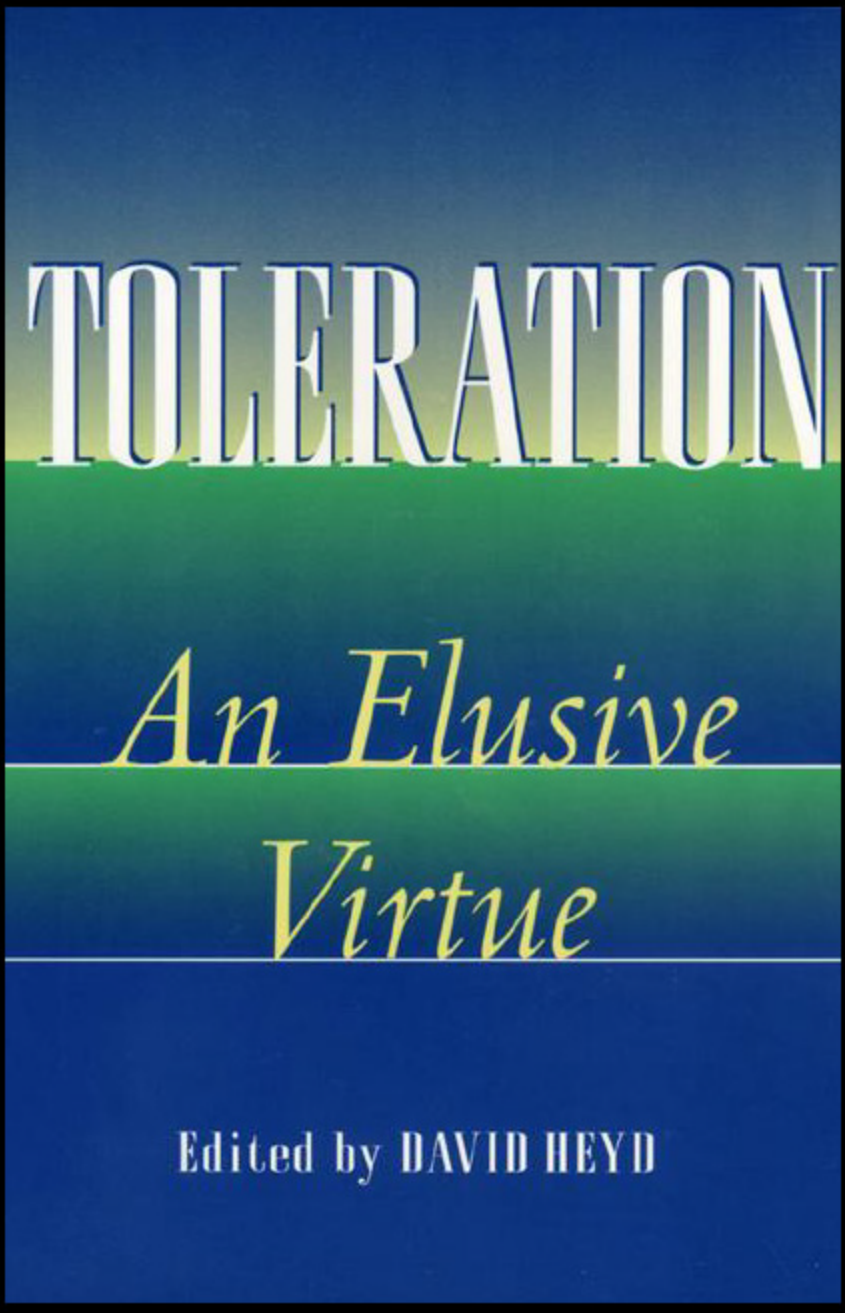
TOLERATION
An Elusive Virtue
Edited by DAVID HEYD

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Preface

THIS VOLUME contains papers delivered in the Tenth Jerusalem Philosophical Encounter held in Jerusalem in January 1992 under the auspices of the S. H. Bergman Center for Philosophical Studies at The Hebrew University. I am grateful to Yirmiyahu Yovel, the founder and general editor of the Jerusalem Philosophical Encounters, and to Ruth Gavison and Igor Primoratz for their assistance in planning this conference on toleration.

Will Kymlicka's article was first published in *Analyse und Kritik* (vol. 14/1, 1993). Joshua Cohen's article was originally published in *Philosophy and Public Affairs* (vol. 22/3, 1993). I am grateful to Princeton University Press and to the editors of both journals for their kind permission to reprint these articles.

One article is sadly missing from this collection. Judith Shklar was in the process of writing a paper for the conference in Jerusalem when she died suddenly and prematurely. In the abstract, which she wrote just a few weeks before her death, Shklar wrote,

> Because toleration emerged as a vital issue in political theory as part of the upheavals of the Reformation, it was some time before arguments in its favor lost their originally religious character. The question of what meaning and worth toleration has within a pluralistic and skeptical context is far from clear, but it might be helpful if one looked at the demands of tolerant personal conduct apart from toleration as a political practice. By keeping the two apart from one another, one might gain a better view of the actual intellectual and political issues that confront us here and now.

Typical of Shklar's acute sensitivity to the philosophical zeitgeist, these words, written long before the conference, can now serve as a motto to this collection of essays. The problematic status of the idea of toleration in a pluralistic society and the tension between its public use as a political practice and the private manifestation as a personal virtue are indeed the two major lines of discussion running through most of the articles.

Judith Shklar was a staunch defender of liberalism, a person of rare intellectual integrity, a sharp and relentless interlocutor, but above all a warm and generous friend. This collection of essays is fondly dedicated to her memory.

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TOLERATION

Introduction

DAVID HEYD

I

Tolerance is a philosophically elusive concept.[1] Indeed, in the liberal ethos of the last three centuries, it has been hailed as one of the fundamental ethical and political values, and it still occupies a powerful position in contemporary legal and political rhetoric. However, our firm belief in the value of tolerance is not matched by analogous theoretical certitude. Perhaps the best indication of the shaky grounds on which the philosophical discussion of tolerance rests is the intriguing lack of agreement on paradigm cases. In the theory of rights, virtue, and duty, people who radically disagree about the analysis and justification of these concepts can still appeal to a commonly shared repertory of examples. But with tolerance, it seems that we can find hardly a single concrete case that would be universally agreed to be a typical object of discussion.

Courage and habeas corpus are standard cases of virtue and rights, respectively. But would we agree on defining the attitude of restraint toward neo-Nazi groups as tolerance, or, alternatively, would we describe as tolerance the way the heterosexual majority treats homosexuals? I suspect that today, despite the long and respectable history of the idea of religious toleration, only a few Catholics or Protestants would describe the way they feel about each other in terms of tolerance. And beyond the derivative use we make of the concept of tolerance in everyday language, it is doubtful whether the attitude of conservative parents toward their children's styles in music and fashion can be taken as a genuine case of toleration, that is, as exemplifying the deep moral value associated with the concept.

The threat of indeterminacy seems to arise from two opposite directions: absolutism and pluralism. There are, on the one hand, cases in which the firm commitment to a moral truth restricts the scope of application of the concept of toleration. For instance, any mode of restraint in the attitude to anti-Turkish incitement by German skinheads would hardly be considered "tolerance," because the object of the restraint is patently immoral. In other words, some actions are straightforwardly "intolerable," and any conciliatory attitude toward them could at best be based on *pragmatic* considerations (of fear or the need for compromise),

but never on the idea of tolerance. On the other hand, there are cases in which the belief in moral pluralism calls for the acceptance of ways of life (or beliefs) different from my own, either because I acknowledge their legitimacy or because I simply do not care about them. Refraining from a hostile reaction to members of other religions, or from persecuting homosexuals, is accordingly hardly to be considered as displaying tolerance under contemporary pluralistic conceptions.

So it seems that the idea of toleration has undergone a gradual process of compression between the demand not to tolerate the immoral (absolutism) and the requirement to accept the legitimacy of the morally different (pluralism). On the theoretical level, this means that toleration in the strict sense must be clearly distinguished from pragmatic compromise with the otherwise "intolerable" as well as from moral indifference. That is to say, the concept of toleration must be narrowed down in its philosophical use so as to refer strictly to cases in which restraint in the response to another's belief or action is based on some specifically *moral* grounds (thus excluding both compromise and indifference). But what are the typical examples for such a narrowed-down idea of toleration?

The history of the idea of tolerance provides us with good examples, from religious toleration in Locke to the modern toleration of minorities, such as Jews, African Americans, homosexuals, and so on. But these are typically historically outdated examples, because today we would expect people to abstain from hostile behavior toward all these groups, not as a matter of toleration but as a matter of the rights of others or the recognition of the value of their ways of life, or because it is simply "none of our business" to interfere with the beliefs and most of the actions of other human beings.

Classical liberalism, such as Locke's or Mill's, rested on the principle of tolerance more than does today's form of liberalism, which is closer to skeptical pluralism. Locke's argument for tolerance was based on the counterproductiveness of the compulsion of religious beliefs; Mill's was based on the value of personal autonomy. The shift from these views to the modern conception, which rests on easy acceptance of the heterogeneity of values and ways of life, pushes the concept of tolerance dangerously close to that of indifference. And even if this moral development is welcomed by the moral pluralist, it must be clear that much of the original intrinsic value of tolerance is put under threat.

It is accordingly fair to say, as a generalization, that side by side with the growing use of ideas of toleration in public discourse and political debate, there is also an increasing awareness in philosophical theory of the tensions and difficulties involved in the definition and justification of the concept of toleration. The present collection of articles attests to this skeptical trend: in emphasizing the shifting locus of toleration in the his-

torical evolution of the idea; in the narrowing down of its scope in the attempt to supply the necessary and sufficient conditions defining it; in the normative difficulty in defending it from the challenges of intolerant ideas and groups; or, in general, in navigating between the Scylla of some minimal commitment to the defence of moral ideals and the fight against evil and injustice and the Charybdis of the indifferent acceptance of an overly "liberal" pluralism.

Bernard Williams's paper sets this skeptical scene for the whole collection in a masterly way. Toleration, according to Williams, is paradoxical, because it is both necessary and impossible. That is, pluralism and conflict of values call for toleration, but toleration is required only for what seems to be intolerable! The attitude of tolerance should be clearly distinguished from both indifference and Hobbesian compromise, particularly if we wish to regard it as a personal virtue rather than merely a political arrangement.

The distinction between tolerance and indifference is an important constituent in any theoretical attempt to delineate the contours of the former. But, as Williams points out, the borderline between the two is constantly shifting in the history of moral and political value. In seventeenth-century England, people's religious practices were hardly treated as lying beyond the legitimate concern of their fellow citizens. In nineteenth-century England, people were rarely indifferent to their neighbors' sexual practices. But in present-day England, most people do not feel very strongly about either the religious faith or the sexual preferences of others. One could even generalize and say that the scope of indifference is growing in the field of value judgment, and that liberalism today means less the toleration of other ways of life than the cool acceptance of the very plurality and heterogeneity of lifestyles. If that is the case, toleration might prove in the future to have been "an interim value," that is, an attitude that characterized political morality between the age of absolutism, in which every deviation from the only truth was suppressed, and the age of pluralism, in which nothing is considered a deviation.

It is an interesting feature in the analysis of toleration that the narrower its definition the more paradoxical it becomes. Thus, the virtue of tolerating the intolerable would not be paradoxical if the object of toleration were not "really" or genuinely intolerable. But John Horton, who in many respects shares Williams's skepticism, adds to the definition of toleration the condition that its object be not only thought to be morally wrong, but *justifiably* thought so. The homophobe's restraint toward homosexual behavior cannot, accordingly, be defined as a case of toleration, because there are no good reasons to object to the behavior in the first place. The same applies to restraint in interracial relations and attitudes. Horton's strict definition of toleration excludes two types of phenomena:

those that are so bad or wrong that they must not be tolerated and those there is no objective reason to reject and that hence should be fully accepted or even respected. This leaves only a narrow space for toleration, namely, the scope of beliefs and actions justifiably disapproved of yet not to the extent of being "intolerable." Abortion could be an example. But one could speculate that in the future even this deeply contested issue will become a matter of indifferent acceptance by liberals.

A possible solution of the paradox of toleration lies in metaethical relativism, that is, in an attempt to deny the objectivist assumptions on which Williams's and Horton's definitions of toleration rest. Thus, if no commitment in matters of values can be justified, we are called on in the name of a second-order principle to restrain ourselves in our attitude to views and practices different from our own. However, as Gordon Graham argues, the very point of toleration is that, contrary to conventional wisdom, it must be distinguished from moral pluralism and relativism. Thus, relativism, on the one hand, can lead to a Nietzschean intolerant model of power relations, whereas objectivism, on the other, as in the case of Mill and Popper, might positively require a tolerant attitude. It is Graham's conviction that toleration and objectivism in morals go hand in hand: there can be no progress in our study of moral truth without an unrestrained flow of ideas and beliefs, and the value of this tolerant attitude to ideas and beliefs does not make sense unless the existence of a right answer in moral issues is assumed.

The starting point of Barbara Herman's paper follows the line of Graham's concern with the threat of pluralism. Deep pluralism is dangerous to social stability as well as to "engaged moral judgment." Like Williams and Horton, Herman recognizes the tension between toleration as a form of restraint in the response to the beliefs and actions of the other and the moral disapproval of these beliefs and actions. The first step she takes in attempting a solution to the paradox is to distinguish between the political, that is, public, character of the tolerant restraint and the moral, that is, private, character of the negative judgment of the belief or action in question. But Herman observes the danger of suppressing the other under the guise of toleration, that is to say, legitimizing the negative judgment by the political ideal of tolerance (like letting the minority express its grievances but not really listening to it).

Herman proposes a Kantian analysis of moral judgment, which would both save objectivism in ethics and be sufficiently context-sensitive to satisfy modern pluralistic views. The key lies in the idea of "a community of moral judgment" in which competing value systems are discussed in a shared deliberative field under second-order regulative principles. One of these principles is toleration, whose particular virtue is that of allowing for a community of moral judgment more inclusive than the one based on

a common value system shared by all members. However, Herman warns that toleration cannot be taken as adequate for creating a pluralistic society, because it is only a negative (political) principle, lacking the positive, affective mutual engagement called for by a stable society. Toleration in itself cannot secure the understanding of other points of view. The ultimate solution to the problem of the Kingdom of Ends in Herman's interpretation is moral rather than merely political, that is, the creation of a maximal set of compossible ends.

So far the idea of toleration has been discussed in traditional, individualistic terms. Indeed, the history of toleration is closely associated with the rise of the individual as the locus of natural rights and personal autonomy. However, the inception of the ideal of toleration is no less related to the Wars of Religion and the call for restraint in the attitude to people belonging to other religious *groups*. Will Kymlicka takes seriously the tension between the two levels of the alleged right to be tolerated: personal liberty on the one hand, and the rights of a group to maintain its collective identity on the other. The millet system of the Ottoman Empire and the status of Native American tribes and the Amish in America are examples of the toleration of others *as* groups. The trouble, as Kymlicka shows, is that with all its moral merits, group toleration can involve sacrificing individual rights, particularly by giving the group immunity from external interference (e.g., by the state) in the way it deals with the internal "deviations" of individuals. According to Kymlicka, Rawls's late "political liberalism" is not rich enough to support a conception of toleration in which individuals are left with the autonomy to form their own lives, especially when this involves changing deep group affiliation (religion, tribal life, etc.). Yet Kymlicka warns against forcing the ideas of liberalism on nonliberal groups and calls for a solution of compromise, leaving them with some living space of autonomy in running their own collective affairs.

In an interesting critical examination of Kymlicka's views, Moshe Halbertal challenges the deep-rooted association of toleration with autonomy. His main thesis is that autonomy, in the sense of the ability to rationally *choose* to revise one's ends and identity, is not a necessary condition of individual freedom of the sort toleration is meant to protect. Moreover, if toleration is justified in terms of autonomy, there is the risk of imposing a particular conception of the good (autonomy, in our case) on individuals who do not value it. The weakness of a justification of toleration by appeal to autonomy is especially manifest in the sphere of education: kibbutz education and Jewish Orthodox education inculcate particular values, which do not include autonomy, and Halbertal insists that there is nothing intolerant about these forms of education that would justify public interference. In other words, society is not entitled to force

communities (kibbutz, the Amish) to bring up "rational choosers" (a goal Halbertal suspects is conceptually incoherent anyway). Political toleration is thus extended to communities in a truly pluralistic society (which, unlike the millet system, is not based on the asymmetrical relations of power between the dominant culture and the minority groups).

Harel's article also shows sensitivity to the shortcomings of traditional liberal theory that advocates toleration on purely individualistic grounds. Harel, like Kymlicka, argues that the individual has strong communal interests. Some of these come under the concept of "exclusionary interests," that is, "interests of members of the community in reinforcing their separateness from a larger social body"; others are entitled "inclusionary interests," because they refer to "the interests members of a community have in becoming an integral part of a broader society." Orthodox Jews' condemnation of homosexual practices is an instance of the former; women's demand to suppress pornography and the struggle of Blacks to curb racist hate speech are examples of the latter. Harel's central claim is that the liberal idea of toleration is challenged from both sides, that is to say, Orthodox Jews demand toleration of their intolerant attitudes to others, and women demand an intolerant interference in the freedom of expression of the producers of pornography. As Harel notes, the two types of challenges are also mutually exclusive; that is, the appeal to the right to maintain a particularistic, separate communal identity within the larger society is incompatible with the appeal to the egalitarian principle as the basis of social membership. Thus, we may add that the paradox of tolerance seems to be unsolvable, because there are good reasons both for tolerating certain forms of intolerant practices and for not tolerating them.

A different perspective on the toleration of groups is suggested by Richards. He draws an analogy between the role of the idea of toleration in interfaith relations and interracial relations. Racial discrimination, like religious persecution, is based on the corruption of conscience and the violation of rights. Toleration was motivated, says Richards, by an attitude of political skepticism about enforceable political epistemologies in both spheres. Accordingly, the abolitionists should be seen as the most principled advocates of the idea of toleration in the nineteenth century, as were Bayle and Locke in the seventeenth. The kind of sectarianism that made slavery possible is challenged in the name of "public reason," the same Kantian idea to which Barbara Herman also appeals.

The theoretical difficulties in adopting a genuinely tolerant attitude are particularly manifest in religious contexts, in which the stakes are especially high, as Locke and all his followers were sharply aware. Although one could appeal to pragmatic, political, and "epistemic" arguments to justify a tolerant attitude to individual members of other religious faiths,

a true acceptance of competing religions cannot be justified on the theological level, especially when monotheistic religions are considered. In Avishai Margalit's words, "a religion based on constitutive, redemptive, revealed truths cannot ascribe value to a religion that contradicts these truths." Through a detailed analysis of Lessing's *Three Rings*, Margalit reaches a conclusion that denies the possibility of religious pluralism and leaves little space for religious tolerance. Unlike the context of science and the growth of knowledge (so central to Mill's argument for toleration), religious belief—being a matter of revelation—cannot attach any value to error, and hence the traditional liberal justification for toleration cannot be applied in the relations of one monotheistic religion with its competitors.

The three main spheres in which the principle of toleration has been operative are religion, sex, and expression. George Fletcher analyzes the "instability" of the notion of toleration in its indeterminate range between the "ceiling" of harm (which calls for intervention) and the "floor" of disregard (things that are "none of my business"). This analysis is reminiscent of Williams's skeptical view of toleration, but Fletcher adds that the grounds for toleration vary in the three aforementioned spheres. In religious matters, there is the internal dimension of personal conviction that makes intervention counterproductive; in the case of freedom of expression, there is the danger of a "slippery slope," which calls for tolerating phenomena like flag burning or denying the Holocaust; and in the case of sexual behavior, immunity from intolerant interference is called for by the value of privacy and the high price of intervention. Again, all these arguments for toleration cast doubt on its allegedly "intrinsic" value, or its justification as an independent virtue.

It is also Joshua Cohen's claim that the protection of free speech is not freestanding or absolute. It is true that the special weight of freedom of expression together with the tendency of governments to curb it for unjustified reasons lend support to a strong protection and lead to the toleration even of "hate speech." But this protection raises the dilemma faced by American universities that try to restrict forms of speech that are directly offensive to minority groups within the campuses. Cohen carefully and systematically analyzes the basis for the principle of free expression and its limits, taking into account the kinds of interests promoted by free speech, the price of its restriction, and some fundamental background facts (like the sensitivity of human beings to offensive speech and the temptation of those who have the power to curb it).

Finally, and still in line with the qualified and suspicious approach to the idea of toleration, Scanlon's article highlights the *risks* of a tolerant attitude for members of a society who are not indifferent to the way their society develops. I may adopt a tolerant attitude toward an individual

fellow citizen, but that does not mean that I forgo my right to resist the wider influence that person's kind of lifestyle has on the society in which we all live. Thus, the protection from religious coercion provided by the First Amendment does not fully satisfy my interests as a secular citizen living in a society that in my mind is over-religious. In other words, under the umbrella of the right to be tolerated, certain groups in society may lead it to undesirable changes in its identity and character. Like Kymlicka, Scanlon sharpens our awareness of the tension between toleration as an ideal for individual human beings taken "in abstraction" and the deep and legitimate interest of members of the community to take part in "the informal politics of social life" and help mold it in a certain way. Scanlon's powerfully illustrative analogy is to our attitude to members of our family and close community, in which we do not typically show a tolerant acceptance of behavior of which we strongly disapprove. Scanlon concludes that this inner tension in the ideal of toleration requires a compromise or accommodation, which in its very nature lacks stability or determinacy.

Thus, an overview of the varied collection of papers in this volume points to a common suspicion of the sweeping liberal support for the principle of toleration, not only because the line between the duty to tolerate and the requirement to oppose the intolerable is not always clear, but because the concept of tolerance itself is problematic, or even paradoxical. The thread that persistently runs through all the papers is that beyond the strong moral commitment of liberal citizens in modern pluralistic societies to the ideal of toleration there is a deep theoretical doubt concerning the likelihood of providing it with a stable philosophical ground.

II

In the remaining pages of this introduction, I try to propose an analysis of the concept of toleration that attempts to give an account of its elusiveness. The concept of toleration I discuss is the strict or narrow one, namely, that which is distinguished from other types of restraint, like indifference or pragmatic compromise. This implies that the following comments cannot be expected to apply to the whole variety of everyday uses of the concept of toleration but only to the typical or paradigmatic ones. It focuses primarily on the ethical, rather than the political, context, that is, on toleration as a virtue of individuals relating to other individuals.

Furthermore, we should keep in mind that the indeterminacy of the concept of toleration is due to its being "compressed" between two spheres: phenomena that by no means should be tolerated (like cruelty

and murder) and phenomena that should not be objected to in the first place (like gender or racial identity). The remaining sphere left for this narrow (but morally valuable) concept of tolerance consists of beliefs and actions that are justifiably (and maybe morally) disapproved of and yet are said to be immune from negative interference. The duality of conflicting reasons for rejecting and accepting certain beliefs and actions creates the so-called paradox of toleration, which is obviously more pointed in the case of morally objectionable phenomena. One way to solve the paradox is (as suggested by Horton) to distinguish between the two types of conflicting reasons and then show, in each case, the grounds for appealing to one set of reasons rather than to the other.

The conception I wish to outline can be called "perceptual." It treats toleration as involving a perceptual shift: from beliefs to the subject holding them, or from actions to their agent. The model of two sets of reasons implies that the reasons for disapproval and those for restraint are *balanced* against each other by some sort of a weighting procedure. The perceptual model, on the other hand, treats the two sets of reasons as qualitatively distinct and irreducible to any common ground. The virtue of tolerance consists in a switch of perspective, a transformation of attitude, based not on the assessment of which reasons are overriding but on ignoring one type of reason altogether by focusing on the other. Thus, to be tolerant one must be able to suspend one's judgment of the object, to turn one's view away from it, to treat it as irrelevant, for the sake of a generically different perspective. It is a kind of a Gestalt switch, which, like the rabbit-duck case, involves on the one hand a choice, sometimes an intentional effort, and on the other hand an "image" that is always exclusive of its competing image at any given time.

The essential element in this perceptual shift might be called "personalization." When opinions and beliefs, actions and practices, are judged on their merit, they are considered impersonally, that is, in abstraction from the subjects holding, choosing, or acting on them. Opinions and practices can be judged for their validity, truth, and value irrespective of the way they have been adopted, chosen, and followed. But opinions and actions do not float subjectless in the air; they can also be viewed as held with integrity, chosen freely, or followed authentically. This personal dimension introduces a categorically different kind of judgment, to which tolerance belongs. The intimate relation as well as the distinction between beliefs and believers, actions and agents, has been the cornerstone of all theories of toleration from Locke, through Kant and Mill, to Rawls, Dworkin, and Raz.

Some contexts typically require an impersonal judgment of beliefs and practices, that is, in abstraction from the person holding them. Obvious examples are the evaluation of scientific beliefs or of legal rules. In these contexts, ad hominem considerations are rightly thought of as fallacies.

But in the sphere of interpersonal relations, particularly when actual interference in another's life is considered, the personal index of beliefs and actions becomes highly relevant; it is never strictly with beliefs or actions that we are interfering, but with individuals and their lives. Tolerance is a virtue that can thus be viewed as the symmetrical counterpart of the virtue of unbiased scientific neutrality (or the blindfolded goddess of justice, forced to ignore the identity of the accused). Both consist of a capacity to adopt a partial perspective in order to achieve a certain goal: the truths of propositions, independent of the persons believing in them, on the one hand; respect for persons, independent of their beliefs, on the other. Note that respect is a moral attitude to others that typically disregards most actions and opinions of the object of respect. Toleration is thus a sub-category of respect, involving restraint.[2]

I call toleration a perceptual virtue, because it involves a shift of attention rather than an overall judgment. Tolerant people overcome the drive to interfere in the life of another not because they come to believe that the reasons for restraint are weightier than the reasons for disapproval, but because the attention is shifted from the object of disapproval to the humanity or the moral standing of the subject before them. This is a feat of abstraction analogous to the opposite abstraction of ideas from the human minds behind them. It consists of the capacity to ignore, or rather suspend or "bracket," a set of considerations, which do not thereby lose any of their original force. Toleration is a perceptual virtue, because it makes one perceive the other as more than merely the subject of certain beliefs or the agent of a particular action. The nature of this "abstracted subject or agent" might be constituted by the very power of choice (as in Millian theories of autonomy), the rational nucleus of the personality (as in Kantian conceptions of autonomy), or the relation of the particular belief or action to a wide system of beliefs or a biography (forming an integrated whole, or a way of life). In any case, it presupposes a distinction between some sort of a core of the human personality and a periphery of particular beliefs and actions. It treats beliefs and practices not as isolated entities but as belonging to a personal cognitive system or to a form of life. This is exactly why the tolerating attitude is closely associated with "understanding" the other, that is, the capacity to anchor the action or belief in its personal background of motives, intentions, or other beliefs in the same cognitive system.

The inspiration for the perceptual model presented here is, of course, John McDowell's work in ethics, as well as Iris Murdoch's ideas about the role of attention in moral judgment. McDowell argues that virtuous action is not an ability to follow rules or the inculcation of particular desires but a perceptual capacity to view situations in a certain light as constituting reasons for action. This, of course, does not mean that

McDowell would be willing to analyze toleration on these lines, especially because it is doubtful (as Williams has shown) whether toleration can be treated as an ordinary virtue at all. Above all, it should be noted that my perceptual analysis of toleration does not share the "silencing element" in McDowell's analysis of virtue: whereas in the mind of the virtuous person the "correct" perception of the situation silences all other alternative perceptions, making the person irreversibly blind to them, the Gestalt switch of the tolerant person is not exclusive, does not make the other set of reasons irrelevant in the mind of the person, and is reversible.[3] One important implication for this difference between my proposal and McDowell's conception of virtue is that toleration calls for *reasons*, that is to say, the switch to the personalized perspective must itself be rationally motivated, because the competing (negative) judgment of the belief or action does not completely lose its original (independent) force. The tolerator must therefore appeal to *second-order* reasons, such as the intrinsic value of autonomy, human respect, the overall value of the whole way of life of which the particular (wrong) belief or action are but a part (as in Harel's view), and so on.

Furthermore, because it is a rational choice of the tolerator to make the perceptual shift in one direction, so it might be rational to make the shift on another occasion in the other direction. In some contexts, we should ignore the individual agent and focus our attention on the action and the reasons for curbing it. This might be called for either when the actions or beliefs in question are particularly harmful or offensive (murder, hate speech) or when they are in some sense not genuinely the agent's (irresponsible behavior of children or mentally retarded adults). Again, unlike the case of virtue, which in McDowell's conception is "absolute," toleration has limits, and these can be rationally debated in terms of the weight of second-order reasons of various kinds.[4]

The traditional, "balancing" account of toleration can at most appeal to the overriding force of the reasons for restraint over the reasons for interfering in the wrong belief or practice. But this is an ad hoc explanation, which considers the relative weight of particular reasons in each case. The perceptual model, by appealing to a second-order reason, provides a *general form* for the tolerant option and is thus theoretically superior in being more systematic in the justification of toleration. The general superiority of the personalized perspective lies in the intrinsic value of individual integrity and the priority of the unique subject-agent to the impersonal content or validity of the beliefs and actions held by her. The values of autonomy, respect, authenticity, integrity, and interpersonal recognition and acceptance are indicative of this priority. These values are particularly conspicuous in the practical realm of agency (rather than the cognitive realm of belief), because they condition the very possibility

of cohesive communal or social coexistence. The Gestalt switch of toleration is grounded in the charitable way we want to treat people who are not too distant (to whom we feel indifferent) or too close (whom we wish to change or mold). Toleration is consequently seen to be also a specifically social virtue, that is, a virtue that not only presupposes but also promotes the social cohesion of a community.

I cannot develop this extremely schematic idea for the analysis of toleration here. I will, however, make a few remarks as to the way it could be deployed to help account for some of the issues raised by the discussion of toleration. Take first the distinction between mere restraint and genuine tolerance. Restraint in itself is a psychological capacity: patience, the ability to check and control one's emotions and actions. It is a typically affective or conative concept, which might be a prerequisite for tolerance. Tolerance, however, is, in the strict sense, the attitude of someone who ideally would not even have to exercise restraint, because the perception of the tolerated party as a rational or autonomous human being would completely overshadow the motives for the initial objection to the beliefs or practices in question. Like the virtue of innocence, that is, the disposition not to see defects in people, tolerance is a matter of perception, even though it can certainly be assisted by a patient temper. We could say that restraint and patience are the condition of the ability to make the perspectival shift, but tolerance is the disposition, the character tendency (and hence virtue), of choosing to actually make this shift. The general nature of the tolerant disposition accords with the general form of the second-order reason for showing restraint toward an otherwise objectionable practice.

According to the perceptual conception, only human beings are, strictly speaking, the objects of toleration. We do not tolerate opinions and beliefs, or even actions and practices, only the subjects holding disliked beliefs and the agents of detested actions. As I have suggested, toleration consists exactly in the shift from the perspective of judging beliefs and actions impersonally to that focusing on persons. Only human beings can be the object of restraint based on respect, which is required by the idea of tolerance. This could also explain why we usually refer to traits of character or psychological dispositions, rather than particular acts, as the objects of tolerance. The former are conceptually closer to the way we identify and refer to individual agents.

In his article, Horton raises the intriguing question of inculcating the virtue of tolerance in the process of education. How can we bring up children to become tolerant of others without weakening their commitment to their cherished beliefs and preferences? How can we expect people to grow up to have a sharply defined political or religious profile, a well-defined aesthetic and moral personality, and yet be tolerant of in-

compatible sets of beliefs and values? If we adopt the perceptual model, this difficulty looks slightly less menacing. Training children to look at people without regard to some of their convictions and behavior might not be easy, but it is fully compatible with implanting strong personal convictions and principles. I would even chance the generalization that young people tend to be less tolerant because they are less disposed to separate opinions from their subjects, actions from their agents. (Incidentally, it seems that they are equally more liable to the symmetrical fallacy in the cognitive sphere, namely, ad hominem judgment.) On the other hand, the perceptual analysis of toleration is compatible with Scanlon's claim (to which Halbertal would probably agree) that we show tolerance primarily to other individuals in our society whom we conceive of as independent of substantive values, rather than to our close relatives (e.g., children) whose moral character we try to mold.

Like Graham's thesis in his article, though for a different reason, the perceptual view frees tolerance from its dependence on relativism and multiculturalism. Toleration of the practices and beliefs of other peoples and cultures involves recognizing the intrinsic value of the human beings who are committed to certain cognitive systems or who autonomously choose and follow certain systems of rules and values. It does not require any weakening of certainty, confidence, or commitment to our own beliefs and values. Ignoring this rather trivial truth often leads modern liberal cultures to believe that open-mindedness and toleration are promoted by inculcating agnostic attitudes or loosening moral and cognitive attachments.

The perceptual account also interprets the idea of "being judgmental": it amounts to the tendency to conflate the judgments we apply to beliefs and actions with those we apply to their subjects and agents. In other words, being judgmental with regard to beliefs and practices in the abstract is a desirable attitude; being judgmental toward human beings is not always a virtue, because we should sometimes respond to them not through their beliefs but through the way those beliefs have been adopted or cohere with other beliefs in a whole system held by a particular human mind. This point coheres with the forgiving attitude or the "understanding" associated with tolerance, as noted above.

Approaching tolerance in perceptual terms also explains why governments cannot strictly be said to be tolerant. Tolerance is not only shown exclusively *to* people but also exclusively *by* people. Only human minds can make the perspectival shift that changes the criteria of relevance or salience of two competing sets of valid considerations. Governments or states cannot literally be said to be patient, to restrain themselves, to "suffer" (in Hebrew, the word for tolerance and the word for patience are derived from the same root, denoting burden or suffering). The state has

no views, no likes and dislikes, which it has to suspend so as to honor people's autonomy or liberty. One may therefore speak only of the *neutrality* of the state, precisely in its having no concern whatsoever with the particular beliefs and lifestyles of its citizens. But neutrality is an abstract principle, like equality before the law, or the equal claim of individuals as citizens to be respected. Satisfying the requirements of this principle does not involve any kind of tolerance in the narrow moral sense.

It has often been said that although people are happy not to be persecuted, they do not like to be tolerated, because toleration is only partial acceptance, the acceptance of the right of a person to lead a certain life or to entertain certain beliefs; it does not extend to the acceptance of the practices and beliefs themselves. It seems to me that the asymmetry between the tolerator and the tolerated on this matter can be explained by the fact that the subjects of the beliefs or the agents of the practices in question find it harder to make the perspectival shift made by the tolerator, because they identify with their beliefs and practices in a much stronger way. The abstraction of agency from actual actions is harder for the agent than for the spectator. Thus, we do not usually apply the concept of tolerance reflexively; that is, we do not say that people tolerate themselves. Moreover, from the first-person point of view, such an abstraction usually has no point or function. It even creates a sense of alienation of subjects from their own beliefs and actions. But from the point of view of the second- or third-person perspective, there is an obvious social benefit to be gained by such a separation.

The lesson of many of the papers in this volume is that there is a distinction between genuine toleration (e.g., in religious affairs, sexual practices, and free expression, as noted by Fletcher) and "toleration" in the purely descriptive sense (e.g., racial toleration, in the sense used by Richards with regard to the abolitionists). The perceptual conception, however, explains why we tend to place some value also on restraint in relation to members of another race, even beyond the obvious value of avoiding racial persecution. My hypothesis is that if the restraint is based on moral grounds, then not only would these lead one to see members of the other race as deserving of human respect irrespective of their color, but eventually this perception would lead to a change in the initial objection or dislike. It is hard to imagine *morally* relevant reasons for restraining oneself from acting on the basis of racial prejudice without at the same time undermining the force of these very prejudices. This could have important implications for educational techniques for fighting racial prejudices. These would consist of a three-stage process: first, abstaining from acting against members of the other race (mere restraint); second, *seeing* them differently, that is, providing the morally relevant reasons for the restraint (toleration); third, abandoning the initial opposition or disap-

proval, thus making toleration (that is, the *shift* in perception) altogether superfluous (full acceptance). Richards's historical perspective attests to this very process in the passage from persecution and discrimination to racial equality via racial toleration.

The perceptual account does justice to the specifically moral dimension of tolerance, its being more than a simple psychological restraint or a behavioral disposition. It takes seriously Horton's conclusion that "not everyone who rightly restrains themselves from acting so as to interfere with conduct to which they object, acts tolerantly," but it does not see it as "most surprising" or a "hint of another paradox of toleration." By giving an account of the relation between the two sets of conflicting considerations, the perceptual view offers a framework for dissolving the original paradox of toleration. Nevertheless, the range of phenomena to which the narrow concept of toleration applies remains elusive and indeterminate. This is due to the dependence of the definition of the scope of toleration (indeed its very possibility) on general but changing moral theories concerning its purported objects.

Notes

1. In this volume, "tolerance" and "toleration" are used interchangeably.

2. Forgiveness is similar to respect in abstracting a certain idea of the subject from the action that deserves a negative response (like resentment or punishment). Hagit Benbaji has suggested to me the interesting possibility of solving the paradox of toleration by treating it as supererogatory. Indeed, the analogy between toleration and forgiveness might support this original proposal. Both forgiveness and the tolerant attitude are meritorious in going beyond the call of duty; that is to say, they are particularly valuable without being obligatory. The initial hostile response in both cases is justified; that is, the tolerated practice as well as the forgiven act remain in themselves "wrong." See my *Supererogation* (Cambridge: Cambridge University Press, 1982), ch. 7.

3. See J. McDowell, "Virtue and Reason," *Monist* 62 (1979): 331–50, particularly p. 335.

4. I am much indebted to John Horton and Yitzhak Benbaji for their detailed and illuminating comments on the limits of the analogy with McDowell's conception of virtue.

1

Toleration: An Impossible Virtue?

BERNARD WILLIAMS

The difficulty with toleration is that it seems to be at once necessary and impossible. It is necessary where different groups have conflicting beliefs—moral, political, or religious—and realize that there is no alternative to their living together, that is to say, no alternative except armed conflict, which will not resolve their disagreements and will impose continuous suffering. These are the circumstances in which toleration is necessary. Yet in those same circumstances it may well seem impossible.

If violence and the breakdown of social cooperation are threatened in these circumstances, it is because people find others' beliefs or ways of life deeply unacceptable. In matters of religion, for instance (which, historically, was the first area in which the idea of toleration was used), the need for toleration arises because one of the groups, at least, thinks that the other is blasphemously, disastrously, obscenely wrong. The members of one group may think that the members of the other group need to be helped toward the truth, or that third parties need to be protected against the bad opinions. Most important—and most relevant for the dilemmas of liberal societies—they may think that the leaders or elders of the other group are keeping the young and perhaps the women from enlightenment and liberation. They see it as not merely in the general interest but in the interest of some in the other group that the true religion (as they believe it to be) should prevail. It is because the disagreement goes this deep that the parties to it think that they cannot accept the existence of each other. We need to tolerate other people and their ways of life only in situations that make it very difficult to do so. Toleration, we may say, is required only for the intolerable. That is its basic problem.

We may think of toleration as an attitude that a more powerful group, or a majority, has (or fails to have) toward a less powerful group or a minority. In a country where there are many Christians and few Muslims, there may be a question whether the Christians tolerate the Muslims; the Muslims do not get the choice, so to speak, whether to tolerate the Christians or not. If the proportions of Christians and Muslims are reversed, so will be the direction of toleration. This is how we usually think of toleration, and it is natural to do so, because discussions of toleration have

often been discussions of what laws should exist—in particular, laws permitting or forbidding various kinds of religious practice—and the laws have been determined by the attitudes of the more powerful group. But more basically, toleration is a matter of the attitudes of any group to another and does not concern only the relations of the more powerful to the less powerful. It is certainly not just a question of what laws there should be. A group or a creed can rightly be said to be "intolerant" if it would like to suppress or drive out others even if, as a matter of fact, it has no power to do so. The problems of toleration are to be found first at the level of human relations and of the attitude of one way of life toward another. It is not only a question of how the power of the state is to be used, though of course it supports and feeds a problem about that, a problem of political philosophy. However, we should be careful about making the assumption that what underlies a practice or an attitude of toleration must be a personal virtue of toleration. All toleration involves difficulties, but it is the virtue that especially threatens to involve conceptual impossibility.

A practice of toleration means only that one group as a matter of fact puts up with the existence of the other, differing, group. A tolerant attitude (toward this group) is any disposition or outlook that encourages them to do so: it is more likely to be identified as an attitude of toleration if it applies more generally, in their relations to other groups, and in their views of other groups' relations to each other. One possible basis of such an attitude—but only one—is a virtue of toleration, which emphasises the moral good involved in putting up with beliefs one finds offensive. I am going to suggest that this virtue, while it is not (as it may seem) impossible, does have to take a very specific form, which limits the range of people who can possess it. Because of this, it is a serious mistake to think that this virtue is the only, or perhaps the most important, attitude on which to ground practices of toleration.

If there is to be a question of toleration, it is necessary that there should be something to be tolerated; there has to be some belief or practice or way of life that one group thinks (however fanatically or unreasonably) wrong, mistaken, or undesirable. If one group simply hates another, as with a clan vendetta or cases of sheer racism, it is not really toleration that is needed: the people involved need rather to lose their hatred, their prejudice, or their implacable memories. If we are asking people to be tolerant, we are asking for something more complicated than this. They will indeed have to lose something, their desire to suppress or drive out the rival belief; but they will also keep something, their commitment to their own beliefs, which is what gave them that desire in the first place. There is a tension here between one's own commitments, and the acceptance that other people may have other, perhaps quite distasteful commit-

ments: the tension that is typical of toleration, and which makes it so difficult. (In practice, of course, there is often a very thin or vague boundary between mere tribalism or clan loyalty and differences in outlook or conviction.)

Just because it involves some tension between commitment to one's own outlook and putting up with the other's, the attitude of toleration is supposed to be more than mere weariness or indifference. After the European Wars of Religion in the sixteenth and seventeenth centuries had raged for years, people began to think that it must be better for the different Christian churches to coexist. Various attitudes went with this development. Some people became skeptical about the distinctive claims of any church and began to think that there was no truth, or at least no truth discoverable by human beings, about the validity of one church's creed as opposed to another's. Other people began to think that the struggles had helped them to understand God's purposes better: He did not mind how people worshiped, so long as they did so in good faith within certain broad Christian limits. (In more recent times, a similar ecumenical spirit has extended beyond the boundaries of Christianity.)

These two lines of thought, in a certain sense, went in opposite directions. One of them, the skeptical, claimed that there was less to be known about God's designs than the warring parties, each with its particular fanaticism, had supposed. The other line of thought, the broad church view, claimed to have a better insight into God's designs than the warring parties had. But in their relation to the battles of faith, the two lines of thought did nevertheless end up in the same position, with the idea that precise questions of Christian belief did not matter as much as people had supposed, that less was at stake. This leads to toleration as a matter of political *practice*, and that is an extremely important result; but as an attitude, it is less than toleration. If you do not care all that much what anyone believes, you do not need the attitude of toleration, any more than you do with regard to other people's tastes in food.

In many matters, attitudes that are more tolerant in practice do arise for this reason, that people cease to think that a certain kind of behavior is a matter for disapproval or negative judgment at all. This is what is happening, in many parts of the world, with regard to kinds of sexual behavior that were previously discouraged and, in some cases, legally punished. An extramarital relationship or a homosexual ménage may arouse no hostile comment or reaction, as such things did in the past. But once again, though this is toleration as a matter of practice, the attitude it relies on is indifference rather than, strictly speaking, toleration. Indeed, if I and others in the neighborhood said that we were *tolerating* the homosexual relations of the couple next door, our attitude would be thought to be less than liberal.

There are no doubt many conflicts and areas of intolerance for which the solution should indeed be found in this direction, in the increase of indifference. Matters of sexual and social behavior which in smaller and more traditional societies are of great public concern, will come to seem more a private matter, raising in themselves no question of right or wrong. The slide toward indifference may also provide, as it did in Europe, the only solution to some religious disputes. Not all religions, of course, have any desire to convert, let alone coerce, others. They no doubt have some opinion or other (perhaps of the "broad church" type) about the state of truth or error of those who do not share their faith, but at any rate they are content to leave those other people alone. Other creeds, however, are less willing to allow error, as they see it, to flourish, and it may be that with them there is no solution except that which Europe earlier discovered (in religion, at least, if not in politics), a decline in enthusiasm. It is important that a decline in enthusiasm need not take the form of a movement's merely running out of steam. As some Christian sects discovered, a religion can have its own resources for rethinking its relations to others. One relevant idea, which had considerable influence in Europe, is that an expansive religion really wants people to believe in it, but it must recognize that this is not a result that can be achieved by force. The most that force can achieve is acquiescence and outer conformity. As Hegel said of the slave's master, the fanatic is always disappointed: what he wanted was acknowledgment, but all he can get is conformity.

Skepticism, indifference, or broad church views are not the only source of what I am calling toleration as a practice. It can also be secured in a Hobbesian equilibrium, under which the acceptance of one group by the other is the best that either of them can get. This is not, of course, in itself a principled solution, as opposed to the skeptical outlook, which is, in its own way, principled. The Hobbesian solution is also notoriously unstable. A sect that could, just about, enforce conformity might be deterred by the thought of what things would be like if the other party took over. But for this to be a Hobbesian thought, as opposed to a role-reversal argument that, for instance, refers to rights, some instability must be in the offing. The parties who are conscious of such a situation are likely to go in for preemptive strikes, and this is all the more so if they reflect that even if they can hope only for acquiescence and outer conformity in one generation, they can conceivably hope for more in later generations. As a matter of fact, in the modern world, the imposition by force of political creeds and ideologies has not been very effective over time. One lesson that was already obvious in the year 1984 was the falsity in this respect of Orwell's *1984*. However, the imposition of ideology over time has certainly worked in the past, and the qualification in the previous statement, "in

the modern world," is extremely important. (This is something I come back to at the end of this paper.)

So far, then, toleration as a *value* has barely emerged from the argument. We can have practices of toleration underlaid by skepticism or indifference or, again, by an understood balance of power. Toleration as a value seems to demand more than this. It has been thought by many that this can be expressed in a certain political philosophy, a certain conception of the state.

To some degree, it is possible for people to belong to communities bound together by shared convictions—religious convictions, for instance—and for toleration to be sustained by a distinction between those communities and the state. The state is not identified with any set of such beliefs and does not enforce any of them; equally, it does not allow any of the groups to impose its beliefs on the others, though each of them can of course advocate what it believes. In the United States, for instance, there is a wide consensus that supports the Constitution in allowing no law that enforces or even encourages any particular religion. There are many religious groups, and no doubt many of them have deep convictions, but most of them do not want the state to suppress others or to allow any of them to suppress others.

Many people have hoped that this can serve as a general model of the way in which a modern society can resolve the tensions of toleration. On the one hand, there are deeply held and differing convictions about moral or religious matters, held by various groups within the society. On the other hand, there is a supposedly impartial state, which affirms the rights of all citizens to equal consideration, including an equal right to form and express their convictions. This is the model of *liberal pluralism*. It can be seen as enacting toleration. It expresses toleration's peculiar combination of conviction and acceptance, by finding a home for people's various convictions in groups or communities less than the state, while the acceptance of diversity is located in the structure of the state itself.

This implies the presence of toleration as more than a mere practice. But how exactly does it identify toleration as a value? Does it identify toleration as a virtue? This turns on the question of the qualities that such a system demands of its citizens. The citizens must have at least a shared belief in the system itself. The model of a society that is held together by a framework of rights and an aspiration toward equal respect, rather than by a shared body of more specific substantive convictions, demands an ideal of citizenship that will be adequate to bear such a weight. The most impressive version of this ideal is perhaps that offered by the tradition of liberal philosophy flowing from Kant, which identifies the dignity of the human being with autonomy. Free persons are those who make

their own lives and determine their own convictions, and power must be used to make this possible, not to frustrate it by imposing a given set of convictions.

This is not a purely negative or skeptical ideal. If it were, it could not even hope to have the power to bind together into one society people with strongly differing convictions. Nor could it provide the motive power that all tolerant societies need in order to fight the intolerant when other means fail. This is an ideal associated with many contemporary liberal thinkers, such as Rawls, Nagel, and Dworkin.

Under the philosophy of liberal pluralism, toleration does emerge as a principled doctrine, and it does require of its citizens a belief in a value: perhaps not so much in the value of toleration itself as in a certain more fundamental value, that of autonomy. Because this value is taken to be understood and shared, this account of the role of toleration in liberal pluralism implies a picture of justification. It should provide an argument that could be accepted by those who do find prima facie intolerable certain outlooks that obtain in the society, and which liberalism refuses to deploy the power of the state to suppress. As Nagel has well put it, "Liberalism purports to be a view that justifies religious toleration not only to religious skeptics but to the devout, and sexual toleration not only to libertines but to those who believe extramarital sex is sinful. It distinguishes between the values a person can appeal to in conducting his own life and those he can appeal to in justifying the exercise of political power."[1] No one, including Nagel himself, believes that this will be possible in every case. There must be, on any showing, limits to the extent to which the liberal state can be disengaged on matters of ethical disagreement. There are some questions, such as that of abortion, on which the state will fail to be neutral whatever it does. Its laws may draw distinctions between different circumstances of abortion, but in the end it cannot escape the fact that some people will believe with the deepest conviction that a certain class of acts should be permitted, while other people will believe with equal conviction that those acts should be forbidden. Equally intractable questions will arise with regard to education, where the autonomy of some fundamentalist religious groups, for instance, to bring up their children in their own beliefs will be seen by liberals as standing in conflict with the autonomy of those children to choose what beliefs they will have. (Such problems may be expressed in terms of group rights.) No society can avoid collective and substantive choices on matters of this kind, and in that sense, on those issues, there are limits to toleration, even if people continue to respect one another's opinions.

The fact that there will be some cases that will be impossible in such a way does not necessarily wreck liberal toleration, unless there are too

many of them. There is no argument of principle to show that if *A* thinks a certain practice wrong and *B* thinks that practice right, *A* has to think that the state should suppress that practice or that *B* has to think that the state should promote that practice. These are considerations at different levels. Nevertheless, there is a famous argument to the effect that the liberal ideal is in principle impossible. Some critics of liberalism claim that the liberal pluralist state, as the supposed enactment of toleration, does not really exist. What is happening, they say, is that the state is subtly enforcing one set of principles (roughly in favor of individual choice—at least, consumer choice—social cooperation, and business efficiency) while the convictions that people previously held deeply, on matters of religion or sexual behavior or the significance of cultural experience, dwindle into private tastes. On this showing, liberalism will come close to being "just another sectarian doctrine": the phrase that Rawls used precisely in explaining what liberalism had to avoid being.

What is the critic's justification for saying that the liberal state is "subtly enforcing" one set of attitudes rather than another? Nagel distinguishes sharply between *enforcing* something like individualism, on the one hand, and the practices of liberal toleration, on the other, though he honestly and correctly admits that the educational practices, for instance, of the liberal state are not "equal in their effects." This is an important distinction, and it can make some significant difference in practice. Being proselytized or coerced by militant individualism is not the same thing as merely seeing one's traditional religious surroundings eroded by a modern liberal society. The liberal's opponents must concede that there is something in the distinction, but this does not mean that they will be convinced by the use that the liberal makes of it, because it is not a distinction that is neutral in its inspiration. It is asymmetrically skewed in the liberal direction. This is because it makes a lot out of a difference of procedure, whereas what matters to a nonliberal believer is the difference of outcome. I doubt whether we can find an argument of principle that satisfies the purest and strongest aims of the value of liberal toleration, in the sense that it does not rely on skepticism or on the contingencies of power, and also could in principle explain to rational people whose deepest convictions were not in favor of individual autonomy and related values that they should think a state better that let their values decay in preference to enforcing them.

