one such candidate along with Ronald Dworkin’s liberal conception of equality.

Rawls seeks to distinguish his idea of an overlapping consensus based on a political conception of justice from that of a *modus vivendi* based on self interest, and to argue for the superiority of the former. A *modus vivendi* (of the kind advocated by Hobbes) lacks any principled basis and as such is inherently unstable: it will be abandoned in the event that one of the parties to it thinks it advantageous to do so. The principles that comprise the consensus, however, are moral principles, ultimately grounded in internally affirmed moral doctrines, and adherence to them is likely to persist in the face of shifting advantage.

Both Gallie and Rawls confront the difficulties that must be acknowledged in any attempt to develop global standards across a number of issues (e.g. ethical identity management), and though they are optimistic that it is not a lost cause they do not underestimate the problems that may be involved. The difficulties they confront are not precisely the same difficulties; they occur at different levels of the socio-political process. Rawls confronts basic structural difficulties that may need to be addressed whereas Gallie is concerned for the most part with divergences that occur among seemingly shared social concepts that are likely – much more than Rawls’s – to be reflective of general and comprehensive doctrines. In both cases, however – and this is perhaps characteristic of a liberal approach – there is a willingness to engage in ongoing reflection and deliberation concerning the issues at stake. It may not be quite true that liberal societies do not war against each other, but there are deep social, political and intellectual resources within those societies for addressing such differences.

An illustration

An apposite instance of this contestability is privacy, for which we will draw upon James Q. Whitman’s provocative paper, “The Two Western Cultures of

6 “The Idea of an Overlapping Consensus”, 6.

Privacy: Dignity versus Liberty.”⁷ The history of the development of privacy in Europe and in the US nicely illustrates the divergence from a common history (prior to US Independence) as well as the possibilities for rapprochement.

It is Whitman’s contention that European (by which he tends to mean German and French) conceptions of privacy view it as an aspect of dignity whereas the US conception of privacy tends to see it as an aspect of liberty. Whitman argues that the European tradition informing privacy has its origins in late eighteenth century notions of honor and dignity (in France) and Kantian notions of personality (in Germany) and places great store on control over one’s public image. Much of European privacy consists in “our right to a public image of our own making, as the right to control of our public face.” Whitman draws attention to what he sees as European wariness about allowing the free market to be the umpire on privacy matters. To illustrate this he looks at credit reporting and consumer data protection. Europeans, he writes, believe that “one’s financial information is information ‘of a personal character,’ over which one must have control just as one must have control over one’s image.”

It is Whitman’s contention that the seminal article by Samuel Warren and Louis Brandeis on “The Right to Privacy”⁸ attempted to import a European conception of privacy into the US. However, influential though their article has been it was an unsuccessful transplant. Although privacy eventually made its way into American constitutional values through *Griswold v. Connecticut*⁹, it did so in a different form and with a different rationale. Whitman does not want to argue that “Americans don’t understand the moral imperative of privacy in the creation of ‘personhood’”, an idea that is central to European conceptions. Rather, what is central to the US conception of privacy is liberty: “Suspicion of the state has always stood at the foundation of American privacy thinking, and American scholarly writing and court doctrine continue to take it for granted that the state is the prime enemy of our privacy.” And so privacy is seen as something that protects individuals from state intrusion – hence the sanctity of the home in American privacy law.

We have, then, two different frameworks for thinking about privacy which clearly overlap but do not coincide. Though they are hard to reconcile at a political level – reflecting “local social anxieties and local ideals” – at a conceptual and normative level they can be brought into much closer alignment. As Whitman puts it: “There is no logical inconsistency in pursuing both forms of privacy protection: it is perfectly possible to advocate both privacy against the state

7 James Q. Whitman, “The Two Western Cultures of Privacy: Dignity versus Liberty”, *Yale Law Journal*, 113 (2004): 1151–1221.

8 Samuel D. Warren and Louis D. Brandeis, “The Right to Privacy”, *Harvard Law Review* 4, no. 5 (1890): 193–20.

9 *Griswold v. Connecticut*, 381 US 479 (1965).

and privacy against non-state information gatherers to argue that protecting privacy means both safeguarding the presentation of self, and inhibiting the investigative and regulatory excesses of the state.”

No doubt Whitman’s account can be questioned in a number of respects.¹⁰ To talk, as he does, as though there are only two cultures, is somewhat tendentious, especially as his accounts of German and French conceptions of privacy point to rather different roots. Nevertheless, Europeans appear to have developed a unified public policy on privacy that now stands in serious tension with American public policy. We might take some comfort from this, however, for despite the differences between Germany and France they were able to develop a unified public policy. Perhaps the same can be achieved in relation to the US and even globally within liberal democratic communities.

¹⁰ See, for example, Francesca Bignami, “European versus American Liberty: A Comparative Privacy Analysis of Anti-Terrorism Data-Mining”, *Boston College Law Review*, 48 (May 2007): 609.