If toleration as a practice is to be defended in terms of its being a value, then it will have to appeal to substantive opinions about the good, in particular the good of individual autonomy, and these opinions will extend to the value and the meaning of personal characteristics and virtues associated with toleration, just as they will to the political activities of imposing or refusing to impose various substantive outlooks. This is not

to say that the substantive values of individual autonomy are misguided or baseless. The point is that these values, like others, may be rejected, and to the extent that toleration rests on those values, then toleration will also be rejected. The practice of toleration cannot be based on a value such as individual autonomy and also hope to escape from substantive disagreements about the good. This really is a contradiction, because it is only a substantive view of goods such as autonomy that could yield the value that is expressed by the practices of toleration.

In the light of this, we can now better understand the impossibility or extreme difficulty that was seemingly presented by the personal virtue or attitude of toleration. It appeared impossible because it seemingly required someone to think that a certain belief or practice was thoroughly wrong or bad, and at the same time that there was some intrinsic good to be found in its being allowed to flourish. This does not involve a contradiction if the other good is found not in that belief's continuing but in the other believer's autonomy. People can coherently think that a certain outlook or attitude is deeply wrong and that the flourishing of such an attitude should be tolerated if they also hold another substantive value in favor of the autonomy or independence of other believers. The exercise of toleration as a virtue, then, and in that sense the belief in it as itself a value, does not necessarily involve a contradiction, though in a given situation it may involve that familiar thing, a conflict of goods. However, we cannot combine this account of liberal toleration with the idea that it rises above the battle of values. The account gives rise to the familiar problem that others may not share the liberal view of these various goods; in particular, the people whom the liberal is particularly required to tolerate are precisely those who are unlikely to share the liberal's view of the good of autonomy, which is the basis of the toleration, to the extent that this expresses a value. The liberal has not, in this representation of toleration, given them a reason to value toleration if they do not share his or her other values.

Granted this, it is as well that, as we saw earlier, the practice of toleration does not necessarily rest on any such value at all. It may be supported by Hobbesian considerations about what is possible or desirable in the matter of enforcement, or again by indifference based on skepticism about the issues involved in the disagreement; though with indifference and skepticism, of course, the point will be reached at which nobody is interested enough in the disagreements for there to be anything to put up with, and toleration will not be necessary.

It is important, too, that the demands on toleration do not arise in contexts in which there are no other values or virtues. Appeals to the misery and cruelty and manifest stupidity involved in intolerance may, in favorable circumstances, have some effect with those who are not dedi-

cated to toleration as an intrinsic value or to the respect for autonomy that underlies toleration as a virtue. As a virtue, it provides a special kind of foundation for the practice of toleration, and one that is specially Kantian, not only in its affinities but in what it demands: its worth lies partly in its difficulty, in its requirement that one should rise not only above one's own desires but above one's desire to secure the fullest expression of one's own values.

It may be that the best hopes for toleration as a practice lie not so much in this virtue and its demand that one combine the pure spirit of toleration with one's detestation of what has to be tolerated. Hope may lie rather in modernity itself and in its principal creation, international commercial society. It is still possible to think that the structures of this international order will encourage skepticism about religious and other claims to exclusivity and about the motives of those who impose such claims. Indeed, it can help to encourage restraint within religions themselves. When such skepticism is set against the manifest harms generated by intolerance, there is a basis for the practice of toleration, a basis that is allied to liberalism but is less ambitious than the pure value of liberal toleration, which rests on the belief in autonomy. It is close to a tradition that can be traced to Montesquieu and to Constant, which the late Judith Shklar called "the liberalism of fear."[2]

It is a good question whether toleration is a temporary problem. Perhaps toleration will prove to have been an interim value, serving a period between a past when no one had heard of it and a future in which no one will need it. At the present moment, in fact, the idea that intolerant outlooks will sink away from the world seems incredible: such outlooks are notably asserting themselves. If they are successful enough, there will once more be not much room for toleration; it will be the tolerant who, hopelessly, will be asking to be tolerated. More probably, we can expect in the medium term some situation in which there will be a standoff between liberal toleration and intolerant outlooks of various kinds. However, as I implied earlier, one thing that the modern international order does make less likely is the self-contained enforcement of opinion in one society over a long time. It will be harder than in the past for a cultural environment of fanatical belief to coincide for a considerable length of time with a center of state power, remaining shielded from external influences. Liberalism and its opponents will probably coexist on closer terms than across tightly controlled national boundaries.

In those circumstances, toleration and its awkward practices are likely to remain both necessary and in some degree possible. If so, it will be all the clearer—clearer than it is if one concentrates on the very special case of the United States—that the practice of toleration has to be sustained not so much by a pure principle resting on a value of autonomy as by a

wider and more mixed range of resources. Those resources include an active skepticism against fanaticism and the pretensions of its advocates; conviction about the manifest evils of toleration's absence; and, quite certainly, power, to provide Hobbesian reminders to the more extreme groups that they will have to settle for coexistence.

Notes

* A shorter version of this paper has been published in the *UNESCO Courier*. June 1992.

1. Thomas Nagel, *Equality and Partiality* (Oxford: Oxford University Press, 1991), p. 156.

2. See her article with that title in *Liberalism and the Moral Life*, ed. Nancy L. Rosenblum (Cambridge: Harvard University Press, 1989).

2

Toleration as a Virtue

JOHN HORTON

It is widely agreed that the core of the concept of toleration is the refusal, where one has the power to do so, to prohibit or seriously interfere with conduct that one finds objectionable.[1] Inevitably there is some vagueness to the concept that permits disagreements about both its interpretation and its application. For instance, how serious must interference with the disapproved conduct be for it to be incompatible with toleration? If, for example, the sale of pornographic magazines is restricted to specialty shops because some people object to them, should we regard this as a tolerant or intolerant response to the sale of pornography? It falls short of prohibition, yet it knowingly makes the sale and purchase of pornography more difficult. In large part, an answer to this question will depend on the reasons motivating the restriction, but, in any case, toleration is often a matter of degree.[2] There is no precise line that can be drawn dividing tolerance from intolerance, which is not to deny that we can identify clear instances of both.

In this respect, toleration is no different from any other moderately complex concept that features in moral and political discourse. However, it also gives rise to deeper perplexities, some of which are specific to toleration, for example, the so-called paradox of toleration. This can be stated in different ways, but one formulation of it is provided by Susan Mendus, who writes, "[N]ormally we count toleration as a virtue in individuals and a duty in societies. However, where toleration is based on moral disapproval, it implies that the thing tolerated is wrong and ought not to exist. The question which then arises is why . . . it should be thought good to tolerate."[3] Much of the philosophical discussion of toleration has been concerned to address just this question. So, in an oblique way, does this paper. However, it is not my intention to provide an answer to it or to seek to resolve or dissolve the paradox.[4] Indeed very little will be said about what is good about toleration. What I shall do is pursue certain questions about the conceptual structure of toleration with a view to bringing out some difficulties in identifying and characterizing a distinct virtue of tolerance or toleration.[5] The purpose of bringing out these diffi-

culties is not to deny, or even call into question, that there is a distinct virtue of toleration. Rather it is to show that giving an adequate account of toleration is much less straightforward than might be thought; that such an account must be placed in some substantive moral context (though no attempt is made to provide such a context); and that the core concept of toleration with which I began stands in need of some refinement. Not surprisingly, perhaps, it is the first of these contentions of which I am most confident. In this respect, my main ambition is the modest one of seeking to show the complexity of the conceptual structure of toleration. In consequence, it will be argued that apparently unproblematic appeals to the virtue of tolerance are less straightforward than they appear, and that in some contexts in which such appeals seem to be most necessary they may yet be morally inappropriate.

The discussion will inevitably be highly selective. It seeks to draw attention to some neglected features of the conceptual structure of toleration and to explore some of their implications. Other significant features will be ignored. For instance, there will be no consideration of the requirement that the exercise of tolerance presupposes the power to interfere with others' conduct. It will be assumed, however, that one can appropriately speak of a disposition to be tolerant in the absence of the power to interfere. Such a disposition can be identified (in principle at least) counterfactually. Hence, very roughly, the tolerant person would not interfere *if* he or she had the power to do so, correspondingly, the intolerant person would interfere *if* he or she had the power to do so. Furthermore, no systematic attempt will be made to distinguish the kinds of entities that can be the objects of toleration: people, actions, beliefs, and so on. Such distinctions are important, and could be important in some respects to the subsequent argument, but they are not its focus.

The conceptual issue with which I begin concerns the question of whether toleration is only appropriately invoked when there is disapproval (where disapproval is understood as expressing a moral objection to what is tolerated) or whether it also extends to cases in which the objection takes a nonmoral form, such as dislike or distaste. The more restricted view is adopted by Peter Nicholson, who defines toleration as "the virtue of refraining from exercising one's power to interfere with others' opinion or action although that deviates from one's own over something important and although one morally disapproves of it."[6] It seems at first sight that Baroness Warnock is surely correct when she responds that Nicholson's definition renders

> the idea of toleration considerably narrower than the normal idea. Often one would think oneself tolerant if one refrained from criticizing something that one disliked, hated or regarded with varying degrees of distaste. I am tolerant

> if one of my daughter's boy-friends wears sandals with his suits or a stock with his tweed coat, and I not only make no mention of this outrage, but actually express myself pleased when they announce their intention of getting married.[7]

The kind of undramatic examples Warnock cites seem to be the stuff of toleration in our everyday lives. Why then does Nicholson adopt the narrower view?

He argues that a distinction between dislike and disapproval is essential if a specifically moral ideal of toleration is to be identified. Nicholson allows that it is quite permissible to include dislike if toleration is employed as a descriptive term, perhaps in the context of a historical or sociological study. But the situation is different if we are trying to characterize a distinctively *moral* ideal of toleration. In this context, Nicholson writes, "Toleration is a matter of moral choice, and our tastes or inclinations are irrelevant. No doubt people's prejudices, their contingent feelings of liking or disliking, have to be taken into account when one is trying to explain why they are tolerant or not; but such feelings are not morally grounded, and cannot be the ground of a moral position."[8] It is this account of morality to which Warnock strongly objects. In fact she has two objections, but here the concern is only with the one that she herself regards as much the more fundamental:

> I simply do not believe that a distinction can be drawn, as Nicholson seeks to draw it, between the moral and the non-moral, resting on the presumption that the moral is rational, or subject to argument, the non-moral a matter of feeling or sentiment. So far is this from being true that the concept of morality itself would wither away and become lost in the concept of expediency if strong feelings or sentiment were not involved in the judgement that something is morally right or wrong. This *fact* (for such I take it to be) is of the greatest importance when we come to consider the limits of toleration. For when the question arises, "can this be tolerated?" or "ought it to be tolerated?", part of the answer must come from the strong feelings that are aroused by "this," whatever "this" may be. The ordinary meaning of the term "intolerable," may be used as evidence here. The intolerable is the unbearable. And we may simply feel, believe, conclude without reason, that something is unbearable, and must be stopped.[9]

In short, for Warnock there can be no sharp distinction between dislike and disapproval, and she argues that sentiment and feeling must be more closely connected with moral judgment than Nicholson's account allows.

I have quoted at some length from this disagreement between Nicholson and Warnock because I believe it raises issues of some importance for the task of trying to characterize a coherent ideal or, what is perhaps not quite the same thing, a virtue of toleration.[10] This, it will be claimed, is a

rather more difficult task than has sometimes been appreciated. Certainly the issues are both more important and more difficult than Warnock's conciliatory conclusion might suggest. In the end, she is content to resolve her disagreement with Nicholson by distinguishing

> a strong and a weak sense of the word "toleration." In the weak sense, I am tolerant if I put up with, do not forbid, things which it is within my power to forbid, although I dislike them or feel that they are distasteful. In the strong sense I am tolerant only if I put up with things which it is within my power to prevent, even though I hold them to be immoral. The distinction between the strong and the weak senses can be roughly maintained even if we hold that sentiment or feeling must enter into the judgement that something is immoral. All I maintain is that no sharp line can be drawn between what I dislike and what I disapprove of. The edges between strong and weak sense may therefore be blurred.[11]

Although such a distinction is no doubt useful for some purposes, it seems to me that it largely evades the problems which really lie at the heart of this debate between her and Nicholson. These problems have to do with the particular character of toleration and the need to circumscribe it in such a way that it can be understood to be a specifically *moral* virtue. These difficulties also do much to explain why toleration is often viewed with suspicion or even rejected, especially by those who are the objects of toleration. I try to bring out some of these difficulties by first considering an important reason why Nicholson might be led to embrace an apparently implausibly narrow view of toleration. I approach matters in this way because I agree with Warnock that no very sharp distinction between morality and sentiment along the lines of Nicholson's account is satisfactory. Yet I also want to suggest that he is led toward that account by a most relevant consideration to which Warnock fails to attend.

Nicholson's underlying worry, I believe, is that if we interpret the moral value of toleration in a weak or wide sense, to include dislike, then we could be driven to regard as virtuous conduct that which is not. Take, for example, racial tolerance. If I am intensely prejudiced against a particular racial group but am able to restrain myself from discriminating against its members, then it might be appropriate, in the weak sense, to say that I am tolerant. I have strong feelings against this group but restrain myself, we shall suppose, on morally relevant grounds from acting on them.[12] But do I exhibit the moral virtue of toleration? In favor of a positive answer to this question is the practically important point that it is better that I show restraint than not. In this respect, my behavior is morally better than it would be if I acted in a repressively discriminatory way against members of the group. However, to regard such restraint as straightforwardly virtuous also seems to imply that my racial prejudices

are in some way either acceptable or their wrongness entirely irrelevant in judging whether or not I am tolerant. By focusing exclusively on the restraint and its justification, and ignoring the nature or grounds of the objection to what is tolerated, the weak or wide sense of toleration seems, in this kind of case, to pass over something important.

Toleration always involves two sets of considerations: reasons for showing restraint toward that which is regarded as objectionable; and reasons (or sentiments) that make something objectionable—the considerations that make it appropriate to countenance prohibition or interference in the first place. Both sets of reasons are relevant to judgments about toleration, and both can be disputed and rejected. From their own point of view, racialists can regard themselves as exemplars of tolerance. So far as they are concerned, they are showing admirable and praiseworthy restraint in the face of that which they hate and despise. But does their point of view have to be accepted? Must we concur that they are indeed tolerant? Joseph Raz appears to think that we should when he writes, "Toleration is a distinctive moral virtue only if it curbs desires, inclinations, and convictions which are thought by the tolerant person to be in themselves desirable. Typically a person is tolerant if and only if he suppresses a desire to cause to another a harm or hurt which he thinks the other deserves."[13] Yet though this is a necessary condition, it is not sufficient. Interestingly, a little later, Raz himself writes that a person can be tolerant only "if the intolerant inclination is in itself worthwhile or desirable."[14] Notice the shift in perspective: initially it was enough that the tolerant person should think his inclination to be intolerant is desirable, but the second statement does not assume that the agent's own judgment about this matter is necessarily authoritative.

In fact there is no reason why we must accept people's own perspective on the validity of their objections to something. If, as Raz contends, a person can be tolerant only if the objection (or intolerant inclination) is itself worthwhile or desirable, then *we* do not have to accept that people are tolerant simply because they do not act intolerantly toward something *they* think is objectionable. Certainly, we cannot dispense with the agent's perspective, because only if the agent does have some objection to what is tolerated will it make sense to speak of that person as showing tolerance. However, it does not follow that this perspective is beyond criticism; such criticism can take the form of denying that the agent is behaving tolerantly, though we can accept that such a person (mistakenly) thinks that he or she is being tolerant. My claim here, I should make clear, is not that there is some completely objective, impersonal or impartial perspective on toleration, only that the agent's own perspective or judgment, though indispensable, is not necessarily compelling.

It is perhaps worth noting at this stage that this claim about the relevance of the nature or basis of the objection to what is tolerated does not precisely map onto the earlier distinction between dislike and disapproval. In some cases, it remains appropriate, as Warnock argues, to see tolerance of what is merely disliked as a straightforwardly moral virtue. The most obvious instances would be those in which people have a right to impose their likes or dislikes but choose not to. Warnock's examples are (sometimes ambiguously or disputably) of this sort. If I dislike people smoking in my house but permit them to do so, then I might be acting tolerantly. I would be within my rights to refuse people permission to smoke in my home—the house is mine and I have to live in it—even if it were agreed that there is nothing immoral about smoking. (Admittedly, this example is complicated by the alleged harms of passive smoking, but the general point, I hope, is clear. In any case, it seems to me that people often use claims about passive smoking simply to legitimize imposing their own preferences.) Dislike and disapproval, therefore, may interrelate in a variety of ways that undermine any attempt to base the concept of toleration on a simple distinction between them.

Allowing that Nicholson's strong sense of toleration is too narrow, however, the difficulty we have identified with the weak sense remains. We need some restriction on the objections that people can have for their restraint in not acting on these objections, if such restraint is to express a genuinely *moral* virtue. This is, of course, a different point from the more commonly remarked one that toleration must observe limits, that is, that there are some things that should not be tolerated and hence it is no virtue to tolerate them. (In any normal context, to describe someone as tolerant of, say, rape or murder does not constitute praise for being virtuous but is an ironical form of moral criticism or a joke in poor taste.) The claim here, however, is not that there are some things it is wrong to tolerate because they should not be permitted (which is of course true), but that there are some things it is inappropriate to tolerate because it is wrong or unreasonable to object to them in the first place. There are, so to speak, two directions from which toleration can cease to be a virtue: on the one hand, some things should not be tolerated, because they should not be permitted; on the other, some things should not be objected to, hence are not the appropriate objects of toleration.

So far, it might seem that I have been making heavy weather of a fairly simple point. Yet its implications, both practical and theoretical, are wider than they might at first appear. For example, there is a common tendency to speak of promoting religious and racial tolerance as if these were pretty much the same sort of thing. They are not. Tolerance can sometimes be an appropriate and important virtue in the context of conflicting

religious beliefs.[15] Tolerance can allow the possibility of peaceful and harmonius coexistence without compromising the integrity of reasonably held and valuable convictions. Typically, the case of race is different. It is not tolerance toward different races that we generally wish to promote but the recognition of the intrinsic moral irrelevance of racial differences.[16] In the case of religion, we will sometimes recognize that the motivation to prohibit or interfere might have merit or is not entirely unreasonable, though we also believe that it is better not acted on. Hence toleration will be desirable. By contrast, in the case of race, we believe the objection, and hence the motivation to interfere or prohibit, to be itself unreasonable or without merit, hence the question of acting on it should not even arise.[17]

One hardheaded response to this would be to grant that the question of toleration should not arise in such a context but to note nonetheless that it clearly does. In a world of casual and commonplace racism, let alone such repulsive phenomena as ethnic cleansing, toleration is very much to the point, if less than an ideal. This response has obvious and undeniable power, and it would be foolish to deny, for example, that if racial prejudice cannot be eliminated then it is at least better that racial discrimination be controlled. If one cannot get people to change their minds, then their restraining their inclinations to oppress or coerce is still a real benefit. So it is, but how does this bear on toleration? The implication of the argument advanced so far is that such behavior does not manifest the virtue of tolerance, though it is obviously preferable to intolerance, and it is perhaps linguistically unexceptional to describe it as "tolerant." What needs to be stressed, whether or not they are both called 'toleration,' is that the logic and moral status of these two kinds of cases is quite different. So, too, are their implications for individual action and public policy.

To begin with a conceptual point, it is a rarely remarked feature of the core concept of toleration—the refusal, when one has the power to do so, to prohibit or seriously interfere with conduct that one finds objectionable—that it admits of two ways in which a person can become more tolerant. The first, and obvious, route is by people's restrictively interfering less with conduct that is objectionable. People become more tolerant by allowing others to act in ways that are found objectionable than by preventing them from, or punishing them for, so acting. However, it is important to note that, on this account, a person does not become more tolerant by finding less conduct objectionable: if a person approves of, or is indifferent toward, an action or practice, then the question of tolerating it does not arise. Moreover, the second route by which a person can become more tolerant is, paradoxically, through *increasing* the range of conduct that is found objectionable, so long, of course, as the person does

not act so as to restrain the objectionable conduct.[18] Suppose, for example, that Jane disapproves of homosexuality; she is tolerant of it if she does not seek to prohibit it or otherwise disadvantage homosexuals in consequence of their homosexuality. By contrast, if she is indifferent toward homosexuality, then, on the standard view, she is neither tolerant nor intolerant of it. However, if subsequently she comes to disapprove of it, she might also become tolerant of it, provided she does not translate this disapproval into restrictive behavior. In short, in terms of the core concept or standard account of toleration, it would seem that not only does one not become more tolerant by ceasing to object to some conduct, one could become increasingly tolerant by disapproving or disliking more conduct, so long as such objections are not the basis of restrictive action toward that conduct.

I do not mention this strongly counterintuitive implication of the core concept of toleration because I think it describes a very credible mental process. The idea of people consciously adopting more-comprehensive standards of disapproval in order to become more tolerant of what they now disapprove of does not possess much psychological plausibility. It would be a mistake, however, to dismiss the point as a mere oddity. It does show, in this instance in an admittedly rather abstract and artificial manner, how focusing too narrowly on the connection between toleration and the negative evaluation of what is tolerated, without enquiring further into the nature and basis of that negative evaluation, gives rise to potentially unacceptable conclusions. They might not be unacceptable if one wishes to employ the concept of toleration in an exclusively descriptive sense. On this interpretation, toleration would be simply a matter of not acting in ways that restrain behavior that is negatively valued. (In fact, I have serious doubts about the coherence of an *exclusively* descriptive concept of toleration, but because these doubts are not my concern here, I will allow that it is an intelligible possibility.) The point is that such an interpretation would not identify a virtue, and this is not only for the obvious reason that some things should be restricted or prohibited but also because there are some things to which it is wrong or unreasonable to have any objection, and to which toleration is therefore a morally inappropriate response.

This point can help us understand one very common reaction to being tolerated. Generally, to be the object of tolerance is a welcome improvement on being the object of intolerance, but typically people do not wish themselves or their actions to be the object of either. Only when people themselves accept that what they are doing is in some respect objectionable is toleration likely to satisfy them. Otherwise, they do not want to be subject to the negative valuation that tolerance necessarily seems to carry with it.[19] Hence the frequently observed pattern that what begins, when

people are faced with intolerance, as a demand for toleration becomes transformed into a demand for more than *mere* toleration, once intolerance is no longer a threat. The demand for more than mere tolerance is the demand that what one is or does no longer be the object of the negative valuation that is an essential ingredient of toleration.

Another issue that these reflections on the concept of toleration help to illuminate is the relationship between it and liberalism (in some of its forms). I take it to be uncontroversial that liberalism, at least historically, is the political theory that has particularly championed the merits of toleration. Yet nonliberals have often felt that there is something specious about this claim, that liberalism is really only tolerant of those things to which liberals have no objection.[20] Roughly, what these critics claim is that what liberals effectively advocate is that others should be tolerant toward actions and practices to which liberals do not object, but that liberals are under no corresponding duty to be tolerant of actions and practices that conflict with the values of liberalism.[21] For instance, Susan Mendus argues of autonomy-based liberalism that it must "construe the toleration of non-autonomy valuing sub-groups as a necessary evil, not a genuine good."[22] On this view, she writes, "Toleration becomes not a virtue, but merely a temporary expedient against the day when all are autonomous."[23] In consequence, for Mendus, the *ideal* of liberal toleration is much narrower than liberals are inclined to admit.

There is, however, another direction from which to question the claims of liberalism to be specially tolerant. For example, if we take neutrality toward competing conceptions of the good as central to liberalism, then it might reasonably be asked whether liberalism is properly described as *tolerant* even toward those conceptions it permits? Here the thought is not the familiar one that complete neutrality, however it is interpreted, is either incoherent or impossible, but simply that because liberalism professes to be neutral toward a range of conceptions of the good—that is it has no objection to them—it cannot therefore be tolerant of them. At least this seems to be the case if liberal neutrality implies indifference, a refusal to judge, the lifestyles it permits. In short, if it is only possible to be tolerant toward what is in some respect negatively valued, the very capaciousness of liberal neutrality could present conceptual difficulties to characterizing it as tolerant. Whereas the first charge against liberalism was that it is less tolerant than it pretends because it is less permissive, the second charge is that it is less tolerant (though not therefore intolerant) precisely because it is so permissive. These charges are to some extent directed at different forms of liberalism, but, taken together, they suggest that it might be surprisingly difficult to vindicate liberalism's claims to be especially *tolerant*: liberalism inclines toward either intolerance or indifference.

One area in which these reflections on toleration are of practical relevance is education. It clearly matters for the moral education of children whether they should be encouraged to be tolerant toward something or whether they should be discouraged from having any objection to it. Some of the confusions concerning multicultural education seem to relate to this issue. In their desire to protect minority cultures from abuse and vilification, some of the more enthusiastic advocates of multiculturalism appear to have dispensed altogether with the idea of judging the practices and values of other cultures.[24] No doubt they are right to try to combat ignorant and ingrained ethnocentrism by encouraging a less complacent response to children's negative attitudes to alien cultures and beliefs. It would be wrong to leave such prejudices and ignorance in place and encourage children simply to put up with that which, on whatever basis, they happen to dislike or disapprove. In this respect, merely to encourage children to be tolerant would be inadequate.

However, some element of judgment of the merits or reasonableness of alien cultures and beliefs cannot but be involved. Critics of the more extreme forms of multiculturalism are surely correct that any serious attachment to values implies that at least some things that conflict with those values must be judged wrong or inferior. Proponents of multicultural education themselves typically reject racism, for example. Toleration, as we have seen, does not require that one accept *any* negative evaluation of others' culture or beliefs and settle only for encouraging restraint in acting on that negative evaluation. We are not faced with a straightforward choice between a complete refusal to criticize the practices and beliefs of other cultures ("multiculturalism") and simply accepting whatever prejudices or antipathies children might possess so long as they do not act on them ("toleration"). Neither of these options is defensible. What we need to recognize is that any inculcation of the virtue of toleration (and any coherent form of multiculturalism) must attend to questions about what it is reasonable to object to, as well as about which of those things that are objectionable should be tolerated and which should not.

The argument so far has been that any attempt to characterize toleration as a virtue is beset by important difficulties of interpretation. In particular, it seems that what was earlier identified as the core concept of toleration needs to be both circumscribed and also perhaps enlarged. It needs to be circumscribed because, for restraint to manifest the virtue of tolerance, the objection to the conduct or practice that is being tolerated must itself not be unreasonable or without value. (Of course, what is being tolerated should not itself be intolerable.) More tentatively, however, it might also be suggested that our understanding of toleration should be enlarged, because the process by which indefensible objections are jettisoned should itself be regarded as part of the process of becoming

more tolerant.[25] The virtue of tolerance should include more than forbearance in not acting restrictively toward those who act objectionably; it should also include not having an excessive and inappropriate range of objections. The tolerant person is not a narrow-minded bigot who shows restraint; he or she is not someone with a vast array of prejudices about others' conduct but who nonetheless heriocally restrains him- or herself from acting restrictively toward them. The restraint involved in toleration is not exclusively of action but also of judgment. The tolerant person is not too judgmental toward others. In becoming less judgmental, a person becomes more tolerant.

This extension of the concept to include narrowing the range of what is considered objectionable is no doubt controversial. It does not easily fit with the core concept of toleration. Yet it is not altogether incongruent with many ordinary uses of tolerance. In describing a person as tolerant, this may be taken to include the idea that such a person is not excessively judgmental, not too narrow-minded, not inappropriately moralistic. Some will persist in the view that this is an illicit, if not uncommon, stretching of the term, which both gives rise to confusion and deprives toleration of its distinctive character. Nor do I want to imply that this objection is without any basis. Restraint of judgment and restraint of action are different, and these differences are worth some philosophical attention. However, such differences are perhaps not sufficient to preclude both kinds of restraint being accommodated within the virtue of toleration. Both can be plausibly viewed as constitutive qualities of a tolerant person.

The claim that it is appropriate to speak of a virtue of tolerance only where the objection to the conduct or practice tolerated is not itself unreasonable or without value is also worth elaborating. The restraint displayed in acting tolerantly will only be virtuous, on this account, if the restraint itself is appropriate. As we have seen, it can be inappropriate in one of two ways. The most obvious and widely recognized way is when what is being permitted should properly be prevented. The second way is more oblique but no less important. Here restraint is inappropriate because it should not be necessary. One should not need to restrain one's desire to seriously impede some action or practice, because one should not have that desire in the first place. For example, if we think that racial prejudice is unreasonable and without value, it is not enough for Joe, who believes that all Black people are inferior, to be described as exhibiting the virtue of toleration merely because he shows restraint in acting on that belief.

It might seem at this point that a crucial component in characterizing toleration has been passed over, namely, a person's reasons for showing restraint. Surely it will be urged it is only when restraint is for certain

kinds of reasons that we can speak of toleration.[26] For example, one is not genuinely tolerant of others' behavior if the only reason one does not prevent it is because one is too idle to do so. Indeed the criticism might be made of what was said just now—about Joe, the man who believes all Black people are inferior—that if his reason for showing restraint is that he recognizes it would be wrong to try to impose these beliefs on others, then is he not indeed a paradigm example of a tolerant person? Of course, people's reasons for showing restraint are crucial to identifying their conduct as being tolerant. (It is partly for this reason that I have serious doubts about a purely descriptive concept of toleration.) However, without going into what these reasons might be, I want to deny that having a morally good reason for showing restraint is of itself sufficient to make a person tolerant. For this reason, I do not agree that we are required to accept that Joe is genuinely tolerant, even though he restrains himself from acting on this belief for what we all might agree are morally good reasons. Some kinds of beliefs, whether or not acted on, might be incompatible with the virtue of tolerance.

One argument against this account is likely to be that the emphasis it places on the reasonableness or merits of an objection seems crucially to undermine the relevance of toleration to many situations in which it is most practically pressing. After all, it will be said, tolerance is a virtue that we both need and recognize without sharing the relevant beliefs of the person exhibiting tolerance. For instance, one can recognize that people who believe abortion is wrong show tolerance toward it if they do not seek to make it illegal, though one does not share their belief in the immorality of abortion. What is crucial in such cases is, I want to suggest, recognizing that the objection has some value or is reasonable. To do this, one does not need to share or endorse the belief. Because a belief in the wrongness of abortion is usually connected with beliefs about the value of life, it is not difficult to see value in the view that abortion is wrong even if one does not share it. Hence one can appreciate how a concern for the value of life could reasonably issue in a belief about the wrongness of abortion, how it makes such a belief far from contemptible though one thinks it misguided or wrong. In this respect, the antiabortionist is significantly different from the racialist.

No doubt many cases will be less straightforward than that of the antiabortionist, and in some the perceived value of the objection will be opaque or so slight that we are very uncertain about the appropriateness of characterizing any restraint as "tolerant." It is no part of my argument to deny that there will be disputes, disagreements, or hard cases: all this argument claims is that for anyone for whom toleration is a virtue, some objections will have value but not be shared, and other objections will be held to be unreasonable and without any value. The space within which

objections are seen as having value or as not demonstrably unreasonable but are not shared is one important area where the virtue of tolerance has its place. Of course it is not the only area, for one must also recognize that toleration has a place with respect to conduct the agent finds objectionable. Otherwise, toleration would not be a virtue that one could possess or practice oneself; it could only be recognized in others. However, when one can see no reason for, or value in, the objection, and especially when the objection itself seems contemptible or disgusting, then there is no place for the virtue of tolerance.

Inevitably, much more needs to be said about many of the issues that have been raised by this argument. In particular, further elaboration is needed of what is involved in seeing the beliefs or commitments of others, which one does not share, as reasonable or having value. It would also be illuminating to compare tolerance with other virtues, such as courage and temperance. However, these issues cannot be pursued here.

What must be made explicit, though, is that in using these examples, I have made many assumptions about what sorts of objections are acceptable or reasonable, assumptions that have not been justified. However, the purpose of my argument is not to outline some background theory or, as I would prefer to say, specific moral context, which gives substance to the virtue of toleration; it is only to show that some such theory or context is presupposed by, or implicit in, any explanation of what is to count as an instance of the virtue of tolerance. (Tolerance is one of what Bernard Williams has called our "thick" ethical concepts.[27]) Nor is it probable that there will be only one such theory or context. Most accounts of the value of toleration will share some very general features in common—perhaps to do with the idea of respect for persons—but they may also have distinctive features. Tolerance could, for example, have a different significance for a certain sort of Christian than for a secular liberal: the former's account of the value of tolerance is likely to make reference to concepts, such as God's will or the example of Christ, that will have no part in the latter's account. It is unlikely that we will all have precisely the same reasons to regard toleration as a virtue. Insofar as our reasons differ, so, too, in all probability will our understanding of what exactly toleration requires, what things it is reasonable or right to object to and when it is morally appropriate to desist from trying to prevent others from doing them. Though this would require much further argument, I am not persuaded there is any one uniquely rational perspective, any Archimedean point, any view from nowhere, from which the reasonableness or rightness of a specific substantive conception of the virtue of tolerance can be established.[28] Tolerance is not a virtue that stands altogether outside the moral and political conflicts it often seeks to mediate. How-

ever, the attempt to substantiate these claims would take us into difficult and complex areas of moral philosophy and cannot be pursued here.

What I have sought to show is that identifying and characterizing a distinctive virtue of tolerance is both more complex and beset by more difficulties than might at first be appreciated. In particular, I have argued that no account of toleration as a virtue can ignore some assessment of the worth of the objection to the conduct or practice that is tolerated. Moreover, I have suggested that eliminating misplaced objections might also be seen as part of the value of tolerance. Both these claims, however, leave me slightly uneasy: neither is entirely in harmony with the core concept of toleration with which I began. Nonetheless, I believe that both are defensible and that perhaps the most surprising conclusion to which the argument of this paper has led is that not all who rightly restrain themselves from acting so as to interfere with conduct to which they object act tolerantly. It almost seems natural to say that though such people resist acting intolerantly, they do not necessarily manifest the virtue of tolerance. Do we have here the hint of another paradox of toleration?[29]

Notes

1. See, for example, Preston King, *Toleration* (London: Allen and Unwin, 1976), p. 22; Carl Kordig, "Concepts of Toleration," *Journal of Value Inquiry* 16 (1982): 59; D. D. Raphael, "The Intolerable," in *Justifying Toleration: Conceptual and Historical Perspectives*, ed. Susan Mendus (Cambridge: Cambridge University Press, 1988), p. 139; and John Horton, "Toleration," in *The Blackwell Encyclopaedia of Political Thought*, ed. David Miller et al. (Oxford: Blackwell, 1987), p. 521.

2. See Igor Primorac, "On Tolerance in Morals," *Philosophical Studies* 31 (1986–87): 72–73.

3. Susan Mendus, *Toleration and the Limits of Liberalism* (London: Macmillan, 1989), pp. 18–19.

4. I have discussed this and some other alleged paradoxes of toleration in "Three (Apparent) Paradoxes of Toleration," *Synthesis Philosophica* 9 (1994).

5. No systematic distinction will be made, as is sometimes attempted, between tolerance and toleration. See, for example, Bernard Crick, "Toleration and Tolerance in Theory and Practice," *Government and Opposition* 6 (1971).

6. Peter Nicholson, "Toleration as a Moral Ideal," in *Aspects of Toleration: Philosophical Studies*, ed. John Horton and Susan Mendus (London: Methuen, 1985), p. 162.

7. Baroness Warnock, "The Limits of Toleration," in *On Toleration*, ed. Susan Mendus and David Edwards (Oxford: Oxford University Press, 1987), p. 125.

8. Nicholson, pp. 160–61.

9. Warnock, p. 126.

10. In the ensuing discussion, I principally have in mind tolerance as an attribute of the character of individuals. It is unclear to me how far this emphasis unduly influences (or distorts) that discussion.

11. Warnock, pp. 126–27.

12. I shall assume here and subsequently that the reasons for showing restraint are moral rather than merely prudential. However, I shall not be concerned with the question of what these reasons might be.

13. Joseph Raz, "Autonomy, Toleration and the Harm Principle," in *Justifying Toleration*, p. 162.

14. Ibid., p. 163.

15. This assumes that a religious belief is accepted as having value even by those who do not subscribe to it. This is not without difficulties of its own. For a useful discussion of religious toleration, see Jay Newman, *Foundations of Religious Tolerance* (Toronto: University of Toronto Press, 1982).

16. Intrinsically morally irrelevant because there could be legitimate extrinsic reasons—the legacy of past discrimination, for example—that make them relevant in some circumstances.

17. Of course, speaking of race and religion in this very general and undifferentiated way obscures many complexities and fails to make numerous qualifications that would be a necessary feature of any fuller discussion of racial and religious toleration.

18. There is perhaps an interesting analogy here with accounts of freedom that allow one to increase one's freedom by reducing one's desires. See, for example, Tim Gray, *Freedom* (London: Macmillan, 1991), pp. 70–71.

19. Of course, in view of my earlier remarks, I do not mean to imply that the perspective of the tolerated must be accepted; typically it will not be by the tolerator.

20. See, for example, Alasdair MacIntyre, *Whose Justice? Which Rationality?* (London: Duckworth, 1988), pp. 335–36.

21. For an interesting attempt to defend liberalism against this charge see Thomas Nagel, *Equality and Partiality* (Oxford: Oxford University Press, 1991), ch. 14.

22. Mendus, *Toleration and the Limits of Liberalism*, p. 144.

23. Ibid., p. 108.

24. For a discussion of this issue, see Peter Gardner, "Propositional Attitudes and Multicultural Education, or Believing Others Are Mistaken," in *Toleration: Philosophy and Practice*, ed. John Horton and Peter Nicholson (Aldershot: Avebury, 1992).

25. This view is advanced in Peter Gardner, "Tolerance and Education," in *Liberalism, Multiculturalism and Toleration*, ed. John Horton (London: Macmillan, 1993).

26. See Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), p. 403.

27. Bernard Williams, *Ethics and the Limits of Philosophy* (London: Fontana, 1985), pp. 140–41.

28. For a discussion of this point in the context of the debate in the U.K. engendered by the publication of Salman Rushdie's novel, *The Satanic Verses*, see Glen Newey, "Fatwa and Fiction: Censorship and Toleration," in *Liberalism, Multiculturalism and Toleration*.

29. I am very grateful for their comments on an earlier draft of this paper to members of the Political Theory Workshop at the University of York, and in particular to David Heyd, Susan Mendus, and Peter Nicholson.

3

Tolerance, Pluralism, and Relativism

GORDON GRAHAM

What is the connection between a belief in toleration, the fact of pluralism, and the metaethical thesis of relativism? It is commonly supposed that in some way or other these three go together and stand allied in opposition to moral absolutism, metaethical objectivism, and a failure to recognize cultural incommensurability. But what *precisely* are the connections here? Implicit in much moral argument, it seems to me, is the following picture.

On one side, the fact of pluralism supports the contentions of the relativist, and because relativism holds that unconditional truth cannot be ascribed to any one moral or political view, relativism in turn provides support for toleration; if no one belief or set of beliefs is superior to any other in terms of truth, all must be accorded equal respect.[1] Conversely, an objectivist metaethics implies the endorsement of just one set of proscriptions and prescriptions as true, which are thus regarded as absolutely forbidden or required. This in turn legitimizes suppressing other erroneous views. Thus a belief in toleration requires us to subscribe to relativism; conversely, the rejection of relativism licenses suppressing moral variation on the general ground that "error has no rights."

In this essay I argue that none of these connections holds and that, contrary to common belief, it is subscription to objectivism that sits best with a belief in toleration. We begin with objectivity and absolutism.

I

Is an objectivist in ethics committed to moral absolutism? By moral absolutism I mean the belief that there are some action types that ought never to be performed, irrespective of context or consequence. Just what these actions are will vary, of course, according to specific moral codes. Some, like Kant, might hold that it is always and everywhere wrong to lie, a view that is unlikely to attract very widespread support nowadays, but equally

absolutist is the view that it is always and everywhere wrong to have sexual congress with children, a view more likely to resonate with the modern moral consciousness. A consequentialist will hold, by contrast, that we can always imagine circumstances in which the consequences of not performing such an act are so horrific that any consistent ethics must license its performance. Consequentialism is thus highly flexible and commends itself to many in large part just because of the unattractive inflexibility of absolutism. But whatever is to be said about the respective merits of each side of this comparison, it is not hard to see that the arguments to be adduced here are different from the arguments that rage between objectivist and relativist. The best-known form of consequentialism is utilitarianism, but utilitarian ethics is as objectivist as any ethics can be. Because it holds that the rightness or wrongness of an action is a function of the happiness it produces or fails to produce, and because consequences for happiness are in principle empirically determinable, whether an action is right or wrong is, for utilitarianism, a question of empirical truth and falsehood. If there are difficulties with the notion of happiness, the same point can be made about the variety of utilitarianism that operates with preference satisfaction; what the relevant preferences are and whether they are satisfied or not are empirically determinable questions. But if this is correct, it follows that objectivism does not imply absolutism, because utilitarianism combines objectivism and the rejection of absolutism.

There are, it is true, complications here. A question arises as to whether the judgment that an action is right or wrong is to be based on estimated likely consequences or on a retrospective assessment of actual consequences. This is a very important issue but, depending on what we say about the estimation of probabilities, it need not affect the general point about separating absolutism and objectivism. Whether we are talking about actual or likely consequences, the determination of right and wrong can still be construed as an empirical question.

A further and more troubling question arises over whether utilitarian ethics is empirical (and hence objectivist), or for that matter consequentialist, all the way down, so to speak. What about its fundamental principle, "The best action is that which maximizes happiness"; does this admit of truth or falsity? David O. Brink has argued that an objectivist construal of utilitarianism is not only possible but attractive, and he calls on naturalism and coherentism to sustain this view.[2] In doing so, he is arguing against the persuasive lines of thought developed by Williams, Nagel, and Taylor, part of whose object is to argue against the impartialism that this seems to imply. But even if we side with them and accept their reservations, the main point I am making is again unaffected. It is not the fact,

if it is one, that at bottom utilitarianism must rest on a subjective commitment that makes it nonabsolutist, but the fact that its basic principle characterizes a *class* of actions and not an action *type*.

This conclusion rests on a slightly contentious interpretation of "absolutism."[3] But clearly the labels we use are not a matter of fundamental importance. We can even say, if we like, that utilitarianism is absolutist with respect to this one fundamental principle (meaning by absolutism here that it admits of no qualification), but, unlike Kantian deontology, it still allows for the correctness of any specific course of action. Of course, "those that maximize the best consequences" picks out a kind of action, as does 'those that take five minutes to complete,' but there is still a distinction to be drawn between types of action and classes of action, otherwise the dispute between deontologists could not even be stated. In terms of this distinction and my use of the term, consequentialism is nonabsolutist. In short, whether we hold that utilitarianism is an objectivist ethics through and through, the contrast with absolutism as I have characterized it still holds.

If this is correct, the first connection in the familiar picture I am examining fails; although they commonly go together, there is no necessary link between absolutism and objectivism.

II

Equally specious is any supposed connection between relativism and toleration. Indeed, as Nietzsche's writings demonstrate, even radical subjectivism need not issue in toleration. Nietzsche believes realism and arguably objectivism in ethics to be an illusion, but this leads him not to the conclusion that all moral views are worthy of equal respect, but that in matters of the moral will might is right (though not, of course, *objectively* right). If there is no truth, what other mark of discrimination or superiority can there be but the brute assertion of a heroic will? Thus Nietzsche supposes, with Thrasymachus in *the Republic*, that in matters of value justice cannot be more than the assertion of the will of the stronger, or perhaps, in view of the possible variations in interpretation that Nietzsche's deliberately suggestive rather than systematic thought allows, we should follow Thomas Hurka in rejecting the straightforwardly egoistic account and say that perfection lies in the assertion of the heroic will.[4] Against this background, it seems implausible to expect either the Nietzschean Übermensch or the Thrasymachean ruler to be models of toleration. It is true that in places Nietzsche seems to suggest that the true Übermensch will be so supremely confident in his own will that he can

afford to tolerate the wills and beliefs of lesser beings. Indeed, at least on occasion, tolerance might be thought to be the very mark of his strength of will. But it is evident that this is not a logical requirement. There is nothing inconsistent in an expression of dominant will through the suppression of others, and the fact that this is a more natural reading of superiority might explain the ease with which connections have been forged between Nietzsche's philosophy and the creeds of Nazism.

In similar fashion, accepting cultural relativism could result in intolerance. Mussolini (or Gentile) believed that war, not truth or reason, was the adjudicator between cultures. This view is not familiar among, or likely to commend itself to, many modern cultural relativists, but it is nonetheless consistent. Respect in the sense of toleration is only one attitude among many that can accompany the perception of cultural incommensurability, and truth is not the only criterion by which cultures can be judged. Those who hold that there is no truth in these matters might still regard some cultures as admirable and others as contemptible, and to be defended or suppressed for these reasons. Whether we take a subjectivist or relativist reading of "admirable" and "contemptible" here is of no significance. Slav culture might appear contemptible only to those of an Aryan culture, but that is still the way they see it. Brink makes this point effectively:

> [N]either noncognitivism nor relativism seems to have any special commitment to tolerance. If no one moral judgement is more correct than another, how can it be that I should be tolerant? Someone with well informed and consistent attitudes might be intolerant, and neither the noncognitivist nor the relativist can complain that his attitude is mistaken (although, of course, many noncognitivists and relativists will hold different attitudes and may express them in his presence). Thus, one person's intolerance is no less justified than the tolerance of others, on these antirealist claims, and the acceptance of these antirealist claims provides no reason for the intolerant person to change his attitude.[5]

Conversely, it is clear that objectivism as such requires no accompanying intolerance. Being true of objectivism, this is obviously true of moral objectivism also, but it is perhaps easier to make the point in other spheres. Take, for instance, mathematics. The practice of mathematics encourages criticism and dispute at the higher levels. The interpretation of mathematics, like the interpretation of morality, admits of disagreement between realists and intuitionists, but whichever side we take it is clear that we must give some account of the possibility of criticism, dispute, and resolution, because these are facts about the practice we are seeking to understand. A thoroughgoing realist about mathematics can

consistently hold that there is a transcendent truth in these matters but that proof and refutation of the sort identified by intuitionism are the sole methods of arriving at it. Realism can also hold that dispute and disagreement must, in the interests of truth, be tolerated, even that it must be encouraged. Similarly, those, like Popper, who take a falsificationist view of natural science might think that progress toward the truth depends on conjecture and refutation, and so commitment to the practice of scientific investigation, if it does not depend on tolerating any and every view, nonetheless depends on tolerating many views that are held to be erroneous.

So, too, with morality. We could hold, as Mill did, that tolerating the public expression of what we believe to be error is an ineliminable part of the public process of arriving at what we hold to be the truth. This is a point to which I will return, but it is worth observing here perhaps that this sort of endorsement of toleration is more than the recognition that error has rights. Whether error has rights or not, if the possibility of error is a necessary accompaniment to the possibility of achieving truth, then the pursuit of truth has, so to speak, a self-interested motive in tolerating expressions of error.

III

It seems then that objectivism and toleration not only are consistent but can go together, even that they must go together. There are two ways we might read this: that a belief in objectivism is intelligible only alongside a belief in toleration, or that a belief in the virtues of toleration is intelligible only against a background of objectivism. We have seen some support for both contentions, it seems to me, but the brief argument I have adduced might not be regarded as a very strong one, because the parallels among science, mathematics, and morality I have been using are contentious. Indeed, to some it is a very superficial one, because a closer look at the facts reveals more differences than similarities. Famously, this is the view of J. L. Mackie in *Ethics: Inventing Right and Wrong*, where he says,

> [I]t is not the mere existence of disagreement that tells against the objectivity of values. Disagreement on questions in history or biography or cosmology does not show that there are no objective issues in these fields for investigators to disagree about. But such scientific disagreement results from speculative inferences or explanatory hypotheses based on inadequate evidence, and it is hardly plausible to interpret moral disagreement in the same way. Disagreement about moral codes seems to reflect people's adherence to and participation in differ-

> ent ways of life. The causal connection seems to be mainly that way round: it is that people approve of monogamy because they participate in a monogamous way of life rather than that they participate in a monogamous way of life because they approve of monogamy. . . .
>
> . . . In short, the argument from relativity has some force simply because the actual variations in the moral codes are more readily explained by the hypothesis that they reflect ways of life than that they express perceptions, most of them seriously inadequate and badly distorted.[6]

This argument has been widely rehearsed in favor of subjectivism or some related thesis that right and wrong are invented rather than discovered. And yet it seems to me a very weak one. To begin with, Mackie supposes that the extent of moral disagreement is more striking than disagreement in other spheres. This can be contested on the grounds that like is not being compared with like; Peter Railton makes this point. Accepting, with Mackie, that "'the phenomenon of moral disagreement' refers not to a philosophical thesis about the impossibility of rational resolution in ethics but to the actual character and extent of moral disagreement," he says,

> It is for various reasons easy to overstate the extent and depth of moral disagreement. Points of moral disagreement tend to make for social conflict, which is more conspicuous than humdrum social peace. And though we sometimes call virtually any social norms "moral," this does not mean that we really consider these norms to be serious competitors for moral standing in our communities. If, in any area of inquiry, including empirical science, we were to survey not only all serious competitors, but also all views which cannot be refuted, or whose proponents could not be convinced on non-question-begging grounds to share our view, we would find that area riven with deep and irremediable disagreement.[7]

But Mackie does not rely solely on the simple *observation* of moral disagreement. The heart of his argument also rests on the *explanation* of this "fact." Let us suppose that he is correct in his ambitious sociological generalization about the nature and genesis of moral belief. What is explained by this generalization, if anything is, is the state of moral consciousness on the part of the members of a culture. But unless we straightforwardly invoke the genetic fallacy, which mistakenly tries to reason about the truth and falsehood of beliefs on the basis of their causal origin, there is not much to be drawn from the truth of this generalization. Indeed, an objectivist might argue that it is precisely a tendency on the part of human beings to base their beliefs uncritically on received practices that explains the widespread existence of moral error and distortion. But so long as we can point to a long-term underlying convergence between

cultures, which plausibly we can, we can continue to hold that the facts of moral variation are wholly consistent with a realistic objectivism.

This point needs some amplification perhaps. It is true that there is considerable variation between moral and religious practices over place and time. Let us suppose that, as in most other spheres, the first efforts of humans in morality and religion are fumbling and that among human beings there is indeed a fundamental uncritical conservatism. If so, we will expect the widespread existence of entrenched, but rationally indefensible positions. But so long as we can detect emergent norms that slowly command universal assent, as we can in the rejection of human sacrifice and slavery, for instance, we will have explained all the facts that Mackie seeks to explain without recourse to the metaethical thesis that morality is a matter of human invention.

Mackie himself observes that the existence of moral reformers is another fact that metaethics must accommodate. He suggests that we can understand moral reform as the pursuit of greater consistency among the elements of a morality. But this can at best be only part of the story. Why should the pursuit of greater consistency carry any force if it is not a part of a general endeavor to make our beliefs and practices conform with universal, that is nonrelativistic, standards of rationality? A simple account of moral reformers is that they apply the methods of reason all moral agents ought to apply, but which few do. It is, admittedly, a further step to claim that these methods of reason result in the apprehension of universally valid truth, but whether this is really required for metaethical objectivism is a matter to which I will return.

Before moving on, however, it might be valuable to take stock. I have argued that though the ideas of pluralism, relativism, and toleration are commonly thought to be associated in some way, this is not so. If and when they are, this is a purely contingent matter, and, as far as the beliefs and concepts these ideas invoke are concerned, there are no necessary links between them. Conversely, metaethical objectivism is a position quite distinct from moral absolutism and can in fact be quite intimately connected with toleration. The parallel with mathematics and science suggests this, but it is a parallel that many writers, including John Mackie, have rejected. But Mackie's argument from relativity, I have claimed, is a very weak one, and there is more to be said for the thesis that moral variation is to be explained as the outcome of distorted perceptions that are uncritically held than he allows.

This argument from relativity is not the only one Mackie employs. Equally well known is his 'argument from queerness,' according to which the postulation of moral and evaluative properties generally is the postulation of properties of a very peculiar kind, properties that, unlike the properties history and science deal with, would have to have the unerring

ability to motivate. This is generally known as an argument, but it seems to me more in the way of an expression of puzzlement and assertion. But something more of an argument with a similar conclusion is to be found in Gilbert Harman's *Nature of Morality*:

> [O]bservation plays a role in science that it does not seem to play in ethics. The difference is that you need to make assumptions about certain physical facts to explain the occurrence of the observations that support a scientific theory, but you do not seem to make assumptions about any moral facts to explain the occurrence of so-called moral observations. . . . In the moral case, it would seem that you need only make assumptions about the psychology or moral sensibility of the person making the moral observation. In the scientific case, theory is tested against the world. . . .
>
> The observation of an event can provide observational evidence for or against a scientific theory in the sense that the truth of that observation can be relevant to a reasonable explanation of why that observation was made. A moral observation does not seem, in the same sense, to be observational evidence for or against any moral theory, since the truth or falsity of the moral observation seems to be completely irrelevant to any reasonable explanation of why that observation was made.[8]

Harman considers as a separate question whether there is a parallel between ethics and mathematics, but he concludes that modern mathematics and physics cannot be separated and that the difference between moral theories and observational theories still stands.

In explaining the observations that support a physical theory, scientists typically appeal to mathematical principles. On the other hand, one never seems to need to appeal in this way to moral principles. Because an observation is evidence for what best explains it, and because mathematics often figures in the explanations of scientific observations, there is indirect observational evidence for mathematics.[9]

Harman's contentions about the testability of moral claims have been the subject of extended discussion, especially between him and Nicholas Sturgeon, and it is instructive to see just how hard it is to state precisely the "obvious" distinction that Harman is invoking.[10] However, let us suppose that what he claims is broadly correct, that moral beliefs and principles are not rooted in empirical observation, that their "truth" does not figure in causal explanations of behavior except by way of some sort of reductionism, and that what people commonly refer to as "moral observations" can be given a wholly emotivist interpretation. A parallel with science and mathematics relevant to the concerns of this essay might nevertheless remain. Rawls has made the method of "reflective equilibrium" a familiar one in moral philosophy. This is the method by which moral principles are tested against considered moral judgments and mu-

tual adjustments are made to both judgments and principles until an equilibrium between the two is arrived at. It is well known, however, that in invoking this method in ethics Rawls is merely deploying a device that Goodman earlier detected at work in both science and logic, which is to say, the pursuit of consistency between general principles of logic and particular judgments of validity.[11] And the pursuit of such consistency is, arguably, a requirement of rationality. The fact that the general statements we operate with are not empirical hypotheses and our particular judgments are not observation statements could mean, as emotivists allege, that moral beliefs cannot be "tested against the world," but it does not follow that there are not other methods of testing them, or that these other methods are any less applications of rationality.[12]

It has been pointed out by many writers, however, that the method of equilibrium cannot be guaranteed to produce just one right answer in any matter under dispute, and even that it is consistent with there being indefinitely many equally good answers. Obviously, if and when this is the case, the pursuit of reflective equilibrium is powerless as a method of rationally resolving disputes. But equally obviously, whether this is true or not is a matter that will vary according to the particular case and context. There is no reason to believe a priori that the method will never produce good resolutions. Moreover, there is no requirement on those who employ it to employ it alone. Indeed, it is hard to see how it could be used anywhere to any effect entirely on its own.

Consider, for instance, the examination of a historical hypothesis. The proposition that the Holocaust never took place requires criticism and refutation by reference to all the existing evidence, the significance of which is a matter of judgment. To begin with, there can be disagreement about what is to be regarded as "all the evidence,"and in the second place, because every piece of evidence *can* be declared the result of misidentification, faulty memory, or deliberate falsification, the pursuit of consistency on its own cannot result in refutation. Nor can the true claim that observational evidence is in play be made to rescue it, for notoriously in history every piece of evidence requires interpretation. But in this particular case, consistency can be preserved only by more and more improbable "explainings away." Past a certain point, such improbabilities and the concerted effort to make them fit together will be declared as "unreasonable" not because they introduce inconsistencies or involve false observations but because without such declarations, reasoning can accomplish nothing.

If this is correct, Harman's claims about the role of observation in science and in ethics are not entirely to the point. Unless there is some other ground, we must conclude that reason is no more or less powerful in ethics than in science or history. Of course, it will be claimed by many

that the difference is this: the fundamental principles of ethics are culture-relative or subjective. But such a claim can hardly be brought to the defence of Mackie or Harman, because this was the conclusion their arguments were supposed to show.

IV

So far we have seen no good reason to accept the contention that moral thinking is radically different from the sort of thinking that goes on in history or science. All thought must operate with standards of reasonableness that cannot be wholly accommodated by standards of accurate observation and valid deduction, so to point to the fact that moral reasoning does not seem to involve the first of these directly is not to locate as radical a difference as might be supposed.

For all that, many people still share Mackie's puzzlement over the "queerness" of moral properties. This puzzlement arises, it will be recalled, from the suggestion that mere perceptible properties can motivate. The puzzlement need not generate a problem for moral objectivism, however, if we first acknowledge, with Mackie, that it is a mistake to construe values in general and moral values in particular as "part of the fabric of the universe." Objectivism can take other forms than Platonic-style ontology, and abandoning the ontology does not prevent us from thinking of evaluative considerations as deriving from objectively defensible principles of practical reason. Indeed, although the relations between metaphysics and epistemology are complex, it does seem possible to give a purely epistemological (as opposed to ontological) reading of all the metaethical positions with which we have been concerned. The heart of at least one dispute in this area is that, at some point or other, the power of reason to decide on questions of right and wrong runs out. Relativists and subjectivists can be construed as disagreeing about where this point is, but both contend, against realists and objectivists, that there is some such point. We might thus characterize the four positions as follows:

1. Subjectivism holds that for no evaluative question is there a right answer, or even a better answer. People might in fact agree on some evaluative matters, but this agreement is at most intersubjective. At any and every point, irresolvable subjective differences can arise.

2. Relativism holds that for some evaluative questions there is no right answer. At the level of particular judgments between people operating within some shared framework, we can apply the notions of correct and incorrect. But when evaluative disputes arise, or seem to arise, between conceptual frameworks, they are rationally irresolvable. These conceptual frameworks, it might

be worth noting, need not define distinct cultures. Gallie's well-known claims about essentially contested concepts, such as socialism or Christianity, make him a relativist in my sense, even though neither socialism nor Christianity can be regarded as a distinct and discrete culture.

3. Realism holds, aside from its ontological claims, that for all evaluative questions there is a right answer. In any particular case, we could fail to find it, but whether we do or not there is in every case a transcendent truth of the matter.

4. Objectivism holds that for any evaluative question there is in principle the possibility of a right answer. There is no class or level of evaluative dispute that the exercise of reason cannot in principle resolve.

These labels—subjectivism, relativism, and so on—are used here for convenience. I do not mean to suggest that the characterizations capture all the variations that have gone by these names or even that they capture those most frequently so called. Indeed, some writers, notably Geoffrey Sayre-McCord, expressly distinguish among these terms in ways that mark out the various positions rather differently.[13] But in my view, nothing much turns on labels, and, defined as I have defined them, they do represent a spectrum on which to place metaethical theories according to the degree to which they extend the scope of reason. Given its place on *this* spectrum, it seems to me, there is scope to defend objectivism in something like the way that Kant defends the postulation of human freedom.

The issue of freedom versus determinism, it will be recalled, is one of Kant's antinomies. Determinism seems the inescapable implication if human beings are regarded as bodies subject to physical laws; regarded as rationally choosing agents, on the other hand, they appear to be free of causal determination. In the final section of *The Groundwork to the Metaphysic of Morals*, Kant allows that he cannot offer a rational resolution of this antinomy. But he also argues that, from the point of view of practical reason, such a resolution is not needed, because the postulation of freedom of the will is an inescapable presupposition of deliberation. That is to say, even if we accept the *metaphysical* thesis of determinism, faced with alternative courses of action, we still have to go through a process of deliberation and choice. The thesis of determinism, we might say, is quite worthless from the point of view of human beings as deliberative choosers.

It seems to me that we can similarly represent the relativist/objectivist dispute as a contest between rival postulations and adjudicate between them in the following way: on which principle can we sensibly engage in the practice of reasoning through dialectic and deliberation? By reasoning here, I mean something rather general, not the application of formalizable systems of induction and deduction but merely the taking of thought with

a view to arriving at a better view or opinion. Clearly, subjectivism as characterized renders such reasoning about matters of value otiose; if we can say at the outset that there are no better or worse answers in this case, we cannot sensibly deliberate about finding them. Of course, as the emotivists observed, this does not mean that there is nothing to *say*; expression and propagation of opinion is still a possibility. But it does mean that what we say to each other is not part of a reflective discovery but of a moral shouting match. In the terminology Kant uses in the *Critique of Judgement*, quarreling is possible but disputing is not. On the subjectivist view, then, any attempt at deliberation is misguided. But as communicating agents, we still have to decide what to say, and this in turn raises the question of what it would be best to say. From the point of view of the deliberator, therefore, the a priori claim that there are never any right answers is of as little interest or use as a belief in metaphysical determinism is to someone faced with a dinner menu.

On the relativist view, by contrast, there are some right answers to be found by reflection. What relativism does not tell us, however, except in abstract terms ("at the boundaries of conceptual schemes," say), is just where the power of reason runs out. Once we actually engage in deliberative reflection, therefore, relativism, even if true, never actually gives us reason to stop. If we can go on to deliberate fruitfully, the relevant boundaries have not been reached, and if we cannot, as yet, relativism gives us no reason to suppose that we never will. Once more, whether relativism is true or false it cannot figure in the practical postulates of the deliberating agent.

Neither can realism. Even if there are indeed transcendentally true answers to all evaluative questions, this, too, is an a priori assertion of no interest from the deliberative point whose concern is not to know whether there is an answer or not, but whether it can be found.

To all three, the response of the deliberative reasoner must be the same: None gives any good reason to engage in reasoning other than openmindedly, without assuming that there is, or is not, an answer that deliberative reasoning can bring us to. This just is the presupposition of objectivism as I characterized it, the belief that for any evaluative question there could be a right answer and that we always have reason to try and find it.

V

I have been arguing that the practice of practical deliberation and social dialectic gives us reason, as reasoners, to accept objectivism, understood as an epistemological rather than an ontological account of evaluation, in preference to other metaethics. Objectivism as I have characterized it can

alone adequately account for practical reason from the point of view of practical reason itself. However, even if this is accepted, the connection with toleration might remain obscure. As I noted earlier, there are two possibilities here: it might be claimed that a belief in objectivism implies a belief in toleration, or that a belief in the virtue of toleration requires subscription to objectivism. The first of these, it seems to me, is too strong, so let us consider the second.

Brink remarks, "There is no special affinity between realism and intolerance or antirealism and intolerance. If anything, the appropriate sort of commitment to tolerance seems to pressupose the truth of moral realism."[14] His use of the term "realism" differs from mine, but the thought is largely the same, so the task here is to dispel, or at least abate, the uncertainty implied in the "if anything." Why should I tolerate, still less *believe* in tolerating, the opinions of others when I hold their opinions to be false or erroneous? One obvious answer, the answer that historically lies at the heart of the belief in religious toleration, is voluntarism, the claim that a large measure of the value that attaches to religious and moral belief arises from individuals coming to believe and accept moral and religious truths *for themselves*. Belief that is induced or coerced is not worth having, on one's own part or on the part of fellow believers. This is an argument that Luther uses and, more famously after him, Locke.[15] But rather obviously, the intelligibility of this defence arises from there *being* religious truth and error and from there actually being different ways of the mind's arriving at it. If all such beliefs are subjective or in the end relative to time and place, all that can matter is convergence and conformity for some other end—social cohesion or the maintenance of public order. It does not matter whether this is brought about by coercion or propaganda; no value attaches to voluntarism. If so, it is in this way that the connection between objectivism and toleration is to be made; the justification of toleration lies in voluntarism, and voluntarism is intelligible only on the presumption of objectivism.

What about the other way around? Cannot a belief in objectivism be consistent with an attitude of intolerance? The short answer is "yes," clearly, because there is no logical incompatibility between the belief that one's own beliefs are true and intolerance of those that conflict with them. Yet there is still something to be said, along the lines that Mill follows in *On Liberty*. If we think that the emergence of truth requires a process of conjecture and refutation and further think, as Mill does, that the validity of moral, religious, and philosophical doctrines requires the constant challenge presented by false competitors, we will have to allow social space for *some* false conjectures. Only by doing so will our grasp of the truth and that of others remain "lively," Mill thinks; more important, only by allowing the possibility of tolerated false conjectures can we rea-

sonably look for the avoidance of error and the emergence of new truths, because "The fatal tendency of mankind to leave off thinking about a thing when it is no longer doubtful, is the cause of half their errors."[16]

Mill's argument has often been vilified but does have some force, in my view. However, we should note in the first place that the necessity of tolerated error for the emergence of new knowledge is an empirical claim about the consequences of certain contingent conditions; it has long been held that God can reveal truths to us independently of any of our inquiries and if so, there is no logical necessity that knowledge of the truth be the outcome of inquiry. Whether this renders Mill's argument less compelling in the world as we know it, of course, is another matter. More important, even where we can show that toleration is a necessary concomitant of the emergence of truth and understanding, just what degree of toleration concern with the truth requires is uncertain.

First, even if true, the contention that acquiring knowledge requires tolerating error does not imply that all beliefs must be tolerated. Consistent with it is the view that beliefs that are so easily shown to be false or foolish that they never count as serious conjectures need not be tolerated. Thus, the attitude of the Christian believers in toleration to the "conjectures" of Nazism about financial conspiracy among the Jews, or the incoherencies of modern-day American witchcraft ("wickism"), can be quite different from their attitudes to the "conjectures" of Islam or Judaism consistent with Mill's argument and with a belief in objectivism. Here there is an easy parallel with other spheres, one alluded to by Railton in the passage quoted above: though medical progress requires the toleration of false conjectures, many "folk" remedies need be given no hearing, though which these are is a different and more difficult question.

Second, if the defence of toleration for the sake of truth rests on a consequentialist argument about contingent conditions, it admits of trade-offs. That is to say, the emergence of truth and its perpetual validation are not the only social values we might hold. Others, such as protecting public order or social cohesion, could on occasion figure more prominently. Locke recognizes this in the *Letter on Toleration,* for, in the interest of public order, he thinks that toleration should stop short of atheism, just as a modern-day state might reasonably hold that certain varieties of Islamic fundamentalism ought not to be accorded the freedom and respect of other religious views. Whether this is a weakness in the argument for toleration, however, is uncertain, for it is hard to see that any social principles can be maintained that do not admit of any trade-offs.

There remains a final objection to be considered. It is parallel to one that has frequently been brought against Kant's defence of freedom, namely, that the argument presupposes what it is supposed to show. Kant's defence of freedom assumes that we are, in one respect at least,

rational agents. But the "fact" of our rational agency is dependent on the falsehood of metaphysical determinism. If determinism is true, then rational agency is an illusion and there is no point of view from which Kant's transcendental argument can be made. Similarly, the argument I have mounted in favor of objectivism appeals to the "fact" that there is a practice of deliberative reason. But if radical subjectivism is true, this is false and any appearance to the contrary an illusion. How is this objection to be countered?

Commentators have found Kant's argument plausible to varying degrees, but in my view there is an incontestable truth in the claim that the point of view of action is inescapable for us as human beings. Even if it is an illusion, it is one we have no choice but to indulge, and, given the undecidability of the metaphysical question, given, that is to say, that it really is an antinomy, this gives us reason to make our own behavior intelligible by the presupposition of freedom. In a similar fashion, the possibility of deliberation is an ever-present one for us. Deliberation arises from a socially sustained pressure to produce reasons for our beliefs and desires. Given this fact, whether or not it is based on some grand delusion, there is pressure to give reasons for the reason giving. It is this that generates the argument I have deployed. Certainly, the argument as I have set it out amounts to less than an a priori proof, but given the general absence of such proofs in this area, it might nonetheless be the best that we can hope for.

VI

I have been arguing, contrary to common opinion, that we can forge more satisfactory connections between toleration and objectivism than with any of its rival metaethics. The connection that takes us from a belief in the value of toleration to a subscription to objectivism as I have construed it is traceable and substantial; the connection from the plausibility of objectivism to the merits of toleration is less so. But sufficient has been said, I hope, to throw doubt on associations and dichotomies whose apparent strength lies in their being largely unquestioned.[17]

Notes

1. This view is expressly endorsed by David Wong in *Moral Relativity* (Berkeley: University of California Press, 1984), chap. 12.

2. David O. Brink, *Moral Realism and the Foundations of Ethics* (Cambridge and New York: Cambridge University Press, 1989), chap. 8.

3. For an alternative definition, see Gilbert Harman "What is Moral Relativism?" in *Values and Morals*, ed. A. I. Goldman and Jaegwon Kim (Dordrecht: D. Reidel, 1978), pp. 143–61.

4. Thomas Hurka, *Perfectionism* (Oxford and New York: Oxford University Press, 1993), chap. 6.

5. Brink, p. 93

6. J. L. Mackie, *Ethics: Inventing Right and Wrong* (Harmondsworth: Penguin Books, 1977), pp. 36–37.

7. Peter Railton, "What the Non-Cognitivist Helps Us to See, the Naturalist Must Help Us to Explain," in *Reality, Representation and Projection*, ed. Haldane and Wright (New York: Oxford University Press, 1993), pp. 281–82.

8. Gilbert Harman, *The Nature of Morality* (New York: Oxford University Press, 1977), pp. 6–7.

9. Ibid., p. 10.

10. See especially Gilbert Harman, "Moral Explanations of Natural Facts—Can Moral Claims Be Tested against Moral Reality?" and the reply by Nicholas L. Sturgeon in *Spindel Conference 1986: Moral Realism, The Southern Journal of Philosophy*, ed. Norman Gillespie, vol. 24, supplement.

11. Nelson Goodman, *Fact, Fiction and Forecast*, 3d ed. (Indiana: Hackett, 1979).

12. It should be noted here that Harman, somewhat oddly perhaps, regards theories of practical reason as reductionist in his sense (see note 10 above). But even if this is so, they might still satisfactorily illustrate the possibility of objective rationality.

13. See Sayre-McCord, "The Many Moral Realisms," in *Spindel Conference 1986*, pp. 1–23. On Sayre-McCord's account, for example, subjectivism can attribute truth values to moral judgments, which my version of subjectivism cannot do.

14. Brink, p. 94.

15. See, for instance, "Secular Authority," in *Martin Luther: Selections from His Writings*, ed. John Dillenberger (New York: Anchor Books, 1961), pp. 363–402.

16. J. S. Mill, *On Liberty*, in *Three Essays* (Oxford and New York: Oxford University Press, 1975), p. 54.

17. I am grateful to my colleague Dr. Berys Gaut for many helpful comments on this essay.

4

Pluralism and the Community of Moral Judgment

BARBARA HERMAN

It is now widely acknowledged that social pluralism—the presence in a society of distinct traditions and ways of life—vastly complicates the project of liberal political thought.[1] The permanent presence of different and often competing systems of value challenges the ideal of civic culture on which liberal principle depends. Conceptions of equal citizenship or of universal human rights can be seen to have protected deep-reaching structures of inequality and domination that are damaging to women and other subordinate groups. The complementary separation of public and private intended to secure a univocal sphere of civic culture paid insufficient attention to the fact that the values governing people's daily lives are not ones they are willing to cabin off from decisions that affect the culture in which their lives take place. It was certainly a vain hope that the effects of continuing religious division would spend themselves in a private sphere of worship, a fact we see played out in the present struggle over gay rights and abortion. About the only thing one can confidently say is that there is no easy bridge between the need to secure uniform principles of reasonable public agreement and the social consequences of deep pluralism.

The hard questions that come with acknowledging the fact of social pluralism are not restricted to liberal political theory. If the elements of pluralism are deep—if persons of different ethnic and religious commitments, different races, men and women, bring different structures of value to bear on the problems of their lives and shared institutions—then this should affect our understanding of the norms and conditions of morality as well.

In much moral philosophy, however, the significance of social pluralism is seen in its potential for introducing ultimate moral disagreement: a challenge to morality's claim to objectivity. I believe that this characteristic response is mistaken in its view of the nature of the moral challenge deep pluralism poses. To explore this claim, I want to examine the much less attended to and prior question of moral judgment: the practical task of engagement with actions and practices embedded in distinct or opposing systems of value. There are very good reasons to begin here: an impoverished account of moral judgment not only is inadequate to the

moral complexity of ordinary life, it also impedes our understanding of the theoretical issues pluralism introduces. One of the things I try to show is that a primary route to the standard epistemological worry depends on a certain obliviousness to what an adequate account of moral judgment involves.

I

In moral theory influenced by liberal values, toleration is sometimes offered as a reasonable strategy of response to a wide range of moral disagreements in circumstances of pluralism. Its value is defended as both pragmatic and instrumental: it does not require resolving all moral disagreements, and it enables other liberal values, such as autonomy, pursuit of truth, and privacy. It also supports an argument for a sphere of legal and social noninterference that, apart from contested issues of harm, requires formal neutrality (a public suspension of moral judgment). But toleration is not a morally or politically neutral response to pluralism insofar as it permits continued private moral hostility toward the values and activities that are the objects of toleration. If, for example, we are to be tolerant of diversity in private consensual sexual conduct, our tolerance is compatible with private disdain for, or abhorrence of, some of the tolerated activity. This can have (and has had) profoundly negative consequences for recognizing legitimate political claims for equality and civil rights. Moreover, widespread disdain for certain sexual preferences can create a moral culture of oppression.[2] The dynamic of toleration and oppression, although hardly inevitable, is, I believe, sustained by the morally minimal and instrumental nature of liberal toleration.[3]

It is useful in this regard to mark two general features of liberal toleration. First, the object of toleration has negative value to the tolerator: one tolerates what one dislikes or disapproves of. What I tolerate, I need not mind—indeed I might want—that it cease to be. Second, toleration is not in itself chosen as a good; one comes to it as the result of balancing competing considerations. One accedes to the continued existence of something one objects to either because its continued existence contributes to something else one values or because the costs of interfering with it are too high. Someone who exemplifies the virtue of toleration thus need not approve of, be interested in, or be willing to have much to do with the objects of her toleration. It is a laissez-faire virtue. If I must tolerate the public speech of minority groups because suppression of speech is politically dangerous over the long run, I do not have to listen. If we may not prevent groups with special histories and traditions from continuing objectionable practices, we do not have to live with them among us. (Though we might not be able to pass restrictive zoning, we can move.)

It is a condition of liberal toleration that the objected-to differences (in ways of life, activities) not be harmful, or not harmful to interests that must be protected. But whether a practice or set of values is harmful has to be to some extent an open question in circumstances of pluralism. An action may be benign in one social context and not in another; the harmfulness of an action may arise from its contingent and local support of objectionable values. A generalizable claim of "no harm" requires that we can show that an action or practice cannot harm regardless of social context. Where circumstances of pluralism obtain, then, to investigate any claim about harm not only must we be able to locate the fit of the questioned action or practice in its own sphere of value, we must be able to judge whether the action or practice contributes to a system of value that is itself morally possible, that is, one that does not generate impermissible actions or support practices inconsistent with persons' moral standing. Determinations of harm can therefore require the possibility of context-sensitive, cross-group moral judgment. Of course it is not enough to show that an action or practice harms someone to justify interference with it. The harm involved must be grave or impermissible or one that persons have a right not to receive. Such determinations also require a high level of contextually sensitive engagement with the object of judgment.

The demand for context-sensitive judgment leads to an awkward impasse. In conditions of deep social pluralism, the moral attitudes liberal toleration permits (and that are part of the values it supports) are inhospitable to the conditions on judgment necessary for justifying toleration. In encouraging a partition between moral attitudes and moral judgment, liberal toleration can be, in a practical sense, self-defeating.[4]

To understand the scope of this problem, we will need a fuller characterization of what engaged moral judgment involves. Much of what I want to say about moral judgment in the circumstances of pluralism is quite general in its import. But because a more theoretically informed guide is sometimes necessary, I develop the account of engaged moral judgment within a Kantian framework. Traditional interpretive misgivings notwithstanding, I believe the Kantian framework provides the reasoned balance between objectivity of judgment and sensitivity to the particular necessary to acknowledge pluralism without succumbing to across-the-board relativism.[5]

II

First, what are the facts of social pluralism to which moral judgment might need to attend? Consider some possibilities. Membership in a group or class of persons could be morally relevant to one's moral stand-

ing, claims, or obligations.[6] The fact that there are such groups may in turn alter the moral terrain of others who interact with them, directly or via participation in shared social institutions. Persons who belong to a group may identify themselves or be partly constituted by a cluster of distinct (or distinctly arranged) values. This will show in matters of character, dispositions, vulnerabilities, and conceptions of the good life. Acting with and toward persons so identified may require different sorts of knowledge and sensitivities than are required when one is "at home." And last, membership in a group may be a practically necessary means for identifying morally relevant facts that apply to a person, especially when the facts are a function of the group's history.[7] There might be other relevant facts; these facts might be inadequately described. But some such set of facts must be what is claimed to obtain if the occurrence of social pluralism is significant for moral judgment. Let us assume, then, that the moral relevance of social pluralism is manifested in these ways.

It would seem that any moral theory that had the resources even to acknowledge such parochial values would run the risk of inviting practical failure: different agents in different cultures (or subcultures) arriving at different conclusions (about themselves, about how they should regard and act toward others) in what seem to be relevantly similar circumstances, on valid grounds that are inaccessible to each other. In the face of this, one might well think that the best strategy is to develop some most widely acceptable neutral notion of impermissible harm, and about other moral matters, accept that we are limited to our own point of view. That this can look to be the only available response depends on holding onto a model of moral judgment that regards local values as fixed objects of local judgment. One of the reasons for employing a Kantian model of moral judgment is that it can acknowledge the distinct claim of local values without regarding them as fixed.

Kantian moral judgment attends to agents' maxims: the subjective principles that express actions in the form a rational agent wills them. Maxims thus represent the subjective justification of agents' choices, including their sense of means-ends fit, consistency with other ends, and judgments of permissibility or obligatoriness. The full relevance to agents of their perceived context of action—their different connections and commitments—is thus reflected in their maxims and available for moral assessment. So choices that are justified in ethnic or racial terms will have maxims whose content reflects those specific value commitments. If the fact that I am a woman or an ethnic European enters my understanding of, and so my reason for, acting in a particular way, my maxim will include these facts. It is an essential part of Kantian moral judgment to provide a method for assessing such maxims, since they contain agents' sincerely proffered justifications.[8] And surely *some* of the facts agents appeal to can make a difference in moral judgment. Being a member of a

historically oppressed race might justify some actions or claims that being of Polish extraction cannot (and, perhaps, vice versa). It is because it has resources to register such possibilities that the Kantian model of moral judgment is well suited to the circumstances of pluralism.

The more comprehensive the claims of a way of life are, the more pervasive its values will be in agents' maxims. Consider the possible diversity of willings involved in child-rearing practices, recreation, conjugal relations, and caring for the homeless. Something as ordinary as choices in clothes can be dictated by slavishness to fashion, whim, religious discipline, or cultural identification. Quite precise facts about cultural commitments, pride, and the connection to personal taste need to be understood in order to determine the rationality—or even to appreciate the sense—of a given choice.

It is no different for maxims with explicitly moral content. Acts of beneficence or charity will be differently understood depending on an agent's view of the resources to be distributed. If wealth is regarded as deserved private possession, charity may be more personal (giving what is one's own) than if one views possessions as common goods held in trust for all (giving as a required redistribution). An account of moral judgment that could not register these differences in willing would plainly be inadequate.

Thinking about Kant here one might object: if we have obligations to the poor (or to those in need), then what morality requires is that we give what is necessary, and do that according to a conception that we are doing what morality requires (this is the motive of duty in its reason-giving form). Anything else in one's maxim of beneficence diminishes its moral content or purity. On this picture, there is *one* correct maxim of beneficence for all agents in comparable circumstances of giving. But this is a picture we have reason not to accept. What is necessary, indeed what counts as giving, cannot be determined independently of context.

We act from the motive of duty in circumstances of need by acknowledging the claim of need as a presumptive (conditionally sufficient) reason for action. The motive of duty, however, does not exhaust the value texture of our action and choices. If I view my level of wealth as a contingent feature of class and good fortune, and have a conception of wealth as joint social product, I can act as morality requires, fully acknowledging the claim of need as a sufficient reason for action, while acting on a maxim of trusteeship. Much of moral importance would be lost if this maxim of giving could not be distinguished from an act of giving *as charity*.

Kant himself adds to the duty to aid the further requirement that acts of charity be performed in ways that do not demean their recipients.[9] His point is not that we should give aid *and* act respectfully—that we should

do two things—but that the aid given should be conceived of, and expressed in, a respectful way. This is a moral, not a conceptual point. And it is a moral point that can have far-reaching moral consequences. The further requirement on acts of charity might give reasons to favor an institution with a conception of property as trusteeship insofar as it supports a moral climate of ownership that avoids both arrogance and servility.

The importance of particular contexts and a morally complete conception of an action is not limited to circumstances that involve institutions. Moral judgment in general requires a fuller conception of action than what might be deemed sufficient to capture a singular performance. One of the things one wants (or ought to want) from a moral theory is an account of moral judgment and deliberation that can underwrite agents' confidence in each other's moral practice. Knowledge that someone has done or intends to do, the right thing is obviously important, but it is often also shallow knowledge. We may in addition need to know what the action meant to someone, how it fit with other things she is doing—questions that have implications about how she would "go on." This is often the case because circumstances of action are not in automatic one-to-one correspondence with judgment. The decision to act in the requisite way, even if correct, may not provide closure. Where resources are limited, an act of charity can strain other obligations. Or the act of charity itself can promote dependency. Some possible effects of an action can and should be anticipated. But some of an action's effects arise from the unexpected (and unexpectable) actions, reactions, and decisions of others. It is a substantive requirement on an agent's maxim that in acting she recognize and where possible anticipate likely outcomes. She must also act with and from the recognition that it is only in rare circumstances (and, perhaps, philosophical discussions) that a single action is a sufficient response to a complex moral situation.[10]

Further, the moral adequacy of an action can depend on the structure and content of the maxims of other persons. That I act from a maxim of beneficence does not guarantee that I act beneficently. If the recipient of my good will is insulted by what I would do, and if this response is at all reasonable, then my action has failed to be the kind of action I willed. This is not a challenge to my moral worth; it calls into question the efficacy of my agency. What makes this of special concern is the possibility that the efficacy of my agency may depend on factors over which I have no complete control and into which I have no automatic insight.

It is a normal feature of action and willing to be concerned with the conditions of effective agency. I do not will as I should when I ignore my own limits of skill and resources. Likewise, my maxims of action must be formed on the basis of some knowledge of how others act and react. If I had no idea about how another agent understands or reacts, the possi-

ble maxims of interaction I could responsibly adopt would be minimal. Much of this we take for granted, because we assume that others are like us: needing food when hungry and help when injured, being susceptible to guilt and shame, being responsive to disrespect, and so on. To a very large extent, we are warranted in this assumption: others *are* pretty much like us. But even in the normal range of cases, we are attentive to relevant differences. We do not treat children as we do adults; we recognize that gross physical or psychological differences can alter what counts as morally significant need. But because we tend to live among others whose similarities to ourselves we take for granted, and because patterns of action become routine, most of us are rarely challenged—in our private lives, anyway—to acknowledge differences that are deep or make us uncomfortable.

Recent lessons about gender and race in the workplace and at universities warn of ways this ordinary fact can support culpable complacency. When apparently sincere and decent people infer from the removal of formal, institutional discrimination that the barriers to the advancement of women and persons of color have been removed, it becomes easy to regard remaining complaints of discrimination as matters of insensitivity or delicate feelings, residues to be dissolved over time, aided by the accumulated effects of good intentions. One of the lessons of pluralism—of moral claims based in facts about groups and their relations—has to be sensitivity to the *moral* fault in such attitudes. Facts about institutions that favor white men, as well as facts about women and racial minorities that make them especially vulnerable to informal barriers, need to be acknowledged in maxims of action in relevant contexts. Educational practices and policies that have the effect of disabling women or racial minorities are not morally neutral.

The possibility of such moral complexity enjoins moral agents to develop a morally tuned sensitivity to the effects of their sincerely intended actions and to the interplay between what they intend and the social or institutional contexts in which they act. There must be intelligent anticipation about failure and subsequent response built into the initial maxims of claim and response. This cannot be restricted to some after-the-fact check. It is rather a morally required feature of judgment and deliberation—of agents' maxims—the effects of which will show in the way agents respond to morally complex circumstances and context-specific claims.

Special burdens of moral judgment are present whenever social circumstances are such that first-order sincerity is morally insufficient. This fact is perspicuous in, though hardly unique to, complex institutional settings. A labor negotiator's maxim with respect to wage claims includes more than a precalculated scale of offer and counteroffer. It presupposes

a shared understanding of responsive action based on the institutional facts of good-faith bargaining, including the conditions for strikes, lockouts, and so on. Part of the work of responsible labor organizing is to educate union members about the structure of collective bargaining. Wildcat strikes, for example, often provide more direct expression of workers' claims. But they can be inappropriate, arguably morally inappropriate, where there exist fair procedures for settling labor and wage disputes.

The same kind of sensitivity and responsibility for the actions of others is plainly not required of agents in all circumstances. Members of a profoundly egalitarian, ethnically and racially homogeneous society would, for the most part, be able to rely on their first-order sincere intentions. The absence of traditions of persecution and dominance, plus public knowledge of the adequacy of institutions, create a context of deliberation and action in which each may be confident of what others' intentions are and of what they will do if the effects of their actions are untoward. Justified public confidence (in a well-ordered society) allows for a certain shallowness of agents' maxims.

III

In complex social circumstances, especially ones involving inequalities of power, in which differences in history (or class or race) produce competing systems of local value, if agents on both sides of an issue are to include in their maxims claims (or responses to claims) that express local values, there must be principles that provide deliberative guidance. Their task is twofold: to reconcile the content of local maxims with objective moral principles and to provide resources for presenting differences that allow for moral conversation and real disagreement. A moral conception is deficient to the extent that it restricts agents to negotiated agreements from within their separate spheres of value. The preservation of mutual opacity forces terms of agreement that track power and trading advantage.[11] Fair procedural constraints on negotiation can eliminate abuse, but they cannot be relied on to be adequately responsive to relevant local claims. The procedural ideal of a level playing field implicitly assumes the irrelevance of differences—that differences, if ineliminable, need only to be balanced or handicapped. This misses the point in those cases in which it is acknowledgment of the significance of difference, or of a claim based on difference, that is the issue. Treating pregnancy as a disability is a good example of this mistake.

To move different systems of local value to a position where disagreements can be resolved through some other means than advantage-negoti-

ation, a moral theory either must provide rules of value translation, so that disputes can be resolved through single-scale balancing or weighing, or it must establish mediating regulative principles that, although neutral, do not efface relevant differences when applied. I think there are many reasons to avoid rules of value translation, chief among them being the difficulty of establishing commensurability. But the deciding advantage of mediating regulative principles is that they better fit the issue at hand. If difference is potentially of the essence of a local value claim, value translation would be self-defeating in a practical sense when agents advancing local value claims have good reason to want their claims acknowledged, as far as possible, in their own terms.

Although the point of regulative principles is to secure fair placement of local value claims in a shared deliberative framework, this often involves costs. Again, the conditions of good-faith collective bargaining provide an instructive example. They demand a certain level of respect for organized labor, on the one side, and recognizing the claims for the necessity of profit and capital accumulation, on the other. Claims that all corporate profits are the illegitimate expropriation of the value created by labor power cannot be encompassed by the regulative principles of collective bargaining. Excluded on the same grounds is the presumption that a fair wage is measured by the price labor can get for itself in an open world labor market. This does not imply that each side must view the other in a sympathetic way. Accusations of greed, stubbornness, and misplaced class solidarity are within bounds as appropriate, and can be part of the process of constructing common ground. It is where the conditions of good-faith collective bargaining do not obtain, where they are not yet established or have broken down, that there may be no alternative to unmediated assertions of local value and advantage-driven settlements.

The effect of regulative principles in mediating local value claims is to constitute a community of moral judgment. Membership in such a community is a necessary condition for the various forms of moral colloquy: agreement in moral judgment, disagreement, even shared confusion. I do not mean to suggest that each person is necessarily a member of only one such community or that a single community of moral judgment can encompass all the relevant moral value claims of its members. I do want to suggest that all moral judgment in fact takes place within the framework of a community of moral judgment. The rules of salience that identify which features of our circumstances require moral attention, as well as the regulative principles that set the deliberative framework, are social rules acquired through participation in a moral community. Even the most basic moral facts—what counts as a harm that sets a moral claim, what counts as conditions for a valid agreement—are functions of social practice.[12]

It is reasonable to suppose that every valid moral conception will have a standard of harm and rules for agreement, and it may be that, given the kinds of beings that we are, certain harms will always establish a claim and certain conditions always invalidate agreement. But, as I noted earlier, general standards do not exhaust the array of reasonable claims and conditions. A culture or group might find nonphysical pain difficult to accept as real injury, and so not a candidate for harm. Another might hold that no pain is worthy of attention until it is named by its professional medical establishment. For them, incapacitating sadness or sorrow might not have moral standing until it is medically indexed as "depression." In such a culture, energy must be expended to influence medical institutions in order to make socially credible the moral standing of certain phenomena.[13] This may seem to us perverse and even abusive. And it may be. But although it might be wrong to allow the medical establishment the power to stipulate what is morally real—what has moral standing—some such institutional mediation of suffering, and so harm, is inevitable. Pain does not speak until it is a social fact, and it is *as* a social fact that it enters moral colloquy.

The general point is this. Neither agents' moral circumstances nor their obligations can be understood without locating them within a social setting. This is not in any way an aberration or something that ideal moral theory might avoid. Even universal grounds of obligation will have local instantiation. But to note the social bases of moral facts is not yet to see the way that regulative principles constitute a community of moral judgment. The question is thus not about the fact or role of a community of judgment, but about what impact the fact of pluralism has on its structure.

IV

Regulative principles constitute a community of moral judgment by creating what I call a shared deliberative field. An agent's deliberative field is the normative space constructed by the principles she accepts—usually, an ordered array of moral and nonmoral principles. What she values or wants is judged to be reason giving insofar as it satisfies the ordered principles and fits with other values or wants already present in the field. On a Kantian account, the ordered set of principles of practical rationality constrain the whole. (This does not imply that other principles and values, aesthetic ones, for example, cannot also have global scope.)

One role of regulative principles is as gatekeepers to the deliberative field. This is a general feature of practical reasoning. Without some developed conception of prudence or well-being, desires and interests cannot

even raise deliberative questions. Consider the way pain gives rise to reasons. Its normally central status in a deliberative field derives from the fact that pain is typically a sign of injury or damage. If pain did not have this role, it is not clear that we would have reason (or the same reason) to prevent its occurrence. Formally, it is no different with desire. That I want something is not in itself a reason for me—or for anyone else—to act to procure it. Desire becomes potentially reason supporting through connection with permissible ends and values that refine the structure of an agent's deliberative field. Some desires (for some persons) have no deliberative place (a recovering alcoholic's desire to drink, for example).[14] It is because it goes without saying (or thinking) that eating is a good thing that the desire to eat can be taken to be reason giving. But this is misleading, of course, for once it is in the deliberative field, the desire to eat now supports a reason to eat *now* only if there is time, if I have not just eaten, if there are not more pressing things to do, and so on.

Not all positions in the deliberative field are equal, some interests weigh more than others, some trump some (or all) others. Principles of prudence may indicate that where a course of action is life-threatening, its avoidance has other-things-equal priority over the immediate end it promotes. But other things may not be equal: the loss of the immediate end may be of greater significance than the avoidance of the threat to life (or even to the loss of life). There are issues of balancing and weighing here. By contrast, principles of morality (Kantian ones, anyway) require a different kind of reckoning. That one's principle (maxim) of action involves disregard for the moral status of another person condemns acting on that maxim, regardless of the value of the end so acting would promote.

The practical principles that structure the deliberative field not only permit local interpretation, they require it. Even Kantian respect for persons (ourselves and others) as rational agents is empty if we cannot introduce, under interpretation, local experiences. In a culture that values individual autonomy, the pain of separation from a parent might be a stage of growth, not a sign of injury, and so does not provide a justifying reason to keep a child at home. In a different culture, one that values strong intergenerational bonds, it might be that the pain of separation indicates the absence of an important developmental stage, and so gives a good reason to resist institutional pressure for early schooling. Assuming that both developmental paths are normal, we cannot be respectful of the growing child or the concerned adult unless we know how these matters are worked out.

The interpreted principles of the deliberative field construct a sensibility that gives practical sense to our experiences. Essential to the nature of this sensibility is that it is shared. In part this is because the interpretations of practical principles must be taught; normal development is otherwise

not possible. Children must learn how and in what sense their feelings and experiences have practical significance. They learn to value some feelings and to discount others. These values must be socially available, both in the sense that people around them hold and act on them and in the sense that circumstances permit their acquisition.

It is not just the role of socialization that explains why the sensibility must be a shared one. There are also social determinants of judgment in the usual sense: particular institutions of contract and property bring objects and the potential for relying on agreements into the moral sphere. Their mediation of our conceptions of what we can effectively desire and do is an integral part of moral deliberation and judgment. They explain why, if we live among persons, membership in civil society is both not optional and partly constitutive of a community of moral judgment.

Kant is quite explicit: The moral point of such institutions is not to compensate for our own and others' deficiencies (of goodness, strength, capacity to trust, etc.); they arise as the necessary social framework in which human beings can exercise and express their rational natures as free and equal persons.[15] Kant argues that, given the conditions of human life, there are things we each must be able to do that are not morally possible absent certain coercive political institutions. Our need to have exclusive use of things introduces a moral requirement for (and so justification of) a coercive political institution of property; our need to rely on (have a moral interest in) the fulfillment of commitments calls for the institution of contract. The needs reflect conditions for effective human agency; the move to civil institutions is necessary, because we cannot have what we need without enforceable rights against each other, without legitimate coercive force.

In neither of these cases, however, is the content of the justified coercive institution fully determined by its justifying argument. Kant's argument for an institution of property is not an argument for any particular system of property, private or communal. It is an argument to the conditions of intelligibility of the moral idea of property or right. The argument is not, however, neutral with regard to all systems of property. If property is justified as the necessary condition for effective rational agency, no institution of property that excludes some persons or groups of persons from ownership can be justified.

The Kantian deliberative framework is thereby able to conjoin contingent local institutions and principles of judgment in a way that preserves local value without sacrificing objectivity. The condition of moral legitimacy of coercive institutions—that they make possible the expression of free rational agency—makes it the case that even though moral judgments may make sense only within a particular culture, when they are expressions of legitimate institutions, local moral judgments can be fully objec-

tive. If this shows that objectivity does not require universality, it also explains why objectivity may not be the cure for moral disagreement.

The legitimate institutions of civil society add essential components to the shared sensibility that both identifies what is morally salient in a wide sphere of circumstances of action and gauges its standing in moral judgment.[16] As articulated, these institutions give the social world many of its moral features. Living in a twentieth-century capitalist democracy, I will directly *see* manufactured objects of a certain size or kind, such as tennis rackets or sports cars, as having the property of being privately owned, just as I directly see these objects as having a certain color. Although there is no necessity to this arrangement of possession (sports cars might have been like the famous white bicycles of Amsterdam in the 1960s were said to be—universally available for use), what is necessary is that such objects be *some* kind of property, under some kind of legal constraint.

In similar fashion, the community of moral judgment determines the relevant properties of morally salient desires and attitudes. Some desires have no standing at all: their satisfaction is not good, their frustration not in itself to be regretted. Sadistic desires, for example. The principles that exclude other desires may or may not be local. Desires to dominate other persons, to possess them materially or sexually, have no right of entry in any Kantian agent's deliberative field. What could be more of a local matter is determining when these are the desires in question. Is someone's emphatic solicitude reasonable parental care or a possessive wish to prolong dependency? The answer might not be available through scrutiny of psychological states alone. Correct identification of an agent's intentions can require interpretation through local institutions. When it is that control over another's choices expresses impermissible possessiveness may be a function of a community's conception of what an adult is. This is not to say that every conception of an adult is morally acceptable, only that more than one may be, and that the threshold for autonomous choice (or autonomous choice in some spheres) may be a region in which there is permissible variation.

V

That the terms and moral properties necessary for moral judgment have their origins in a community of moral judgment is not a view specific to Kantian ethics. What Kantian ethics adds to this is the claim that local values can support objective moral judgments only insofar as they are mediated by moral principle (the categorical imperative). Local value has moral standing insofar as it does or can express the value of rational agency. A given institution—of, say, property or family life—satisfies this

role if it makes the expression of rational agency in action possible (for those within the orbit of the institution), and when the connection to the conditions of rational agency is or can be an essential part of the available cultural understanding of the institution (its structure and requirements). We might say that local values that satisfy this condition support translation or reconfiguration in the terms of moral principles. Values that cannot accept translation have no legitimate deliberative place.

Thus "family values" that support spousal rape (or other forms of abuse) would be condemned: there is no possible translation of these values into terms that accept or express the regulative priority of support for rational agency. Other local values that are not condemned might not have the standing in the deliberative field that they claim in their own terms. For example, some ethnic and religious traditions, in addition to specific practices, make claims of ultimate authority over their members' ways of life and sometimes even their beliefs. The translation of local value may leave religious or ethnic practices unperturbed while rejecting the authority of the tradition that supports them. There is room for only one supremely regulative value in the Kantian deliberative field.

Because the location of local values in a structured deliberative field cuts them off, to some degree, from their original source of authority, they will be regarded as *possible* sources of value, subject to regulative principle and constraints of fit. Local community values are thus treated, in a formal sense only, on a par with desires and interests. They provide sources for reasons: they are not reason giving on their own. This is not to say that all possible sources of value are reduced to mere interests, competing with each other and with interests in general for normative space. Much of the interior structuring of a life that religion or ethnicity may provide can be preserved. But this is not because there is something special about local values. Complex personal ends—career choices, attachments, political commitments, and the like—all provide substructures in the deliberative field that guide choice and perception. What makes this possible is the indeterminateness of shape of the deliberative field. Kantian morality does not designate a morally (or rationally) preferred way of life. The great variety of human interests and traditions, coupled with the fact that choices to pursue certain kinds of activities tend to preclude the pursuit of others, suggests that, from the point of view of rational agency, there cannot be only one way to live.

Not just normative authority but also the content of local values can be affected by their relocation in the Kantian deliberative field. It is a constitutive principle of the deliberative field that no maxim of action may be inconsistent with the principle of respect for persons. This normative constraint not only rules out certain kinds of actions that local value supports, it requires the transformation of local values concerning the kinds

of reasons they provide. If it is a rule in my community that women's place is in the home, the practice of female homemaking may survive, but not as something women must see as their morally ordained place.

In general, where practices survive and where the values that support them gain entry into the deliberative field, they will be to a greater or lesser extent transformed along the dimensions of authority, content, and value-based reasons. This might in some cases undermine a local value; it will in other cases affect what counts as satisfaction of a value.

Although this is not the place to try to say what sorts of local values could survive translation to the terms of the Kantian deliberative field, or what they would look like if they could, some projection is possible. For example, it is not clear whether Kantian notions of autonomy permit vesting any person or group with ultimate deliberative authority, whether fathers, councils of elders, or experts. What I think we can say is that *if* deliberative authority is permissible, it must be justified by reasons that are consistent with deliberative norms: deference to expertise that cannot be easily shared, the necessity of efficient and final decision making in emergencies, and so on. Claims of authority are subject to deliberation-relative justification, and thus permanently open to rebuttal. A certain kind of critical practice is therefore necessary to maintain the legitimacy of authority. So, for example, to the extent that modern medicine relies on the obscurity of unnecessary Latin and the absence of generally accessible medical education, its authority is morally suspect.

Ways of life whose constitutive values resist transformation by moral principle can nonetheless contain virtues we admire. The courage and grace of a warrior class, the exquisite taste encouraged by great wealth or a hereditary nobility, or the self-sacrificial passion for justice in a revolutionary vanguard are unlikely to be present in a deliberative framework structured by Kantian principle. But the fact that, from the moral point of view, we cannot endorse everything in which we can see some good is not in itself an argument against the authority of moral principle.

VI

The range of differences that can be included in a single community of moral judgment is a function of the requirements for ongoing moral colloquy. Although neither consistency with moral principle (the values of rational agency) nor openness to reconfiguration in moral terms is sufficient to guarantee that two local values can be in the same community of moral judgment, there is reason to think that many encounters between initially incompatible systems of value need not conclude in mutual opac-

ity and exclusion. The Kantian account, as I have reconstructed it, resists a kind of value stasis in judgment that encourages systems of value to remain disengaged from one another.

There is again an analogous deliberative problem for an individual. One can regard interests and commitments as making separate claims for deliberative attention and priority. Sometimes competing interests cannot be adjusted to each other: devotion to a fast-track corporate career conflicts with the desire to be a committed and available parent. Although a choice has to be made, its terms need not be dictated from the fixed perspective of either interest. If interests are denied authority independent of their place in a deliberative field, the exclusionary claim of a given interest is subject to reexamination, and it can be reestablished on different terms. There is nothing compelling in the picture that describes the choice to move to a different career track or a different model of successful parenting as choice to gain one thing at the expense of another. This is to accept the idea that our interests have some independent standing in our lives, some autonomous claim to expression. One could equally view one's life as involving in an essential way the development and mutual adjustment of a variety of interests. One does not know at any given point exactly how things will go, what one might come to care about, or how what one cares about might change as one comes to care about other things.[17] Practical rationality is a permanent task.

The point of the analogy is to underscore the conditional status of the interests and values that constitute a life or a community at a given time. Interests and values are to be adjusted to principles of practical rationality as well as to each other. The analogy breaks down over what drives each system toward higher degrees of unity and integration. One can exaggerate the unifying effect of being a person as a single locus of activity—we are all too able to adopt and pursue conflicting projects—but there is clearly something in the idea of a prudential need to live one life that is absent from the circumstances of multiple communities of moral judgment.

Kant argued that where "a multitude of persons" live in such a way that they "affect one another," they are under moral necessity to enter together into civil society.[18] This is because the absence of common institutions of property and contract, with enforceable rights, is an impermissible hindrance to the effective expression of human rational agency. I think it can be argued that we are similarly obliged to enter and sustain a community of moral judgment not to secure enforceable rights but to bring about the conditions for moral development and colloquy: the conditions necessary to secure what Kant calls the "public use of reason." This provides the moral impetus to unity in circumstances of pluralism. It

also explains the inappropriateness of tolerance as a first moral response to pluralism. Because toleration is at issue only where people can affect one another, where the conditions for toleration obtain, there is already in place a prior moral requirement to a more inclusive community of moral judgment.

While the moral necessity of civil society justifies coercing entry, the community of moral judgment cannot be brought about by compulsion. The obligation to enter and sustain a community of judgment sets agents a task of understanding and accommodation: a constraint on maxims. It is the practical expression in judgment of the kingdom of ends as a cosmopolitan ideal.

VII

Suppose one faces a community of moral judgment different from one's own, where, by definition, one is in moral disagreement either with the community's justifying reasons or with the outcomes of its sincere moral judgments.[19] In circumstances governed by the model of liberal toleration, I maintain a position of judging outsider, attempting to assess in my own terms whether the area of disagreement meets the conditions warranting intervention. If it does not, having made my critical judgment, there is only the private matter of attitude, continued proximity, and so on. That is why toleration can be a matter of public policy.

If instead I act under the obligation to extend the community of moral judgment, my task is both more complex and more demanding. Because one needs to determine the possibility of moral colloquy, the task of judgment requires substantial engagement with the values in question, not just to determine consistency with moral principle but to consider the potential areas of mutual adjustment that may be necessary to make the community of moral judgment more inclusive. It can be difficult, for example, to determine whether one is facing a distinct community of judgment or whether moral deviance is masking itself as difference. Different questions arise depending on whether the focus of judgment is a subgroup within a pluralistic society or, as Kant imagined, groups encountered through travel and commerce.

Judgment that uses the conditions of moral colloquy to determine local legitimacy of ways of life must take care that difference per se is not read as grounds for exclusion. Correct judgment depends on the particular facts and norms of the institution or practice in question. Although, we might conjecture, the value of polygamous marriage as it functioned in the historical community of Latter Day Saints could not be mediated by Kantian principle (because of its institutionalized subordination of

women), nothing follows from this about other patterns of multiple-spouse marriage. The issue is not the pattern of marriage per se but the moral meaning that comes with its mode of spousal relation.

Imagine two communities demanding local control over education, one seeing it as a necessary means for preserving its language and customs, the other wanting to protect its children from exposure to material that displays other systems of value in a favorable or even neutral light. Both demands might be in conflict with the dominant culture's value of uniform public, liberal education. In the United States, this sort of issue is usually discussed as it raises constitutional questions about the separation of church and state. But it is also, and perhaps first, a moral issue. The values involved and the practices they support are different in morally significant ways. Partial separation from the standard pattern of civic socialization in order to preserve a cultural identity need not threaten the conditions of moral colloquy. By contrast, because the proposed instantiation of the values of the second community promotes parochial intolerance, their case for preserving cultural identity (in this way) does not carry moral weight. This is not because their practice will lead to wrongful interference with others, it might not. Education to intolerance undermines the conditions for participation in an inclusive community of moral judgment.

The fact that a community would not survive the loss or change of a condemned value neither alters the terms of inclusion nor gives reason to shift to a model of toleration. Communities as such do not have rights of survival. However, where local values can be successfully mediated and the conditions for public dialogue and reasoning secured, a community's interest in preserving local value—in preserving itself—would seem to be determinative. The legitimate interests of the larger community are limited to the satisfaction of the membership conditions in the community of moral judgment. But this description concedes too much to the dominant group. The conditions of comembership in a community of moral judgment demand positive engagement with non-majority systems of local value. The issue is not whether one can put up with ways of life one does not like, or whether other values one has are promoted by noninterference. That is the question of toleration. Rather, one needs to know that, and on what terms, there is a possible community of moral judgment. And this may require changes in one's own values. Not all values will satisfy the terms of entry, and not all values that survive will do so unchanged. If there are costs of entry to a community of moral judgment—costs to the local values themselves—it cannot be that the dominant community always decides who pays. Engaged moral judgment requires an openness in both communities to the point and role of value differences and a willingness to modify local values (even if at some cost

to the continuity of community tradition) in order to achieve mutual accommodation.

In short, the obligation to inclusion does not leave everything as it would have been absent the fact of pluralism.[20] In conditions of pluralism, parochialism is not acceptable. If we follow Kant, parochialism is a violation of our duty to enter and maintain (if necessary, to create) a cosmopolitan moral community.[21]

Notes

1. In recent essays, John Rawls talks about "the permanent fact of pluralism." He does not have in mind social and ethnic diversity as such, but rather the probable fact that philosophical argument will not demonstrate the truth of any single comprehensive conception of the good. That is why he thinks that the strongest available justification of principles of justice is found in an "overlapping consensus." The pluralism of views he has in mind coexists with deep social homogeneity. In this essay, the pluralism at issue is social, ethnic, and racial diversity in the familiar sense.

2. There is in this a reason to be cautious about the move from moral relativism to a social-contractarian resolution of disagreement. This accepts too easily the need for a political solution to a moral problem. (Gilbert Harman is tempted this way in his "Moral Relativism Defended," *Philosophical Review* 84 [1975]:3–22.)

3. That oppression might follow on toleration may also reflect a power asymmetry. The weak are not normally in a position to tolerate the strong. Nietzsche's *Genealogy of Morals* provides a delicate exploration of the complex strategies and attitudes involved in reversing this.

4. It is not much of an objection to claim that the conditions of judgment do not have to be satisfied by each agent because what is and is not to be tolerated is a public or political decision. We would have to give up a great deal to accept that persons who are required to tolerate or permitted to interfere could not know or appreciate the supporting moral reasons.

5. Before continuing, I should note that Kant's explicit discussions of toleration do not indicate that he saw any connection with the problems posed by social pluralism. (Kant's extended discussions of toleration are to be found in the essays "What Is Enlightenment?" and "Theory and Practice." The best treatment of Kant on toleration is Onora O'Neill, "The Public Use of Reason," in her *Constructions of Reason* [Cambridge: Cambridge University Press, 1989].) On religious toleration, Kant is consistently liberal—with a twist. The lack of certainty about all religious claims makes hatred and persecution of other religions groundless. Further, because religions are historically embedded and limited practices, it is only insofar as they express (independent) morality that their tenets are normative at all.

Kant does have striking views about political toleration, especially about the necessity of free speech as the public use of reason. He holds that "[r]eason depends on this freedom for its very existence. For reason has no dictatorial author-

ity; its verdict is simply the agreement of free citizens, of whom each one must be permitted to express, without let or hindrance, his objections or even his veto." (*Critique of Pure Reason* A738/B766, trans. N. K. Smith [London: Macmillan, 1933]). Nothing follows directly from this understanding of toleration that connects with the moral effects of social pluralism. What can be drawn on is the ideal of public reason: a formal, normative construction of the space of moral judgment that can provide room for the expression of distinct values in conformity with the standard of practical reason.

6. Because the topic is social pluralism, I am not considering the special problems for moral judgment posed by nonhuman groups.

7. The contrast I have in mind is with cases in which knowledge of group identity is merely convenient for identifying something to which we have or could have independent access (e.g., susceptibility to a genetic disorder).

8. There are general arguments that support this assumption in chapter 7 of my *Practice of Moral Judgment* (Cambridge, Mass.: Harvard University Press, 1993).

9. Kant, *The Doctrine of Virtue,* 452, pt. 2 of Immanuel Kant, *The Metaphysics of Morals*, ed. M. Gregor (Cambridge: Cambridge University Press, 1991).

10. Because the required nature and degree of such further response is not a matter of individual choice, an adequate moral theory must have resources to develop such standards. And they need to be *developed*, for what counts as adequate preparation in one situation could be woefully unsuited to another. This can be an especially acute matter when the context of action involves agents with different or culturally diverse conceptions of what is at issue.

11. This is Harman's picture, I believe. It is what Rawls's original position blocks through constraints on information, justified by the goal of constructing principles on which all could reasonably agree. The Kantian alternative I am sketching takes the task to be one of elaborating the moral structures required for deliberation and conscientious action in circumstances of pluralism supported by complex social and cultural differences.

12. This does not mean that persons from different backgrounds and cultures cannot have fruitful moral debate. A shared moral root (religion, for example) makes overlapping principles possible. Powerful transcultural communities are created by international commerce and some deep similarities in forms of oppression. I have doubts, though, about how deep or wide-ranging such moral colloquy can be.

13. This can work in both directions. For example, the attempt to make sexual orientation a medical or biological fact can be seen as part of a morally questionable program to create inflexible sexual categories.

14. This is the reverse of the usual reason-desire connection. It is usually argued that there are no reasons without supporting desires. The claim here is that the presence of a desire does not by itself support reasons.

15. Kant, *Doctrine of Right*, 245ff, pt. 1 of Immanuel Kant, *The Metaphysics of Morals*.

16. Thus although it is the principle of manipulation of agency in Kant's famous maxim of deceitful promising that makes such promising impermissible, what makes it a maxim of deceitful promising is a function of the prevailing

institutions of promise and contract. This is not a deep point. Whether an expression of future intentions in a context of possible cooperative activity constitutes a commitment depends on conventions; it does not follow from the internal logic of the utterance. In similar fashion, the terms of legitimate possession, and so of misappropriation, are social, not natural.

17. That this is a normal fact does not exonerate those institutions that force such adjustments when they are not necessary.

18. Kant, "Perpetual Peace," 358, in *Kant's Political Writings*, ed. Hans Reiss (Cambridge: Cambridge University Press, 1970). *The Doctrine of Right*, 252–55.

19. To simplify matters, I am ignoring the fact that it is from within a group that one encounters other communities of judgment.

20. It is possible that there are no a priori limits to the modifications in values that might be required. But the losses involved should not be exaggerated, and the potential benefits not ignored. It will be the task of a subsequent essay to explore this claim.

21. There is no guarantee, of course, that such efforts will succeed. Failure of the project of inclusion could have various sources. Systems of value might not be able to survive proximity: their encounter can lead to one (or both of their) demise. There need be no fault here. The conditions of comembership do not guarantee sustained coexistence. Further, attempts at inclusion can fail if defining social institutions are incompatible. Some institutions are more generous than others. Within the system of liberal property, for example, it is permissible to have a range of private arrangements that express different values: families, private corporate entities, and utopian communities can operate within the dominant system according to their own rules of possession. To be sure, private arrangements exist on the sufferance of the public, and there must be recognized authority to resolve system-based conflicts. It is a suggestive thought that those institutions are best that can accept the greatest range of normalized variants.

5

Two Models of Pluralism and Tolerance

WILL KYMLICKA

1. The Lessons of the Reformation

In his most recent work, John Rawls argues that "we must draw the obvious lessons of our political history since the Reformation and the Wars of Religion," namely, that we must recognize and accommodate "the plurality of conflicting, and indeed incommensurable, conceptions of the good affirmed by the members of existing democratic societies" (Rawls 1987:13; 1985:225, 249).[1] In the sixteenth century, Catholics and Protestants each sought to use the state to support their conception of true faith and to oppose the other. After innumerable wars and civil strife, both faiths learned that only the oppressive (and futile) use of force could ensure adherence to a single comprehensive religious doctrine. Both faiths now accept that "a practicable political conception for a constitutional regime cannot rest on a shared devotion to the Catholic or Protestant faith" (Rawls 1987:5).

According to Rawls, this development of religious tolerance was one of the historical roots of liberalism. Liberals have simply extended the principle of tolerance to other controversial questions about the "meaning, value and purpose of human life" (Rawls 1987:4; 1985:249). Unless oppressive state force is employed to prevent it, the members of a democratic society will invariably endorse different views about the highest ends in life, just as they endorse different religious views. Some will view civic participation or communal cooperation as our highest end, others will view individual accomplishment as the greatest good. Any conception of justice that hopes to serve as the basis of political legitimacy, therefore, "must be one that widely different and even irreconcilable comprehensive doctrines can endorse" (Rawls 1989:235). Hence liberal "neutrality" on questions of the good accepts and extends the lessons of the Reformation.[2]

In this paper, I want to raise some questions about this "obvious lesson" of the Reformation, or rather about Rawls's interpretation of it. I accept the need for religious tolerance. But there is more than one form of

religious toleration. In the context of Western democracies, tolerance took a very distinctive form, namely, the idea of individual freedom of conscience. It is now a basic individual right to worship freely, to propagate one's religion, to change one's religion, or indeed to renounce religion altogether. To restrict an individual's exercise of these liberties is seen as a violation of a fundamental human right. Rawls views this as the most natural form of religious toleration. Indeed, as we will see, he often writes as if it is the only form of toleration. He simply equates "the principle of toleration" with the idea of individual freedom of conscience.

In this paper, I want to consider a second model of toleration, which is based on group rights rather than individual liberty. In both models, religious communities are protected from oppression, but in very different ways. The Rawlsian model protects each religious community by separating church from state. It removes religion from the public agenda, leaving adherents of the competing doctrines free to pursue their beliefs in private churches. In the group-rights model, on the other hand, church and state are closely linked. Each religious community is granted official status and a substantial measure of self-government. In the "millet system" of the Ottoman Empire, for example, Muslims, Christians, and Jews were all recognized as self-governing units (or "millets") within the empire.

There are a number of important differences between these two models. For the purposes of this paper, the most significant is that the group-rights model need not recognize any principle of *individual* freedom of conscience. Because each religious community is self-governing, there is no external obstacle to basing this self-government on religious principles, including the enforcement of religious orthodoxy. Hence there may be little or no scope for individual dissent within each religious community, and little or no freedom to change one's faith. In the millet system, for example, the Muslims did not try to suppress the Jews, and vice versa, but they did suppress heretics within their own community. Heresy (questioning the orthodox interpretation of Muslim doctrine) and apostasy (abandoning one's religious faith) were punishable crimes within the Muslim community. Restrictions on individual freedom of conscience also existed in the Jewish and Christian communities. The millet system was, in effect, a federation of theocracies.

My aim is not to defend this second model. On the contrary, like Rawls, I believe that the liberal system of individual liberty is a more appropriate response to pluralism. My aim, rather, is to see what sorts of reasons liberals can give to defend their commitment to individual liberty. The "obvious lesson" of the Wars of Religion is that diverse religions need to tolerate each other. It is less obvious why we must tolerate dissent within a religious (or ethnic) community.

Rawls has not, I think, adequately addressed this question. In fact, I

believe that Rawls's recent work has obscured the basis for this liberal commitment to individual liberty. Hence, after spelling out some of the details of the group-rights model (section 2), I will turn to Rawls's recent work, particularly his claim that liberals should defend their views on "political" and not "comprehensive" grounds (sections 3 and 4). I will argue that liberals must give a more comprehensive defense of liberal values if they are to adequately defend individual liberty. I will conclude with some suggestions about how liberal democratic regimes should deal with minorities who reject liberal ideals (section 5).

2. The Group-Rights Model and the Ottoman Millet System

This section will consider the group-rights model, focusing in particular on the Ottoman millet system. The Ottoman Turks were Muslims who conquered much of the Middle East, North Africa, Greece, and eastern Europe during the fourteenth and fifteenth centuries, thereby acquiring many Jewish and Christian subjects. For various theological and strategic reasons, the Ottomans allowed these minorities not only the freedom to practice their religion, but a more general freedom to govern themselves in purely internal matters, with their own legal codes and courts. For about five centuries, between 1456 and the collapse of the empire during World War I, three non-Muslim minorities had official recognition as self-governing communities (or "millets")—the Greek Orthodox, the Armenian Orthodox, and the Jews—each of which was further subdivided into various local administrative units, usually based on ethnicity and language. Each millet was headed by the relevant church leader (the chief rabbi and the two Orthodox patriarchs).

The legal traditions and practices of each community, particularly in matters of family status, were respected and enforced through the empire. However, although they were free to run their internal affairs, their relations with the ruling Muslims were tightly regulated. For example, non-Muslims could not proselytize, they could build new churches only under license, and they were required to wear distinctive dress so that they could be recognized. There were limits on intermarriage, and they had to pay special taxes, in lieu of military service. But within these limits, "they were to enjoy complete self-government, obeying their own laws and customs." Their collective freedom of worship was guaranteed, together with their possession of churches and monasteries, and they could run their own schools.[3]

Although the millet system was generally humane and tolerant of group differences, it was not a liberal society, for it did not tolerate individual dissent within its constituent communities. It was, rather, a deeply

conservative, theocratic, and patriarchal society, antithetical to the ideals of personal liberty endorsed by liberals from Locke to Kant and Mill. The various millets differed in the extent of their enforcement of religious orthodoxy. There were many periods during the five-hundred-year history of the millets in which liberal reformers within each community pushed for constitutional restrictions on the power of the millet's leaders. And in the second half of the nineteenth century, some of the millets adopted liberal constitutions. (Hence, the idea of according special rights of self-government to minority communities need not be illiberal, if this communal self-government respects the civil rights of its members).[4] But, in general, there were significant restrictions on the freedom of individuals in the Ottoman Empire to question or reject church doctrine. The Ottomans accepted the principle of tolerance, where that is "understood to indicate the willingness of a dominant religion to coexist with others" (Braude and Lewis 1982:3), but did not accept the quite separate principle of individual freedom of conscience.

This system of toleration is, in one sense, the opposite of that in the West, because it unites, rather than separates, church and state. It is interesting to note that the two systems had similar historical origins. The Ottoman restrictions on the building and location of non-Muslim churches were similar to the system of "licensed coexistence" established under the Edict of Nantes (1598). Under that edict, which ended the Wars of Religion, Protestants in France could build new churches only in certain locations, and only with a state license.[5] In the West, however, state-licensed coexistence between Protestants and Catholics gradually evolved into a system of individual freedom of conscience. This never occurred in the Ottoman Empire. As noted above, there were some liberal reformers who questioned the legitimacy of theocratic rule. Some Jews and Christians in the Ottoman Empire had extensive contact with the West. They brought back Enlightenment ideas of freedom and reason and, like liberals in the West, challenged the rule of "obscurantist" religious leaders who maintained power by keeping the people fearful and ignorant.[6] These reformers wanted to secularize, liberalize, and democratize the millet system and use it as the basis for national self-government by the various national groups in the empire. The Ottoman rulers actually sided with these liberal reformers in 1856 and demanded that the non-Muslim millets adopt new and more democratic constitutions.[7] However, unlike in the West, liberal reformers were a small minority, and the patriarchs were able to maintain their hold on the reins of power, albeit with ever-decreasing relevance.

The influence of Western ideas was just one of many external influences that ultimately combined to undermine the millet system (along with eco-

nomic competition, military force, and diplomatic meddling). But its internal dynamics were remarkably stable. As Braude and Lewis note, "For nearly half a millennium, the Ottomans ruled an empire as diverse as any in history. Remarkably, this polyethnic and multireligious society worked. Muslims, Christians, and Jews worshipped and studied side by side, enriching their distinct cultures" (Braude and Lewis 1982:1).[8]

The millet system, therefore, offers a viable alternative form of religious tolerance to Rawlsian liberalism. It does not deny the obvious lesson of the Wars of Religion, that is, that religions need to coexist. Indeed, the existence of the millets probably saved the Ottoman Empire from undergoing these wars. In fact, this is arguably the more natural form of religious tolerance. The historical record suggests that "in practice, religions have usually felt most violently intolerant not of other religions but of dissenters within their own ranks" (Elton 1984a:xiii). This was true of paganism in antiquity (Garnsey 1984:24) and of leading figures in the English Reformation, such as Thomas More (Elton 1984b:174–75, 182–83).

The Ottoman millet system is the most developed form of the group-rights model of religious tolerance. But variations on that model can be found in many other times and places, including many contemporary liberal democracies. Consider the following three cases:

1. American Indian tribes have a legally recognized right to self-government. As part of this self-government, tribal governments are not subject to the U.S. Bill of Rights. Some tribes have established a theocratic government that discriminates against those members who do not share the tribal religion. For example, the Pueblo deny housing benefits to those members of the community who have converted to Protestantism (Weston 1981).

2. Both Canada and the United States exempt a number of long-standing religious sects (e.g., Mennonites, Doukhobours, Amish, Hutterites) from laws regarding the mandatory education of children. Members of these sects can withdraw their children from schools before the legal age of sixteen and are not required to teach the usual school curriculum. Parents worry that if their children received this broader education, they would be tempted to leave the sect and join the wider society (Janzen 1990:chaps. 5–7).

3. Britain has recently received a considerable number of Muslim immigrants from its former protectorates and colonies. Some traditional practices in Muslim countries violate current British law, including coercive arranged marriages and various forms of sexual discrimination. Some Muslim leaders have called for a milletlike system in Britain, which would allow Muslims to govern themselves according to their own laws regarding education and family status.[9]

In each of these cases, an ethnic or religious group has sought the legal power to restrict the liberty of its own members, so as to preserve its traditional religious practices. These groups are seeking to establish or maintain a system of group rights that protects communal practices not only from external oppression but also from internal dissent, and this often requires exemption from the constitutional or legislative requirements of the larger society.

This demand for group rights is often phrased in terms of tolerance. But it is not the sort of tolerance Rawls has in mind. These groups do not want the state to protect each individual's right to freely express, question, and revise her religious beliefs. On the contrary, this is precisely what they object to. What they want is the power to restrict the religious freedom of their own members, and they want the exercise of this power to be exempted from the usual requirement to respect individual rights.

Hence, the idea of group rights is a pressing issue in many democracies. Yet Rawls never considers this model of tolerance. He talks about "the principle of tolerance" (e.g., Rawls 1987:18; 1985:225) as if there were just one, which he equates with the idea of freedom of conscience. Indeed, he often writes as if respect for individual rights is the only way to accommodate pluralism. Consider his claim that the liberal commitment to individual rights was accepted "as providing the only alternative to endless and destructive civil strife" (Rawls 1987:18). Or his claim that parties in his "original position" would see the fact of pluralism as sufficient grounds for adopting a principle of individual rights: "[W]e need only suppose in the first stage that the parties assume the fact of pluralism to obtain, that is, that a plurality of comprehensive doctrines exists in society. The parties must then protect against the possibility that the person each party represents may be a member of a religious, ethnic, or other minority. *This suffices for the argument for the equal basic liberties to get going*" (Rawls 1989:251, my emphasis; cf. Rawls 1982b:25–26). Indeed, Rawls sometimes writes as if a religiously diverse society had never existed before the birth of liberalism: "[T]he success of liberal institutions may come as a discovery of a new social possibility: the possibility of a reasonably harmonious and stable pluralist society. Before the successful and peaceful practice of toleration in societies with liberal political institutions there was no way of knowing of that possibility. It can easily seem more natural to believe, as the centuries' long practice of intolerance appeared to confirm, that social unity and concord requires agreement on a general and comprehensive religious, philosophical or moral doctrine" (Rawls 1987:23). But the "successful and peaceful practice of toleration" existed in the Ottoman Empire long before England's Toleration Act.

Even if we endorse Rawls's liberal conception of tolerance, the millet system is a useful reminder that individual rights are not the only way to accommodate religious pluralism.

3. Individual Rights and Autonomy

The millet system is clearly incompatible with Rawls's theory of justice, because it restricts one of the basic liberties Rawls ascribes to each person.[10] But how can he defend individual liberty as a superior response to pluralism than group rights?

Most liberals would object to the millet system on the grounds that it makes it difficult or impossible for people to question or revise their religious commitments. It does not impose religious views on people, in the sense that there is no forced conversion. But nor does it allow people to judge for themselves what parts of their traditional religious faith are worthy of their continued allegiance, and why. They can only follow inherited customs and practices uncritically.

One way to express this objection is to say that the millet system restricts individual autonomy. It limits individuals' ability and freedom to judge the value of inherited practices and to thereby form and revise their own conception of the good. Many liberals explicitly appeal to this idea of autonomy as the basis for their defense of individual rights. Consider the following passage from J. S. Mill's *On Liberty*:

> [I]t would be absurd to pretend that people ought to live as if nothing had been known in the world before they came into it; as if experience had as yet done nothing towards showing that one mode of existence, or of conduct, is preferable to another. Nobody denies that people should be so taught and trained in youth as to know and benefit by the ascertained results of human experience. *But it is the privilege and proper condition of a human being, arrived at the maturity of his faculties, to use and interpret experience in his own way. It is for him to find out what part of recorded experience is properly applicable to his own circumstances and character*. (Mill 1982:122, my emphasis)

For Mill and other liberals, a basic argument for civil rights is that they help ensure that individuals can make informed judgments about the inherited practices of the community. For example, mandatory education ensures that children acquire the capacity to envisage alternative ways of life and rationally assess them. Freedom of speech and association (including the freedom to proselytize or dissent from church orthodoxy) ensures that people can raise questions and seek answers about the worth of the different ways of life available to them. Because the millet system re-

stricts these civil rights, it harms a basic interest of people, by leaving them unable to rationally assess the worthiness of their current ends and to revise their ends accordingly.

I call this the "Millian" or "autonomy" argument for civil rights, that is, the view that we have a basic interest in being able to rationally assess and revise our current ends. These labels might be misleading, because Mill never used the term "autonomy," and this is only one of his arguments for civil rights. Moreover, there are other conceptions of autonomy present in the liberal tradition. However, I believe that this particular conception of autonomy—Buchanan calls it the "rational revisability" conception of autonomy—is central to Mill's defense of individual rights, and to many other liberal theorists.[11]

In his earlier work, Rawls seems to endorse the Millian argument. He says that members of a liberal society have the capacity "to form, to revise, and rationally to pursue" a conception of the good. It is important to note that Rawls explicitly mentions the capacity to *revise* one's conception of the good, alongside the capacity to pursue one's *existing* conception. Indeed, he suggests that the latter "is in essential respects subordinate" to the former. Exercising our capacity to form and revise a conception of the good is a "highest-order interest," in the sense of being "supremely regulative and effective." People's interest in advancing their existing conception of the good, on the other hand, is simply a "higher-order interest." Although it is of course important to be able to pursue one's existing conception of the good, the capacity to evaluate and revise that conception is needed to ensure that it is worthy of one's continued allegiance (Rawls 1980:525–28).

Hence people have a highest-order interest in standing back from their current ends and assessing their worthiness: "As free persons, citizens recognize one another as having the moral power to have a conception of the good. This means that they do not view themselves as inevitably tied to the pursuit of the particular conception of the good and its final ends which they espouse at any given time. Instead, as citizens, they are regarded as, in general, capable of revising and changing this conception on reasonable and rational grounds. Thus it is held to be permissible for citizens to stand apart from conceptions of the good and to survey and assess their various final ends" (Rawls 1980:544). This capacity to survey and assess our ends is in fact one of the two fundamental "moral powers" (along with the capacity for a sense of justice) that define Rawls's "conception of the person." And, like Mill, Rawls defends civil liberties in terms of their contribution to the realizing and exercising of this moral power (Rawls 1980:526; cf. 1989:254; 1982a:165).

Some communitarians deny that we can "stand apart" from (some of) our final ends. According to Michael Sandel, some of our final ends are

"constitutive" ends, in the sense that they define our sense of personal identity (Sandel 1982:150–65; cf. MacIntyre 1981:chap. 15; Bell 1993:24–54). It makes no sense, on his view, to say that my final ends might not be worthy of my allegiance, for these ends define who I am. Whereas Rawls claims that individuals "do not regard themselves as inevitably bound to, or identical with, the pursuit of any particular complex of fundamental interests that they may have at any given moment" (Rawls 1974:641), Sandel responds that we are in fact "identical with" at least some of our final ends. Because these ends are constitutive of people's identity, there is no reason why the state should not reinforce people's allegiance to those ends.

This communitarian conception of the self as defined by constitutive ends is one possible basis for the group-rights approach to tolerance.[12] Sandel himself rarely discusses the question of group rights, and he often qualifies his idea of constitutive ends in a way that suggests that people can, after all, stand back and assess even their most deeply held ends.[13] Hence he and other contemporary communitarians might well object to the sorts of individual restrictions imposed by some group-rights systems.[14]

However, a milletlike system can be seen as a sort of hypercommunitarianism. It assumes that people's religious affiliation is so profoundly constitutive of who they are that their overriding interest is in protecting and advancing that identity, and that they have no interest in being able to stand back and assess that identity. Hence the millet system limits people's ability to revise their fundamental ends and prevents others from trying to promote such revision.

This is perhaps most obvious in the prohibition on proselytization and apostasy. If we assume that religious ends are constitutive of people's identity, then proselytization is at best futile and at worst an inherently harmful attempt to tempt people away from their true identity. This is indeed one reason why systems of group rights often seek to limit or prohibit proselytization or its secular equivalents (e.g., the attempts of the Amish to prevent their children from learning about the outside world in schools).

The liberal model, on the other hand, gives people access to information about other ways of life (through proselytization), indeed requires people to learn about these options (through mandatory education), and allows people to radically revise their ends (apostasy is not a crime). These aspects of a liberal society only make sense, I think, on the assumption that we have an interest not only in pursuing our existing conception of the good but also in being able to assess and potentially revise that conception. The liberal model assumes that revising one's ends is both possible and sometimes desirable. It assumes that people's current ends

are not always worthy of their continued allegiance, and that exposure to other ways of life helps people make informed judgments about what is truly worthwhile.

4. Comprehensive versus Political Liberalism

In his earlier work, Rawls clearly endorses the Millian view that we have a basic interest in assessing and potentially revising our existing ends. In his more recent work, however, Rawls seems to want to avoid appealing to this conception of autonomy, which he now sees as "sectarian," in the sense that it is an ideal that is "not generally, or perhaps even widely, shared in a democratic society" (Rawls 1987:24; 1985:246). He wants to find an alternative basis for defending civil rights, one which can be accepted even by those who reject the conception of the person implicit in the Millian argument.

His proposal is not to reject the autonomy argument entirely but rather to restrict its scope. In particular, he wants to continue appealing to it in *political* contexts, while avoiding it in other contexts. The idea that we can form and revise our conception of the good is, he now says, strictly a "political conception" of the person, adopted solely for the purposes of determining our public rights and responsibilities. It is not, he insists, intended as a general account of the relationship between the self and its ends applicable to all areas of life, or as an accurate portrayal of our deepest self-understandings. On the contrary, in private life it is quite possible and likely that our personal identity is bound to particular ends in such a way as to preclude rational revision. As he puts it,

> It is essential to stress that citizens in their personal affairs, or in the internal life of associations to which they belong, may regard their final ends and attachments in a way very different from the way the political conception involves. Citizens may have, and normally do have at any given time, affections, devotions, and loyalties that they believe they would not, and indeed could and should not, stand apart from and objectively evaluate from the standpoint of their purely rational good. They may regard it as simply unthinkable to view themselves apart from certain religious, philosophical and moral convictions, or from certain enduring attachments and loyalties. These convictions and attachments are part of what we may call their "nonpublic identity." (Rawls 1985:241)

So Rawls no longer assumes that people's religious commitments are revisable or autonomously affirmed. He accepts that these ends might be so constitutive of our identity that we cannot stand back from them and subject them to assessment and revision. However, in political contexts,

we ignore the possible existence of such constitutive ends. As *citizens*, we continue to see ourselves as having a "highest-order interest" in our capacity for autonomy, even though as *private individuals* we might not see ourselves as having or valuing that capacity. Rawls's conception of the person, based on the two moral powers of justice and autonomy, continues to provide the language of public justification in which people discuss their rights and responsibilities as citizens, although it may not describe their "nonpublic identity" (Rawls 1980:545).

Hence Rawls distinguishes his "political liberalism" from the "comprehensive liberalism" of Mill. As we have seen, Mill thinks that people should exercise autonomy in both public and private contexts. Mill's argument that people should be able to assess the worth of inherited social practices applies to all areas of life, not just political life. Indeed, he was mostly concerned about the way people blindly followed popular culture and social customs in their everyday personal affairs. Hence Mill's liberalism is based on an ideal of rational reflection that applies to human action generally and that is intended "to inform our thought and conduct as a whole" (Rawls 1987:6).

Rawls worries that many people do not accept Mill's idea of autonomy as a principle governing human thought and action generally. However, he thinks that such people can nonetheless accept the idea of autonomy if it is restricted to political contexts, leaving them free to view their nonpublic identities in quite different ways. People can accept his political conception "without being committed in other parts of their life to comprehensive moral ideals often associated with liberalism, for example, the ideals of autonomy and individuality" (Rawls 1985:245).

Is this a coherent position? The problem is to explain why anyone would accept the ideal of autonomy in political contexts without also accepting it more generally. If the members of a religious community see their religious ends as constitutive, so that they have no ability to stand back and assess these ends, why would they accept a political conception of the person which assumes that they do have that ability (and indeed a highest-order interest in exercising that ability)?

One answer Rawls might give is that everyone can accept his political conception, because those who do not generally value the capacity for autonomy can simply refrain from exercising it in private life. Although a liberal society allows rational assessment and revision of one's ends, it does not compel it. Hence, he might argue, even if this view of autonomy conflicts with a religious minority's self-understanding, there is no cost to accepting it for political purposes.

But there is a cost to nonliberal minorities from accepting Rawls's political conception of the person, namely, it precludes any system of group rights that limits the right of individuals to revise their conceptions of the

good. For example, it precludes a religious minority from prohibiting apostasy and proselytization or from preventing their children learning about other ways of life. The minority might view these civil liberties as harmful. But if, for the purposes of political debate, they accept the assumption that people have a highest-order interest in exercising their capacity to form and revise a conception of the good, then they have no way to express their belief in the harm of allowing proselytization and apostasy.

Consider the Canadian case of *Hofer v. Hofer*, which dealt with the powers of the Hutterite Church over its members. The Hutterites live in large agricultural communities, called colonies, within which there is no private property. Two residents of a Hutterite colony, who had been members of the colony from birth, were expelled for apostasy. They demanded their share of the colony's assets, which they had helped create with their years of labor. When the colony refused, the two ex-members sued in court. They objected to the fact that they had "no right at any time in their lives to leave the colony without abandoning everything, even the clothes on their backs" (Janzen 1990:67). The Hutterites defended this practice on the grounds that freedom of religion protects a congregation's ability to live in accordance with its religious doctrine, even if this limits individual freedom.

The Canadian Supreme Court accepted this Hutterite claim. But it is far from clear that the Hutterite claim can be defended, or even expressed, within the language of Rawls's "political liberalism." As Justice Pigeon noted in dissent, the usual liberal notion of freedom of religion "includes the right of each individual to change his religion at will." Hence churches "cannot make rules having the effect of depriving their members of this fundamental freedom." The proper scope of religious authority is therefore "limited to what is consistent with freedom of religion as properly understood, that is freedom for the individual not only to adopt a religion but also to abandon it at will." Justice Pigeon thought that it was "as nearly impossible as can be" for people in a Hutterite colony to reject its religious teachings, because of the high cost of changing their religion, and so they were effectively deprived of freedom of religion.[15]

Justice Pigeon's view, it seems to me, is most consistent with Rawls's "political liberalism." Pigeon is assuming, as Rawls says we should for the purposes of political argument and legal rights, that people have a basic interest in their capacity to form and revise their conception of the good. Hence, he concludes, the power of religious communities over their own members must be such that individuals can freely and effectively exercise that capacity. The power of religious authorities clearly cannot be such as to make it effectively impossible to exercise that capacity. Were the Hutterites to accept Rawls's conception of the person, then they, too,

would have to accept the view that freedom of religion must be interpreted in terms of an individual's capacity to form and revise her religious beliefs.[16]

Hence Rawls's strategy of endorsing autonomy only in political contexts, rather than as a general value, does not succeed. Accepting the value of autonomy for political purposes inevitably enables its exercise more generally, an implication that will be favored only by those who endorse autonomy as a general value.[17] Rawls has yet to explain why people who reject his conception of the person in private life should endorse it as a political good.[18] Rawls might be right that "Within different contexts we can assume diverse points of view toward our person without contradiction so long as these points of view cohere together when circumstances require" (Rawls 1980:545). But he has not shown that these points of view do cohere. On the contrary, they clearly conflict on issues of intragroup dissent, such as proselytization, apostasy, and mandatory education.[19]

Why has Rawls not seen this conflict? Perhaps because he thinks that his political conception is the only one that can protect religious minorities from the intolerance of the majority. Recall his claim that the fact of pluralism is sufficient ground for endorsing individual rights: "[W]e need only suppose in the first stage that the parties assume the fact of pluralism to obtain, that is, that a plurality of comprehensive doctrines exists in society. The parties must then protect against the possibility that the person each party represents may be a member of a religious, ethnic, or other minority. This suffices for the argument for the equal basic liberties to get going" (Rawls 1989:251). Rawls here implies that the only viable way to prevent persecution between groups is to allow freedom of conscience for individuals. But this is a mistake; one can ensure tolerance *between* groups without protecting tolerance of individual dissent *within* each group. A system of group rights ensures the former without ensuring the latter. If we want to defend civil rights for individuals, therefore, we must go beyond the need for group tolerance and give some account of the value of endowing individuals with the freedom to form and revise their final ends.

Rawls is mistaken, therefore, to suppose that he can avoid appealing to the general value of individual autonomy without undermining his argument for the priority of civil rights.[20] The mere fact of *social plurality*, disconnected from any assumption of *individual autonomy*, cannot by itself defend the full range of liberal freedoms.[21] If people's private identity really is tied to certain ends, such that they have no interest or ability to question and revise them, then group rights might be a superior response to pluralism. If individuals are incapable of revising their inherited religious commitments, or if it is not important to enable individuals to

exercise that capacity, then the millet system might best protect and advance those constitutive ends.

This is hardly a novel conclusion. On the contrary, this is what defenders of group rights have often argued. They believe that once we drop the assumption that autonomy is a general value, then religious and ethnic groups should be allowed to protect their members' constitutive ends by restricting certain individual rights (Kukathas 1992; McDonald 1991).

If liberals wish to defend individual freedom of conscience, they must reject the idea that people's ends are beyond rational revision. At one point, Rawls seems to do just this. He notes that some people think of themselves as being incapable of questioning or revising their ends, but he suggests that this may be inaccurate: "[O]ur conceptions of the good may and often do change over time, usually slowly but sometimes rather suddenly," even for those people who think of themselves as having constitutive ends. For example, "On the road to Damascus Saul of Tarsus becomes Paul the Apostle" (Rawls 1985:242).

This is an important point. No matter how confident we are about our ends at a particular moment, new circumstances or experiences can arise, often in unpredictable ways, that cause us to reevaluate them. This is the beginning of an argument for why people should be free to stand back and assess their ends. But Rawls makes no attempt to elaborate on it. He does not explain why it is important for people to be able to make these kinds of changes, or how this capacity should be legally and socially encouraged (e.g., through education or freedom to proselytize).

5. The Issue of Nonliberal Minorities

Why is Rawls so reluctant to affirm the Millian argument and explicitly endorse autonomy as a general human interest? What is wrong with Mill's "comprehensive" liberalism? The problem, Rawls says, is that not everyone accepts this ideal of autonomy, and so appealing to it in political life would be "sectarian": "As comprehensive moral ideals, autonomy and individuality are unsuited for a political conception of justice. As found in Kant and J. S. Mill, these comprehensive ideals, despite their very great importance in liberal thought, are extended too far when presented as the only appropriate foundation for a constitutional regime. So understood, liberalism becomes but another sectarian doctrine" (Rawls 1985:246). Mill's defense of civil rights rests "in large part on ideals and values that are not generally, or perhaps even widely, shared in a democratic society," and hence "cannot secure sufficient agreement" (Rawls 1987:6, 24).

This is a legitimate point, but Rawls overstates it and draws the wrong conclusion from it. The idea that we have an interest in being able to

assess and revise our inherited conceptions of the good is very widely shared in Western democratic societies.[22] There are some insulated minorities who reject this ideal, including some indigenous groups (the Pueblo) and religious sects (the Amish and the Mennonites). These groups pose a challenge for liberal democracies, because they often demand group rights that conflict with individual civil rights. We cannot simply ignore this demand or ignore the fact that they reject the idea of autonomy.

But Rawls's strategy is no solution to the questions raised by the existence of nonliberal minorities. His solution is to continue to enforce individual rights, but to do so on the basis of a "political" rather than a "comprehensive" liberalism. This obviously does not satisfy the demands of nonliberal minorities. They want group rights that take precedence over individual rights. Rawls's political liberalism is as hostile to that demand as Mill's comprehensive liberalism. The fact that Rawls's theory is less comprehensive does not make it more sympathetic to the demands of nonliberal minorities.[23]

How then should a liberal state treat nonliberal minorities? To begin with, we need to distinguish two very different questions that Rawls conflates: First, what kind of provision for religious and ethnic minorities is consistent with liberal principles? Second, should liberals impose their views on communities that do not accept liberal principles? The first is a question of *identifying* a defensible liberal theory of tolerance; the second is a question of *imposing* that liberal theory.

With respect to the first question, I believe that the most defensible liberal theory is based on the value of autonomy, and that any form of group rights that restricts the civil rights of group members is therefore inconsistent with liberal principles of freedom and equality. The millet system, or the Pueblo theocracy, is therefore seriously deficient from a liberal point of view.

That does not mean that liberals can impose those principles on groups that do not share them. There are a number of further steps that are required before we can answer the question of imposing liberalism. Once we know what an appropriate liberal conception of minority rights is, we can then determine how much it coincides with, or differs from, the wishes of a particular minority. Once we have determined the extent of any disagreements, then we are faced with the question of intervening in order to promote liberal ideals. This in turn will depend on many factors, including the severity of rights violations within the minority community, the degree of consensus in the community on the legitimacy of restricting individual rights, the ability of dissenting group members to leave the community if they so desire, the existence of historical agreements with the minority community (e.g., treaties with American Indian tribes;

historical promises made to immigrant groups), the nature of the proposed intervention, and so forth.[24]

The question of imposing liberalism comes, therefore, a number of steps after the question of identifying a liberal theory. In many cases, there will be little room for coercive intervention. Relations between majority and minority groups should be determined by peaceful negotiation, not force (as with international relations). This means searching for some basis of agreement. If two groups do not share basic principles and cannot be persuaded to adopt the other's principles, then they will have to come to some kind of accommodation. In cases in which the minority rejects liberal values, then the resulting agreement might well involve recognizing group rights. And, as noted above, contemporary liberal societies do in fact recognize some milletlike structures, for example, education exemptions for the Amish, theocratic government for the Pueblo Indians.[25] But this is a compromise of, not the instantiation of, liberal principles, because it violates a fundamental liberal principle of freedom of conscience. Hence liberal reformers inside the group would seek to promote their liberal ideas through reason or example, and liberals outside would lend their support to any efforts the community makes to liberalize.

Rawls seems to conflate these two questions of identifying and imposing a liberal theory of justice. His "political" conception of liberalism is not, I think, an adequate answer to either question. It does not adequately *identify* a defensible liberal theory, because he leaves it entirely unclear why citizens (but not private individuals) have a highest-order interest in their capacity to form and revise a conception of the good. It does not adequately answer the question of *imposing* liberalism, because it would enforce liberal rights in minority communities that might have a strong social consensus in favor of group rights, and a strong historical claim to them as well.

Rawls is right to worry about the existence of ethnic and religious minorities that reject the value of autonomy, but his response is misguided. In the face of such minorities, Rawls has become less willing to defend comprehensive liberalism but is still willing to impose liberal political institutions. A more appropriate response, I believe, is to continue defending comprehensive liberalism based on autonomy as a general value, but become more cautious about imposing the full set of liberal political institutions on nonliberal minorities.

6. Conclusion

I have described two models of religious tolerance: a liberal model based on individual liberty, and a hypercommunitarian model based on group rights. Both recognize the need for different religious communities to co-

exist, and hence are consistent with the fact of religious pluralism in modern societies.[26] However, they disagree fundamentally on the role of individual freedom within religious communities. The group-rights model allows each group to limit the religious liberties of its own members so as to protect the constitutive ends and practices of the community from internal dissent. The liberal model insists that each individual has a right to freedom of conscience, including the right to question and revise her religious beliefs, and so allows for proselytization, heresy, and apostasy.

Rawls has consistently endorsed the liberal model, and his theory of justice precludes any system of group rights that limits freedom of conscience. But his justification for this preference has become increasingly obscure. In his earlier work, he seemed to defend the liberal model on the ground that people have a basic interest in their capacity to form and revise their conceptions of the good, so as to ensure that these conceptions are worthy of their continued allegiance. This autonomy argument is a familiar liberal argument for civil rights. Indeed, liberals are often defined as those who support toleration because it is necessary for the promotion of autonomy.[27]

In his more recent writings, however, Rawls wants to avoid this autonomy argument, which he views as "sectarian" and insensitive to the views of certain religious and ethnic minorities. His solution is to abandon any form of liberalism that relies on a "comprehensive" ideal, such as autonomy, and rely instead on a "political" conception of the person as free and equal. But this strategy, I have argued, does not work. It simply leaves it unclear why a liberal state should assign priority to civil rights, without in fact being any more sympathetic to the demands of nonliberal minorities. A more appropriate response, I believe, is to continue to defend comprehensive liberalism, but to recognize that there are limits to our ability to implement and impose liberal principles on groups that have not endorsed those principles.

Notes

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1. By Rawls's "recent" writings, I mean his post-1985 articles, in which he emphasizes the distinction between "political" and "metaphysical" or "comprehensive" conceptions of liberalism (Rawls 1985, 1987, 1988, 1989). These articles have now been collected in Rawls 1993.

2. The term "neutrality" has a number of different meanings, and so talking about liberal neutrality often creates confusion. The sense in which a liberal state

is "neutral" with respect to competing conceptions of the good is a very specific one: the state does not justify its actions on the grounds that some ways of life are intrinsically more valuable than others. The *justification* of state policy, therefore, is neutral between rival conceptions of the good. This does not mean that the *consequences* of state policy are neutral, in the sense of equally helping or hindering each way of life. On the contrary, how well a way of life fares in a liberal society depends on its ability to gain or maintain sufficient adherents, and those that are unable to do so will wither away in a liberal society, while others flourish. A liberal state allows these non-neutral consequences of individual freedom of choice and association to occur. It does not, however, try to preempt this process by developing a public ranking of the intrinsic value of different ways of life, which it then uses to influence individuals' choices. For further discussion of the difference between "justificatory" and "consequential" neutrality, see Kymlicka 1989b. For Rawls's discussion of neutrality, see Rawls 1988:260, 265.

3. For a helpful introduction to the millet system, see Runciman 1970:27–35; and Braude and Lewis 1982:1–34.

4. It is important to distinguish two kinds of group rights that can be attributed to minority communities: rights of the group *against the larger society*, and rights of the group *against its own members*. I believe that in the case of minority cultures, the former are consistent with liberal views of freedom and equality if they protect a vulnerable minority from the impact of majority economic or political decisions. Such intergroup rights can include land claims, language rights, guaranteed representation in political institutions, veto power over certain kinds of policies, etc. For a liberal defense of these rights, see Kymlicka 1989a:chaps. 7–10. This paper, however, will focus on the latter kind of group right, which I believe is generally inconsistent with liberalism. For the rest of this paper, therefore, I will use the term "group right" to refer to rights of groups against their own members. I discuss the distinction between these two kinds of group rights in Kymlicka 1994 and Kymlicka 1995:chap. 3.

5. Another historical parallel is that both systems combined toleration of religious worship with discrimination in terms of public office. In the millet system, the non-Muslim communities gained freedom of worship in the 1400s but only achieved full legal equality in 1856. This parallels the growth of toleration in Britain, which adopted the Toleration Act in 1689, but which imposed some legal disabilities on Catholics and Jews until 1829 and 1846 respectively.

6. Davison discusses these challenges to clerical rule, inspired by Western liberalism, in Davison 1982:332. The impact of the "corrosive notions of the European Enlightenment" on the millet system is also discussed in Braude and Lewis 1982:18–19, 30–31; and Karpat 1982:159–63.

7. For example, the Protestant millet, established in 1850, was "lay controlled, democratic, and on Anglo-Saxon lines" (Davison 1982:329). On the more general attempts to liberalize the millets in the 1850s, see Braude and Lewis 1982:22–23.

8. On the foreign influences that conspired to undermine the millet system, see Braude and Lewis 1982:28–30.

9. For a discussion of the British Muslim case, see Poulter 1987; Parekh 1990; and my exchange with Tariq Modood (Modood 1993).

10. Rawls's first principle of justice states that "[e]ach person has an equal right to the most extensive system of equal basic liberties compatible with a similar scheme of liberty for all." First on the list of basic liberties, Rawls says, are freedom of thought and liberty of conscience.

11. Buchanan 1975. It is important to distinguish this conception of autonomy from others that have been defended within (or attributed to) the liberal tradition. Some people think that the exercise of autonomy is intrinsically valuable, because it reflects our rational nature (this view is ascribed to Kant). Others believe that nonconformist individuality is intrinsically valuable (this view is often ascribed to Mill). What I am calling the Millian conception of autonomy, however, is simply the claim that autonomy enables us to assess and learn what is good in life, and why. It presupposes that we have an essential interest in revising those of our current beliefs about value that are mistaken. I discuss these different conceptions of autonomy and their role in contemporary liberal thought in 1989a:chap. 4. See also Norman 1990.

12. This is anachronistic in the case of the millet system, which was based on Muslim theology not a more general communitarian conception of the person. Indeed, the Muslims did allow for certain kinds of voluntary revisions of religious ends (Braude and Lewis 1982:4).

13. He does briefly discuss the case of the Amish and defends the group's right to make it difficult for their children to learn about other ways of life (Sandel 1990). He argues that freedom of conscience should be understood as freedom to pursue one's constitutive ends, not as an "unencumbered" freedom to choose one's religion. People's religious affiliation, he claims, is so profoundly constitutive of who they are that their overriding interest is in protecting that identity, and they have no comparable interest in being able to stand back and assess that identity. Hence he defends the right of the Amish to withdraw their children from school before the legal age of sixteen, to ensure that the children do not learn about the outside world, and so are not tempted to stray from their true identity.

14. However, once these qualifications are added in, it is no longer clear how Sandel's conception of the person differs from the Rawlsian one he claims to be criticizing (see Kymlicka 1989a:chap. 2). D'Entreves argues that communitarians are committed to tolerance because they believe in a conception of the person "that critically evaluates his/her beliefs and desires, that reflects upon his/her needs and motives, and that judges the worth of his/her preferences" (D'Entreves 1990:83). This sounds very much like the Millian/Rawlsian conception of the person that communitarians claim to reject.

15. *Hofer v. Hofer et al.* (1970), 13 DLR (3d) 1, cited in Janzen 1990:65–67.

16. Rawls does emphasize that the point of protecting civil rights is not to *maximize* the development and exercise of the capacity to form and revise a conception of the good. As he rightly notes, it would be "absurd" to try to maximize "the number of deliberate affirmations of a conception of the good." Rather, "these liberties and their priority are to guarantee equally for all citizens the social conditions essential for the adequate development and the full and informed exercise of these powers" (1982b:47–49). It seems clear, however, that the Hutterites do not provide the social conditions essential for the "full and informed" exercise of autonomy.

17. Indeed, the connection between the political and the private is not only causal but conceptual. Rawls accepts that exercising autonomy in the political sphere might causally promote its exercise in private life. But he insists that this is a contingent and unintended effect and that his political conception of the person concerns only the way "that the moral powers [of autonomy and a sense of justice] are exercised in political life and in basic institutions as citizens endeavour to maintain them and to use them to conduct public business" (Rawls 1988:272n28). What does it mean to exercise our capacity for autonomy "in political life"? The capacity for autonomy is quite different in this respect from the capacity for a sense of justice, although Rawls treats them together in this passage. The capacity for a sense of justice is exercised by "assessing the justice and effectiveness of laws and social policies," and hence is primarily concerned with, and exercised in, political life. The capacity to form and revise a conception of the good, on the other hand, is primarily concerned with what Rawls calls our "nonpublic identity," with our comprehensive, rather than our political, identity. As Rawls himself puts it, "liberty of conscience and freedom of association enable us to develop and exercise our moral powers in forming, revising, and rationally pursuing our conceptions of the good that belong to our comprehensive doctrines, and affirming them as such" (Rawls 1989:254). Hence, the capacity for justice is about evaluating *public* policies and institutions, whereas the capacity to form/revise a conception of the good is about evaluating the comprehensive religious and moral doctrines that define our *private* identity. But then what does it mean to say that the exercise of this latter capacity can be restricted to political life, without its impinging on our private identity? Because the capacity involved just is the capacity to form and revise our comprehensive ends, it seems that any exercise of it necessarily involves our private identity.

18. Rawls does briefly suggest another argument for endorsing liberal freedoms over group rights, namely, that only the former is consistent with the idea of "citizenship." He says that a society "in which basic rights and recognized claims depend on religious affiliation, social class, and so on . . . may not have a conception of citizenship at all; for this conception, as we are using it, goes with the conception of society as a fair system of cooperation for mutual advantage between free and equal persons" (Rawls 1989:241). There is some truth to Rawls's claim here. There was only a very weak sense of shared citizenship in the millet system, and the same is true in other systems of group rights (e.g., amongst the Amish). People's identity as citizen is less important, in these systems, than their identity as a member of the group. But so long as the system is stable, why is this a problem? A defender of group tolerance would respond that the sense of citizenship should be molded to fit people's religious identity, not vice versa.

Rawls suggests that a strong sense of shared citizenship is needed to ensure the political virtues of "reasonableness and a sense of fairness, a spirit of compromise and a readiness to meet others halfway" (Rawls 1987:21). But I see no reason why these virtues cannot exist in the group-rights model. Indeed, the history of the millet system suggests that the creation of a shared sense of citizenship can threaten these virtues. In the Ottoman Empire, compromise between groups was traditionally ensured by the system of self-government that accorded equal status to each group and limited mutual interference. In the mid–eighteenth century,

however, the Ottomans tried to promote a sense of shared citizenship that cut across religious and ethnic boundaries, so that everyone's political rights and identity were based on a common relationship to the Ottoman state rather than membership in a particular millet. As Karpat notes, the result was disastrous: "Once the corporate status of the millet and the segregation of the various groups ended, the relative position of the religious and ethnic groups in the Ottoman Empire toward each other began to be decided on the basis of their numerical strength. Hence they were transformed into minorities and majorities. It was obvious that sooner or later the views of the majority would prevail and its cultural characteristics and aspirations would become the features of the government itself" (Karpat 1982:163). A similar process occurred when indigenous peoples in North America were accorded citizenship (often against their will), and so became a numerical minority within the larger body of citizens, rather than a separate, self-governing people. Rawls suggests that a sense of shared citizenship is needed to deal with the danger that majorities will treat minorities unfairly. But the Ottoman experience suggests that the notion of shared citizenship might have created that danger in the first place, by transforming self-governing groups into majorities and minorities.

19. It is worth noting that Rawls's example of an "overlapping consensus" on his political conception of the person does not include any groups that reject the idea of rational revisability in private life. His example involves three doctrines: a theological conception of true faith that demands freedom of conscience; a comprehensive liberal conception of the person as autonomous; and a self-standing, liberal political conception of society as a system of cooperation between free and equal citizens (Rawls 1985:250; 1987:9).

20. The assumption that we can assess and revise our ends is also needed, I believe, to justify Rawls's claim that people "are regarded as capable of taking responsibility for their ends," in the sense that they "are thought to be capable of adjusting their aims and aspirations in the light of what they can reasonably expect to provide for" (Rawls 1985:243). Because people can adjust their aims, Rawls claims, we have no obligation to subsidize those with expensive tastes. I discuss this aspect of Rawls's theory in Kymlicka 1990:73–77.

21. Rawls's belief that social plurality can defend individual liberty, even in the absence of individual revisability, is made most explicit in "The Basic Liberties and Their Priority" (1982b). In that article, Rawls distinguishes two arguments for freedom of conscience. On the first argument, conceptions of the good are "regarded as *given and firmly rooted*; and since there is a plurality of such conceptions, each, as it were, non-negotiatable, the parties recognize that behind the veil of ignorance the principles of justice which guarantee equal liberty of conscience are the only principles which they can adopt." On this view, freedom of conscience protects religious minorities. Without freedom of conscience, people could find, once they drop the veil of ignorance, that they "belong to a minority faith and may suffer accordingly." On the second argument, conceptions of the good are "seen as *subject to revision* in accordance with deliberative reason, which is part of the capacity for a conception of the good." On this view, freedom of conscience protects individuals who wish to change their faith, because there "is no guarantee that all aspects of our present way of life are the most rational for

us and not in need of at least minor if not major revision" (Rawls 1982b:25–29, my emphasis). Rawls thinks that these two arguments "support the same conclusion" (1982b:29), i.e., that recognizing the *plurality* of conceptions of the good within society has the same implications for individual liberty as affirming the *revisability* of each individual's conception of the good. But they do not support the same conclusion on such issues as proselytization, which is an essential liberty on the second argument but a futile and disruptive nuisance on the first argument.

22. See Nickel 1990:214. Rawls's fear that the Millian conception of autonomy is not widely shared depends on conflating this conception of autonomy with the other, more controversial, conceptions discussed in note 11 above. It is important to note that although Mill's conception is "general," in applying to all areas of life, it is not "comprehensive," because it does not define a set of final ends or intrinsic goods to be pursued by each individual. Rather, it concerns the process by which we deliberate and assess our final ends.

23. The only case of group rights that Rawls discusses concerns the demands of some traditional religious groups (e.g., the Amish) for exemption from mandatory education. Rawls argues that his political liberalism is more sympathetic to this demand than Mill's comprehensive liberalism. Whereas comprehensive liberalism "may lead to requirements designed to foster the values of autonomy and individuality as ideas to govern much if not all of life," political liberalism "has a different aim and requires far less," because it is only concerned with promoting a liberal ideal of *citizenship* ("the state's concern with [children's] education lies in their role as future citizens"). As a result, Rawls says, political liberalism "honors, as far as it can, the claims of those who wish to withdraw from the modern world in accordance with the injunctions of their religion, provided only that they acknowledge the principles of the political conception of justice and appreciate its political ideals of person and society" (Rawls 1988:267–68). However, it is doubtful that political liberalism meets the demands of groups like the Amish. For one thing, as we have seen, the distinction between political and comprehensive liberalism is unstable, because accepting the value of autonomy for political purposes has unavoidable implications for private life (see note 17). Moreover, it is clear that many religious communities would object to political liberalism on its own terms, as a theory of citizenship. Mennonites and Hutterites in Canada have objected to some of the materials they are required to teach their children, because these materials promote an ideal of citizenship that is in conflict with their religious ideals of person and society. Whereas the government talked about preparing children for the rights and duties of citizenship, Mennonites saw "a different purpose of education . . . to prepare their children for life in their communities." Similarly, the Hutterites are "concerned not primarily with the potential for rationality but with, as they see it, the need for obedience. They argue that education should reorient the individual's self-regard and nurture a desire to abide by the will of the community." These groups do not see political liberalism as honoring their claims, and, as result, they have sought exemption from the sort of education that Rawls's "political liberalism" insists on. See Janzen 1990:143 (Hutterites) and 97 (Mennonites).

24. The ability to leave the community is a very important proviso. However, unlike some commentators (Svensson 1979:437; Kukathas 1992:133), I do not

think that the ability of individual members to exit is sufficient to justify internal restrictions, any more than racial segregation in the American South was made legitimate by the fact that individual Blacks could move north (although many defenders of segregation made this argument).

For further discussion, see Kymlicka 1992:144–45, from which I have taken the following paragraph; and Kymlicka 1995:chap. 8.

25. However, we rarely grant such rights to immigrant communities. This suggests there is a morally relevant difference between national minorities and immigrant groups. I discuss this in Kymlicka 1991; and 1995:chap. 2.

26. The group-rights approach cannot be used to accommodate all facets of modern-day pluralism. It presupposes that pluralism takes the form of identifiable groups, each with a relatively high degree of self-identification and the potential for some kind of organizational and leadership structure. Without these features, self-government is not likely. Hence the group-rights model seems most feasible in cases of ethnic and religious pluralism. Other forms of pluralism arising from competing conceptions of the good (e.g., diverse sexual lifestyles) require other modes of tolerance. However, as Rawls notes, religious and ethnic conflicts are the most divisive and destabilizing. It is only when pluralism does take this form—cohesive groups capable of collective action—that pluralism becomes genuinely destabilizing. Hence, it is particularly important to assess the different models of tolerance that are feasible in these cases.

27. "The autonomy argument is sometimes referred to as the characteristically liberal argument for toleration" (Mendus 1989:56).

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6

Autonomy, Toleration, and Group Rights: A Response to Will Kymlicka

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Kymlicka's main purpose is to establish a necessary connection between toleration of individuals and the possibility and value of autonomy. This principal thesis is preceded by an interesting historical observation drawn from the political arrangements in the Ottoman Empire, which leads Kymlicka to offer a distinction between group pluralism and individual freedom. In the Ottoman Empire and its millet system, religious freedom was granted to groups rather than individuals. Members of the Greek Orthodox community, Jews, and Armenians were autonomous in all matters of religious life and were thus tolerated by their Muslim rulers. However, these three communities did not tolerate individual dissent within themselves, and each minority group had the legal right to impose on its members its own particular way of life. Hence, according to Kymlicka, Rawls is wrong in claiming that religious toleration and pluralism began in the wake of Protestantism; in the form of group toleration, in fact, religious pluralism was practiced long before Protestantism and the religious wars of Europe.

This argument, though, is not merely historical. Kymlicka claims that Rawls was mistaken not only concerning the history of toleration. According to Kymlicka, Rawls's mistake is rooted in a philosophical error that equates pluralism with individual freedom of conscience. The Ottoman experience, he contends, teaches us that religious toleration of groups is possible without practicing individual freedom of conscience. This observation leads Kymlicka to the second and central point of his argument. He argues that the move from group pluralism, such as that found in the Ottoman millet system, to individual freedom must be supported by the value of individual autonomy. According to Kymlicka, Rawls's reluctance (in his later work) to base pluralism on the possibility and value of individual autonomy limits the application of pluralism to groups alone. On this point, Kymlicka and Rawls radically differ. According to Kymlicka, the principle of "autonomy" is necessary for the defense of individual freedom, whereas according to Rawls, the support

of toleration based exclusively on autonomy ties pluralism to an excessively narrow conception of the "good life" and is therefore an obstacle to his attempt to provide a maximally broad consensus for toleration within a political structure.

This essay focuses on the problem of whether autonomy is a necessary condition for individual freedom. I contend that toleration can be more successfully defended without appeal to the possibility of autonomy or to its value. I also attempt to defend an even more cogent argument that basing individual freedom on the notion of autonomy could lead to imposing a particular conception of the good life on individuals who do not perceive autonomy as valuable. This second argument also reveals differences between Kymlicka's view and my own regarding the scope and nature of group rights within a framework of individual freedom.

Before entering the problem of the relationship between individual freedom and autonomy and its implications for group rights, I will address Kymlicka's historical argument and clarify Rawls's conception of pluralism. The millet system was not an attempt to build a consensus among believers of radically different religious worldviews concerning the nature of a pluralistic society. In the Ottoman experience, the dominant power, that is, the Muslims, granted weaker minorities self-rule in religious matters. Rawls would not consider such an arrangement to be a genuine case of religious toleration, not only because it does not involve individual freedoms but because it was done in a framework of extreme asymmetry of power. Rawls is searching for a case in which radically different communities are involved in shaping a shared political structure. In such a case, according to Rawls, the fact of pluralism would force all the groups to liberal neutrality, because they would avoid giving priority to a particular conception of the good life in shaping the basic structure of society and its norms. It seems that such a scenario is very far from the millet system and indeed is unprecedented before the Reformation. The asymmetry of power in the millet system is itself a violation of pluralism in its most basic form. In the Ottoman Empire, unequal distribution of power was also based on religious affiliation. Minorities were discriminated against regarding equal access to political power, merely because they belonged to other faith communities.

The context of asymmetry of power in the millet system also seems to defy toleration, even in the religious realm. This context does not allow us to attribute to any party genuine pluralism (even group pluralism). The weaker parties had no choice but to be tolerant of the other parties, whereas the stronger and dominant party did not share government with others and was not involved in shaping a common pluralistic political structure. It did, though, grant the weak minorities some privileges. Toleration, in its political manifestation as an attempt to shape a common

political structure shared by radically diverse groups, is thus a relatively modern phenomenon.

It is important to stress that Rawls himself is not interested in providing another argument for toleration, namely, liberal neutrality. The Rawlsian idea of toleration as represented in the original position is that (1) people are granted rights independent of their conception of the good life, and (2) the constitutional framework of society is shaped in such a way that it enables different justifications of itself from different angles, that is, overlapping consensus. Neither condition of toleration exists within the millet system even on the group level. Rights are not granted even to groups within the millet system independent of their view of the good life. The constitutional framework of the Ottoman Empire can be justified only in terms of the Muslim dominant group. Thus, the problem with religious toleration in the millet model is not only its limited scope but its practice in a context of asymmetry of power. Let us turn now to the connection between toleration and autonomy and its implications for group rights.

Kymlicka's argument for toleration from autonomy proceeds in this way: (1) Individuals are capable of reflecting on their way of life, to assess it rationally and revise it. (2) It is in individuals' basic interest to be able to revise their life according to what they perceive as rational, thus avoiding staying in what they consider an unworthy form of life. (3) Therefore, only within a tolerant society can such a vital interest be secured. According to Kymlicka, "If liberals wish to defend individual freedom of conscience, they must reject the idea that people's ends are beyond rational revision."[1] Autonomy is thus necessary for the defence of individual freedom. The practice of toleration toward individuals rests on the fact that people are capable of free and rational revision of their ends, and preserving this capability is of extreme value. It is no accident that Kymlicka devotes part of his argument to debate views that, according to his reading, claim that conceptions of the good are constitutive of an individual's identity and are therefore not revisable.[2] It seems to Kymlicka that Rawls held such a view in his later work or at least wished to accommodate his earlier work to such a possibility, and thus undermined the very basis for toleration. Kymlicka quotes with approval another statement in which Rawls seems to agree that an individual is capable of revising a constitutive good: " '[O]ur conceptions of the good may and often do change over time, usually slowly but sometimes rather suddenly,' even for those people who think of themselves as having constitutive ends. For example, 'On the road to Damascus Saul of Tarsus becomes Paul the Apostle' " (p. 94). In order to examine Kymlicka's notion of autonomy, I consider Paul's conversion seriously, because it is a paradigmatic case for both Rawls and Kymlicka, exemplifying the autonomous capability

of individuals to revise their conception of the good. I think that Paul's case is in fact an interesting counterexample to a notion of individual autonomy.

For the sake of argument, let us deny autonomy in light of four arguments, while using Paul's conversion as a paradigm for a nonautonomous revision of the concept of the good: (1) An individual who changes his or her way of life is no longer the same self. (2) An individual cannot change goals freely. (3) Such a change is never a result of rational assessment, but a leap of faith. (4) There is no value in presenting a person with different conceptions of the good so that he or she may assess them rationally and freely and choose between them. Paul himself, I think, would have described his own experience in terms closely related to the following four points. First, after the conversion on the road to Damascus, Paul was no longer Saul. Paul was not a self who revised his way of life, but rather a self that was transformed by a conversion to an alternate way of life. Saul thus became Paul, a totally different individual, who might describe conversion in terms of birth rather than revision. Second, Paul did not initiate his own conversion; significantly, it was forced on him, happening to him rather than by him. Third, Paul's conversion was not motivated by a change in his conception of the good born out of rational assessment of options; it was a leap of faith rather than an argument. And fourth, Paul would not consider it important to expose himself to various ideas of the good and continually assess them. From his perspective, his conversion was final. If we agree with Paul on these four points, thus denying autonomy, are we free to coerce him into paganism or back to Judaism? According to Kymlicka, the answer is yes, because "If liberals wish to defend individual freedom of conscience, they must reject the idea that people's ends are beyond rational revision" (p. 94). In my opinion, even if we deny the possibility of rational assessment and autonomous revision of ends of life, toleration ought to be practiced. Paul's right to his Christian way of life was not dependent on the fact that he achieved it through free and rational assessment (which he did not), nor on the possibility that in the future he might assess his own Christian way of life as mistaken. It is rooted in the fact that his present state is of enormous importance to him, because that state shapes his identity, and forcing him out of it means destroying his individuality and violating what for him is perhaps the most important and meaningful aspect of his being. I will call this argument for toleration the harm argument, because it is based on the enormous harm done to others by robbing them of the possibility of continuing a way of life that harbors great meaning for them as individuals. In this respect, the right to one's way of life is comparable to property rights or to rights over one's own body—rights that do not need any support from the fact or value of autonomy.

Kymlicka's emphasis on the possibility of revision as the main good protected by toleration results in a paradox. Toleration, according to Kymlicka, is geared toward enabling people to revise their way of life, rather than protect their right to the lifestyle they now lead, regardless of whether they are capable of revising it or whether they have reached it through a rational assessment of a previous way of life. To escape such a paradox, Kymlicka could reformulate his position, claiming that what is important for people in their lives are only those goals and forms of life they acquire through a rational assessment of their previous given life. According to such a formulation, people consider those goals alone as fully theirs, and therefore only coercion that is directed to such goals can be considered a crime. But this option seems to be mistaken as well. A great deal of our identity is not a product of choice and, needless to say, not of rational choice. National identity is one example. It is central and extremely important to many individuals, but usually people do not offer a rational argument about why they should remain English rather than becoming, say, French (I do not want to argue that it is not possible to find rational reasons for dissociating from a certain national identity. Regretfully there are too many examples for this). The ways of life that matter to people are charged with elements dear to them, goals and values they identify with and believe in, which were not necessarily adopted through a process of rational revision.

The argument I would like to offer in support of toleration as an alternative to autonomy recognizes that individual forms of life and goals are extremely important to people, they cherish them and are willing to endure great suffering in their defense. Preventing people from practicing their way of life, in cases that involve no denial of the same right to other individuals, is as wrong as violating their property rights or their bodily self-ownership.

Such an alternative to the argument of autonomy has two merits. One relates to the Rawlsian program. Rawls would hold that such an argument for toleration is preferable, because it does not rest on contested assumptions of the possibility and value of personal autonomy, and such an argument thus allows for a broader consensus. But I think that independent of the Rawlsian concern for overlapping consensus, this argument accords with the intuition that the basic wrong that coercion produces is not failing to allow for revision of one's ends but forcing people away from what is important and central in their life, thus causing tremendous pain and harm.

One of the interesting implications of Kymlicka's argument is related to the problem of group pluralism and its connection to individual freedom. Kymlicka considers other contemporary examples of group rights in order to distinguish between them and individual freedom and to stress

the importance of autonomy. His first example is the American Indian tribes, who have a legally recognized right to self-government. Some of them discriminate against members who do not share the tribal religion. The Pueblo, for instance, deny housing benefits to those members of the community who have converted to Protestantism. This is indeed a violation of individual freedom, done in an attempt to prevent a group tradition from collapsing from within. It is a violation of the principle of toleration, because it is an attempt to force the converts to Protestantism away from their way of life. Thus, according to the harm argument for toleration, such a practice should be prohibited, not only because penalizing converts to Protestantism restricts the possibility for those who adhere to the Pueblo tradition to revise their religion but because for those already converted, being Protestant is of enormous importance. The argument for autonomy is not the only justification, in such a case, for restricting group rights in order to give room to individual freedom.

The second case Kymlicka mentions is more problematic, and there the difference between the harm argument and the autonomy argument becomes clear: "Both Canada and the United States exempt a number of long-standing religious sects (e.g., Mennonites, Doukhobours, Amish, Hutterites) from laws regarding the mandatory education of children. Members of these sects can withdraw their children from schools before the legal age of sixteen and are not required to teach the usual school curriculum. Parents worry that if their children received this broader education, they would be tempted to leave the sect and join the wider society" (p. 85). It seems to me that in this example the harm argument for toleration and the autonomy argument collide. According to the autonomy argument, the benefit of toleration consists in the possibility of revising one's way of life. Education, therefore, should be aimed at presenting options and producing a chooser, that is, a person who has the skills to make informed and rational judgments about different goals and forms of life: "[M]andatory education ensures that children acquire the capacity to envisage alternative ways of life and rationally assess them" (p. 87). The practice of education in the Amish community negates this notion of education and, according to the autonomy argument, is intolerant. An alternative approach views education as concerned primarily with transmitting a particular tradition and developing a strong commitment to that particular way of life. Such a conception might be accompanied by deliberately attempting to negate certain alternative ways of life, either by teaching them and claiming that they are false or by excluding them altogether from the curriculum. I know of no mandatory education system that does not contain dominant elements of this conception of education. Most public education in modern nation-states is geared toward educating loyal citizens. Emphasis is therefore put on the students' acquaintance

with the particular history and culture of their community. Other alternatives naturally are omitted; sometimes, when the situation involves rival communities, those alternatives are intentionally blocked. I doubt whether educating a chooser is a serious educational concept, but even if it is, in its pure form it does not exist in any mandatory educational system known to me.

More overtly ideological conceptions of education do exist. Their aim is to foster loyalty to particular ways of life with stronger commitments than citizenship in a nation-state. In Israel there are two paradigmatic examples of such a conception of education. The first is kibbutz education, which aims at transmitting a socialist way of life, and one of its goals is to ensure the continuity of the kibbutz as a viable social ideal. The other trend is the Orthodox community and its autonomous educational system, which is directed toward ensuring a continuation of the Jewish religious tradition. Adherents to both forms of life feel in some respect besieged, trying to compete with the temptations of urban capitalistic life and secular ideology, and both present those alternatives as false and decadent; sometimes they do not present them at all. It is no accident that until the sixties graduates of the kibbutz education system who wanted to leave the kibbutz and integrate into urban Israeli society had to complete matriculation examinations on their own if they wanted to be admitted to a university. The same is true of yeshiva education in the ultra-Orthodox community, where secular studies are minimal and the main aim of the institution is to perpetuate the traditional form of Torah study. I do not think there is anything intolerant in the practices of these communities. At this point, though, the autonomy argument for toleration and the harm argument part ways. Kymlicka, in accordance with the autonomy argument for toleration, claims that such a conception of education is intolerant and, therefore, should in principle be prohibited. In contrast, the harm argument for toleration obligates a community not to force or penalize individuals who actually choose an alternative way of life. But the value of toleration does not obligate a community to pose that alternative to students and present it as a legitimate option for choice. In case they opted for such an alternative through their own efforts (because in a pluralistic community those alternatives do exist), no one is entitled to alienate them from that choice. Forcing a yeshiva or a kibbutz school or the Amish community to produce a chooser rather than a member loyal to a particular community, in the name of the value of autonomy, is intolerant toward those communities. Such communities must be entitled to shape their own form of education as long as they do not violate the principle of toleration in its harm justification.

Autonomy as the ground for toleration seems to me wrong for two reasons. First, it rests on a questionable metaphysical assumption concerning

rational revisability of ways of life, an assumption that often does not capture the nature of "big decisions," as in Paul's case. In extreme cases of conversion, the possibility of rational revision is questionable, but we definitely want to include those cases within the realm of toleration. The other reason does not question the possibility of autonomy but rather the results of structuring toleration on the value of autonomy. In such cases, toleration would collide with conceptions of education that do not aim at producing a "chooser" but rather at transmitting a particular way of life. Those educational practices and institutions seem legitimate as long as they do not force members and students to adhere to a particular form of life without their consent. Toleration based on the harm argument applies to decisions and views that deny the possibility of autonomy. It also enables the operation of institutions and practices that do not recognize the value of autonomy as inherent in their conception of education. As applied to education, the principle of toleration should not delegitimize the very idea of transmitting cultural values; rather, it ought to set the limits to the means that are used in the process of transmission. The principle of toleration, therefore, excludes any use of force or penalty directed at members who dissent from the community's views. It does not obligate a community to present its younger or older members with alternative ways of life or develop in them the skills for assessment.

Notes

1. See W. Kymlicka, in this volume, p. 94.

2. I think, in opposition to Kymlicka, that the claim that notions of the good are constitutive of someone's identity does not entail that he or she cannot in principle revise them. The constitutive argument rejects a certain view of *how* such revision is accomplished and not *whether* it is possible to accomplish such a revision. The model of revision rejected by the constitutive argument is that a person can retreat from certain ends to his or her inner self, which is the "choosing self," and from that point of view opt for another way of life. Revision, according to the constitutive argument, is tied inherently to one's former way of life. In that sense, although Paul made a radical revision of his life on the road to Damascus, it is no accident that he converted to Christianity, which he was at the time trying to combat. In that respect, it does not make any sense for Paul to retreat to his "inner self" and then choose, for example, to become a Zoroastrian unless a story can be told concerning how such a choice is tied to his former life.

7

The Boundaries of Justifiable Tolerance: A Liberal Perspective

ALON HAREL

1. Introduction

It is often claimed that tolerance is a major virtue of liberal societies. Tolerance is praised as a means by which pluralism can be reinforced, the options available to individuals can be expanded, and hence their ability to pursue their own chosen projects and pursuits can be promoted.

The supposed value of tolerance is challenged, however, by two independent claims. First, religious or ethnic minorities holding intolerant views and practices persistently claim that they should be allowed to advocate intolerance as well as express it in their practices. Second, women and minorities demand the suppression of forms of speech or practices that seem to them to threaten their full integration in society. These two types of demands are often incompatible with each other. The latter, e.g., demands for restrictions on racist or sexist speech or practices, requires restricting precisely those practices that demand immunity under the first type of demand.

In this article, I explore the merits of these conflicting demands. I argue that both demands are based on genuine interests of individuals and hence are prima facie justifiable. Once the prima facie value of the conflicting demands is illustrated, I set up criteria for properly balancing these demands in cases of conflict, as well as briefly explore the proper institutional means to guarantee the satisfaction of these demands.

2. Social Preconditions of Well-Being: A Liberal Perspective

An exploration of the proper boundaries of tolerance in modern society should be based on its impact on the well-being of individuals.[1] The specification of what well-being consists of and the methods of measuring and comparing the well-being of different individuals in instances of conflict differ under different political theories.

Under a liberal conception, the ability of individuals to promote their own life projects, to pursue their own conception of the good, and to live in accordance with self-chosen goals and relationships are important components of one's well-being.[2] Liberals do not deny that there are other aspects of one's well-being that might sometimes conflict with these interests. However, they argue that in the case of such conflicts the interest of individuals in leading their own life is an important (although not always an overriding) consideration.[3]

The interest individuals have in living in accordance with their freely made choices imposes a duty on the state to promote and reinforce this interest. It is traditional within liberal theory to point out two central duties derived from this interest:

1. The state has a duty to avoid interfering in freely chosen pursuits of individuals unless it has powerful reasons to do so.

2. The state has a duty to safeguard individual choice against (undue) interference by others, including individuals and collective bodies, such as religious or cultural institutions.

Both of these are established duties of a liberal state. However, as has recently been made clear, they are not sufficient to enable individuals to live according to their choices.[4] Individual choice is always made within a particular social context. A social context can be more or less conducive to such choice. Various explanations have been provided by political philosophers as to the importance of social context in facilitating individual choice. These include the claim that the capacity for choice can be nurtured only within the boundaries of a community;[5] that meaningful choice requires social confirmation of one's values;[6] and that a rich social context is a prerequisite for providing meaningful and socially defined and determined pursuits and activities.[7] All these claims share the view that individuals can engage in meaningful choice only in a social context that encourages and supports such activity.[8]

There are two ways of understanding the claims about the social prerequisites for meaningful choice. Under a weak interpretation, claims affirming the importance of a social context for choice are conceptual but do not entail any duties beyond those that are already contained in the ones mentioned above, namely, the duty of the state to avoid interference in freely chosen ways of life and its duty to protect such ways of life from interference by others. The strong interpretation requires adding an additional duty:

3. The state has a duty to sustain and reinforce a social context conducive to individual choice.

The liberal conception of well-being as presented here is sympathetic to the role of the state in reinforcing individual choice. It is clear, however, that under the liberal conception the state can contribute only indirectly to the provision of a fertile context for individual choice. This duty of the state cannot be fulfilled by directly *creating* or *producing* a social context that is conducive to choice. It can be fulfilled only indirectly, by promoting and reinforcing existing social structures in a way conducive to individual choice.[9]

So far, some duties of the state, namely, those that are derived from the liberal conception of well-being, have been discussed on a general and abstract level. Providing a more specific description of the social prerequisites for meaningful choice, as well as the duties of the state in sustaining and promoting those social prerequisites, requires an exploration of the particular types of interests individuals share. These interests cannot be analyzed independently of the social context in which the individuals operate. More specifically, they differ according to the social group to which the individuals belong, because these are interests individuals share not *qua individuals* but rather *qua members of particular communities*. Such interests are conceptually tied to membership in a community or a social group and hence *cannot logically be shared* by outsiders.[10]

This article will identify three interests individuals can share qua members of particular communities, each of which has important social and legal implications. The first is the interest individuals might have in participating in intolerant practices and sharing intolerant beliefs, when those practices and beliefs form part of a comprehensive way of life. The second is the interest they might have in the existence and flourishing of minimally supportive communities. The third is the interest they might have in "egalitarian intolerance," namely, in the exclusivity of egalitarian values. Let me elaborate on each one.

A. The Indivisibility of Ways of Life

Orthodox Jews might genuinely believe that their religion entails certain views of the role of women in society or certain positions about the moral standing of homosexuality. Admittedly, it is not logically impossible to be an Orthodox Jew and at the same time a feminist or a gay liberationist. But for many religious Jews, the antifeminist position or the condemnation of so-called "unnatural" sexual practices form part of a comprehensive worldview and are routinely manifested in the practices related to such a worldview.[11]

This example illustrates that intolerant views, opinions, or values can be an aspect of a wider net of opinions and sensibilities that, taken to-

gether, form a distinctive style or way of life. Expressing disagreement, condemnation, hostility, and intolerance can be valuable as a means of affirming one's own values or as an integral component of one's way of life.[12] The complex cluster of values and practices that comprise a particular way of life cannot be interfered with by the state without undermining the integrity of that way of life.

In order for practices that form integral parts of comprehensive ways of life to command our respect, such practices must satisfy two conditions. First, it is necessary to show that the intolerant practice is indeed an integral part of a way of life. Second, it must be shown that the way of life as a whole is a valuable one. It is certainly possible that some intolerant practices are integral parts of ways of life that are not valuable and hence need not be protected. The difference between one's attitude toward such practices as those of fundamentalist religious groups, on the one hand, and those of the KKK, on the other, can be explained by the claim that whereas the former are valuable (although they might contain repugnant values and practices), the latter lack any value.

The requirement that we respect values and practices that constitute integral parts of comprehensive ways of life can be explained in terms of the holistic, indivisible nature of ways of life. They are often conceived by their participants as indivisible clusters of values and practices. Respect shown to a way of life as a whole entails taking seriously the internal perspective of its participants, including their perception that it consists of an indivisible cluster of values and practices. A selective attempt to regulate some of those practices or restrict the promulgation of certain values can therefore be interpreted as an expression of disrespect toward the way of life as a whole.[13]

It might seem as if this argument is applicable only to fanatical communities, because intolerance supposedly can only be a component of a fanatical worldview. This assumption is misleading. Individuals who hold egalitarian sentiments can sometimes demonstrate intense intolerance toward racist or sexist ideas or practices. The fact that egalitarian intolerance of racism or sexism might be morally justified does not detract from the fact that this intolerance can be a means of affirming one's own egalitarian worldview.

A genuine interest in sharing intolerant ideas or participating in intolerant practices as a means of affirming one's own values does not necessarily entail a *moral obligation* on the part of others to respect or tolerate those ideas and practices, but it might provide *good reasons* for tolerating them. This interest might justify more than merely *legal* protection of intolerant practices that are essential to one's way of living. It could also imply that we have reasons to respect, rather than merely tolerate, intolerant values and practices when they constitute an integral part of a com-

prehensive worldview. The respect shown to the intolerant values and practices that form part of a valuable way of life is a byproduct of the respect shown to that way of life as such.[14]

Understanding the role of ideas and practices that form part of comprehensive ways of life can have important policy implications. It is common to argue that practices that are permissible if performed by secular individuals for secular purposes should also be permissible if performed by individuals for religious purposes, and, conversely, those that are justifiably prohibited if performed by individuals for secular purposes should also be prohibited if performed by individuals for religious purposes.[15]

The analysis presented above illustrates the falsity of this position. Religious practices are part of comprehensive ways of life. Under the above description, the protection granted to ideas and practices is based on the role they play within such ways of life. Hence, it is not inconsistent to grant immunity to practices when they are conducted as part of comprehensive ways of life, for example, when they are conducted as part of religious life, while at the same time to prohibit those very same practices when they do not reflect components of such a way of life.[16]

Our argument so far is a limited justification for tolerating intolerance. Though it might lead us to grant legal protection to intolerance as well as to sympathize, understand, and tolerate it, this argument cannot provide us with reasons for *being intolerant*.[17] Are we ever justified in being intolerant rather than merely in tolerating or respecting manifestations of intolerance? In the next two subsections, I explore this possibility.

B. Minimally Supportive Communities

I argued earlier that individuals need a fertile social context in which to exercise individual choice. Social context consists mainly of a supportive community that shares one's values and practices. The emergence of competing ways of life can be detrimental to the existence of a supportive community, and thus can be detrimental to one's interest in living one's chosen way of life. Members of cultural minorities have often found themselves in conditions that have endangered the fulfillment of their interest in living within a supportive community. History has shown that individual rights and liberties granted to the majority resulted in the erosion of the traditional values of cultural minorities. Some cultural minorities have reacted by initiating campaigns favoring some restrictions on individual rights for the sake of reinforcing the values of such cultures.[18] We cannot ignore the possibility that the interest of individuals in the existence of a supportive community might override the interests other

individuals have in participating in practices or advocating views that threaten the survival of that supportive community.

This might seem to be a very radical suggestion. If left unqualified, its oppressive potential is almost unlimited. One central qualification can already be formulated.

One's interest in the existence of a supportive community rarely requires or justifies intolerance. I can express an interest in the viability of a secular community that can typically be fully satisfied without imposing any restrictions on the religious practices of religious communities. Of course, the larger the secular community, the more it can support and enhance secular lifestyles. But if a sufficiently large secular community exists, the marginal benefit the secular person derives from a further enlargement of that community is nil or close to nil. Consequently, the secular person's interest in the survival of a secular community can usually be satisfied without imposing any restrictions on religious practices. The need to impose restrictions in order to protect secular communities from the threat of extinction will arise, therefore, only when the secular community is too small or weak to provide meangingful life for its members without the aid of such regulation.

One's interest in a supportive community can therefore be more accurately described as an interest in a *minimally* supportive community, that is, the smallest community capable of providing adequate support for one's chosen way of life. The crucial element here is not necessarily the size of the community but its ability to provide adequate support. Once this interest is guaranteed, any further interest in enlarging and strengthening the supportive community is too weak to justify intolerance. Consequently, with the exception of minority cultures that cannot provide adequate support for their members, one's interest in the existence of a supportive community cannot justify the endorsement of legal or social intolerance.

It is important to draw out the implications of this argument. Unlike the duties derived from the interest concerning the indivisibility of ways of life, those relating to the interest in sustaining minimally supportive communities are not necessarily derived from the internal perspective of the members. The latter interest could sometimes require tolerance toward practices of the community that are essential to its viability, but it could also include policies unrelated to community practices, such as subsidies, immigration policies designed to protect the community, inheritance laws, and so on.[19]

So far I have described two types of interests individuals share qua members of communities: respect granted to their intolerant values and practices when those constitute an integral part of their way of life, and sustaining a minimally supportive community. Both interests can

be classified as exclusionary, that is, interests of members of the community in reinforcing their separateness from a larger social body. Yet members of communities also share inclusionary interests, that is, the interests they have in becoming an integral part of a broader society. Inclusionary interests, as we shall see, present a much greater challenge to a liberal society.

C. Egalitarian Intolerance

The feminist movement is fighting to suppress pornography. Human-rights organizations are struggling to suppress racist propaganda. The aim of these struggles is to facilitate integrating women and Blacks into a broader social body. Both campaigns are motivated by the interests members of the relevant groups have in becoming full participants in the broader community in which they live. They are therefore paradigmatic instances of policies designed to promote the inclusionary interests shared by members of the these groups.

Claims of this type present a difficult challenge to a liberal society. Exploring the content of the demand to suppress racist or sexist forms of speech can explain the source of the difficulty in meeting these demands. The interest that would justify suppressing pornography is not merely women's interest in the survival of a nonsexist supportive community but their interest in totally eliminating sexist attitudes and practices. Similarly, the interest Blacks supposedly share is not merely the existence of a nonracist supportive community but eliminating racist sentiments altogether. The alleged threat to the welfare of women in a sexist society, and of Blacks in a racist society, is not that a community that shares egalitarian values is not a minimally supportive one but the very existence and prevalence of sexist or racist sentiments. Consequently, only the elimination of sexist and racist sentiments can satisfy the demands of these groups.[20]

These demands differ fundamentally from those based on the indivisibility of ways of life or the need to protect the survival of a minimally supportive community. Unlike the former (analyzed in sections A and B), this latter demand insists on granting exclusivity to a specific set of values; more particularly, it is a demand to grant exclusivity to egalitarian values. Its unique character stems from the exclusive role to be played by a particular set of values if those demands are to be met.[21]

What is the justification for demanding the exclusivity of egalitarian values? Can this demand be justified on the basis of the genuine interests of members of marginalized groups? It is beyond the aims of this article to provide a full defense of this demand. However, it is useful to point out

an important interest of members of marginalized groups that gives special force to their demand.

Membership is considered an important good and is often a prerequisite for various entitlements. Individuals can be full members of traditional societies without being conceived as possessing the same status as other members. For instance, some major religions recognize women as members of religious communities while assigning them different and, some would argue, inferior roles.[22] Modern societies, on the other hand, regard equality of some sort as a prerequisite for membership. Hence racial minorities cannot be considered both inferior and at the same time full members of the community. Denying equality is therefore interpreted in modern societies as a denial of membership itself. Its particular importance is a byproduct of its relations to the concept of membership in modern society.

This observation suggests that being a member of a modern society is tantamount to being an equal member. Denying equality is therefore denying membership as such. Hence, eliminating discriminatory attitudes and practices is a prerequisite for membership.

One can easily detect a potential conflict between the interests of members of some communities in enjoying immunity for their values and practices and the interest of others in the exclusivity of egalitarian values. For example, a conflict might emerge between the interest of women in eliminating sexism and the interest of Orthodox Jews in living their lives in accordance with their sexist values. The former interest provides us with reasons for manifesting legal or social intolerance toward sexism with the intention of eliminating it, whereas the latter interest, as I argued above, can provide us with reasons for tolerating and even respecting this form of intolerance. The multiplicity of considerations described above—in particular, the coexistence of exclusionary interests of members of traditional communities (namely, their interest in enhancing the separateness of their practices from those of the rest of the society) and inclusionary interests of members of marginalized groups (namely, their interest in becoming part of a broader social body)—can explain the persistence of the conflicting demands at the focus of this article. In the last section, I explore the means of reconciling these conflicting interests.

3. Toward a Reconciliation of Inclusionary and Exclusionary Interests

I have so far pointed out some considerations suggesting that the exclusionary interests of individuals *qua members of communities* provide, under certain circumstances, reasons to tolerate and respect intolerant

practices when these are indivisible components of a valuable way of life or when tolerating them is necessary for the survival of minimally supportive communities. On the other hand, it has been shown that the inclusionary interests of individuals *qua members of communities* can provide reasons to grant exclusivity to egalitarian values. These two interests, it has been claimed, often lead to conflict.

Inegalitarian practices and sentiments are particularly harmful to the inclusionary interests of marginalized groups when adopted by individuals or communities with a significant impact on the lives of members of marginalized communities, that is, when the lives of members of different communities are intertwined. The more individuals and communities are integrated into a broader society that does not share their values, the more harmful their inegalitarian sentiments can be. Thus, an important factor in determining the degree of immunity to be granted to cultural practices is the degree to which those practices have spillover effects. The more isolated the communities that participate in these practices, the less serious their impact on the inclusionary interests of marginalized groups. The strength of the demands made by Native Americans in the United States and Canadian Aboriginals to immunize their practices from interference is based on these groups' isolation, and hence on the limited impact their values and practices have on the society at large.

Spillover effects can be partially manipulated by institutional methods of granting immunity to cultural communities. The sovereignty of Native American reservations is often perceived as a device intended to protect the interests of Native Americans. It can, however, also be described as a means of realizing the inclusionary interests of marginalized groups in the society at large. Sovereignty is a device used by the society at large to respect, but at the same time distance itself from, the practices of Native Americans, which are incompatible with its own egalitarian values.

This last observation provides us with an important lesson often ignored in the current literature. The institutional means of protecting the interests of individuals *qua members of communities* are as important as the scope of the protection itself. Protecting practices of Native Americans from interference can be carried out by different means. Granting sovereignty to those communities is particularly useful because it is a powerful symbolic recognition of the exclusionary interests of Native Americans as well as a powerful statement by means of which society at large can dissociate itself from these practices and consequently enhance the inclusionary interests of members of other marginalized groups.

Tolerance is a liberal value, but liberalism also points out the limitations of tolerance. These limitations might require us to respect intolerant practices in contexts in which they are conducive to the exclusionary interests of individuals or to suppress intolerant practices when they are

detrimental to the inclusionary interests of minorities. There is no guarantee that these conflicting interests can always, or even often, be reconciled. However, legal and other institutional mechanisms can sometimes alleviate the tension between them.

Notes

1. This claim can be derived from a more general claim, which Raz calls "the humanistic principle": "[t]he explanation and justification of the goodness or badness of anything derives ultimately from its contribution, actual or possible, to human life and its quality." See J. Raz, *The Morality of Freedom* (Oxford: Clarendon, 1986), 194.

2. For a formulation of the liberal conception of well-being, see Raz, 369.

In this context, I prefer to use Raz's formulation, emphasizing the successful pursuits of self-chosen goals and relationships. See Raz, 370. This construction, if broadly interpreted, encompasses one's ability to pursue freely chosen life projects as well as one's interest in living according to one's conception of the good. It also includes one's interests in pursuing one's judgments in matters that cannot be described as either life projects or conceptions of the good.

3. The liberal conception of well-being as presented here regards the ability to choose as *one* component of well-being. It is therefore weak enough to be acceptable to communitarians. It is labeled the "liberal conception of well-being," however, because liberals will tend to attribute more importance to this aspect of well-being than adherents of most other philosophical persuasions.

4. See W. Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon, 1991).

5. C. Taylor, "Atomism," in C. Taylor, *Philosophical Papers*, vol 2: *Philosophy and the Human Sciences* (Cambridge: Cambridge University Press, 1985), 207. For a critique of this view, see Kymlicka, 74ff.

6. R. Smith, *Liberalism and American Constitutional Law* (Cambridge, Mass.: Harvard University Press, 1985) 170. For a critique, see Kymlicka, 61ff.

7. See Raz, 308–13; Kymlicka, 164–78.

8. There is, however, an important difference between various attempts to characterize the role of social context in facilitating or enhancing individual choice. Some attempts are based on claims of the dependence of the agent's or the agency's capacities on proper social context. Other attempts locate the role of social context in shaping the circumstances of choice rather than in facilitating agency itself.

9. There are various reasons for the liberal insistence on the indirect role of the state in facilitating and enhancing a social context conducive to choice. First, there are institutional factors concerning the limits of the role of the liberal state and the risks of manipulating social context in a way that is not conducive to individual choice. Second, there are conceptual problems, in particular, the logical incoherence of free individual choice with decisions determined not by the agent but by circumstances shaped and manipulated by external forces.

10. This does not imply that outsiders could not have interests that coincide with interests held by members of the community qua members of a particular community. I might, for example, have an interest in the future existence of the Islamic religion because I am sympathetic to that religion or because, after reflection, I might one day discover its merits and convert to Islam. The future existence of Islam provides me with opportunities I would otherwise not have had, for example, to join it in case I find its doctrines compelling.

But this interest is different from that of a person who is already practicing Islam. The interest one has in the future existence of the particular community one belongs to is an interest in sustaining the way of life one has already chosen. This interest coincides with that of an outsider who has an interest in having the opportunity to make the same choice, but it is nevertheless a different interest.

11. See Joseph Raz, "Free Expression and Personal Identification," *Oxford Journal of Legal Studies* 11 (1991):303, 321.

12. I use the term "way of life" to denote what Raz labels "form of life" or "style of life." See ibid., 309–10.

13. It should be noted that intolerant practices and values can be indivisible components of a way of life even if a proper interpretation of the more fundamental values underlying these ways of life would in fact require one to abandon these intolerant practices and values. Some Orthodox Jews criticize the sexist practices of Orthodox Judaism, claiming that they are based on an incorrect interpretation of the Scripture. This criticism might be valid with respect to the Scripture, but it is irrelevant to the issue at hand. It is not the correctness of the sexist interpretation of the Scripture by Orthodox Judaism that provides reasons for respecting these practices, but rather the role these practices play within the lives of Orthodox Jews.

14. I do not deny that there are often powerful reasons to interfere in intolerant practices. In particular, interference can often promote the interests of members of the intolerant community who are the victims of its intolerance. The argument is only intended to illustrate a powerful prima facie reason to respect intolerant views and practices. I believe that the victims of intolerant attitudes of cultural or religious communities sometimes have to choose either to exit their community altogether or attempt to demonstrate to other members that the intolerant practices and ideas are based on a false understanding of their own cultural tradition.

15. This position is adopted by Locke:

> By this we see what difference there is between the church and the commonwealth. Whatsoever is lawful in the commonwealth cannot be prohibited by the magistrate in the church. Whatsoever is permitted unto any of his subjects for their ordinary use, neither can nor ought to be forbidden by him to any sect of people for their religious uses. If any man may lawfully take bread or wine, either sitting or kneeling in his own house, the law ought not to abridge him of the same liberty in his religious worship; though in the church the use of bread and wine be very different, and be there applied to the mysteries of faith and rites of divine worship. But those things that are prejudicial to the commonweal of a people in their ordinary use, and are therefore forbidden by laws, those things ought not to be permitted to churches in their sacred rites. (John Locke, *A Letter Concerning Toleration*, ed. Mario Nontuori [The Hague: Martinus Nijhoff, 1963], 67)

This view is derived from Locke's claim that it is not coercion as such that is evil but coercion undertaken for certain reasons or certain ends. Hence, only a restriction on religious practices motivated by religious reasons is unjustified. See J. Waldron, "Locke, Toleration and the Rationality of Persecution," in J. Waldron, *Liberal Rights: Collected Papers* (Cambridge: Cambridge University Press, 1993), 88, 104–7.

16. Several qualifications should be made. First, the protection that should be granted to religions should not be absolute. Second, it is not claimed that only religions form comprehensive ways of life. Secular lifestyles also deserve protection to the extent that they are valuable. Third, there could be institutional reasons to be reluctant to give the executive or the judiciary the right to make the distinction between those practices that form part of comprehensive ways of life and those that do not. If indeed there are institutional reasons of this sort, it might be inadvisable to adopt the policy of granting broader immunities to practices when they form part of comprehensive ways of life because of the inability of the courts to make the relevant judgments.

In practice, the legal system provides ample instances in which religious practices enjoy special immunity. The "free exercise" clause of the United States Constitution singles out religion for special treatment, as do some of the decisions of the United States Supreme Court. In *Wisconsin v. Yoder* (1972), 406 U.S. 205, the court reasoned in terms very similar to those analyzed above, exempting Amish parents from the duty to provide their children with a secondary education. The court relied on two factors. First, it concluded that compulsory secondary education is incompatible with the attitudes, goals, and values of Amish life. In the terms used above, the court reasoned that the absence of secondary education is indeed an integral part of the Amish way of life. Second, it relied heavily on the fact that the Amish community has been a law-abiding and productive community. The court therefore concluded that the Amish way of life is a valuable one and hence deserves special immunity from duties that would otherwise be imposed on it.

There is, however, one feature in *Yoder* that differentiates the arguments in *Yoder* from my analysis. Forcing the Amish children to go to secondary schools is not *in itself* incompatible with the Amish way of life. It is only the consequences of such education, in particular, the alien influence inculcated through this education, which are detrimental to the Amish way of life. My analysis, on the other hand, focuses on the importance of tolerating intolerant practices that are *in themselves* constitutive to valuable ways of life.

17. Unless, of course, we are members of a community that adopts intolerance as part of its worldview.

18. See Kymlicka.

19. See Kymlicka.

20. The legal system sometimes (justifiably) recognizes (in a limited manner) the interest of women or minorities in the exclusivity of antisexist or antiracist practices. For example, human-rights laws prohibit discrimination on the basis of gender or ethnicity even in private businesses. Other laws, in particular in Europe, prohibit speech that reinforces sexist or racist values.

I have argued in favor of granting exclusivity to egalitarian values in the context of the debate on the boundaries of freedom of expression. See A. Harel, "Bigotry, Pornography and the First Amendment: A Theory of Unprotected Speech," *Southern California Law Review* 65 (1992):1887; A. Harel, "Review Essay: Free Speech Revisionism: Doctrinal and Philosophical Challenges," *Boston U. L. Rev.* 74 (1994):687.

21. The difficulty in meeting the demand to grant exclusivity to egalitarian values is aggravated once the broad meaning attributed to the notion of equality is fully understood. Two factors related to this meaning make satisfying this demand particularly difficult.

First, minority groups have often exposed the subtle discriminatory nature of established institutions and practices. Equality of women or gays could, under the broad meaning attributed to this term, require us to suppress pornography, change our abortion laws, expand the legal and social definitions of family to include single mothers and gays, etc. Granting exclusivity to egalitarian values might therefore require us to grant exclusivity to a very broad and demanding conception of equality.

Second, the interpretation given to the term "equality" is often deliberately intended to fit the perspective of members of minority or otherwise marginalized groups, and hence might be alien to the perspective of privileged groups. Meeting the demand to grant exclusivity to egalitarian values could mean granting exclusivity to a conception of equality as conceived from the perspective of marginalized communities. This claim is often made by feminists. See, e.g., C. MacKinnon, *Towards a Feminist Theory of the State* (Cambridge, Mass.: Harvard University Press, 1989), 83–154.

22. Dworkin has argued that equality interpreted abstractly as "equal concern and respect" is the starting point of any acceptable tradition. See Dworkin, *Law's Empire* (Cambridge, Mass.: Belknap Press, 1986). On Dworkin's view, if a traditional society wants its sexist practices to be respected, it must show that those practices do not infringe on women's rights to equal concern and respect, but rather represent a different conception of equality.

I believe that this is an artificial attempt to attribute a central value of our culture to traditional communities that do not share those values. The very act of comparing the concern and respect granted to different individuals is alien to traditional societies. Therefore, attempts to interpret the practices either as an expression of inequality or as an expression of a different conception of equality are bound to be arbitrary.

On my view, the acceptability of practices of inequality in traditional societies is not based on the ability to interpret them as reflecting a different conception of equality but rather on the fact that equality is not a prerequisite for membership in these societies.

8

Toleration and the Struggle against Prejudice

DAVID A. J. RICHARDS

THE ARGUMENT for toleration was of pivotal importance not only in the development of the civil liberties of religion, free speech, and privacy,[1] but in the abolitionist criticisms of slavery and racism in America, Britain, and elsewhere and their correlative expressions in law (for example, American constitutional principles of equal protection).[2] My theme here is the pivotal role that the argument for toleration played in the first sustained criticism in human history of slavery as an institution and the associated criticism of racial prejudice. The analysis of racial prejudice, as a political and constitutional evil, was, I argue, very much a generalization of the rights-based analysis of religious intolerance as an evil. The analysis of anti-Semitism, which has taken the form of both religious intolerance (Christian anti-Semitism) and modernist racism (anti-Christian anti-Semitism), will be a central case study for this argument as an explanatory model for the correlative political evil of American-style racism against Blacks. Both the development of these political evils and their criticism as political evils share a history that is, in ways I hope to make clear, structurally interdependent.

My argument uses American political and constitutional experience as a useful starting point in the analysis of phenomena that are, I believe, universal in the long and still incomplete struggle of free people everywhere for rights-based constitutional government under the rule of law. Hopefully, the account will, by its end, suggest important continuities and even points of mutual influence in the experience of many peoples (including the impact of American understanding of the evil of European anti-Semitism on American criticism of its own racism). The argument, if plausible, also suggests why contemporary forms of rights-based constitutional democracies have distinctively developed doctrines and institutions to identify and condemn the force of racism and similar prejudices in democratic politics. The interest of the argument is the fruitful use to which it puts the argument for toleration as a powerful explanatory and normative tool in the struggle for a deeper and more complete understanding of what the struggle for universal human rights means and should be taken to mean.

1. Abolitionist Ethical Criticism of Slavery: The Analogy of Anti-Semitism

Theodore Weld, one of the most important and influential of the early American abolitionists, presented in his widely circulated *American Slavery as It Is*, not only a factual picture (gathered largely from southern newspapers) of life in the South under slavery, but a normative argument in light of which those facts should be interpreted. The normative argument took it to be fundamental that persons have "inalienable rights."[3] The abridgment of such inalienable rights (including "free speech and rights of conscience, their right to acquire knowledge"[4]) required a heavy burden of justification.

Weld identified an important analogy between the inadequacies of the justifications in fact offered by southerners and the comparably inadequate arguments offered in support of religious persecution, whether Puritan persecutions of the Quakers,[5] Roman persecution of Christians, or Christian persecutions of pagans and heretics.[6] The key to understanding the political evil of both religious persecution and slavery was the intrinsic corruptibility of human nature by political power over certain kinds of questions. The worst corruption was of conscience itself—a fact that was, he argued, well reflected in the cumulative blinding of Southern public morality to the evils of slavery.[7]

In the most important studies of the morality of slavery by an American philosopher in the antebellum period, William Ellery Channing had temperately stated the ethical dimensions of the abolitionist case for both the evil of slavery and the need for abolition in a similar way.[8] In order to understand the subversion of conscience that slavery required, Channing, like Weld, drew an analogy to the history of religious persecution, whose injustice often rested on the corruption of conscience.[9] Making pointed reference to anti-Semitism,[10] Channing drew instruction from the history of religious persecution, because it exemplified both an abridgment of inalienable human rights and a familiarly inadequate way in which such abridgments have been justified. Pro-slavery views exemplified the same structure of argument and should be condemned for the same reason.

We need now to explore what this abolitionist argument was and what role the example of the wrongness of anti-Semitism played in it.

2. The Argument for Toleration

The argument for toleration assumed by both Weld and Channing was an American elaboration of the argument for universal toleration that had been stated, in variant forms, by Pierre Bayle and John Locke.[11] The con-

text and motivations of the argument were those of radical Protestant intellectual and moral conscience reflecting on the political principles requisite to protect its enterprise against the oppressions of established churches, both Catholic and Protestant.

That enterprise arose both from a moral ideal of the person and the need to protect that ideal from a political threat that had historically crushed it. The ideal was of respect for persons in virtue of their personal moral powers both rationally to assess and pursue ends and reasonably to adjust and constrain pursuit of ends in light of the equal moral status of persons as bearers of equal rights. The political threat to this ideal was the political idea and practice that the moral status of persons was not determined by the responsible expression of their own moral powers, but specified in advance of such reflection, or the possibility of such reflection, by a hierarchical structure of society and nature in which they were embedded. That structure, classically associated with orders of being,[12] defined roles and statuses in which people were born, lived, and died, and exhaustively specified the responsibilities of living in light of those roles.

The political power of the hierarchical conception was shown not only in the ways in which people behaved but in the ways in which it penetrated into the human heart and mind, framing a personal, moral, and social identity founded on roles specified by the hierarchical structure. The structure—religious, economic, political—did not need to achieve its ends by massive coercion precisely because its crushing force on human personality had been rendered personally and socially invisible by a heart that felt, and a mind that imaginatively entertained, nothing that could render the structure an object of critical reflection. There could be nothing that might motivate such reflection (life being perceived, felt, and lived as richly natural).

In light of the moral pluralism made possible by the Reformation, liberal Protestant thinkers like Bayle and Locke subjected the political power of the hierarchical conception to radical ethical criticism in terms of a moral ideal of the person having moral powers of rationality and reasonableness; the hierarchical conception had subverted the ideal and, for this reason, distorted the standards of rationality and reasonableness to which it appealed.

Both Bayle and Locke argued as religious Christians. Their argument naturally arose as an intramural debate among interpreters of the Christian tradition about freedom and ethics. An authoritative Pauline strand of that tradition had given central weight to the value of Christian freedom.[13] That tradition, like the Jewish tradition from which it developed, had a powerful ethical core of concern for the development of moral personality; Augustine of Hippo thus offered a model of God in terms of the elements of moral personality.[14] Indeed, the argument for toleration arose from an internal criticism by Bayle of Augustine's argument for the perse-

cution of the heretical Donatists; to wit, Augustine had misinterpreted central Christian values of freedom and ethics.[15] The concern was that religious persecution had corrupted ethics and, for this reason, the essence of Christianity's elevated and simple ethical core of a universal brotherhood of free people.

The argument for toleration was a judgment of, and response to, perceived abuses of political epistemology. The legitimation of religious persecution by both Catholics and Protestants (drawing authority from Augustine, among others) had rendered a politically entrenched view of religious and moral truth the measure of permissible ethics and religion, including the epistemic standards of inquiry and debate about religious and moral truth. By the late–seventeenth century (when Locke and Bayle wrote), there was good reason to believe that politically entrenched views of religious and moral truth (resting on the authority of the Bible and associated interpretive practices) assumed essentially contestable interpretations of a complex historical interaction between pagan, Jewish, and Christian cultures in the early Christian era.[16]

The Renaissance rediscovery of pagan culture and learning reopened the question of how the Christian synthesis of pagan philosophical culture and Jewish ethical and religious culture was to be understood. Among other things, the development of critical historiography and techniques of textual interpretation had undeniable implications for reasonable Bible interpretation.[17] The Protestant Reformation both assumed and further encouraged these new modes of inquiry, and encouraged as well the appeal to experiment and experience that were a matrix for the methodologies associated with the rise of modern science.[18] These new approaches to thought and inquiry had made possible the recognition that there was a gap between the politically entrenched conceptions of religious and moral truth and inquiry and the kinds of reasonable inquiries that the new approaches made available. The argument for toleration arose from the recognition of this disjunction between the reigning political epistemology and the new epistemic methodologies.

The crux of the problem was this. Politically entrenched conceptions of truth had, on the basis of the Augustinian legitimation of religious persecution, made themselves the measure both of the standards of reasonable inquiry and of who could count as a reasonable inquirer after truth. But, in light of the new modes of inquiry now available, such political entrenchment of religious truth was reasonably seen often to rest not only on the degradation of reasonable standards of inquiry but on the self-fulfilling degradation of the capacity of persons reasonably to conduct such inquiries. In order to rectify these evils, the argument for toleration forbade, as a matter of principle, the enforcement by the state of any such conception of religious truth. The scope of legitimate political concern

must, rather, rest on the pursuit of general ends like life, basic rights, and liberties (for example, the right to conscience). The pursuit of such goods was consistent with the full range of ends free people might rationally and reasonably pursue.[19]

A prominent feature of the argument for toleration was its claim that religious persecution corrupted conscience itself, a critique we have already noted in the American abolitionist thinkers who assume the argument. Such corruption, a kind of self-induced blindness to the evils one inflicts, is a consequence of the political enforcement at large of a conception of religious truth that immunizes itself from independent criticism in terms of reasonable standards of thought and deliberation. In effect, the conception of religious truth, though perhaps having once been importantly shaped by more ultimate considerations of reason, ceases to be held or to be understood and elaborated *on the basis of reason*.

A tradition that thus loses its sense of its reasonable foundations stagnates and depends increasingly for allegiance on question-begging appeals to orthodox conceptions of truth and the violent repression of any dissent from such conceptions as a kind of disloyal moral treason. The politics of loyalty rapidly degenerates, as it did in the antebellum South's repression of any criticism of slavery, into a politics that takes pride in widely held community values solely because they are community values. Standards of discussion and inquiry become increasingly parochial and insular; they serve only a polemical role in the defense of the existing community values and are indeed increasingly hostile to any more impartial reasonable assessment in light of independent standards.[20]

Such politics tends to forms of irrationalism in order to protect its now essentially polemical project. Opposing views relevant to reasonable public argument are suppressed, facts distorted or misstated, values disconnected from ethical reasoning; indeed, deliberation in politics is denigrated in favor of violence against dissent and the aesthetic glorification of violence. Paradoxically, the more the tradition becomes seriously vulnerable to independent reasonable criticism (indeed, increasingly in reasonable need of such criticism), the more it is likely to generate forms of political irrationalism (including scapegoating of outcast dissenters) in order to secure allegiance.

I call this phenomenon the paradox of intolerance. The paradox is to be understood by reference to the epistemic motivations of Augustinian intolerance. A certain conception of religious truth was originally affirmed as true and was politically enforced in the society at large because it was supposed to be the epistemic measure of reasonable inquiry (i.e., more likely to lead to epistemically reliable beliefs). But the consequence of legitimizing such intolerance over time was that forms of reasonable inquiry, outside the orthodox measure of such inquiry, were repressed. In

effect, the orthodox conception of truth was no longer defended on the basis of reason but was increasingly hostile to reasonable assessment in terms of impartial standards not hostage to the orthodox conception. Indeed, orthodoxy was defended as an end in itself, increasingly by nonrational and even irrational means of appeal to community identity and the like. The paradox appears in the subversion of the original epistemic motivations of the Augustinian argument. Rather than securing reasonable inquiry, the argument now has cut off the tradition from such inquiry. Indeed, the legitimacy of the tradition feeds on irrationalism precisely when it is most vulnerable to reasonable criticism, contradicting and frustrating its original epistemic ambitions.

The history of religious persecution amply illustrates these truths and, as the abolitionists clearly saw, no aspect of that history more clearly so than Christian anti-Semitism. The relationship of Christianity to its Jewish origins has always been a tense and ambivalent one.[21] The fact that many Jews did not accept Christianity was a kind of standing challenge to the reasonableness of Christianity, especially in its early period (prior to its establishment as the church of the late Roman Empire) when Christianity was a proselytizing religion that competed for believers with the wide range of religious and philosophical alternative belief systems available in the late pagan world.

In his recent important studies of anti-Semitism,[22] the medievalist Gavin Langmuir characterizes as anti-Judaism Christianity's long-standing worries about the Jews because of the way the Jewish rejection of Christianity discredited the reasonableness of the Christian belief system in the pagan world. Langmuir argues that the Christian conception of the obduracy of the Jews and the divine punishment of them for such obduracy were natural forms of anti-Judaic self-defense, resulting in the forms of expulsion and segregation from Christian society that naturally expressed and legitimated such judgments on the Jews.[23] In contrast, Langmuir calls anti-Semitism proper the totally baseless and irrational beliefs about ritual crucifixions and cannibalism of Christians by Jews that were "widespread in northern Europe by 1350";[24] such beliefs led to populist murders of Jews usually (though not always) condemned by both church and secular authorities.

Langmuir suggests, as does R. I. Moore,[25] that the development of anti-Semitism proper was associated with growing internal doubts posed by dissenters in the period 950–1250 about the reasonableness of certain Catholic religious beliefs and practices (for example, transubstantiation) and the resolution of such doubts by the forms of irrationalist politics associated with anti-Semitism proper (often centering on fantasies of ritual eating of human flesh that expressed the underlying worries about transubstantiation). The worst ravages of anti-Semitism illustrate the paradox

of intolerance, which explains the force of the example for abolitionists. Precisely when the dominant religious tradition gave rise to the most reasonable internal doubts, these doubts were displaced from reasonable discussion and debate into blatant political irrationalism against one of the more conspicuous, vulnerable, and innocent groups of dissenters.

Langmuir's distinction between anti-Judaism and anti-Semitism proper is an unstable one. Both attitudes rest on conceptions of religious truth that are unreasonably enforced in the community at large; certainly, both the alleged obduracy of the Jews and their just punishment for such obduracy were sectarian interpretations of the facts and not reasonably enforced at large. Beliefs in obduracy are certainly not as unreasonable as beliefs in cannibalism, and segregation is not as evil as populist murder or genocide. But both forms of politics are, on grounds of the argument for toleration, unreasonable in principle. More fundamentally, anti-Judaism laid the corrupt political foundation for anti-Semitism. Once it became politically legitimate to enforce at large a sectarian conception of religious truth, reasonable doubts about such truth were displaced from the reasonable discussion and debate they deserved to the irrationalist politics of religious persecution. In the Christian West, the Jews have been the most continuously blatant victims of that politics, making anti-Semitism "the oldest prejudice in Western civilization."[26]

The radical criticism of political irrationalism implicit in the argument for toleration, once unleashed, could not be limited to religion proper but was naturally extended by John Locke to embrace politics as such.[27] Reflection on the injustice of religious persecution by established churches was generalized into a larger reflection on how political orthodoxies of hierarchical orders of authority and submission (for example, patriarchal political theories of absolute monarchy like Filmer's[28]) had been unreasonably enforced at large. The generalization of the argument for toleration naturally suggested the political legitimacy of some form of constitutional democracy (in which the principle of toleration would play a foundationally central role) as a political decision procedure more likely to secure a reasonable politics that respected human rights and pursued the common interests of all persons alike.[29]

The argument for toleration was motivated by a general political skepticism about enforceable political epistemologies. Such politics enforced at large sectarian conceptions of religious, moral, and political truth at the expense of denying the moral powers of persons to assess these matters in light of reasonable standards and as reasonable persons.

The leading philosophers of toleration thus tried to articulate some criteria or thought experiment in terms of which such sectarian views might be assessed and debunked from a more impartial perspective. Bayle thus put the criterion in terms of a contractualist question: "Is such a

practice just in itself? If it were a question of introducing it in a country where it would not be in use and where he would be free to take it up or not, would one see, upon examining it impartially that it is reasonable enough to merit being adopted?"[30]

Bayle's use of a contractualist test was generalized by Locke into a comprehensive contractualist political theory.[31] Though Locke is not clear on the point, contractualism has nothing to do with history; nothing in the argument turns on the actual existence of a state of nature. Rather, as Jeffrey Reiman has strikingly put it, in contractualism "[t]he state of nature is the moral equivalent of the Cartesian doubt."[32] Descartes was not, of course, an ultimate epistemological skeptic but rather a philosopher of knowledge worried by the unreliable ways in which beliefs were conventionally formed; he was, for this reason, concerned heuristically to discover what could count as a reasonable basis on which reliable beliefs could be formed, and the Cartesian doubt was a way of articulating what he took that basis to be.

In the same way, neither Bayle nor Locke were moral, political, or religious skeptics; they were concerned, rather, by the unreliable appeals to politically enforceable conceptions of sectarian truths (i.e., politically enforceable epistemologies) and articulated a thought experiment of abstract contractualist reasonableness to assess what might legitimately be enforced through law. Bayle's use of a contractualist test made this point exactly: abstracting from your own aims and the particular customs of your society, what principles of legitimate politics would all persons reasonably accept? The test is, of course, very like Rawls's abstract contractualist test in the absence of knowledge of specific identity, and serves exactly the same political function.[33]

Such a contractualist test assumes that persons have the twin moral powers of rationality and reasonableness in light of which they can assess human ends, their own and others'.[34] The principles of prudence enable us to reflect on the coherence and complementarity among our ends and the more effective ways to pursue them subject to principles of epistemic rationality; the principles of moral reasonableness enable us to regulate the pursuit of our ends in light of the common claims of all persons to the forms of action and forebearance consistent with equal respect for our status in the moral community. These self-originating powers of reason enable us to think for ourselves not only from our own viewpoint but also from the moral point of view that gives weight, or should give weight, to the viewpoints of everyone else.

Reason—epistemic and practical—can have the power that it does in our lives because it enables us to stand back from our ends, to assess critically how they cohere with one another and with the ends of others,

and to reexamine and sometimes revise such judgments in light of new insights and experience and to act accordingly. Reason can reliably perform this role only when it is itself subject to revision and correction in light of public standards that are open, accessible, and available to all. Public reason—a resource that enables all persons better to cultivate their moral powers—requires a public culture that sustains high standards of independent, critically tested and testable, revisable argument accessible to all. In order to perform the role that it should play in the exercise of our internal moral powers, public reason cannot be merely or even mainly polemical. It must afford sufficient public space within which we can comfortably express what doubts we might have or should have about our ends, lives, and communities, and deliberatively discuss and resolve such doubts.[35]

Respect for our capacity for reason, thus understood, requires a politics that respects the principle of toleration. Forms of traditional wisdom that have a basis in public reason will not be subject to the principle. But the principle does deny that convictions of sectarian truth *can be enforced through law solely on that basis* (the role of such convictions in private life is, of course, another matter). The principle thus limits the force in *political* life of convictions that draw their strength solely from the certainties of group loyalty and identification that tend, consistent with the paradox of intolerance, most to insulate themselves from reason when they are most reasonably subject to internal doubts.

3. Slavery as a Political Evil

It was no accident, but fundamental to their vindication of the right to conscience against majoritarian American complacency, that the abolitionists—the most principled nineteenth-century advocates of the argument for toleration in the United States—should have come to see the abolition of slavery as the central critical test for American contractualism.

The theory of toleration not only supplied the internal ideals of the supremacy of critical conscience that motored the abolitionist project, but supplied a diagnosis of the underlying political and constitutional problem. American constitutionalism, ostensibly based on the argument for toleration, had betrayed its own central ideals by allowing a politically entrenched sectarian conception of the religious and political legitimacy of slavery to be the measure of legitimate political debate about this issue. The consequence was what the argument for toleration would lead one to expect: the debasement of public reason about the political morality of

slavery and about issues of constitutional interpretation relating to slavery. In the South, the paradox of intolerance ran amok; reasonable doubts about slavery were brutally suppressed, and the politics of group loyalty displaced these doubts into increasingly irrationalist pride and violence that culminated in an unjust and illegitimate civil war.[36]

Political abolitionists, like Theodore Parker and the founders of the Republican Party, developed a unified theory to explain the force of this debasement, namely, a slave power conspiracy that permeated the fabric of American political life.[37] Abolitionists brilliantly analyzed the political pathology of southern pride and violence and northern indifference and cowardice, because they saw so clearly their common roots in an irrationalist intolerance that American constitutional institutions and traditions had proven unable to contain. In so doing, they articulated an argument of principle that rendered their defense of human rights not hostage to the abolition issue alone.

4. The Political Evil of Racism

In addition to the criticism of slavery, one group of abolitionist Americans had also long urged the full inclusion of Blacks into the political community on terms of equal citizenship with white Americans. Their thought was understandably to be pivotally important once the nation embraced such inclusion. The argument for toleration was central to this claim and to its underlying political analysis of the evil of racism.[38]

The abolitionist theory of racism offered a cultural analysis of both the construction of irrationalist prejudice and how it was sustained. American racism arose reactively as a way of justifying cultural boundaries of moral and political community—ostensibly universalistic in their terms—that had already excluded a class of persons from the community. Slavery was such an excluding institution, and it was historically based on a folk bias against Africans that centered on their unfamiliar culture and for which color became a kind of proxy. A public culture, based on the principle of toleration, is and should be open to all persons on fair terms of freedom of conscience and moral and cultural pluralism. American slavery violently disrupted and intolerantly degraded the culture of African slaves. The peculiarly onerous conditions of American slavery (prohibitions on reading and writing, on religious self-organization, and on marriage, and limitations and eventual prohibitions on manumission)[39] deprived Black slaves of any of the rights and opportunities that the public culture made available to others; in particular, Black Americans were deprived of the respect for their creative moral powers of rational and reasonable freedom in public and private life. The nature of American slav-

ery and the associated forms of racial discrimination against free Blacks both in the South and in the North had socially produced the image of Black incapacity that ostensibly justified their permanent heathen status (outside the community capable of Christian moral freedom).

For these abolitionists, consistent with the argument for toleration, slavery and discrimination were forms of religious, social, economic, and political persecution motivated by a politically entrenched conception of Black incapacity. That conception enforced its own vision of truth against both the standards of reasonable inquiry and the reasonable capacities of both Blacks and whites that might challenge the conception. A conception of political unity, subject to reasonable doubt as to its basis and merits, had unreasonably resolved its doubts, consistent with the paradox of intolerance, in the irrationalist, racist certitudes of group solidarity on the basis of unjust group subjugation.

Black Americans were the scapegoats of southern self-doubt in the same way European Jews had been the victims of Christian doubt. Frederick Douglass, the leading Black abolitionist, stated the abolitionist analysis with a classical clarity:

> Ignorance and depravity, and the inability to rise from degradation to civilization and respectability, are the most usual allegations against the oppressed. The evils most fostered by slavery and oppression are precisely those which slaveholders and oppressors would transfer from their system to the inherent character of their victims. Thus the very crimes of slavery become slavery's best defence. By making the enslaved a character fit only for slavery, they excuse themselves for refusing to make the slave a freeman.[40]

Abolitionist analysis of the evil of racism focused on the corruption of public reason that its defense required. Its defense had, by the nature of the evil to be defended, required depriving the basic rights of whites as well as Blacks, for example, to free debate about the evils of slavery and racism. The abolitionists—the only consistent advocates of the argument for toleration in antebellum America—were for this reason pathbreaking moral and constitutional dissenters of conscience from, and critics of, the stifling tyranny of the majority of Jacksonian America. The ethical impulse that motivated abolitionists was the corruption of conscience that slavery and racism, like religious persecution, had worked on the spiritual lives of Americans. To sustain these practices and institutions, pro-slavery theorists had, consistent with the paradox of intolerance, repressed criticism precisely when it was most needed. Instead, they fostered decadent standards of argument in the use of history, constitutional analysis, Bible interpretation, and even in science, whose effect had been to corrupt the public sense of what ethics was. From the abolitionist perspective, such attitudes could, consistent with respect for human rights,

no more legitimately be allowed political expression than could religious intolerance with its analogous corruption of public reason. Religion, the first suspect classification under American constitutional law, should, as a matter of principle, be generalized to include cognate forms of classification highly likely to be actuated by comparable forms of irrationalist prejudice that are inconsistent with respect for human rights.

As we have seen, abolitionists often made their point by analogy to anti-Semitism. It confirms the power of their analysis to show how it clarifies the related development of European anti-Semitism into racism.

5. Anti-Semitism as Racism

If American politics in the nineteenth century was preoccupied by the issue of the terms and scope of political community (including the status of Blacks), the comparable political issue in Europe was posed by the emancipation of the Jews against the background of the principles of Enlightenment thought embodied in the French Revolution[41] and the ancient anti-Judaism and anti-Semitism we earlier discussed. In the medieval period, both the expulsions of the Jews and their segregation were justified on the ground that they were legitimately the serfs or slaves of Christian princes, because of their culpable failure to adopt Christian belief.[42] Segregating Jewish communities from the life, occupations, and responsibilities of Christian communities—intended, as it was, to stigmatize their culpability—created a Christian image of Jewish culture as inferior, the kind of cultural degradation that was, as we have seen in the case of American Blacks, the context of American racism. It was, as we shall now see, also part of the historical background of the modern European form of racism we call anti-Semitism.

Modern European anti-Semitism, sometimes marked by its students as anti-Christian anti-Semitism,[43] arose in the context of the tense relationship between emerging European principles of universal human rights, sponsored by the French Revolution, and nineteenth-century struggles for a sense of national identity and self-determination. When the French Revolution took the form of Napoleonic world revolution, these forces became fatally contradictory. The emancipation of the Jews fatally occurred in this tense environment and became over time its most terrible victim. The Jews, whose emancipation was sponsored by the appeal to universal human rights, were identified with a culture hostile to the emergence of national self-determination. Their very attempts at assimilation into that culture were, on this view, marks of their degraded inability for true national culture.

The struggles for national identity in nineteenth-century Europe—against the background of balkanized German principalities, Italian kingdoms, and imperialistic domination by non-Germans and non-Italians—were not obviously religious struggles.[44] Indeed, many of them were self-consciously secular and some of them deeply antireligious (thus, German anti-Christian anti-Semitism). Religion was not usually the rallying call of national identity, but culture was—culture often understood in terms of linguistic unity as the basis of a larger cultural and ultimate national unity (thus, Pan-Germanism). National unity, particularly in Germany, was increasingly identified with forging a cultural orthodoxy centering on the purity of the German language, its ancient "Aryan" myths,[45] its high culture. This search for cultural unity arose in part in reaction to the French imperialistic and assimilationist interpretation of universal human rights. That history invited the search for an alternative, linguistically and culturally centered concept of national unity.

But cultural unity—when hostile to universal human rights—is, as under southern slavery, an unstable, highly unprincipled, and sometimes ethically regressive basis for national unity. It can unreasonably enforce at large highly sectarian values by deadly polemical reaction to its imagined spiritual enemies; and it is all too historically comfortable to identify those enemies with a group already historically degraded as culturally inferior. Blacks were this group in America; in Europe, Jews performed this role, a highly vulnerable, historically stigmatized cultural minority—the paradigm case of cultural heresy, as it were. In the German case, where there was little solid humane historical background of moral pluralism on which to build, romantic aesthetic values increasingly dominated over ethical ones; Italy's Mussolini, in contrast, had the history of Roman pluralistic toleration of Jews to appeal to in rebuking Hitler's very German anti-Semitism.[46] Richard Wagner, a major influence on the development of German anti-Semitism, thus preposterously regarded his artistic genius as sufficient to entitle him to articulate, as a prophetic moral leader like Lincoln, an ethical vision for the German people in the Aryan myth embodied in his opera Parsifal. Such a confusion of the categories of aesthetic and ethical leadership reflects the underlying crisis in ethical and political culture.[47]

These deadly confusions are brilliantly displayed in Houston Chamberlain's immensely influential book *The Foundations of the Nineteenth Century*,[48] a work much admired and indeed used by Hitler.[49] Chamberlain, Wagner's son-in-law, offered a cultural history of the world in which Aryan culture was the repository and vehicle of all value and Jews, as rationalists lacking creative imagination, the embodiment of negative value. In effect, Chamberlain called for a politically enforceable cultural

orthodoxy centering on Aryan culture against corrupting non-Aryan (Jewish) culture.

Chamberlain's argument clearly exemplified the paradox of intolerance; he admitted that there were reasonable scientific doubts about the equation of language and race (which underlay his thesis), but he resolved these doubts by appeal to a certitude expressive of the political irrationalism of the will: "Though it were proved that there never was an Aryan race in the past, yet we desire that in the future there may be one. That is the decisive standpoint for men for action."[50] Jesus of Nazareth, whom Chamberlain claimed to much admire, must, of course, be a non-Jew, an Aryan in fact. We are in the never-never land where wishes become, magically, facts.

As in the evolution of American racism, religious intolerance became racist subjugation under the impact of decadent standards of public reason. Chamberlain thus gave an essentially cultural argument a racial interpretation (transmogrifying religious or cultural intolerance into racism) at a time precisely when such scientific racism, as he (like Hitler[51]) clearly recognized, was under examination and attack among students of language and of culture more generally.

Franz Boas, a German Jew and anthropologist who emigrated to the United States and became a central architect of the modern human sciences of culture, had begun seriously to debunk the racial assumptions of European and American anthropology as early as the 1890s.[52] In a way that had not been the case earlier, racial theory was now under sharp attack as scientifically unsound. Yet it was in this context that the increasingly well understood irrationalism of racial thinking was accorded its fullest and most dangerous political expression in the legitimation of a new conception of the basis of political unity and identity.

The malignant consequences of the dynamic of such irrationalism, when it is actually seriously harnessed to political power that is aggressively hostile to human rights, was played out in the history of modern political anti-Semitism and the racial genocide of some six million European Jews to which it ruthlessly led.[53] Political leaders obtained or retained populist political support for governments that violated human rights (and whose legitimacy was therefore in doubt) by appealing to racist fears as the basis of national unity. This strategy included the blatant falsification and distortion of facts that, self-consciously consistent with the aims of Chamberlain and Hitler, inspirited the national will with an unreasonable certitude (for example, the Dreyfus affair in France and the Protocols of the Elders of Zion in imperial Russia).[54]

In the German world, political anti-Semitism became, under Hitler's leadership, the very core of the success of Nazi politics in a nation humiliated by the triumphant democracies in World War I.[55] Reasonable stan-

dards of discussion and debate on issues of race and human rights were brutally suppressed by a government-sponsored pseudoscience of race enforced by totalitarian terror.[56] Nazism was self-consciously at war with the idea and practice of human rights, including the institutions of constitutional government motivated by the construction of a politics of public reason that respects human rights.[57] Its politics of an artificially constructed group solidarity of myth, ritual, and pseudoscience, having no basis whatsoever in public reason, was motivated by the internal dynamic of the paradox of intolerance to manufacture a basis of unity in an irrationalist will to believe in the fantasized, degraded evils of the Jews. The social construction of racism was carried in Nazi politics to its most irrationalist and immoral extremes because the basis of unity of Nazi politics was essentially a social solidarity of political unreason.

6. Concluding Comparisons

Events in America after the Civil War reveal a not dissimilar dynamic of increasingly powerful political racism; a comparison of these developments to those in Europe would clarify one of the most important interpretive developments in our time, the constitutional acceptance and later repudiation of state-sponsored racial segregation in the United States. As I argue at length elsewhere,[58] American critical understanding and repudiation of its racism was crucially advanced by its confrontation with, and victory over, a racist state (Nazi Germany) genocidally at war with the theory and practice of universal human rights.

On my analysis, identifying and criticizing both slavery and racism as evils (and properly interpreting constitutional principles and doctrines that reflect this mode of criticism) arise within the context of a rights-based contractualist interpretation of political legitimacy as such. In this paper, I have tried to show how and why this is so. The argument for toleration plays the central role that it does in this enterprise because it condemns not only the unreasonable abridgment of the human rights of one person, but, a fortiori, the unreasonable abridgment of the human rights of whole classes of persons. It is for this reason that constitutional democracies, concerned as they are to protect basic equal liberties of religion, speech, and privacy, are increasingly concerned as well to protect persons against the unjust subjugation from their status as bearers of human rights expressed in the irrationalist populist politics of race and gender and sexual preference.[59]

My argument tries to show not only the important role the argument for toleration plays in properly understanding and justifying these developments, but how easily the force of the argument can be abusively cir-

cumscribed by forms of putative emancipation that darkly betray the promise of universal toleration. I have, of course, largely focused on American experience as a kind of important constitutional experiment of the uses and abuses of the argument for toleration from which all peoples can learn. But even that focus has necessarily had to be enlarged to include the larger human experience that American culture often importantly reflects. The moral tragedy of American racism is one with the tragedy of European anti-Semitism. I hope to have shown how both the promises and the betrayals of universal toleration are universal to all peoples. The struggle for universal human rights, in which the argument for toleration has played a pivotal role, is the struggle of all people and peoples against their myopia and insularity. Constitutional government, if I am right, must play a central role in that battle by constructing forms of governance that adequately express a principled articulation of the reasonable demands of the argument for toleration. A constitutional culture, actuated by the demand to justify political power in terms of respect for universal human rights, must, as a matter of principle, condemn equally the populist politics of both religious persecution and its ugly modernist expressions in the group solidarity of irrationalist prejudice.

Notes

1. I develop and explore this theme in David A. J. Richards, *Toleration and the Constitution* (New York: Oxford University Press, 1986); for an elaboration of the argument exploring the foundations of the American idea of an enduring written constitution, see David A. J. Richards, *Foundations of American Constitutionalism* (New York: Oxford University Press, 1989).

2. For a much fuller expression of this argument, on which I draw here, see David A. J. Richards, *Conscience and the Constitution: History, Theory, and Law of the Reconstruction Amendments* (Princeton, N.J.: Princeton University Press, 1993).

3. See Theodore Dwight Weld, *American Slavery as It Is* (New York: Arno Press and The New York Times, 1968) (originally published 1839), p. 123; see also pp. 7–8, 143–44, 151.

4. Ibid., 7–8.

5. See ibid., pp. 112–13.

6. See ibid., pp. 118–20.

7. See ibid., pp. 113–17, 120–21, 123–25, 146, 184–86.

8. See *Slavery*, pp. 688–743; *Remarks on the Slavery Question*, pp. 782–820; and *Emancipation*, pp. 820–53, in William E. Channing, *The Works of William E. Channing* (New York: Burt Franklin, 1970). For commentary on Channing and his background, see Andrew Delbanco, *William Ellery Channing: An Essay on the Liberal Spirit in America* (Cambridge, Mass.: Harvard University Press, 1981); Daniel Walker Howe, *The Unitarian Conscience: Harvard Moral Philoso-*

phy, 1805–1861 (Middletown, Conn.: Wesleyan University Press, 1988). See also D. H. Meyer, *The Instructed Conscience: The Shaping of the American National Ethic* (Philadelphia: University of Pennsylvania Press, 1972).

9. See Channing, *Slavery*, pp. 704–5, 714, 715, 722; Channing, *Emancipation*, pp. 839–43.

10. See Channing, *Emancipation*, p. 840.

11. For fuller examination of the argument in Locke and Bayle and its American elaboration notably by Jefferson and Madison, see Richards, *Toleration*, pp. 89–128.

12. See, in general, Arthur O. Lovejoy, *The Great Chain of Being* (Cambridge, Mass.: Harvard University Press, 1964).

13. See Richards, *Toleration*, pp. 86–87.

14. See ibid., pp. 85–88.

15. See ibid., pp. 89–95.

16. See ibid., pp. 25–27, 84–98, 105, 125. For an important recent study of the use and abuse of the interpretation of Judaism in this general context, see Frank E. Manuel, *The Broken Staff: Judaism through Christian Eyes* (Cambridge, Mass.: Harvard University Press, 1992).

17. See Richards, *Toleration*, pp. 125–126.

18. For a recent review of the question, see I. Bernard Cohen, ed., *Puritanism and the Rise of Modern Science: The Merton Thesis* (New Brunswick, N.J.: Rutgers University Press, 1990).

19. See Richards, *Toleration*, pp. 119–20.

20. See, in general, John Hope Franklin, *The Militant South 1800–1861* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1956); cf. W. J. Cash, *The Mind of the South* (New York: Vintage Books, 1941).

21. For a useful study of the early Christian period, see John A. Gager, *The Origins of Anti-Semitism: Attitudes toward Judaism in Pagan and Christian Antiquity* (New York: Oxford University Press, 1983). The classic general study is Leon Poliakov, *The History of Anti-Semitism*, vol. 1, trans. Richard Howard (New York: Vanguard Press, 1965); vol. 2, trans. Natalie Gerardi (New York: Vanguard Press, 1973); vol. 3, trans. Miriam Kochan (New York: Vanguard Press, 1975); vol. 4, trans. George Klin (Oxford: Oxford University Press, 1985).

22. See Gavin I. Langmuir, *Toward a Definition of Antisemitism* (Berkeley: University of California Press, 1990); Langmuir, *History, Religion, and Antisemitism* (Berkeley: University of California Press, 1990).

23. See Langmuir, *Toward a Definition of Antisemitism*, pp. 57–62.

24. Ibid., p. 302.

25. See R. I. Moore, *The Formation of a Persecuting Society: Power and Deviance in Western Europe, 950–1250* (Oxford: Basil Blackwell, 1987).

26. Langmuir, *Toward a Definition of Antisemitism*, p. 45.

27. See Richards, *Toleration*, pp. 98–102; Richards, *Foundations*, pp. 82–90.

28. See Robert Filmer, *Patriarcha* (originally published, 1680), reprinted in Johann P. Sommerville, ed., *Patriarcha and Other Writings* (Cambridge: Cambridge University Press, 1991), pp. 1–68.

29. See Richards, *Foundations*, pp. 78–97.

30. Pierre Bayle, *Philosophical Commentary*, trans. Amie Godman Tannenbaum (New York: Peter Lang, 1987), p. 30.

31. See Richards, *Foundations*, pp. 82–90; Richards, *Toleration*, pp. 98–102.

32. Jeffrey Reiman, *Justice and Modern Moral Philosophy* (New Haven: Yale University Press, 1990), p. 69.

33. See John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971).

34. For a fuller account of these powers, see David A. J. Richards, *A Theory of Reasons for Action* (Oxford: Clarendon Press, 1971).

35. For a useful discussion of all these points, see Onora O'Neill, *Constructions of Reason* (Cambridge: Cambridge University Press, 1989). For Kant on public reason, see "An Answer to the Question: 'What Is Enlightenment?'", in Hans Reiss, ed., *Kant's Political Writings* (Cambridge: Cambridge University Press, 1970), p. 55: "The *public* use of man's reason must always be free."

36. For fuller discussion, see Richards, *Conscience and the Constitution*, pp. 73–80.

37. See, in general, Theodore Parker, *The Slave Power*, ed. James K. Hosmer (Boston: American Unitarian Association, n.d.); David Brion Davis, *The Slave Power Conspiracy and the Paranoid Style* (Baton Rouge: Louisiana State University Press, 1969); William E. Geinapp, *The Origins of the Republican Party 1852–1956* (New York: Oxford University Press, 1987), pp. 353–65.

38. For fuller discussion, see Richards, *Conscience and the Constitution*, pp. 80–89.

39. On the special features of American slavery, in contrast to slavery elsewhere, see Stanley M. Elkins, *Slavery*, 3d ed., revised (Chicago: University of Chicago Press, 1976); Kenneth M. Stampp, *The Peculiar Institution* (New York: Vintage, 1956); Eugene D. Genovese, *The World the Slaveholders Made* (Middletown, Conn.: Wesleyan University Press, 1988); John W. Blassingame, *The Slave Community*, 2d ed. (New York: Oxford University Press, 1979); Carl N. Degler, *Neither Black Nor White* (Madison: University of Wisconsin Press, 1986); Peter Kolchin, *Unfree Labor: American Slavery and Russian Serfdom* (Cambridge, Mass.: Harvard University Press, 1987).

40. Frederick Douglass, "The Claims of the Negro Ethnologically Considered," in Philip S. Foner, ed., *The Life and Writings of Frederick Douglass*, vol. 2 (New York: International Publishers, 1975), p. 295.

41. See Arthur Hertzberg, *The French Enlightenment and the Jews* (New York: Columbia University Press, 1990).

42. See Langmuir, *Toward a Definition of Antisemitism*, pp. 156–7.

43. See, in general, Uriel Tal, *Christians and Jews in Germany*, trans. Noah Jonathan Jacobs (Ithaca, N.Y.: Cornell University Press, 1975).

44. See, in general, E. J. Hobsbawm, *Nations and Nationalism since 1780: Programme, Myth, Reality* (Cambridge: Cambridge University Press, 1990); Ernest Gellner, *Nations and Nationalism* (Ithaca, N.Y.: Cornell University Press, 1983). Such struggles, of course, strikingly continue today in not dissimilar forms. For an important recent study of Pan-Africanism along these lines as a kind of reaction to Western racism, see Kwame Anthony Appiah, *In My Father's House:*

Africa in the Philosophy of Culture (New York: Oxford University Press, 1992). For an important general study of the construction of national identity in a post-colonial world, see also Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1983).

45. For a superb treatment, see Leon Poliakov, *The Aryan Myth: A History of Racist and Nationalist Ideas in Europe*, trans. Edmund Howard (London: Sussex University Press, 1971). For an important recent treatment of longstanding anti-Semitic features of German culture as such, see Paul Lawrence Rose, *Revolutionary Antisemitism in Germany: From Kant to Wagner* (Princeton, N.J.: Princeton University Press, 1990).

46. See Poliakov, *The Aryan Myth*, p. 70.

47. See Poliakov, *The Aryan Myth*; Poliakov, *The History of Anti-Semitism*, vol. 3, chap. 11. On Wagner's actual confused state of belief, see Jacob Katz, *The Darker Side of Genius* (Hanover, N.H.: University Press of New England, 1986). For good general studies of Wagner and Wagnerism (including their political uses by Hitler), see L. J. Rather, *Reading Wagner: A Study in the History of Ideas* (Baton Rouge: Louisiana State University Press, 1990); David C. Large and William Weber, eds., *Wagnerism in European Culture and Politics* (Ithaca, N.Y.: Cornell University Press, 1984).

48. Houston Stewart Chamberlain, *The Foundations of the Nineteenth Century*, trans. John Lees (London: John Lane, 1911), 2 vols.

49. See Adolf Hitler, *Mein Kampf* (New York: Reynal and Hitchcock, 1940), pp. 116, 307, 325, 359, 369, 395, 413, 605. On Chamberlain's admiration and support for Hitler, see David C. Large and William Weber, eds., *Wagnerism in European Culture and Politics*, pp. 124–25.

50. Chamberlain, *The Foundations of the Nineteenth Century*, vol. 1, p. 266n.

51. For Hitler's clear recognition "that in the scientific sense there is no such thing as race," see Rather, *Reading Wagner*, p. 286 (quoting conversation with Hitler reported by Rauschning).

52. See Franz Boas, "Human Faculty as Determined by Race," in George W. Stocking, Jr., ed., *A Franz Boas Reader* (Chicago: University of Chicago Press, 1974) pp. 221–42, originally published in American Association for the Advancement of Science *Proceedings* 43 (1894): 301–27. For Boas's fullest statement of his views, see Franz Boas, *The Mind of Primitive Man* (Westport, Conn.: Greenwood Press, 1963) (first edition published, 1911). On Boas's critical influence on modern social theory, see George W. Stocking, *Race, Culture, and Evolution* (New York: Free Press, 1968); Carl J. Degler, *In Search of Human Nature* (New York: Oxford University Press, 1991). For a useful comparison of American and British antiracist thought and argument, see Elazar Barkan, *The Retreat of Scientific Racism: Changing Concepts of Race in Britain and the United States between the World Wars* (Cambridge: Cambridge University Press, 1992).

53. See Raul Hilberg, *The Destruction of the European Jews*, vol. 3 (New York: Holmes and Meier, 1985), pp. 1201–20. On anti-Semitism, see, in general, Poliakov's magisterial *The History of Anti-Semitism*, 4 vols.

54. See Poliakov, *The History of Anti-Semitism*, vol. 4.

55. See Peter Pulzer, *The Rise of Political Anti-Semitism in Germany and Austria*,

rev. ed. (Cambridge, Mass.: Harvard University Press, 1988); Jacob Katz, *From Prejudice to Destruction* (Cambridge, Mass.: Harvard University Press, 1980).

56. See, in general, Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt Brace Jovanovich, 1973).

57. See ibid.

58. See Richards, *Conscience and the Constitution*, pp. 160–70.

59. I explore this argument further in Richards, *Conscience and the Constitution*, chap. 5, and, with respect to sexual preference in particular, in Richards, "Sexual Preference as a Suspect (Religious) Classification: An Alternative Perspective on the Unconstitutionality of Anti-Lesbian/Gay Initiatives," *Ohio State Law Journal*, 55 (1994): 491.

9

The Ring: On Religious Pluralism

AVISHAI MARGALIT

Can Judaism, Christianity, and Islam be pluralistic? The question is not whether they can tolerate one another, but whether they can accept the idea that the other religions have intrinsic religious value. Christians, said Goethe, want to be accepted, not tolerated. This is presumably true of Jews and Muslims as well. The question is whether each of these groups is willing to accept the others, that is, to ascribe value to the others' lifestyle, so that, if they have the power, they will not only refrain from persecuting the others but will also encourage the flourishing of their way of life.

Put differently, do the three religions allow their adherents to ascribe intrinsic value to competing religious ways of life? In competing ways of life, beliefs and values essential to one of them contradict beliefs and values essential to the other. The life of a nun and that of a prostitute are an extreme example of a contradiction that is more than mere incompatibility. To contradict, however, is not necessarily to reject. The tension of attraction and rejection between the prostitute and the saint, between Salome and John, is a familiar theme.

My question is about the possibility of interreligious rather than intrareligious pluralism, where the latter includes the acceptance of Protestants by Catholics, of Sunnis by Shiites, and of Reform Judaism by the Orthodox. If a religion can adopt a pluralistic stance with respect to other religions, this does not necessarily imply that it can also adopt such a stance toward heterodox streams within itself. Religious expectations from people perceived as belonging to one's own religion are liable to be much more demanding than those relating to people on the outside.

The Parable of the Rings

The lore of discussions about religious pluralism is accompanied by the folklore of the parable of the three rings, a story made famous by Lessing in his play *Nathan the Wise*. This story has many different medieval ancestors, but I will jump through the rings regardless of historical precedence.

A king leaves a legacy of three rings to his three sons. Only one of the rings is real, and its owner is the king's legitimate heir. But the father has mercy on his other children and gives them imitation rings that look like the real one. The analogy is clear. The king is the Heavenly Father, who is the king of the universe, and the three sons are Moses, Jesus, and Muhammad. The real ring is the true revelation.

The story of the one real ring is an antipluralist story. There is one true religion, and the others are false. An imitation ring—for example, one with glass instead of a diamond—not only is valueless but can even have negative value if it pretends to be a real ring.

In the above version, the father did indeed leave two imitation rings and one real one, but no one else knows for certain which ring is the real one. This doubt should lead to an attitude of "respect and suspect," because it is possible that the truth is in another religion.

Another, more radical reading of the parable claims that none of the rings is real. The genuine ring is actually somewhere else. The three rings are only a means for discovering the genuine one. This version of the parable, in which the real ring is not one of the three, has two different interpretations. One is a mystic interpretation, which can be found, for example, in the writings of the thirteenth-century Jewish mystic Abulafia. This interpretation claims that the degree of religious perfection represented by the genuine ring cannot be attained by any of the three traditional religions. Religious perfection can be achieved only by the mystic, who is the sole possible owner of the real ring. The second interpretation of this version claims that the real ring is philosophy. Only philosophy permits the supreme religious knowledge that constitutes religious perfection. (Spinoza is probably the most radical advocate of the philosophical ring.) None of the three rings is real, but this does not mean that they are not effective, that is, able to promote the creation of a social order that enables the real ring to be found—in other words, a social and political order that permits doing philosophy.

Yet another version of the parable, that of Lessing in his play, is that none of the rings has intrinsic value in the sense that a gold ring has such a value, which is the worth of the gold it is made of. Rather, the worth of a ring is in the attitude of its owner. A religion is genuine in the sense that a wedding ring is. It is the person's belief in its significance that makes it effective, for example, by leading to love or good deeds. For someone who does not believe in it, the ring is worthless. All three rings can be valuable or valueless; their worth is in the eye of the beholder.

This last version of the parable raises the question of what it means for a ring to be genuine. Here there are three possibilities that need to be distinguished. One is that the ring is made out of the material it is supposed to be made of. A gold ring is genuine if it is made of eighteen-karat

gold. The analogy to this is that the belief is true. The second possibility is that the ring is real if it is effective, if faith in it leads to desirable actions. The analogy here is to religious practice; a religion is genuine if it leads to the proper worship of God. The third possibility is that the ring is real if it truly determines who the father's legitimate heir or representative is. Here the analogy is to the question of who truly constitutes the source of religious authority—more precisely, who the true prophet is, from among the three claimants for legislative revelation.

Of course, there is yet another important version of the parable. A ring made of impure gold, which was the best available in its time, is replaced by a ring of purer, "more real" gold. This is a possible Christian or Muslim interpretation of the story, and the analogy is clear. The ring that was once "real" represents Judaism; now its time has passed, and the father has provided a "more real" ring, in all the senses of "real" I have discussed.

My ring stories do not have Boccaccio's mocking Renaissance charm or Lessing's moral sublimity, but their dry schematism has the advantage of suggesting, if only in parable form, the approaches *to* religion and *within* religion that bear on religious pluralism.

I intend to approach the discussion of religious pluralism indirectly. I will present an antipluralist argument, the argument of the one genuine ring. Possible rebuttals of the premises of this argument, if any, would then constitute a basis for the claim that religious pluralism is possible. Thus this possibility requires the rebuttal of at least one of the premises, and the stance of religious pluralism will be only as convincing as this rebuttal.

The One-Ring Argument

Premise 1: Revelation is propositional.

Premise 2: Revealed truths are constitutive of religion and of redemption through religion.

Premise 3: Religions acquire their intrinsic value by providing a framework for redemption (that is, for achieving religious perfection).

Premise 4: There are contradictions between the constitutive revealed truths of each pair of the three traditional religions.

Premise 5: The fact that the source of religious truths is revelation implies that false religious propositions are valueless (as opposed to scientific errors, for example, which could have value).

Premise 6: Premises 1–5 fit the historical reality of the three religions.

Conclusion: A religion based on constitutive, redemptive, revealed truths cannot ascribe value to a religion that contradicts these truths. Thus each religion sees itself as the only true religion and ascribes no value to the others. In other words, there is no room for religious pluralism.

I will now examine this argument.

Propositional Revelation

Propositional revelation is the transmission of truths from the Divinity to humankind by means that transcend the ordinary course of nature. This does not necessarily imply that the revelation must actually occur in a linguistic form, but only that what is transmitted in the revelation can be formulated in language. When the revelation is transmitted in book form (the Koran, for example), the transmission itself is propositional.

A proposition is generally an indicative sentence that makes a statement that can be either true or false. However, I see the concept of propositional revelation as including commandments as well, such as "Remember the Sabbath day to keep it holy." Moses Mendelssohn thought that the Jewish concept of revelation refers to laws rather than to a creed. Thus, on Mendelssohn's account, a revelation formulated in imperative sentences should be considered propositional. The reason for not distinguishing between indicative and imperative sentences in the presentation of a revelation as propositional is that every imperative sentence can be formulated as an indicative sentence stating that the command is an expression of God's will.

Premise (1) of the one-ring argument is that revelations are propositional. This contradicts a view that has become very widespread, especially in the twentieth century and particularly in Protestant thought. This view claims that revelation is not propositional but rather has to do with the divine presence in historical events. But even if one claims that revelations have an experiential nature, as encounters of divine significance, this does not necessarily, as I see it, prevent the revelation from having propositional content. Saying that Protestants oppose the idea that revelation is propositional does not necessarily mean claiming that they play their religion on the organ. Opposing the idea of propositional revelation is a way of expressing opposition to the notion of Church dogma rather than to the linguistic nature of revelation. According to the view of revelation as "nonpropositional," it is a living dialogue rather than a list of commands and articles of faith. Revelation is meant to be an encounter with "the living God," not with an institution issuing metaphysical truths

or authoritarian commands. Revelation for the believer is a "belief in," which cannot be reduced to a "belief that." It is in this sense that it is non-propositional, not in the sense that the revelatory encounter cannot be formulated in propositional language.

Constitutive Truths

The one-ring argument rests on the premise that the truths received in revelation are those that are constitutive of the religion, whether in the form of dogmas to be held or commands to be obeyed. In either case, they are the truths that define the religion. The definition of the religion is thus essentially dependent on revelation. Revelations can come in various sizes and shapes. The "shapes" can vary from the direct presence of God to the appearance of an angel; they can occur in a vision or a dream. The various "sizes" are the number of people receiving the revelation—an individual or a group, a large group or a small one.

What is crucial for the present discussion is not the form of the revelation but its significance. I distinguish between constitutive revelations, which reveal the religious path, and secondary (instructive) revelations, which bring strayers back to the known straight path. In Judaism the constitutive revelation is to Moses, whereas in Islam it is to Muhammad. The case of Jesus in Christianity is more complicated. In one sense Jesus *is* the revelation, but in another sense the revelation is to Jesus. In either sense, however, this revelation is constitutive of Christianity. In Judaism the distinction between constitutive and secondary revelations is a sharp one. "One must not obey a divine voice, because the Torah was already given at Mount Sinai." That is, any revelation that contradicts the constitutive one at Mount Sinai must be ignored. Moreover, anyone who claims to have received such a revelation is by definition a false prophet.

Premise (2) of the one-ring argument claims that there is a constitutive element in the religion that is given through revelation. A stronger traditional claim is that every constitutive element in the religion is given through revelation. This stronger claim, however, is not necessary for the present argument. On the other hand, the weaker notion put forward by Bultmann and Tillich, which suggests that the purpose of revelation is to release religious life from the pettiness of the everyday, is not sufficient for the present argument.[1] The importance of revelation lies not in the fact that it is dramatic rather than banal, but in the fact that it is essential for the religion.

One well-known argument against giving a constitutive status to the truths of revelation is the argument from God's benevolence: it is impossible that God should give revelatory truths to one person or group and

keep these truths from other people. God's truths must be available to everyone. In a radical (deistic) formulation, this is an argument against revelation in general. In a more moderate formulation, it is an argument against truths that cannot be attained through reason and yet are constitutive of a religion. The idea is that constitutive truths should be subject to human understanding, whereas revelatory truths should serve only to delineate the conditions and the method of applying constitutive principles. Thus, for example, the necessity of giving thanks to God is a matter of reason and a basic principle. The particular way of giving thanks—that is, the method and timing of the prayers—is given by revelation.

In other words, what can be given through revelation is the religious lifestyle, not the principles. According to this view, the truths of revelation in the various religions do not stand in contradiction to one another.

Intrinsic Value

The one-ring argument demonstrates that each religion denies the others intrinsic religious value, the sort of value that is the basis of pluralism, as opposed to mere tolerance. As premise (3) says, intrinsic religious value is attributed to a system that presents a framework for attaining religious perfection, in other words, for redemption. Calling the religiously perfect state "redemption"—whether in the personal or the public realm—is not acceptable to the same extent, or in the same sense, in all three religions. This term fits the Christian sense, and to a lesser extent the Jewish formulation, but it hardly fits the Muslim use. Nevertheless, I intend my use of the term "redemption," as referring to whatever has intrinsic religious value, to be neutral between the three religions. Thus, for example, the state of religious perfection that I am calling "redemption" can include a state in which the right God is worshiped in the right way. I have deliberately left open the description of the state of redemption. My claim is merely that only this state can confer intrinsic value on a religion, as opposed to instrumental value, such as being a tool for preserving the public order.

The advantage of using the concept of redemption only for what grants religion its intrinsic value is that redemption is thereby perceived as a ticket to the world to come, a passport to the City of God. The equivalent of the presumptive Jewish promise "All Israelites have a share in the world to come" exists in the other two religions as well. One place to examine the possibility of religious pluralism is in the willingness of each religion to grant members of the other religions citizenship in the world to come. It makes no difference for the present discussion whether "the world to come" is meant literally or metaphorically. Thus the test of

whether a given religion allows for pluralism is whether that religion is willing to recognize the citizenship of members of other religions in the world to come. This test can be refined: is the ticket to the world to come offered *in spite* of, or *because* of, the candidate's being a member of another religion? This is obviously a distinction that makes a difference.

There is no salvation outside the Church, says an ancient Church doctrine. The Koran, for its part, says (sura 3, verse 18): "The only true faith in Allah is Islam." These statements seem to be judgments that other religions have no intrinsic value. But, as mentioned, the way to test the stringency of these pronouncements is to find out whether the members of other religions have a share in the world to come. Maimonides incorporated in his code the view that "the pious of the nations of the world have a share in the world-to-come" (*Mishneh Torah, Hilkhot Teshuvah* 3:5). This inclusion in the Heavenly Club is not enough to establish religious pluralism. The righteous among the gentiles can be included in spite of the fact that they belong to another religion, rather than because of it.

Contradictory Truths

Premise (4) in the one-ring argument is that there are contradictions between the revealed truths of the different religions. This premise refers not to just any revealed truth but to important truths that are constitutive of the religion, especially those vital for redemption. If the Christian outlook is defined by the belief that Jesus is the Redeemer, and redemption requires this belief as a necessary component, then it is clear that Judaism denies it. Christianity, for its part, of course claims not only that there is nothing in the Jewish revelation that contradicts the belief in Jesus' redemptive role, but that the Bible as a source of revelation for the Jewish people attests to that very belief. This example demonstrates that the issue of contradiction here is not a matter for the logician but for the believer. Jewish believers might see a contradiction just where Christian believers see evidence supporting their belief. In order to say whether there is a contradiction between religions, it is necessary to specify for whom it is supposed to be a contradiction.

Another note might be in order here. It is not difficult to recognize the possibility of religious pluralism, even with respect to the religions based on historical revelation, if one believes that these revelations are addressed to different groups of people. The Jewish Midrash (*Exodus Rabbah* 5) says that the pronouncements made on Mount Sinai were conveyed to all the nations in seventy languages. If this is taken figuratively to mean that every nation received a different revelation, then there is no contradiction between them.

At any rate, the problem of religious pluralism arises when a contradiction is found between revelations, a contradiction in matters essential to the religion and particularly to the issue of redemption. If the area in which the contradiction is found is an issue that prevents redemption, then the competing religion must be considered lacking in intrinsic value. Not every element that is constitutive of a religion is necessarily vital for redemption. One might consider such a commandment as circumcision vital to Judaism without seeing it as a necessary condition for redemption. (It is interesting to note that the question of whether circumcision is vital for redemption is actually debated in the New Testament. On the one hand, the Jewish Christian from Judea warns: "Except ye be circumcised after the manner of Moses ye cannot be saved" (Acts 15:1). On the other hand, according to Paul: "If ye be circumcised Christ shall profit you nothing" (Galatians 5:3).)

The issue of contradictions between the three revelatory religions is a complicated one. As mentioned, there is a lack of symmetry among the religions with respect to such contradictions. Christianity and Islam affirm the revelations of Judaism, but not vice versa. It sometimes seems as if the controversy between Judaism and Islam is not about the truths of revelation but about principles of the kind governing the firing of employees. Judaism holds the principle of "Last in, first out," Muhammad being the last one in this case. The Islamic principle, on the other hand, is "First in, first out," in this case, Moses. According to the latter principle, the revelation to Muhammad has priority because it came later than those to Moses and Jesus. Islam recognizes that the Torah and the New Testament were taken from the same heavenly tablets as the Koran, but because the Koran came last, it has the power to cancel what was said before.

What does it mean to abrogate what was given in previous revelations? In Islam it is common to use a path metaphor: Islam is seen as the guide to the straight path. Thus we can present our question in terms of this metaphor. There is a difference between two of its usages. One is the idea that a short, straight path leading to the City of God was revealed to Muhammad, but the old paths, even though they are winding and full of pitfalls, still lead to the same place. The other idea is that the old paths were closed off after the new, straight one was revealed, and so they can no longer bring the traveler to the City of God. In the second case, unlike the first, using the old paths contradicts the only set of directions that can lead to redemption. The one-ring argument is based on the idea that all the other paths to redemption are closed off. In this sense, one can speak of a contradiction between the religions.

A move that is familiar to us from Wittgenstein questions the whole idea that religious discourse can be presented in terms of contradictions. If I say the deposed interior minister will be put on trial during the coming

year and you say he will not, then our assertions are contradictory. In contrast, if you claim that on the Day of Judgment I will be put on trial before the heavenly throne and I, as a nonbeliever, deny this, our disagreement cannot be described in terms of contradictions. A sentence about the Day of Judgment is a framework sentence, and framework sentences cannot be contradicted, because it is only within a framework that the idea of contradiction makes any sense. A person who rejects such a proposition is living within a different framework but does not hold a contradictory proposition.

As I see it, however, it is precisely between the religions of historical revelation that there is sufficient agreement, including agreement about many framework sentences, that sentences affirmed by one religion and negated by another can be seen as disagreements rather than misunderstandings. The idea is that in general not everything that seems formally to be a contradiction (one sentence negating another) actually is one. In most cases, it is a manifestation of misunderstanding rather than disagreement. In order for the disagreement between two views to be focused enough to constitute a contradiction, there must be a broad basis of agreement in their judgments. The broader and more varied the basis of agreement between two views, the more focused are the contradictions generated by the disagreements between them. Because this is indeed the situation with the religions of historical revelation, it is appropriate to speak of contradictions between them.

Another claim is that the unit of religious communication is not the proposition but the symbol, and that the opposition between religions is an opposition of symbols. The same symbol, for instance, the cross, is seen as attractive in one religion and as loathsome in another. What is difficult in religious pluralism is overcoming the feelings of loathing aroused by the symbols of the other religion, rather than trying to reconcile propositions. There is some truth in this claim, but it is entirely parasitic on the fact that symbols gain their currency from propositions. Propositions are not everything in the psychological acceptance of others, but they are a central element to a normative acceptance of them.

Revelation and Error

Pluralism has a far-reaching requirement: ascribing value to forms of life based on error, precisely what is denied in premise (5). One way of justifying this requirement is to say that the possibility of choosing a mistaken path is necessary for the individual's autonomy and the community's self-definition. Respecting the autonomy of individuals means respecting their choices even if these are mistaken.

Must we accept this claim? It seems that the same argument about error could be raised with respect to evil in general. After all, a necessary component of free choice is the possibility of doing what is bad. Then must we respect evil just because we respect free choice? No. For one thing, what is predominantly bad about evil is that it harms others. One reason for not tolerating evil, even if it is an expression of free choice—which is a good thing in itself—is because of the harm to others.

One antipluralist stance in the religious realm is based on the idea that error and evil should not be distinguished. Religious error constitutes sin if the person committing the error ought to have known better. Toleration of error is like toleration of evil, it is a manifestation of sloth, the worst of the seven deadly sins. In Judaism, Islam, and Catholicism, there is a conception of a religious collective that does not permit them to adopt the distinction between harm to oneself and harm to others. Locke's view, which is based on the idea that religion is a voluntary organization for the purpose of attaining private redemption, is not acceptable to those religions, or at least not to important divisions of them.

The one-ring argument relies on the assumption that, because the revelatory religions claim the authority of revelation for their basic truths, this renders whatever is done on the basis of error devoid of intrinsic value, whether it is the error of people whose revelation was false to begin with (i.e., not really a revelation) or of people whose revelation has become outdated. There is a specific reason for not ascribing value to religions based on error: it is because the truths constitutive of religion—those concerning the worship of the right God in the right way—are given by revelation, not reason.

We might call the specific argument about the connection between revelation and the worthlessness of a life based on error the crystal-ball argument. Suppose we have a crystal ball that tells us medical truths and suggests treatment methods. If the goal is curing people, an error in treatment resulting from not relying on the crystal ball would be a foolish act that should not be respected from any point of view. If, on the other hand, it is scientific medicine that is in question, then errors in theory or treatment could still be considered rational. What gives the errors value is the fact that they are the result of the rational act of hypothesis testing. In other words, the possibility of error has a constitutive function in scientific activity, and a society that relies on scientific rationality must be an open society that encourages competition among hypotheses, including those that bear a high risk of being false. When truth is given by revelation, or when medicine is a crystal-ball practice, errors are not a constitutive element in attaining truth. Errors have no value, and when they occur in a way of life, or in medical treatment, they become sins.

Historical Faithfulness

Premise (6) of the one-ring argument is that the previous antipluralistic premises are faithful to the historical reality of the relations among the three religions. Although my question relates to the possibility of interreligious pluralism rather than to the reality of the relations among the religions, the claim of historical faithfulness, if correct, is relevant to the discussion. The question about the possibility of interreligious pluralism is, after all, being asked with respect to religions that are historical givens. It is not a question about every possible revelatory religion but about serious possibilities. The given state of the religions must provide us with a sense of the various possible relationships among them. The history of these religions is half as old as time. It may be presumed that in such a long history it will always be possible to find some quotation to support any position we want to ascribe to any of the three religions. It is therefore important to ascertain whether the quotation is an authentic one, and thus indicates a serious possibility, or whether it is merely an eccentric curiosity. In the realm of historical possibilities, it would seem that the modal rule, "what exists must be possible," does not always hold. If we ask, for example, whether there can be three popes at the same time, we will obviously get a negative answer. Even if there once were three popes, this is irrelevant to the present judgment. This is the sense of possibility that is not empirical but normative. A church headed by three popes is liable to be considered by believers to be so corrupt that the three popes will not be recognized as legitimate, even if there was nominally a time when three persons were called "pope." In order to ascertain what is possible in a long cultural tradition, judgment is sometimes more important than logic. For acquiring discerning judgment, the protagonist's point of view has an advantage over the spectator's.

As a spectator, I accept that there is a great deal of descriptive truth in the premises of the one-ring argument. I am therefore convinced that the burden of proof is on those who believe in the possibility of religious pluralism. Be that as it may, one thing is clear: the pagan Ovid got it right when he said, "A ring is worn thin by use."

Note

1. Rudolf Bultmann, *Kerygma and Myth I*, ed. Hans Werner Bartsch, trans. R. H. Fuller (S.P.C.K., 1953). Paul Tillich, *Systematic Theology*, vol. 1, p. 1, *Reason and Revelation* (James Nisbett, Digswell Place, n.d.).

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The Instability of Tolerance

GEORGE P. FLETCHER

Tolerance is an unstable virtue. The reason, I will argue, is that tolerance presupposes a complexity of two sentiments: the first, an impulse to intervene and regulate the lives of others, and the second, an imperative—either logical or moral—to restrain that impulse. This complexity readily gives way to a range of simple and straightforward sentiments. At the one extreme, is intolerance toward activities deemed harmful to others. Since John Stuart Mill's proposal in *On Liberty*, the conventional justification for the state's casting intolerance into coercive laws is the protection of secular interests, such as life, health, privacy, reputation, and property. Of course, there are many activities that could generate a risk of harm to these interests, and it is a matter of debate whether a slight risk can justify the state's prohibition. Tolerance can come into play in deciding when the threshold of risk is crossed. The more tolerant we are of risks, the less likely we are to intervene.

At the opposite extreme from intolerance lies a posture of indifference toward what other people do. There is no issue of tolerance, properly understood, in my contemplating my neighbor's choice of television shows or the hours she keeps or the way she spends her money. These things are none of my business. Even if I disapprove of her taste and style of life, I am not in a position to be either tolerant or intolerant of the way she lives. Calling my hands-off attitude a matter of tolerance cheapens the virtue and arrogates too much power to myself.

Tolerance comes into play, therefore, between a ceiling of harm that rules out forbearance and a threshold of concern that makes someone else's behavior my business. The classification of a matter as one for tolerance easily veers off to these extremes. If pornography is harmful to women the way assault is harmful, there is no case for tolerance. If practicing a religion is a matter of private entertainment, something like playing cards or watching television, there is no serious debate about tolerance.

On a tangential axis, we find the attitude of acceptance or respect toward my neighbor's living habits or the religion she practices. Respect differs radically from tolerance. It is a single-stage attitude. When T. S. Eliot said, "The Christian does not wish to be tolerated," presum-

ably he meant that the Christian desires acceptance and respect. I suppose we would all prefer to have our religion, our political views, or our sexual orienattion respected rather than merely tolerated. Yet, as I shall argue, there is merit in maintaining in some situations a posture of tolerance as opposed to both indifference and respect.

Indifference and respect are both simple, first-order attitudes. Tolerance suffers from the complexity of its being a virtue attitude about a first-order attitude of disapproval and rejection. At the second level, the tolerant decide—for reasons yet to be explored—not to follow their first-order instincts. In this respect, tolerance resembles mercy, a second-order virtue that does not come into play unless one has good reason to condemn and punish another.

The core of tolerance lies in the internal conflict of the tolerant. If they could, tolerant people would wish the tolerated behavior out of existence, but they nonetheless recognize that the intervention required to realize that wish is either impossible or unadvisable. They must suffer what they would rather not confront. This element of suffering in tolerance is more evident in other languages, in which there seems always to be a strong connection between "patience" and "tolerance." The connection is patent in Hebrew (*savlanut* and *sovlanut*), in German (*Geduld* and *Geduldsamkeit*), in Russian (*terpenie* and *terpimoct'*) and presumably in numerous other languages. To be tolerant, therefore, is to suffer what we cannot stand because we ought not, for a variety of reasons, intervene.

This element of suffering, I contend, generates the instability of tolerance. Those who suffer understandably prefer an easier way. Their natural inclination is to figure out an effective way of intervening to change the behavior they disapprove of, or the tolerated behavior will become a matter of indifference. As a third option, the tolerated will press and gain acceptance and even respect. The new advocates against hate speech and obscenity think they can safely intervene and excise some speech that they dislike. Following the example of T. S. Eliot, gays and lesbians now seek, in many countries, to go beyond tolerance and demand full acceptance (Eliot himself would probably not appreciate the analogy). Tolerance is unstable, because no one wishes either to tolerate when intervention is possible or to be tolerated when there is an option for something better. Let us examine how these forces play themselves out in the classic arenas of religion, speech, and sex.

1. Religion

In order to take the problem of religious tolerance seriously, we have to make several assumptions that were common when John Locke wrote in the late–seventeenth century but which can only seem peculiar to most

educated people in the industrialized world today. We have to believe first that there is something called "salvation" of individuals (Christians) or of the people (Jews); that this salvation, or eternal life with God, depends on whether one lives correctly, according to the true faith; and that this loving God requires that we bear at least some responsibility for the salvation of our neighbors. If any one of these three premises fails to obtain, the problem of tolerance disappears or at least should disappear. Let us see why.

If there is no salvation, or if salvation bears no relation to correct beliefs and practices, I do not see why I should give a hoot whether my neighbor believes in one god or ten, whether she thinks that wine is transformed in church into the blood of her savior, or accepts any of a hundred other random religious doctrines. Without salvation or some or other ultimate concern at stake, these beliefs become personal idiosyncracies, something like believing in astrology or reading coffee grounds. At this level of casualness, the religious beliefs of my neighbor are no more my business than other matters of taste and style.

But let us suppose that having the correct religious beliefs and practices bears on the human condition at least as much as we now think that health is central to the good life. Suppose my neighbor is overweight, eats red meat, and smokes two packs a day. I find this behavior horrendous, and as a friend I try to persuade her to change her ways. She refuses. Even though I am convinced that she is eating and smoking her way into her grave, it seems to me that I have no basis for interfering further in her life. My carrying on a campaign against her smoking—say, by slipping notes under her door and leaving messages on her answering machine—would be a violation of her privacy and arguably subject to legal sanctions. My abstaining from further intervention is required not only by the principle of tolerance but by the basic assumption of nonaggression in an orderly society.

If this were the way seventeenth-century Christians thought about the salvation of their neighbors, there would never have been need for a principle of tolerance. Just as we now let others smoke themselves into their graves, Christians would have allowed their neighbors to go to hell with their incorrect vision of God. It is only when saving the souls of others becomes our mission and duty that we encounter a problem of tolerance. For passionate Jews today, the problem of tolerance is particularly acute, for the religion holds that all Jews are responsible for each other and further that the Messiah will come (the Jewish version of salvation) only when all Jews observe all the mitzvoth, or commandments. When an observant Jew encounters one who refuses to perform the commandments, he or she can feel only pain and the yearning to find a way to induce a fellow Jew to comply with what he or she takes to be God's law.

The closest a modern secularist can come to Locke's context in arguing for toleration is to imagine that we are all deeply concerned about each other's physical health and that we are convinced that certain practices are harmful and others are conducive to good health. What do we do with dissenters who insist on smoking, eating red meat, and lying down whenever they get the urge to exercise? Must we tolerate their bad practices when we care so much about them? It would be painful to do so; we would feel trapped in contradiction. Yet the only way to intervene might be the extreme of imposing penalties for self-destructive behavior like smoking and eating too much fat. Admittedly, health is only one value to be balanced against others, such as privacy and pleasure. No one would want to live in a society that so devalued these competing elements of the good life that smokers had to sneak their puffs in the closet and meat eaters had to go beyond the three-mile limit to have a good steak.

Yet imagine an issue like health that takes precedence over all matters of personal pleasure and privacy. This is the only way to think about salvation in a culture that takes religion seriously. No other value comes close to eternal life with God. Now the question becomes: why not force others to save themselves by adhering to the true religion? Paradoxically, John Locke had a relatively easy time with this issue, because he devised a knockdown argument to show that intervention against those following the false religion would be counterproductive. Salvation, he reasoned, requires a personal quest, a self-actuated identification with the beliefs and practices that bring about the state of grace. State coercion, intervention "by the magistrate," as he quaintly put it, prevents this personal quest from taking place. Tolerance is required of other Protestant sects, because there is no choice.

The argument works insofar as Protestant salvation by faith alone is our concern. The argument works less well for Catholics among themselves (salvation by works rather than faith) and seemingly not at all for Jews relative to other Jews (non-Jews not being their concern). The internal Jewish position appears, at first blush, to be the opposite of Locke's. A long tradition supports the view that it is not intention but external compliance with the mitzvoth that counts. So long as matzo passes over the lips during Passover, a Jew fulfills the commandment of eating matzo. Whether one intends to eat unleavened bread is supposedly irrelevant.

Yet a version of Locke's argument applies as well in the Jewish context. According to the late, revered theologian Yeshayahu Leibowitz, the proper posture of the Jew in fulling the commandments is submission to God's authority.[1] Doing the same act without being commanded to do so is less worthy, for it does not testify to God's sovereignty as lawgiver. Now if a Jew observes the commandments solely because the magistrate has commanded it, the action fails to testify to God's supremacy over all

other lawgivers. Acting out of fear of secular sanction rather than out of respect for God's command is to do the right deed for the wrong reason.[2] It would be good to fulfill the commandment but less holy than if the state had not coerced it. Not surprisingly, Leibowitz regarded the state as the primary enemy of the religious life.

There is a general argument, then, of this form: neither the state nor other coercive bodies can intervene to bring about desired behavior, because, in the nature of things, individuals must do it on their own, and coercive threats—from the state or anybody—prevent (or tend to prevent) individuals from acting with internal motivation. Call this the logical argument against intervention. Locke uses the argument. Kant uses it. Leibowitz uses it. It is probably the most ingenious argument ever devised to curtail the power of the state. The argument forces us to stand back and recognize the limits of our power over other individuals. We cannot intervene and force them to do the right thing. Nor can we get the magistrate to do it for us.

Of course, the logical argument for nonintervention works only if we take seriously ultimate values, such as salvation (Locke), transcendent reason (Kant), and the kingship of God (Leibowitz). These are the ideas that generate our need to defer to the individuals' acting on their own internal springs of action. Without these ultimate values, the reasons for nonintervention and the basis for tolerance collapse.

A second way to generate a case for tolerance, it seems, is to weaken the bonds of reciprocal concern for living right according to the true religion. Locke goes surprisingly far in this direction when he argues, "If any man err from the right way, it is his own misfortune, not injury to thee: nor therefore art thou to punish him in the things of this life, because thou supposest he will be miserable in that which is to come."[3] Locke writes later in the same *Letter* that "the greatest duty of a Christian" is to "employ as many exhortations and arguments as possible as he pleases, toward another man's salvation."[4] Exhortations are all right, but coercion is not. It is not clear whether Locke should be read as indifferent to the fate of others when he writes that their going to hell is "no injury to thee." What he means, it seems, is that it is not the kind of injury that can either justify or be remedied by the magistrate's intervention. There are hints of skepticism in the remark that "thou supposest" knowledge of the true religion. If this were merely a supposition, it is not clear why there should be any duty at all "toward another man's salvation."

However Locke should be read, the attitudes presaged in his writing—a high degree of indifference and at least some skepticism—are the hallmarks of the modern approach to religious liberty. A century after Locke's *Letter*, at a time when many states had established churches, the principle of "free exercise of religion" came to be entrenched in the First

Amendment to the United States Constitution. John Rawls incorporates the same attitude toward religious liberty in a more general concept of liberty to which each person is entitled to a maximum amount compatible with a like liberty enjoyed by others.

The First Amendment and the Rawlsian conception of religious liberty reflect a structure of thinking suggested in Locke's distinction between activities that are within the domain of traditional (Judeo-Christian) religious practice and those that impinge on the domain of civil society. The magistrate, Locke concedes, can intervene to execute equal laws designed to protect civil interests, such as life, liberty, health, and property.[5] Rawls agrees that liberty of conscience is limited by the "common interest in public order and security."[6]

These terms are, of course, vague, and they provide little guidance in resolving difficult cases, such as animal sacrifice in Santeria rites, recently resolved by the Supreme Court.[7] The Santeria religion coalesced in Cuba as a fusion of native East African beliefs and Catholicism; its adherents sacrifice small animals, such as chickens and turtles, in order to nourish the "orishas" that guide personal destinies. When the residents of Hialeah, Florida, learned that practitioners of the Santeria rites had immigrated from Cuba, they enacted a special ordinance to suppress the "ritual sacrifice" of animals. The problem under Mill's principle is whether the unnecessary killing of animals (i.e., not for food consumption) represents a harm to other individuals in Hialeah or elsewhere.

It is obviously not enough that the local residents were offended by the practice of killing chickens and turtles in church. If being offended by thinking about others' engaging in the practice were sufficient, anything might qualify as harm to others. The best argument for the city was that the unnecessary killing of animals created a danger to public health. Creating a risk of disease would be sufficient to justify official intolerance and intervention against animal sacrifice. This argument persuaded the two lower courts that the city had a sufficiently strong interest to justify the apparent restriction on official freedom. But the same argument failed at the level of the Supreme Court, because the justices were impressed by the apparent failure of the City of Hialeah to address other equally urgent risks to public health, such as the restaurants' disposing of organic waste and hunters' bringing home dead carcasses. The selective nature of the local ordinance convinced the court that the motive for legislative intervention was not the public good but discriminatory intolerance. That the ordinance was aimed specially at one religious group and its practices made it constitutionally unacceptable.

If we leave the issue of discrimination, we encounter problems in applying the conventional criteria for deciding when the "magistrate" may intervene to prevent harm. On the one hand, Locke holds that things that

are "not lawful in the ordinary course of life . . . neither are they so in the worship of God."[8] In the same passage, however, he opines that there should be no law against sacrificing a calf "for no injury is thereby done to anyone."[9] There is no way to predict whether Rawls would conclude that animal sacrifice encroaches on "the common interest in public order and security." The Supreme Court seems all too often to have come to that conclusion—in cases ranging from Mormons' engaging in polygamy[10] to Native Americans' smoking peyote as part of their ritual.[11]

The focus on injury to the common interest illustrates how easy it is to move from the threshold of making someone's practice the business of others to the ceiling, where harm to the public good requires prohibition under the criminal law. It is almost as though the window of tolerance between these two extremes has disappeared. As soon as religious practices become a matter of community interest, they appear to be harmful to some common interest, such as public health. The realm of tolerance is squeezed out. If religion remains in the private sphere, limited to prayers and other traditional rites, these acts of personal liberty are nobody's business. As soon as religious life encounters the slightest resistance of others, as soon as it properly becomes of concern to others, the argument is easily made that the practice is injurious to the common interest and therefore properly enjoined.

It seems that in the United States, we want to ensure that religious practices are never upsetting to anyone. As soon as they become upsetting, as when people have multiple wives or smoke peyote or slaughter animals, we think up neutral laws (or apply old ones) that cover the case and prohibit the activity. Significantly, the Supreme Court has explicitly upheld religious liberty primarily in cases in which the complainant desires to abstain from an objectionable practice, such as saluting the flag, working on the Sabbath, or taking a blood transfusion.[12] It is relatively easy to be tolerant of these abstentions and more difficult to accommodate assertions of the religious spirit that encroach affirmatively on existing laws.

Before turning to the problem of free speech, consider one practical example in which tolerance is in fact operative in the field of religion. The uneasy truce between the religious and secular forces in Israel reflects not indifference, not acceptance, but at most tolerance. The struggle in Israel is for the shape of the public culture, for the style of life that is visible on the street and in the mall. It makes an enormous difference to the religious forces whether public buses operate on the Sabbath, whether the state airline serves only kosher food, and whether Jewish stores sell leavened bread during Passover. The secular regard all of these religiously motivated restrictions, none of which would be thinkable in the United States, as violations of their civil liberties. Significantly, Israel is one of the few

countries in the world where the religious and the secular do not clash on the issue of abortion. Their energies are spent fighting about the state's enforcement of Jewish practices.

Both the religious and the secular in Isreal would like to be accepted and respected by the other side, but by and large they have only contempt for each other. Yet neither side can do much to make the lives of the other more uncomfortable without violating the criminal law. This is a case in which intervention is not logically, but only practically infeasible. There are few options available. The compromise that has evolved in Israeli society allows each side some symbolic victories. El-Al serves only kosher food, but other airlines are available to and from Ben-Gurion Airport. By and large, buses do not run on the Sabbath, but privately owned cars do, except in neighborhoods reserved for the ultrareligious. You will not find pork on the menu, but "white steak" (the same thing) is readily available. This is a species of toleration that is likely to remain stable. It is not likely to flip over as acceptance and respect; nor is it likely to diminish to the level of indifference. It stands in contrast to the interwoven pattern of indifference and of mutual respect that has developed among Protestant sects, between Catholics and Protestants (save in Northern Ireland), and between Christians and Jews.

2. Free Speech

As compared with words and rites directed toward God, words and gestures directed toward others offer more than ample opportunities for tolerance. These words that come at us are often offensive. They contain expletives that we would rather not hear, political opinions that attack our beliefs, and often racist, anti-Semitic, sexist, and homophobic slurs. These are words that wound. Pictures, particularly of sex acts, can be even more disturbing, and moving pictures are the most effective means of propagating lies and hate that the world has ever devised. All these words and pictures seem easily to pass the threshold of indifference and enter the realm where tolerance is required.

It is not hard to grasp why personally directed verbal attacks and insults are the business of the person addressed. It is harder to explain why discursive speech, not directed toward anyone in particular, becomes the business of particular groups or even of everyone. Why should it be my business if some revisionist historian denies that the Holocaust ever happened? Why should it matter to me as an American if someone burns an American flag in a demonstration and thereby communicates contempt for the United States? Both of these speech forms are constitutionally protected in the United States but, mutatis mutandis, prohibited in most

other advanced industrial societies. If they are not prohibited, then they are a fit object for tolerance. (Indifference seems unlikely, and respect is out of the question.) Yet we need some account of why these verbal acts count as invasive, as my proper concern, when the recitation of prayers in a religion I regard as false can be accepted and ignored.

Holocaust denial and flag burning are examples of political speech. Both could easily be treated as political nonsense. No educated person believes the revisionist Holocaust historians, and flag burning does not visibly hurt the nation whose flag is torched. Yet regardless of the likelihood of tangible harm, it seems right for each of us to be concerned about the dissemination of political nonsense that, if believed, could be harmful. The reason for this proper concern, I submit, is not the risk of realization but rather a function of speech that, with some risk of misunderstanding, I describe as mystical.

Uttering falsehoods is the closest we can come to creating falsehoods. It is almost as though by claiming that the Holocaust never happened, one is creating a world—the world that comes to be between speaker and listener—in which it never did happen. As literature becomes its own reality, systematic political misrepresentation becomes a detached, sealed world in which one lie validates another. Flag burning has mystical overtones in another sense. Displaying the flag is itself a form of speech but a more profound mode of speech than, as the Supreme Court dismissively puts it, a form of symbolic representation of the nation.[13] The flag is not the symbol of the nation in the way a Christmas tree is the symbol of Christmas. For those who believe in it, the flag invokes the nation state's presence. Burning it symbolically negates its presence and its power. This accounts for the use of the religious term "desecration" to name the offense of flag burning.[14]

Tolerance toward speech is important, for self-expression is so easily suppressed. It might be hard to prevent someone from screaming insults on the street corner, but it is easy to prevent distribution of pictures and of the written word. The police can simply seize newspapers and film prints before they reach their intended audience. They can prevent the "wrong" people from appearing on radio and television. Censorship is an ever-ready remedy for speech that we do not like. There is not much an individual can do against a neighbor who is distributing hate propaganda or pornography, but the state can readily intervene and prevent the vicious stuff from spreading.

In many cases, speech does directly cause harm. When it does, states have no qualms about intervening to punish, or provide civil sanctions against, for example, criminal solicitation, blackmail, extortion, copyright infringement, and defamation. Where speech falls short of causing harm but nonetheless offends some people, why should the state not in-

tervene when it can do so easily? The Lockean logical argument does not strictly apply; the state can suppress speech without contradiction. Yet precisely because intervention is so easy and tempting, an extended version of the Lockean argument comes into play.

One argument is that being forced to tolerate opinions we detest exercises the virtue of tolerance.[15] Yet the same argument could be made about harmful activities that we suppress. Tolerating noxious speech must make sense on its own terms not simply because it enables us to tolerate more of the same.

Another argument is that censors initiate a process that easily goes to extremes. If it is a crime to use a conventional racial epithet, then soon it will be a crime to call a woman a "bitch" or a politician a "crook." If it is a crime to deny the Holocaust, then perhaps it should be a crime to question the reigning view of historians about other troubling historical events. What if someone could show that Lincoln did not care about emancipating the slaves, that he was interested only in the economic value of the Union? Should this view be suppressed? This is the slope that becomes too slippery to stop the slide toward ever more censorship. The only way to check the danger is to prohibit censorship altogether.

A related argument holds that intervention against irresponsible revisionist historians gives them more attention than they deserve. This seems to be the observation of many who witnessed the Alberta prosecution of James Keegstra, the high school teacher who taught his students that the Holocaust was a Jewish fabrication. Bringing Keegstra to trial, calling witnesses, putting the factual issue in doubt, allowing him to defend himself—this official recognition only gave his lies greater respectability. Even though he was convicted, more people probably had doubts after the trial about whether the murder of the six million ever occurred.[16]

Locke himself used a version of the "slippery slope" argument when he argued that it was dangerous even to suppress religions that were patently false and sinful, such as those that practiced idolatry. Locke could imagine that the officials evaluating religion might not be Christians, but Muslims or pagans: "And what if . . . to them, the Christian religion seems false and offense to God?"[17] He concluded that punishing idolaters would establish a precedent that, if generalized, could easily lead to the punishment of Christians. The "slippery slope" argument acknowledges that the evaluation of offensive ideas as well as sin is far from objective and scientific. The practice of suppressing religion and censoring offensive speech always begins in clear and appealing cases. It is the later cases, the ones yet to be heard before less wise decision makers, that become the object of concern.

A strong position in favor of free speech reflects an attitude toward the distasteful ideas that is tolerance in its purest form. The attitude toward

racist and sexist speech is neither indifference nor acceptance. We suffer speech that we find offensive because we sense that it is too dangerous to intervene and excise just that arena of freedom and nothing more. Our fear of overkill is undoubtedly heightened by our appreciation for speech as a privileged form of freedom, an essential medium of democratic politics, artistic creation, and an unrestrainedly expressive life.

The instability of this tolerance derives from the relentless drive to find some harm in offensive speech and thus push it into the category of suppressible behavior. The latest version of the argument is that racist speech and obscenity violate the constitutional guarantee of equal protection of the laws. The repeated use of racist, ethnic, homophobic, and misogynist slurs reinforces the subordinate positions of the affected groups in society. Put in its most attractive light, the argument is not that a single speech act implying the inferiority of others effects their subordination, but that ongoing patterns of "surpremacist" speech reinforce attitudes of subordination already existing in American society. The argument undoubtedly has a point, and it increasingly finds an audience. The way obscenity affects subordination and generates a violation of equal protection is less clear, but the view has its advocates, notably the relentless Catharine MacKinnon. Many countries agree with the arguments against hate speech but balk at the necessity of controlling obscenity. In the United States, at least, it is not clear whether the advocates of tolerance will be able to hold the line against those who think they can excise some "harmful" forms of speech without heading down the slippery slope of evermore-vigilant demands for censorship.

3. Sex

People seem to care passionately about what other people do in the bedroom. Twenty-two American states (the figure usually given) still prohibit acts of sodomy between consenting adults. Less than a generation ago, oral sex between consenting adults (a form of foreplay now recommended by pulp sex manuals) was thought to be so disgusting, so deeply "unnatural" and wrong, that it was treated as a crime in most states. Not even married couples were exempt. The principle of intolerance toward so-called deviant sexuality rests on a long tradition of obsessive interest in the way other people receive their sexual pleasure. Even the great liberal Immanuel Kant writes offhandedly that people engaging in sex with animals should be exiled, for they are obviously unfit to live with human beings.[18]

At first blush, this seems most curious. Why should we think it our business what strangers do with their genitals? The Bible is not to blame,

for the legal regime generated by the Bible comprehensively regulates the use of bodily orifices. If what you put in your mouth is a fit object for divine guidance, if the Talmud devotes chapters and chapters to the proper response to bodily excretions, then it is not surprising that Jewish law would pay attention to sex. Yet the Western legal tradition ignored issues of diet and excretion and concentrated exclusively on channeling sexual activity into perceived patterns of normalcy.

English law, obviously influenced by Christian sexual repression, turned out to be more intolerant of sexual diversity than was the Bible. True, some biblical prohibitions escaped the lawmakers' vigilant eye. It was never a crime, so far as I know, to have sex with both a mother and a daughter (remember *The Graduate*?) or to engage in any number of the imaginative variations prohibited in Leviticus. Yet the English legal tradition extended the prohibition against homosexual sodomy to stigmatize "unnatural" lovemaking between heterosexuals and lesbians. The English also expanded the range of impermissible liaisons branded as incest; for example, marrying your niece is all right for the Jews but not for the English. These perpetuators of sexual intolerance obviously had a vision of a normal sexual world, and they believed that they could use the repressive power of the state to realize that vision in English, and later in American, society.

As curious as this traditional form of sexual intolerance is, there has been an extraordinary and very recent shift in American and Western European attitudes toward sexual acts that not long ago were branded as "unnatural." It is hard to find anyone who regards oral sex as anybody's business except the consenting adults who are enjoying it. The attitudinal shift here has been from intolerance, backed by criminal sanctions, to benign indifference. Attitudes toward homosexuality are in a much greater state of flux. Americans are deeply divided between those fearful of gays and lesbians in the military and trendsetters in the media and the universities who routinely denounce homophobia along with racism and sexism.

Among those more tolerant of homosexuality, the problem is distinguishing among the sentiments of indifference, acceptance, and tolerance in the narrow sense. The problem is complicated by the ascendancy in this century of privacy as a moral and constitutional value. We no longer feel it appropriate to think about what consenting adults do with each other in bed. In the doctrine-breaking *Griswold* decision, Justice Douglas invoked the horror of police searching "the sacred precincts of marital bedroom for telltale signs of the use of contraceptives" to argue that purchasing and using birth control was within a constitutionally protected domain of privacy.[19] In *Roe v. Wade*, the Supreme Court extended the principle of privacy to encompass abortion prior to the viability of the

fetus.[20] The notion of privacy has spawned the rhetoric of the "pro-choice" movement, which demands acceptance not of abortion but of the principle that, in certain matters, the state should not intervene in the mother's decision whether to bear her child or not. True, in a widely criticized decision, the court refused to extend the principle of privacy and tolerance for personal choices to include sodomy in private, whether between heterosexual or homosexual consenting adults.[21] Nonetheless, among those now more tolerant of homosexuality, the dominant idea seems to be that what goes on in private between the sheets is not the business of the public or of the legal system.

It is not clear whether this privacy-conditioned attitude should be described as tolerance. Respecting the privacy of others inclines us toward indifference to what they do in private. Yet a version of the Lockean argument suggests that perhaps tolerance is the proper description. Recall that the Lockean argument is based on the logical impossibility of intervention. In the context of free speech, the argument appears in warnings against embarking on the slippery slope of censorship. As to homosexual behavior, the argument for tolerance would be that one would prefer to prohibit and punish certain sexual acts but that the invasion of privacy required to enforce the law is worse than the behavior in question. A version of the same argument enters the abortion debate: trying to control the decision about reproduction will only drive women to the more dangerous alternative of illegal, back-alley abortions. The justification for tolerance in all these cases is that, although one would like to intervene, one cannot do so safely and effectively. Toleration is always the second-best solution.

Understandably, activist gays and lesbians do not like to be treated as second best. Paraphrasing T. S. Eliot, they do not wish merely to be tolerated. They wish to be accepted and respected for their own normal mode of coupling. This acceptance would be expressed by legally recognizing same-sex marriages and by presenting these marriages in our educational system (e.g., in reading primers) as a normal and respectable way of life. Within religious orders, the issue of acceptance, as opposed to tolerance, is captured in the question of whether gays and lesbians should be recognized in leadership roles as rabbis, ministers, and priests.

I confess to a certain amount of sympathy for this push toward acceptance rather than tolerance or indifference toward homosexuality. The core cases of tolerance—religion and speech—express a refined reciprocity. The tolerated are also tolerant; they return what they receive. If you do not interfere with my religion, I will not interfere with yours. If you do not suppress my outrageous political views, I will not suppress yours. In the case of homosexuality, this subtle balance crashes on one side. Homo-

sexuals have no trouble accepting and respecting the way men and women do it together. Yet the favor is not returned. If they did not insist on acceptance, gays and lesbians would be in a position of submitting to tolerance. They would surrender to a status less favorable than that which they accord straight society.

The instability of tolerance is evident in cases of religion, speech, and sex. In the first case, tolerance tends toward indifference; in the second, arguments of harm seek to push tolerance over the threshold and justify the state's intervention against hate speech and obscenity; in the third case, sexual orientation, tolerance is constantly subject to the demand for respect and acceptance. The two-step thinking required for tolerance—I do not like it, but intervening is impossible or unadvisable—is constantly replaced by the one-step logic implicit in indifference, justified intervention, or acceptance. The complexity of tolerance gives way to simpler responses, and the social struggle in any particular area of dispute defines itself by the option most likely to replace tolerance.

Notes

1. See Yeshayahu Leibowitz, *Judaism, Human Values and the Jewish State*, ed. and trans. E. Goldman (Cambridge, Mass.: Harvard University Press, 1992).
2. On this point, see Meir Dan-Cohen, "In Defense of Defiance," *Philosophy and Public Affairs* 23 (1994).
3. J. Locke, *A Letter Concerning Toleration*, ed. J. Horton and S. Mendus (London: Routledge, 1991).
4. Ibid., 42.
5. Ibid., 17.
6. John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), 212.
7. See *Church of Lukumi Babalu Aye v. Hialeah*, 113 S. Ct. 2217 (1993).
8. Locke, *Letter*, 36.
9. Ibid.
10. *Reynolds v. United States*, 98 U.S. 145 (1879).
11. See *Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).
12. For a survey and interpreation of these cases, see my treatment in George P. Fletcher, *Loyalty: An Essay on the Morality of Relationships* (New York: Oxford University Press, 1993), 89–99.
13. See *United States v. Eichman*, 110 S.Ct. 2404 (1991).
14. For an analysis of these religious overtones, see Fletcher, *Loyalty*, 129–34.
15. See, generally, Lee Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (New York: Oxford University Press, 1986).

16. This is the informal report of Irwin Cotler, who surveyed the reactions of his students at McGill University to the Keegstra trial.

17. Locke, *Letter* 39.

18. Immanuel Kant, *The Metaphysics of Morals*, trans. Mary Gregor (Cambridge: Cambridge University Press, 1991), 168.

19. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

20. *Roe v. Wade*, 410 U.S. 113 (1973).

21. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

11

Freedom of Expression

JOSHUA COHEN

In April 1989, students at the University of Michigan walked into a class and were faced with a blackboard that read, "A mind is a terrible thing to waste—especially on a nigger." This message followed closely on the appearance of a flier at the university declaring "open season on Blacks." A month later, an African student at Smith College found a message slipped under her door that read, "African nigger do you want some bananas? Go back to the jungle."[1]

Responding to a pattern of such incidents and the long-standing American traditions of racial hatred and violence reflected in them, a substantial number of colleges and universities have adopted codes regulating racist and other forms of hate speech. These regulations have been the object of intense controversy. Denounced by some as the work of "tenured radicals,"[2] they have also been the target of more serious criticism. The University of Michigan's own speech code was found constitutionally infirm by Judge Avern Cohn.[3] Considering the university's record in implementing that code, Cohn's objections were well taken.[4]

Still, critics commonly sweep too widely. The United States is, after all, unique internationally in its legal toleration of hate speech.[5] And the Michigan rule is not the only model. Consider, for example, Stanford's regulation on discriminatory harassment (overturned in February 1995; see first note to this chapter). The Stanford code regulates "speech or other expression" that is

> **1.** *intended* to insult or stigmatize individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin;
>
> **2.** addressed *directly* to the individual or individuals whom it insults or stigmatizes; and
>
> **3.** makes use of insulting or "*fighting words*" or nonverbal symbols that are "commonly understood to convey direct and visceral hatred or contempt for human beings on the basis of their sex, race, etc."

Expression is only regulable if it meets all three conditions. So here we have a not very restrictive regulation that can be endorsed consistently

with a strong commitment to freedom of expression and to the toleration associated with that commitment.[6] It does restrict some expression. But it is not very restrictive.[7] There is no violation if a student in a course or at a political rally says, "the Holocaust is a Zionist fraud" or "slavery was a great civilizing influence." Indeed, the regulation does not prohibit very much at all—for example, probably not the Michigan or Smith cases I mentioned at the outset.

Putting the extent of prohibition to the side, what is the rationale for it and similar regulations? The aim is not to encourage civility, shelter people from offensive comments, or punish malign ignorance. They are motivated instead by various costs associated with discriminatory harassment: direct psychological injury to targets, indirect injuries from encouraging assaults on targeted groups; and, in particular, damage to prospects of equality that comes from undermining equality of educational opportunity within the university and from contributing to an environment in which unacceptable forms of discrimination seem reasonable. Judge Cohn's opinion in *Doe v. University of Michigan* gives special notice to concerns about equality. He begins by noting that it is an "unfortunate fact of our constitutional system that the ideals of freedom and equality are often in conflict." Responding to this unfortunate fact, he indicates in the concluding section of his opinion that the court is "*sympathetic* to the University's obligation to ensure equal educational opportunities for all of its students," but emphasizes that "such efforts must not be at the *expense* of free speech."[8]

Why not? What is the "expense" of regulating free speech? Why is this expense of such magnitude that in the face of it concerns about such substantial values as equality rise only to the level of "sympathetic" concern?

My aim here is to address these and related questions. To that end, I leave aside for now the immediate controversies about speech codes, though I return to the Stanford code at the end, indicating why a pallid endorsement of it is consistent with affirming stringent protections of expressive liberties. Principally, however, I argue for the pallor of the endorsement by discussing some reasons for the protections. The discussion will show that support for such regulations need not reveal a disdain for the values of freedom of expression, and that lack of enthusiasm for them need not reveal indifference to the destructive potential of hate speech. To claim otherwise—to draw a line of principle around regulations of this kind—is to provoke a divisive and unnecessary conflict between liberal and egalitarian commitment.

I start (section 1) by describing what I mean by "stringent protections of expressive liberties." Then (in section 2) I sketch and criticize two strategies for defending such stringency. The first, which I call "minimalist,"

holds that expression deserves stringent protection not because it is so valuable but because it is costless ("just speech"), because the costs it imposes cannot permissibly be taken into consideration by the state, or because government is especially untrustworthy when it comes to regulating expression: the common thread running through the several variants of minimalism is that the defense is to proceed without recourse to the thesis that expression has substantial value. "Maximalist" views, by contrast, concede the costs of stringent protections but argue that the transcendent value of expression guarantees that it trumps the costs (except when they are of equally transcendent value).

Maximalism and minimalism are not formal theories about freedom of expression. Still, each represents an important tendency of thought in this area.[9] Moreover, their attractive simplicity encourages the assumption that they exhaust the field of justifications. Because neither is compelling, nihilism about freedom of expression lives parasitically off their defects—the nihilism urged, for example, in Stanley Fish's claim that "there's no such thing as free speech and it's a good thing, too."[10] Put less colorfully, the nihilist claims that all there really is—all there could be—when it comes to decisions about restricting or permitting speech is an *ad hoc* weighing of costs and benefits in particular cases using the scales provided by "some particular partisan vision."[11] No general presumption in favor of protection can withstand inspection.

But maximalism and minimalism do not exhaust the strategies of argument for stringent protections.[12] The central burden of my argument (in sections 3 and 4) is to present an alternative to maximalism and minimalism and thereby to defuse some of the temptations to nihilism. Less simple than the alternatives, this view proposes that stringent protections emerge as the product of three distinct considerations:

1. Certain fundamental interests—expressive, deliberative, and informational—are secured by stringent protections of expressive liberty.

2. The costs of expression can, in an important range of cases, be addressed through, as Justice Brandeis put it, "more speech."

3. Certain features of human motivation render expression vulnerable to underprotection, and so recommend rigid protections for it.[13]

Stringent protections, then, help to advance a set of fundamental interests and are recommended principally by the importance of those interests, by the prospects of using expression as a preferred strategy for combating the costs of expression, and secondarily—but only secondarily—by concerns about our tendency to underprotect expression or fears of government regulations of it.[14] I see no rationale that is at once simpler and as compelling. To be sure, the complexity may prompt charges of

manipulability: providing a set of relatively unstructured elements that, with suitable adjustments, can be made to deliver any result. I do not think the view has that defect. In any case, I think things are just this complex and see no gain in substituting an arbitrary truncation of relevant considerations for a complex but hard-to-manage structure.[15]

One feature of the account that I want especially to emphasize is that it does not depend on a freestanding preference for liberty over all competing values, in particular, not on a freestanding preference for liberty over equality and an associated condemnation of any restrictions of expression that (like hate-speech regulations) are undertaken in the name of the value of equality.[16] The idea that a commitment to freedom of expression depends on a freestanding preference for liberty over equality is, I believe, a serious mistake. It fosters an unnecessary and destructive hostility to freedom of expression among friends of equality and an unnecessary and destructive hostility to equality among friends of expressive liberty. Where reconciliation is possible, it promotes division; where disagreement is possible on common ground, it insists on drawing false lines of principle.

This point bears special notice because of the current state of debate about freedom of expression. For much of the twentieth century, egalitarians of the political Left have been among the most insistent defenders of stringent protections of expressive liberty, arguing that freedom of expression is both an intrinsic aspect of human liberation and a precondition of popular democratic politics. Over the past fifteen years, this conjunction of egalitarian and libertarian commitment has been subjected to increasingly severe strain. Regulations of political spending aimed at enhancing the voice of less-wealthy citizens have been condemned as unacceptable abridgments of expressive liberty. And free-speech values have been advanced as an obstacle to regulating pornography and hate speech. Because these regulations, too, are in part about promoting equality, the suggestion has emerged that egalitarian and libertarian commitments have come to a parting of the ways. I disagree and aim to state a case for stringent protections of expressive liberty in the tradition of free-speech egalitarianism.

Finally, I explore some of the implications of the view. In particular, the basic framework of argument for stringent protections suggests a different treatment of hate-speech regulations than that advanced in Justice Scalia's opinion in the 1992 case of *R. A. V. v. St. Paul*. So in section 5, I discuss some reasons for rejecting Scalia's reasoning and explore the consistency of a certain style of pornography regulation with the view advanced here. Finally, I return to the Stanford regulation (section 6), indicating how an endorsement of it is consistent with my case for stringent protections of freedom of expression.

One last introductory point: throughout, I help myself freely to examples, terms, and ideas drawn from First Amendment law.[17] My aim, however, is not to interpret the U.S. Constitution but to provide a rationale for stringent protections.

1. Stringent Protections

I begin by explaining what I mean by "stringent protections of expressive liberties." My explanation proceeds by setting out four familiar themes suggested by the free-speech tradition. Nothing I say about these themes is original, or even unfamiliar; each could be expressed in different ways; and not much turns on the particular formulations. But I do need some statement of themes at hand to fix the idea of stringent protections sufficiently to be able to consider the bases for it.

Presumption against Content Regulation

It is common to distinguish regulations of expression that focus on content—including viewpoint and subject matter—from those that are content-neutral. A prohibition on advocating adultery restricts viewpoint; a prohibition on discussing adultery restricts subject matter; a prohibition on debating the merits of adultery (or anything else) on my street at 3:00 A.M. is content-neutral. The first theme, then, is that there is an especially strong (if rebuttable) presumption against regulating expression by virtue of subject matter and, still more particularly, viewpoint: a presumption against regulations animated by a concern for what a person says or otherwise communicates, or consequences flowing from what he or she says.[18]

Categorization

Despite this general presumption, some kinds of content regulation seem intuitively less troubling: for example, regulations of express, direct incitement; truth in advertising; private libel; fighting words; bribery; espionage; and nonobscene child pornography.[19] Because content-regulation is in general objectionable, these exceptions need to be confined. So a second main theme recommends a special approach to handling content regulations. Sometimes called "categorization,"[20] the approach singles out of a small set of categories of expression—in First Amendment law, for example, child pornography, commercial speech, obscenity, fighting words,

and express incitement—for lesser protection, specifying conditions for permissible regulation of expression in each category.[21] For content-neutral regulations, by contrast, the second theme recommends a more-or-less-explicit balancing, with a thumb on the scale for speech and an especially heavy thumb when the burden of a content-neutral regulation is especially great for groups with restricted means for conveying their views.[22] (I revisit this last point about "weighted balancing" below, in "Fair Access").

Costly Protections

Expression sometimes has unambiguous costs: a price.[23] It is sometimes offensive, disgusting, or outrageous; it produces reputational injury and emotional distress; it requires protection from hecklers; when it is delivered through leaflets, someone has to clean up the mess; and, concentrated in sufficient numbers on billboards, telephone poles, and buses, it can add to the general ugliness of an urban environment. But—here is the third theme—the presence of such costs does not generally suffice to remove protection from expression. Neither offense, nor cleanup costs for taxpayers, nor reputational injury, nor emotional distress, for example, suffice by themselves to deprive expression of protection.[24]

I am not suggesting that all libel law is inconsistent with stringent protections of expression, that the intentional infliction of emotional distress always deserves protection, or that fines for littering always offend the ideal of freedom of expression.[25] I mean only that even uncontested facts of reputational injury, emotional distress, or mess are not always sufficient to deprive expression of protection, as when the target of expression is a public figure or when the expression focuses on a subject of general interest. When, for example, *New York Times v. Sullivan* required a showing of "actual malice" in order for a public figure to win a libel judgment,[26] or when *Hustler v. Falwell* required actual malice in cases of the intentional infliction of emotional distress,[27] there was no suggestion that actual malice is necessary for reputational injury or emotional distress. Instead, it was held, in effect, that the values associated with a system of free expression outweigh those injuries.

Fair Access

A system of stringent protections of expressive liberties must assure fair opportunities for expression, that is, the value of expressive liberties must not be determined by a citizen's economic or social position.[28] Taking the

unequal command of resources as a fact, a system of stringent protections must include measures aimed expressly at ensuring fair access to expressive opportunities. Such measures might include keeping traditional public forums (parks and streets) open and easily accessible; expanding the conception of a public forum to include airports, train stations, privately owned shopping centers, and other places of dense public interaction; affirming the importance of diverse broadcast messages and the role of fair access in contributing to such diversity; financing political campaigns through public resources; and regulating private political contributions and expenditures. The requirement of fair access supports a strong, general presumption against content-neutral regulations with substantially disparate distributive implications—for example, regulations on distributing handbills or using parks and sidewalks that impose disproportionate burdens on people who otherwise lack the resources to get their message out.

Several preliminary comments on this inclusion of fair access in the account of stringent protections are in order. First, the measures I listed for ensuring fair access are all content-neutral, and all are addressed to remedying problems of unfair access that reflect inequalities of material resources. But it is an open question whether and to what extent fair access can be assured through content-neutral remedies. A lack of fair access—social and political exclusion—is sometimes said to result precisely from what others say and not from the distribution of resources.[29] This tension between the demands of content-neutrality and fair access lies at the heart of Catharine MacKinnon's argument for regulating pornography on grounds that—because of its content—it silences women and so prevents fair access.[30] Here I want simply to call attention to this concern. Later, I will suggest some ways to address it and so to broaden the range of cases in which values of fair access and content-neutrality can be reconciled (pp. 200–204).

Second, it might be objected that including requirements of fair access abuses the phrase "stringent protection," that ensuring fair access is really a matter of "positively" expanding expressive opportunities rather than "negatively" protecting expressive liberty. I have a more formal and a more substantive response to this objection.

The formal response is that my four points define "stringent protection" for the purposes of the paper. So the terminological issue does not interest me very much. More substantively, I disagree that this inclusion abuses or stretches the term "protection." When owners of shopping malls wish to prevent people from leafletting on the premises and the state bars them from doing so, the state *is* protecting at least some expression from efforts (by the owners) to silence it. It is tendentious to describe this as an effort by the state to expand opportunities for the leafletters rather

than as an effort to protect their liberty from intrusion: tendentious, because that description imports a presumptive right of owners to exclude into the distinction between protection and expansion.[31] The real issue is whether fair access to expressive arenas ought to be ensured as a matter of right to citizens, including those who otherwise lack the resources for participating in such arenas. In grouping these four themes together as "protections," I do not mean to have answered, or even to have addressed, that question.

So here we have four components of a system of stringent protections of expressive liberty: a strong presumption against content regulation; categorization as a method for handling such regulation; a willingness to protect expression despite its costs; and assurances of a fair distribution of expressive opportunities. I now consider some reasons for endorsing a scheme of stringent protections, thus understood.

2. Two False Starts

Earlier I briefly sketched minimalist and maximalist styles of argument for stringent protections. Taking "stringent protections" now to be defined by the four features I presented in the last section, I want to discuss these strategies in more detail.

Minimalism

Generically described, minimalism aims to defend stringent protections without attaching any elevated importance to expression: to make the case for stringent protections by concentrating, so to speak, on the magnitude of the evil those protections prevent rather than the magnitude of the good they protect. One familiar minimalist strategy—I call it "no-cost minimalism"—rests on an expression/action distinction. Relying on that distinction, the minimalist argues that expression, as distinct from action, is not *in itself* costly or harmful and that the harms that might flow from it *in conjunction with* its surrounding conditions can always be addressed without abridging expression. The no-cost case does not rest on attaching an especially significant value to expression itself: the harm principle suffices to generate the protections.

Other minimalists emphasize as well the remedial side of stringent protections, arguing that they are required by the pervasive tendency of people generally (or, in some versions, of political officials) to silence expression for insubstantial or impermissible reasons: for example, to protect officials from criticism, or enforce social morality. Ronald Dworkin, for

example, has argued that a right to consume pornography is one implication of a general ban on enforcing preferences about the proper way for other people to conduct their lives; the right serves as a protective device against the legal imposition of moralistic preferences and is required, because such imposition would constitute a demeaning denial of the abstract right of citizens to be treated as equals.[32] This defense of the right to consume pornography is minimalist, beause it does not turn on any special value of expression generally, or of sexual expression in particular, or on the claim that restrictions of expression are especially burdensome, but—only on the abstract right to be treated as an equal, the claim that that right is violated by the legislative imposition of external preferences, and the factual assumption that regulations of expression that emerge from the democratic process commonly are rooted in such preferences.

Minimalism makes two important points: it registers a concern about tendencies to excessive abridgment; and it emphasizes the importance of avoiding the injuries of expression by means other than the restriction of expression, where that is possible. Both points will figure in my own account. But minimalism generally, and no-cost minimalism in particular, is pretty much hopeless as a foundation for stringent protections.

Consider, for example, the third element in the scheme of stringent protection: using "expression" in its ordinary English sense, expression is sometimes harmful, and so protecting it has a price.[33] Denying the cost is simply insulting to those who pay it. Moreover, protecting people with unpopular messages and assuring outlets for expression is costly: sometimes you have to pay for police protection or to sweep the streets to clean up leaflets. It is not clear how no-cost minimalism proposes to capture these components of a scheme of stringent protections. The minimalist might of course be understood as introducing a new technical sense of expression: call something "expression" only if it carries no costs. But then minimalism will offer no help in understanding the rationale for stringent protections of expression as characterized here, because they protect expressive liberty in a much wider sense than the technical one just noted, that is, even when expression has costs.[34]

Or consider the style of minimalism that supplements the case for stringent protections by emphasizing a concern for tendencies to restrict expression for demeaning reasons. This still seems insufficient as a rationale for a system of free expression. It is difficult, for example, to see the justification for a "thumb on the scale" for expression in the case of content-neutral regulations or in the face of a wide range of costs of expression, unless we premise an *affirmative value* for expression and not simply a requirement to abjure demeaning justifications for restrictions of liberty. Consider some content-neutral reasons for restricting expression: to keep

streets clean, clutter under control, noise levels down, and traffic flowing smoothly. Nothing here seems to involve a troubling (because demeaning) failure to treat people as moral equals. The problem with, for example, sharp restrictions on political demonstrations enacted for these reasons is that they give insufficient weight to the value of expressive liberty.[35] It is true, as I indicated earlier, that content-neutral regulations are sometimes troubling because of their disparate impact, that is, because they are especially burdensome for citizens who lack the means to get their message out. And it might be thought such unequal burdensomeness signals the presence of a demeaning rationale for the regulations. But without an antecedent reason for treating expressive liberties as fundamental, I doubt that the conclusion can be supported, unless all forms of disparate impact are demeaning.[36]

Finally, none of the forms of minimalism seems to provide a good rationale for the fourth feature of stringent protections: assurances of fair access to expressive opportunity.

Maximalism

Maximalism inverts the minimalist strategy. Generically described, the maximalist proposes that expression merits stringent protection, because its great value guarantees that the benefits of protection trump the costs.[37] The maximalist might, for example, argue that the dignity of human beings as autonomous and responsible agents is so immediately at stake in any act of expression or so immediately threatened by any regulation of expression—or at least any regulation of expression on grounds of its communicative impact—that abridgments of it represent intolerable violations of human dignity.[38]

The maximalist view has something right, and I will say what it is when I discuss in section 3 fundamental expressive and deliberative interests. Still, maximalism is too simple to capture the contours of freedom of expression. In its simplicity, it either exaggerates the stakes in particular cases of regulating expression or else manipulates the notion of autonomy to make it fit the complexity of the terrain.[39]

For example, maximalism does not help us to understand why there are cases in which costs do seem relevant to justifying regulations: why regulations of group libel might be more problematical than restrictions on individual libel; why it might make sense to distinguish the treatment of reputational injury to public and nonpublic figures; or why autonomy does not simply trump reputational injury altogether. Similarly, maximalism does not seem to be a promising route to understanding why false

or misleading advertising seems less worthy of protection than false or misleading claims offered in the course of political or religious argument.[40] In each of these cases, maximalism has troubles with an intuitive idea or distinction. Perhaps there is, in the end, nothing more to these "intuitions" than second nature masquerading as first. But they do have some presumptive weight, and so raise troubles for maximalism.

Furthermore, if considerations about the transcendent value of expression are understood only to provide grounds for rejecting regulations on grounds of communicative impact, then they will provide no limit at all on content-neutral regulations—no weighted balancing—and no basis for a concern with fair access. On the other hand, if considerations of autonomy are understood to ground a uniform presumption against all regulation of expression because of the uniform connection between expression and autonomy, then either the uniform presumption will be very low and protections will be weak or the uniform presumption will be very high and we will all have lots of listening to do.

More fundamentally, the main idea behind the variant of maximalism I focus on here is that expression always trumps other values because of its connection with autonomy. This suggests that a commitment to freedom of expression turns on embracing the supreme value of autonomy as a human good. But this threatens to turn freedom of expression into a sectarian political position. Is a strong commitment to expressive liberties really available only to those who endorse the idea that autonomy is the fundamental human good, an idea about which there is much reasonable controversy? I do not doubt that such a strong commitment *is* available to those whose ethical views are of this kind, but I wonder whether such views are necessary. The force of this concern about sectarianism will become clearer as I describe an alternative to minimalism and maximalism. Suffice it to say for now that it would be desirable to frame an account of the values at stake that is capable of receiving wider support: an account that would free the doctrine both from the insulting idea that expression is costless and from the sectarian idea that it is priceless.

3. An Alternative Strategy: Foundations

The difficulties with maximalist and minimalist strategies recommend a different angle of approach, one which gives stringent protections as a conclusion but does not assume that expression is costless or priceless. More precisely, I will present a view that gives more weight to the value of expression than minimalism, while retaining its emphasis on the desirability of nonrestrictive remedies for harms and its concern with tenden-

cies to overregulate, and that has greater discriminating power than maximalism, while preserving its emphasis on the importance of expression. I propose that three kinds of considerations work together to generate upward pressures for protection and so to provide the basis for the scheme of stringent protections:

1. an idea of the fundamental *interests* that are protected by a system of freedom of expression;

2. an account of the *cost* structure of these protections; and

3. a set of more-or-less commonsense factual claims that I refer to as *fundamental background facts*.

I consider each of these in turn and then in the next section discuss the case for protection produced by their joint operation.

Interests

Freedom of expression is commonly associated with such values as the discovery of the truth, individual self-expression, a well-functioning democracy, and a balance of social stability and social change.[41] I do not wish to dispute these associations but rather to connect more transparently the importance of expression with certain fundamental interests.

In particular, I distinguish three interests protected by stringent assurances of expressive liberty whose importance makes the demand for substantial protection reasonable. I call them the *expressive, deliberative, and informational* interests. Before describing those interests, however, I want to highlight the background to my account of them.

Earlier I accused maximalism of sectarianism. Because I want to steer clear of sectarianism, my presentation of these interests and of their importance is framed to accommodate the idea of reasonable pluralism.[42] In brief, the idea of reasonable pluralism is that there are a plurality of distinct, conflicting, fully reasonable understandings of value. An understanding of value is fully reasonable—which is not the same as *true*[43]—just in case its adherents are stably disposed to affirm it as they acquire new information and test it through critical reasoning and reflection.[44] I emphasize that "test through critical reasoning and reflection" is itself a normative notion: a view is not reasonable simply because of the dogged persistence of its adherents, who preserve their disposition to affirm it after hearing (though not listening to) all the arguments. The contention that there are a plurality of such understandings is suggested by the absence of convergence in reflection on issues of value—the persistence of disagreements, for example, about the values of autonomy, welfare, and

self-actualization; about the value of devotions to friends and lovers as distinct from more diffuse concerns about abstract others; and about the values of poetic expression and political engagement.

Acknowledging the pluralism of reasonable evaluative conceptions has important implications for political justification. It suggests that we ought to conduct such justification in terms of considerations that provide compelling reasons within other views as well. When we restrict ourselves in political argument to the subset of moral considerations that others who have reasonable views also accept, we are acknowledging that their views are not unreasonable, even if they do believe what we take to be false.

Assuming reasonable pluralism, then, I look to characterize interests whose importance provides a basis for stringent protections and that are located on common ground shared by different reasonable conceptions. Because different views disagree in their substantive characterization of what is valuable, the basic interests will inevitably be presented in abstract terms. But this abstractness is no metaphysical or philosophical predilection; instead it is the natural consequence of taking seriously the diversity that issues from the free exercise of practical reason.

First, then, there is the *expressive* interest: a direct interest in articulating thoughts, attitudes, and feelings on matters of personal or broader human concern, and perhaps through that articulation influencing the thought and conduct of others.[45] When we think of expression quite generally as a matter of outwardly indicating one's thoughts, attitudes, feelings (or at least what one wants others to believe those inner states are), then the importance of the expressive interest might seem elusive. Drawing some distinctions within the general category of expression, however, will clarify the asserted importance of the interest and one source of the burdensome quality of regulations of expression.

A feature shared by different evaluative conceptions is that the conceptions themselves single out certain forms of expression as especially important or urgent; the conception implies that the agent has weighty reasons for expression in certain cases or about certain issues.[46] The failure to acknowledge the weight of those reasons for the agent, even if one does not accept them, reflects a failure to appreciate the fact of reasonable pluralism. Consider in particular three central cases in which agents hold views that state or imply that they have very strong, perhaps compelling, reasons for expression, and so three central cases illustrating the importance of the expressive interest:

First, in a range of cases, the limiting instance of which is a concern to "bear witness," a person endorses a view that imposes an *obligation* to speak out, to articulate that view and perhaps to urge on others a differ-

ent course of thought, feeling, or conduct. Restricting expression in such cases would prevent the person from fulfilling the obligation assigned by the view; it would impose conditions that the person reasonably takes to be unacceptable. Here, expressive liberty is on a footing with liberty of conscience, and regulations are similarly burdensome.[47]

In a second class of cases, expression addresses a matter of political justice. Here the importance of the issue, indicated by its being a matter of justice, provides a substantial reason for addressing it. The precise content and weight of the reason is a matter of controversy. Brandeis, for example, urged that "public discussion is a political duty."[48] Perhaps so. But even if expression on such issues is not a matter of duty, still, it is a requisite for being a good citizen—in some cases, for sheer decency—and as such is characteristically supported by substantial reasons within different moral-political conceptions, even though those conceptions might disagree about the precise importance of civic engagement and the occasions that require it.

In a third class of cases, expression is not a matter of personal obligation, nor does it address issues of justice. It is moved by concerns about human welfare and the quality of human life; the evident importance of those concerns provides substantial reasons for the expression. A paradigm here is expression about sexuality, say, artistic expression (whether with propositional content or not[49]) that displays an antipathy to existing sexual conventions, to the limited sensibilities revealed in those conventions, and the harms they are perceived as imposing. In a culture that is, as novelist Kathy Acker says, "horrendously moralistic," it is understandable that such writers as Acker challenge understandings of sexuality "under the aegis of art, [where] you're allowed to actually deal with matters of sexuality."[50]

Another paradigm is social satire (or analogously, caricature). Lenny Bruce's biographer described him as a "man with an almost infantile attachment to everything that was sacred to the lower-middle class. He believed in romantic love and marriage and fidelity and absolute honesty and incorruptibility—all the preposterous absolutes of the unqualified conscience. . . . Lenny doted on human imperfection: sought it out, gloated over it—but only so he could use it as a *memento mori* for his ruthless moral conscience. . . . The attempt to make . . . him a hippie saint or a morally transcendent *artiste*, was tantamount to missing the whole point of his sermons, which were ferociously ethical in their thrust."[51]

There are further important cases here, including an interest in creating things of beauty. But the three I have mentioned are central cases of the expressive interest and suffice to underscore the basis of its importance. They work outward from the case of fully conscientious expression, the paradigm of expression supported by substantial reasons from the agent's

point of view. To be sure, diverse evaluative conceptions carry different implications about what is reasonable to say and do. But they all assign to those who hold them substantial reasons for expression, quite apart from the value of the expression to an audience, and even if there is no audience at all.

One alternative line of argument about freedom of expression focuses entirely on public discussion and locates the contribution of expression to public debate at the core of the ideal of freedom of expression. Such views miss the parallels between expressive liberty and liberty of conscience. As a result, they are insufficiently inattentive to the weight of the expressive interest and are likely to be too narrow in the scope of their protections.

Cass Sunstein, for example, has recently defended a two-tier conception of freedom of expression, with political speech occupying the upper, stringently protected tier.[52] Although Sunstein's immediate focus is the proper interpretation of the First Amendment, his case rests in part on general political values and so intersects with my concerns here.[53] Sunstein defines speech as political when "it is both intended and received as a contribution to public deliberation about some issue."[54] This conception of political speech is very broad and is understood to encompass "much art and literature," because much "has the characteristics of social commentary."[55] It is not boundless, however, in that it excludes from highest level protection commercial speech, bribery, private libel, and obscenity.

Because of the breadth of Sunstein's conception of political speech, the practical differences between his approach and mine might turn out to be rather subtle. Still, it strikes me as a mistake to make core protection contingent on the role of expression in contributing to public discussion, in particular on how it is received. Should the level of protection of, for example, Kathy Acker's literary exploration of sexuality be made to depend on whether people find her *Hannibal Lecter, My Father* or *Blood and Guts in High School* challenging or instructive rather than offensive, disgusting, or, simply, out-of-control, post-modernist, identity-deconstructive raving?[56] Should the level of protection of a doctor's conscientious efforts to advise a pregnant patient on the alternatives available to her depend on that advice being intended or received "as a contribution to public deliberation" about reproductive choice.[57] Expression of these kinds is often supported by very substantial reasons, quite apart from how it is *received*. As my discussion of the expressive interest indicates, an account of freedom of expression ought not to disparage those reasons.

In response, it might be urged that the justification for establishing an upper tier occupied by political speech does not depend on assessing the relative *value* of different sorts of speech but on assessing their relative

vulnerabilities: because the government has such strong incentives to regulate political speech, it is especially vulnerable; because it is so vulnerable, it requires especially strong protections.[58]

This response is not convincing. The evidence of special vulnerability is at best uncertain.[59] In any case, the reasons for special protection extend beyond vulnerability. As I have indicated in my discussion of the expressive interest, very substantial interests *are* at stake. I see no compelling reasons—of political theory, general constitutional theory, or American constitutional tradition—to deemphasize the weight of those interests and shift focus to assessments of vulnerability.[60]

We proceed, then, to the second basic interest: the deliberative interest. This interest has two principal aspects. The first is rooted in the abstract idea, shared by different evaluative conceptions, that it is important to do what is best (or at least what is genuinely worthwhile) not simply what one now believes best (or what one now believes worthwhile). For this reason, we have an interest in circumstances favorable to finding what is best, or at least what is worthwhile, that is, to finding out which ways of life are supported by the strongest reasons.

The second aspect of the deliberative interest is rooted in the idea that it is important that one's evaluative views not be affirmed out of ignorance or out of a lack of awareness of alternatives. So alongside the interest in doing what is in fact supported by the strongest reasons, we also have an interest in understanding what those reasons are and the nature of the support they give. This, too, leads to an interest in circumstances favorable to such understanding.

The connection between these two aspects of the deliberative interest and expression lies in the familiar fact that reflection on matters of human concern typically cannot be pursued in isolation. As Mill emphasized, it characteristically proceeds against the background of an articulation of alternative views by other people.[61] So here, again, there is an interest in circumstances suited to understanding what is worth doing and what the reasons are that support it, for example, circumstances featuring diverse messages, forcefully articulated.[62]

Finally, and most straightforwardly, I assume a fundamental interest in securing reliable information about the conditions required for pursuing one's aims and aspirations.

Having described these three interests, I return to the complaint I registered earlier about the sectarianism of autonomy-based, maximalist views of freedom of expression. It might now seem that my own view is not, after all, so sharply distinct from them. I respond briefly by noting three sorts of differences.

First, autonomy has a capaciousness that strikes me as a vice in an account of expressive liberty. Each of the basic interests I have mentioned is sometimes included within the value of autonomy, but they are impor-

tantly different interests. Bringing out these differences helps both to clarify the importance of those interests within different evaluative conceptions and to provide the basis for a theory of expressive liberty that is able to capture intuitive distinctions among different sorts of expression. Second, I am not supposing, with the maximalist, that the three interests always trump other values. Nor, third, do I assume that the interests are uniformly implicated in different sorts of expression; for example, I do not think they are equally at stake in commercial, political, and artistic expression. (I return to this point in my discussion of categorization in section 4).

There are, then, at least these three basic interests rooted in diverse, determinate, evaluative conceptions and in the second-order concerns collected under the deliberative rubric.[63] A first component of the case for stringent protection, then, lies in the ways that such protection secures favorable conditions for advancing these fundamental interests. In the case of the expressive interest, the grounds for protecting expression lie in the importance of the expressive activity itself, as specified by the agent's reasons; in the case of the deliberative and informational interests, the grounds for protecting expression lie in the importance of the interests to which expression contributes. In short, the reasons for protection are partly intrinsic, partly instrumental. I see no basis for deciding (nor any reason to decide) which is more fundamental.

I return later to a more detailed discussion of connections, but first the costs and background facts.

Costs

What then of the costs of expression? Commentators since Justice Holmes have noted that protection for expression cannot be premised on faith in its impotence.[64] As Harry Kalven put it, "Speech has *a price*. It is a liberal weakness to discount so heavily the price. [It] is not always correct to win [the protection of speech] by showing [that the] danger [it threatens] has been exaggerated."[65] Underscoring Kalven's point about the price of speech and the weakness of characteristic arguments for protection, recent "outsider" jurisprudence has portrayed the injuries that hate speech imposes on its targets, by narratively recounting those injuries.[66] If we abjure both the minimalist denial of the price and the sectarian route of maximalism, then the idea of stringent protections could seem simply indefensible, and the skeptical response—"there is no such thing"—could seem a natural alternative.

What kinds of costs does expression impose? In answering this question, I want to organize them along just one axis, distinguishing three types of costs by the pattern of their etiology.

First, there are direct costs. Here I have in mind cases in which, intuitively, nothing intervenes between the expression and its price, where "the very utterance inflicts injury":[67] I shriek at a neurasthenic with a weak heart; disrupt the peace and quiet with loud shouting; falsely tell an elderly mother that her child has just died; spread defamatory falsehoods about a colleague; use offensive language in a public setting; offer a raise or a higher grade in return for sex. When I have said my piece, the damage is done, and it is done by what I said—and in the latter four cases, by its content.

A second category of costs are "environmental." Thus expression could help to constitute a degraded, sickening, embarrassing, humiliating, obtrusively moralistic, hypercommercialized, hostile, or demeaning environment. It might, for example, combine with other expressive actions to contribute to an environment of racial or national antagonism, or to one in which dominance and submission are erotized. Here the harm is not the expression by itself, because in the absence of other similar sayings the environment would not be degraded, hypercommercialized, or hostile; we might be unable to trace particular injurious consequences to particular acts of expression that help to constitute the unfavorable environment.[68] Instead, the price of the expression lies in its contribution to making an environment hostile to, for example, achieving such fundamental values as racial or sexual equality.

Finally, there are straightforwardly indirect costs. Here the injury results from the expression's causing (by persuasion, suggestion, or providing information) someone to do something harmful, as when someone persuades others to purchase too much of a scarce resource or to join the Ku Klux Klan or to support a war that results in massive death and destruction.

Background Facts

To complete the picture of the bases of stringent protections, I now come to the background facts.[69] These facts are sociological and anthropological claims that play a central role in arguments about freedom of expression, though often only as an implicit, half-articulated, thus easily manipulable background.[70] Whatever their common treatment, their importance will eventually become clear. My aim here is simply to make them explicit.

I group the facts into three broad categories, which I label the "facts of reasonableness," the "bare facts of life," and the "unhappy facts of life." Intuitively, the difference among the three categories is that the facts of reasonableness are considerations that would favor protecting speech even under fully ideal conditions; the bare facts favor protection and are unal-

terable; the unhappy facts of life are considerations that now favor protection but that we might hope are alterable features of our circumstances.

Among the facts of reasonableness, are

1. The fact of reasonable pluralism: under conditions of expressive liberty, people will arrive at conflicting, reasonable evaluative convictions.

2. The fact of reasonable persuasion: people have the capacity to change their minds when they hear reasons presented, and sometimes they exercise that capacity. This assumption lies behind Brandeis's remark that "if there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, *the remedy to be applied is more speech*, not enforced silence."[71] But for the fact of reasonable persuasion, more speech would be a diversion rather than a remedy.

As bare facts of life, we have

1. The fact of resource dependence: expression depends on resources, and access to those resources is commonly unequally distributed.

2. The fact of innocent abuse: if expression is relatively uninhibited, people will sometimes, even without malign intent, say things that are false, offensive, insulting, psychically injurious, emotionally distressing, and reputationally damaging. As James Madison put it, "Some degree of abuse is inseparable from the proper use of everything."[72]

3. The cold (chilling) facts: if sanctions are attached to expression for being false, offensive, insulting, psychically injurious, and so on, then people will be reticent to express themselves (chilled), even if they think their expression is true, inoffensive, not insulting, and so on. Moreover, if the regulation of expression proceeds in ways that are highly uncertain—because standards are vague (e.g., if sanctions attach to remarks that are offensive, deeply disturbing, "outrageous" insults[73]) or because their application depends on weighing competing considerations in each case—then many people will be reticent to express themselves, even if their views deserve protection.

Finally, I count among the unhappy facts of life

1. The fact of power: most people, particularly those with power, do not like to be criticized or disagreed with and are tempted to use the means at their disposal to avoid criticism or disagreement.[74]

2. The fact of bias: we tend to confuse what we would prefer other people to do with what would be best for them to do or with what they must do on pain of immorality.[75]

3. The fact of disadvantage: in a society with relatively poor and powerless groups, members of those groups are especially likely to do badly when the regulation of expression proceeds on the basis of vague standards whose implementation depends on the discretion of powerful actors.

4. The fact of easy offense: putting sociopaths to the side, everyone is offended by something.[76]

5. The fact of abuse: against a background of sharp disagreement, efforts at persuasion sometimes proceed through exaggeration, vilification, and distortion.[77]

IV. An Alternative Strategy: Implications

I want now to bring the different pieces together into a case for a scheme of stringent protections. I will proceed through the four themes discussed in section 1, showing how each can be explained by reference to the elements I have just sketched. In my explanation, I place principal emphasis on the expressive and deliberative interests and the facts of reasonableness. The aim is to show that stringent protections are driven principally by the substantive value of expression and the possibilities of using speech to combat the harms of speech; such protections are only secondarily remedial, only secondarily driven by fear and mistrust underwritten by our tendency, or the tendency of government, to undervalue or suppress expression.

Content Regulation

Take first the presumption against content regulation. This presumption is driven in part by the fundamental expressive and deliberative interests. Content regulation presents the possibility that regulation could effectively exclude certain views from the marketplace, that is, not only drive them into another market niche but drive them out altogether. Content-neutral regulation also presents that possibility, but the threat from content-discriminatory regulations is greater because the targeting is more precise. Because of this threat, content regulations pose a more substantial danger that people will be prevented from expressing views despite, as they see it, the existence of substantial reasons for such expression. In short, they represent a direct threat to the expressive interest.

Moreover, the limits imposed by content regulations on the range of messages threaten the deliberative interest. By directly reducing the diversity of expression, they distort, as Meikeljohn said, the "thinking process of the community."[78] More immediately, by restricting the range of views and establishing official dogma, they limit reflection on alternative views and, therefore, on the reasons for holding one's own views. The problem is *not* that content regulation keeps people from being persuaded to change their minds; rather, it prevents us from figuring out just what our

minds are on some subject and what the reasons are for not changing them.

The fact of power points in the same direction. Those with power often wish to insulate themselves from criticism, and the power to regulate content is an especially refined instrument of such insulation. This is particularly true of viewpoint regulation. By contrast, content-neutral regulations are blunter and so less desirable instruments of insulation. To be sure, blunt instruments are still instruments. And if someone expects the distribution of messages to be unfavorable, that someone will want to reduce the level of expression. Moreover, content-neutral regulations can have more or less transparently discriminating effects with respect to classes of speakers. So content-neutral regulations, too, raise serious concerns. But the point suggested by the fact of power remains: there is typically no motivation to reduce the quantity of expression of the same kind and intensity as the motivation to target certain topics, or more particularly certain views. So content-neutral regulations are often less troublesome.

These considerations about the interests and the fact of power indicate why content regulation is especially troubling. Given those troubles, the fact of reasonable persuasion helps to secure the case for a presumption against such regulations. It suggests that the damaging consequences of expression with objectionable content can, apart from the case of direct costs, be addressed with more expression. Because such address is preferable to imposing sanctions, we ought to establish a general presumption in favor of relying on it.

In the case of political speech, for example, these pressures for protection exercised by the basic interests and the facts of power and reasonable persuasion are very strong. So some rule of the sort advanced in *Brandenburg v. Ohio* is naturally suggested: advocacy of violent political change can legitimately be restricted only when "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[79] Advocacy of the kind addressed by this rule is not the only kind that threatens harm, nor is the expected value of the harm necessarily the greatest. But it is the only case in which circumstances preclude the preferred remedy.

Categorization

We come next to categorization as an approach to handling content regulations. Recall that the idea of categorization is to confine exceptions to a general presumption against content regulation by singling out a small set of categories of expression—for example, child pornography, commer-

cial speech, obscenity, fighting words, and express incitement—for lesser protection, specifying conditions for permissible regulation of expression in each category. The rationale for this strategy divides naturally into two parts.

We need first to account for the distinctions between more and less important kinds of expression. Judgments of importance proceed principally by considering the connection of the expression to the fundamental interests, and secondarily by considering the prospects of addressing the harms through more expression and the fragility of expression given the bare and the unhappy facts of life.

So, for example, political expression is especially important, because it is so closely connected to each of the basic interests and because of its fragility in light of the fact of power. Because it is commonly a form of political speech, group libel is more strongly connected to expressive and deliberative interests than expression that threatens individual libel, and the injuries are more easily remedied with group libel than individual. For these reasons, it is important to confine reduced protection to a category of individual libel, even though people can be harmed by libeling groups to which they belong or with which they identify. The idea that group libel ought to be more strongly protected than individual libel is not contingent on a liberal individualist failure to acknowledge the possibility of harm through group libel, any more than the protection of the libel of public figures requires a denial of its harm.[80]

Commercial speech is, or can be, a source of information. But it is less important than political expression, because it is not so closely connected to the expressive or deliberative interests.[81] Moreover, the cold facts and the fact of innocent abuse have much less force in the case of commercial speech.[82] The economic interests fueling commercial speech ensure that it is less susceptible to regulatory chill, and the fact that commercial advertisers are best situated to know the accuracy of their claims reduces concern about the chilling effects of requiring accuracy in commercial speech.

Even if—and here we come to the second part of the case—we can provide an account of relative importance, why filter judgments of relative importance by categorization rather than working case by case?[83] Here the main burden is carried by the chilling facts and the unhappy facts of power, bias, and disadvantage. Together they suggest that ad hoc regulation will err on the side of excessive interference, on the side of underprotecting what should be protected. Moreover, ad hoc judgments are likely to raise greater concerns about chilling expression. Categories, then, serve as a protective device, a device of self-binding, against excessive interference in a context in which a very substantial value is at stake.

To elaborate, unless expression falls into a less-protected category, we

impose very high barriers to regulating it. And before we can consider more substantial regulation of some act of expression, we need to find a general category into which it falls such that we are prepared to reduce the protection for all expression in that general category. The result might be greater protection for some expression than we are inclined to think suitable.[84] If the facts are right, however, then the alternative would be insufficient protection to some expression. Of course, the claim that categorization plays this role assumes that the categories are—whether for semantical or psychological reasons—not so utterly manipulable and indeterminate that they serve no channeling function at all. If they are not thus manipulable, if the facts are as stipulated, and if the choice of regulatory form does have the proposed consequences, then it is reasonable to pursue the strategy of protection through categorization.

Digression: Nihilism Redux

Earlier I mentioned free-speech nihilism, the idea that "there is no such thing as free speech." The pieces are now in place for a response to it.

What does the nihilist denial of free speech come to? Echoing Holmes's remark that "every idea is an incitement" and Kalven's "speech has a price," Fish explains it this way: "There is no such thing as 'speech alone' or speech separable from harmful conduct, no such thing as 'mere speech' or the simple nonconsequential expression of ideas."[85] Beginning from these familiar observations, Fish concludes that decisions about the permissibility of speech always require a balancing of benefits and costs in particular cases by reference to "some particular partisan vision."

I have two disagreements with this conclusion: first, with the idea that decisions about cases must be a matter of ad hoc balancing and, second, with the idea that such balancing must proceed by reference to a particular partisan vision.

As to the first, Fish himself acknowledges the importance of general categories and principles in deciding how to handle particular cases, and for roughly the reasons I just sketched in my remarks on categorization. He says that "free speech principles function to protect society against over-hasty outcomes; they serve as channels through which an argument must pass on its way to ratification."[86] This acknowledgment of the role of "free speech principles" in protecting against "over-hasty outcomes" shows that Fish is not really, as it might have seemed, offering balancing as the mandatory way to resolve particular cases. Neither metaphysics nor politics condemns the resolution of cases by reference to general, free-speech principles that serve (as we see it) to tie our hands against over-

hasty outcomes. So the mere fact that speech is consequential carries no implications at all about the proper, much less the necessary, forms for regulating expression.

If free-speech nihilism is not nihilism about principles and a corresponding embrace of ad hoc balancing as the proper form of regulation, then perhaps it registers a point about justifying the principles used to decide cases: because speech is "never free of consequences,"[87] any justification of principles for resolving cases must take into account the values that a scheme of restrictions and permissions promotes and the costs it imposes.

This thesis is indisputable, but also uncontested. Justice Black, for example, urged free-speech absolutism as a doctrine about *decision making under* the First Amendment—"no law" means "no law"—not as a theory about the *justification of* that amendment. He did not deny the importance of a "balancing of conflicting interests" in justifying the First Amendment prohibition on laws restricting freedom of speech; he thought instead that the authors of the First Amendment did all the balancing necessary when they settled on the phrase "shall make no law."[88]

Perhaps, then, free-speech nihilism consists neither in the rejection of principles as guides to decision making nor simply in the claim that a justification of such principles must take the consequences of speech into account. Perhaps it is the claim that justification must always proceed in terms of the aims, interests, and aspirations of particular groups, in terms of "some particular partisan vision";[89] that is, there are no common or shared interests that can serve as a basis for justification. Thus understood, nihilism suggests a pair of practical precepts: if you are weak, argue as forcefully as you can for an encompassing protection of speech in the hope of gaining some political space for your vision; if you are strong, "refashion" principles "in line with your purposes" and then "urge them with a vengeance."[90]

But—here I come to my second disagreement—expressive, deliberative, and informational interests do, I claim, provide common ground among a range of genuinely different views and "particular partisan vision[s]." Of course neither those interests nor any other general scheme of values resolves all controversy about specific cases. But if nihilism amounts only to the thesis that judgments in this area are controversial and contestable, then it wins a quick and uninteresting victory.

Some views, to be sure, do deny the importance of expressive and deliberative interests, so it might be said that endorsing those interests is itself partisan. But partisanship in this sense—not being accepted by all—is consistent with holding that these interests provide common ground for a wide range of *distinct* moral-political views, that they are not the exclu-

sive possession of one particular partisan vision. As to the views that deny these interests, we need to consider actual cases in order to see whether the positions have any serious claim to be reasonable and whether the partisanship they embrace is not still more narrow and particular. In short, we need to consider cases to decide whether the partisanship is really troubling.

Take, for example, a "rationalist fundamentalist."[91] This person denies the idea of reasonable pluralism, affirming instead that it lies within the competence of reason to know that salvation is the supreme value, that there is a single path to salvation, that there is no salvation among the damned, that there are no expressive and deliberative interests, and that free expression is to be condemned along with liberty of conscience. This is not a common view, if only because it claims for reason territory more commonly reserved for faith.[92] But if people advance it, then one ought to say that they are simply mistaken about the powers of reason.[93] Even if the views of the rationalist fundamentalist are all rationally permissible, reason surely does not mandate them, and in insisting that it does the fundamentalist is not acknowledging the facts. So the fact that expressive and deliberative interests are not recognized by the rationalist fundamentalist does not seem very troubling.[94] To be sure, other cases might present greater difficulties. But that needs to be shown. It is not enough to point to the fact of disagreement and conclude that there are only particular partisan visions.

We now return to the case for stringent protections.

Costly Protections

What about protecting expression despite its costs? Why is the fact that expression imposes conditions that are reasonable to want to avoid not sufficient to remove the presumption of protection from it?

To address this question, I start with the special case of offensive expression, in particular, expression that disturbs our sensibilities. We cannot ensure fair opportunities for expression while protecting people generally from offensive expression. Given the fact of easy offense and the associated ubiquity of offense, such protection would have to take the form of substantially restricting expression. But the weight of the expressive and deliberative interests is much greater than the weight of the interest in not being offended, so those restrictions would be intolerable. Moreover, it will not help to confine regulatory efforts to "grossly offensive" expression, because the likely vagueness in regulations of the "grossly offensive" threatens to chill acceptable expression.[95]

I do not deny that offensive expression imposes costs; indeed, its costs are direct. Instead, I claim that the costs of avoiding offense are to be borne by those subject to it, they must, for example, "avert their eyes."[96]

Offensive expression is, as I said, a special case. Moving beyond it, then, the general strategy in deciding whether to protect expression despite its price is to consider the importance of the expression (with attention to the role of categories), how direct and serious the harm is, and the vulnerability of the expression to underprotection, given the background facts. Let me illustrate with three kinds of cases.

In cases of the first type, expression belongs to an important category, is vulnerable, and imposes environmental or indirect costs. Then the reasons against restriction are especially strong, even if the cost is substantial.

Consider, for example, the pornography ordinances adopted in Minneapolis and Indianapolis in the 1980s. According to the Indianapolis ordinance, pornography is the "graphic, sexually explicit subordination of women, whether in pictures or in words," that also meets one of the following conditions:

> (i) women are presented as sexual objects who enjoy pain or humiliation; or (ii) women are presented as sexual objects who experience sexual pleasure in being raped; or (iii) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or (iv) women are presented being penetrated by objects or animals; or (v) women are presented in scenarios of degradation, injury, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or (vi) women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.[97]

As this language indicates, those ordinances, by contrast with obscenity regulations, included no provision for the artistic, literary, scientific, or political value of the expression they sought to regulate. So they were inattentive of the importance of the expressive, deliberative, and informational interests associated with sexually explicit expression. But expressive interests are important in this area, because advancing views about human sexuality is supported by substantial reasons from the point of view of the expresser. I noted this in my earlier discussion of expressive interests. Moreover, deliberative and informational interests are at stake:

> [The existence of pornography] serves some social functions which benefit women. Pornographic speech has many, often anomalous, characteristics. One is certainly that it magnifies the misogyny present in the culture and exaggerates

> the fantasy of male power. Another, however, is that the existence of pornography has served to flout conventional sexual mores, to ridicule sexual hypocrisy and to underscore the importance of sexual needs. Pornography carries many messages other than woman-hating: it advocates sexual adventure, sex outside of marriage, sex for no other reason than pleasure, casual sex, anonymous sex, group sex, voyeuristic sex, illegal sex, public sex.[98]

Apart from their inattention to basic interests, the ordinances were vaguely drawn, suggesting inattention to the historical vulnerability of sexual expression to moralistic overregulation.[99] And they did not consider alternative ways to address the injuries they associated with pornography. For example, if the problem with pornography is that it sexualizes, and thereby legitimates, abuse, then one natural step would be to target sexual abuse—the abuse of women as women—directly and seriously. Such targeting might, for example, include a tort of domestic sexual harassment modeled on workplace sexual harassment, including elements of quid pro quo and hostile-environment harassment.[100] If the injury of pornography is that it silences women, then, taking seriously Brandeis's idea of combating the harms of speech with more speech, there could be regular public hearings on sexual abuse, perhaps subsidies for women's organizations to hold such hearings,[101] or easier access for women to broadcast licenses.

To be sure, the regulations of pornography did claim to address its harms. But their breadth of coverage makes the arguments about costs look suspect: given the importance of the regulated target, the claims about costs seems too speculative to sustain the case for regulation.

These criticisms of the speculative character of the connections between the availablity of pornography and its alleged costs derive their force in part from the broad sweep of the regulations and so from the importance of the expression they sought to regulate. The case does not rest entirely on freestanding doubts about the speculative quality of the connections between the expression and the costs. Less sweeping regulations, drafted with more attention to the value of sexual expression, ought to trigger correspondingly less concern about the need for a conclusive showing of injury and so demand less-exacting scrutiny.

Consider, for example, a regulation targeted on the "pornographically obscene": the subset of the constitutionally obscene (prurient, offensive, and minimally valuable expression) that erotizes violence. The case against this regulation would be weaker, because of the weak relation of obscenity to the fundamental interests. Given that weak relation, it is less important that the costs are not direct and that the arguments in support of the costs are speculative.[102] (I provide a more detailed case for this conclusion later on).

I come now to a second type of case, in which expression belongs to an important category and is vulnerable, but the costs are direct and unavoidable. In such a case, expression is still to be protected. Paradigms here are expression that causes emotional distress or reputational injury to public figures.

Consider, for example, the case of *Hustler v. Falwell*. In a *Hustler* parody of a Campari ad, the Reverend Jerry Falwell was represented as having had his first sexual encounter while drunk, in an outhouse, and with his mother. Falwell won a substantial settlement for the intentional infliction of emotional distress. The Supreme Court overturned the settlement, rejecting the idea that tort law protections should define the scope of expressive liberty. Without denying the reality of Falwell's distress, dismissing it as merely "mental" or emotional, or disputing *Hustler's* responsibility for it,[103] the Court nevertheless argued that the parody was protected, absent a showing of actual malice. The decision did not simply protect offensive expression; emotional distress is not a matter of being offended. Nor did it reflect the view that the liberty to inflict emotional distress is, *in general*, of greater weight than the injury of such distress. The decision turned instead on Falwell's standing as a public figure and the importance of freewheeling, sharp criticism of public figures. In a world in which carefully crafted personal images play a central role in politics, and in which fundamental interests depend on the operation of the political arena, equally well targeted efforts at deflation deserve strong protection. By requiring actual malice, the Court in effect licensed increased emotional distress in order to protect the values associated with expressive liberty.

In a third type of case, importance and vulnerability diminish, and there are direct costs. Here, restriction is permitted. Take, for example, the case of libel of private figures. The vulnerability of reputations, the difficulty of repairing them through more speech, and the fact that such libel is typically not supported by weighty expressive or deliberative interests combine to reduce the appropriate level of protection.

Fair Access

Finally, we come to the requirement of ensuring fair access to expressive opportunities. Three main lines of argument converge on this conclusion.

The first begins by underscoring the central role played in the account of stringent protections by the fact of reasonable persuasion and Brandeis's associated counsel that we remedy the harms of speech with more speech. By holding out the hopeful prospect of reconciling stringent protection of expressive liberties with other substantial political values (in-

cluding the value of equality), Brandeis's point helps to remove the sectarian edge from freedom of expression. Instead of winning arguments by always insisting that the "danger has been exaggerated," we take the costs seriously and embrace expression as the preferred strategy for addressing them.

But if we help ourselves to Brandeis's thesis, then we must also take its implications on board. When Brandeis urged more speech, in the case of *Whitney v. California*, the context was subversive advocacy.[104] But his remarks were not addressed to the advocates: Anna Whitney was using speech; the state was shutting her up. Brandeis was reminding political elites of the vast means at their disposal for addressing arguments for revolutionary change: they might, for example, try to cure the social ills that prompt such arguments or to present the case against a revolutionary solution.

Addressed to less powerful groups, with restricted access to means of expression, the easy injunction "More speech!" loses its edge. If we insist that "more speech" is the preferred remedy for combating the harms of speech and appeal to the Brandeisian injunction in criticizing content regulation, then we also have an obligation to ensure fair access to facilities of expression where the additional speech might plausibly help the "deliberative forces" to "prevail over the arbitrary."[105] Put otherwise, any argument in which Brandeis's thesis figures as a premise must count assurance of fair access among its conclusions. It is simply unacceptable to impose a high burden on justifying restrictions on expression, to justify that burden partly in terms of the possibilities of combating the harms of speech with more speech, and not to endorse the requirement of ensuring such facilities.

A second line of argument for fair access is rooted in the expressive interest. The argument follows a generic egalitarian strategy of argument for substantively egalitarian norms. Described abstractly, the strategy begins with a more formal and less controversial political norm—for example, the norm of formal equality of opportunity—and then argues that the best justification for that norm provides a rationale for a more egalitarian norm, for example, substantive equality of opportunity.[106]

To put the point less abstractly and apply it to the issue at hand, the rationale for the more formal requirement of an equal right to expressive liberties rests centrally on a conception of the human interests served by that guarantee. More specifically, the reason for protecting expressive liberties against content regulation or other forms of undue restriction lies partly in the importance of assuring favorable conditions for pursuing the expressive interest. But once we acknowledge the need for favorable conditions for realizing this basic interest, we are naturally led from a more formal to a more substantively egalitarian requirement, because the latter

more fully elaborates the range of favorable conditions. In particular, given the fact of resource dependence, favorable conditions for realizing the expressive interest will include some assurance of the resources required for expression and some guarantee that efforts to express views on matters of common concern will not be drowned out by the speech of better-endowed citizens.

The deliberative interest provides the foundation for a third, more instrumental rationale for fair access. The cornerstone of this deliberative case is provided by the Millian thesis that favorable deliberative conditions require a diversity of messages. Such diversity might be encouraged in a variety of ways. But one natural means to diversity is to ensure that all citizens have fair opportunities for expression, the expectation being that the breadth of subject matters and viewpoints will increase if the extent of expressive opportunity is not determined by economic or social position.[107]

I have already indicated some ways to achieve fair access in a world of unequal resources (pp. 178–80). One requirement is to endorse a more "functional" conception of a public forum,[108] rejecting the conception of such forums as places that are by tradition or explicit designation open to communicative activity, and instead accepting a presumption that any location with dense public interaction ought to be treated as a public forum that must be kept open to the public.[109] Another condition of fair access is a heightened presumption against content-neutral regulations that have substantially disparate distributive implications, when, as with regulations on distributing handbills or using parks and sidewalks, they work to impose disproportionate burdens on those who otherwise lack the resources to get their message out.

Furthermore, fair access recommends financing political campaigns through public resources, at least to ensure reasonable floors, and regulating private political contributions and expenditures.[110] In *Buckley v. Valeo*, the Supreme Court drew a sharp distinction between regulations of contributions, which are acceptable because they help to prevent the appearance and reality of corruption, and regulations of expenditures, which are an unacceptable burden of expressive liberty.[111] In arguing against expenditure limits, the Court appealed in part to the greater burdens imposed by such regulations. More fundamentally, however, the majority condemned restrictions (even if content-neutral) on expressive liberty imposed in the name of "enhanc[ing] the relative voice of others"[112] and thereby "equaliz[ing] access to the political arena."[113] The Court did not deny that expenditure limits would work to "equalize access" but instead held that regulations of expression aimed at such equalization were "wholly foreign to the first amendment."[114]

Whatever their connection to the First Amendment, it is difficult to understand how any plausible account of expressive liberty would regard content-neutral regulations enacted in the name of fair access as foreign to its concerns. In any case, I have suggested that requirements of fair access share a common justification with other stringent protections of expressive liberty; rather than being "wholly foreign," they are on a par.

Thus far I have focused on measures for ensuring fair access that are content-neutral and concerned to remedy the effects of inequalities of material resources on access to expressive opportunities. But, as I indicated in the discussion of fair access in section 1, it is not clear that content-neutral regulations suffice when it comes to addressing problems of fair access that do not reflect the distribution of material resources. In the case of pornography, for example, the mechanisms of exclusion have been tied directly to what is said. Consider the argument that pornography works by silencing women. Responding to the Brandeisian "more speech" argument, MacKinnon explains the problem of silencing and the consequent tension between content neutrality and fair access this way:

> The situation in which women presently find ourselves with respect to the pornography is one in which more *pornography* is inconsistent with rectifying or even counterbalancing its damage through speech, because so long as the pornography exists in the way it does there *will not be more speech by women*. Pornography strips and devastates women of credibility, from our accounts of sexual assault to our everyday reality of sexual subordination. We are stripped of authority and devalidated and silenced. Silenced here means that the purposes of the First Amendment, premised upon conditions presumed and promoted by protecting free speech, do not pertain to women because they are not our conditions. . . . Any system of freedom of expression that does not address a problem where the free speech of men silences the free speech of women, a real conflict between speech interests as well as between people, is not serious about securing freedom of expression in this country.[115]

I agree with the last claim about the implications of a serious commitment to freedom of expression, and later I present a style of pornography regulation that is less encompassing than MacKinnon's proposals but consistent with the perspective I have advanced in this article. I do wish, however, to resist jumping too quickly to the conclusion that content regulation is the only way to ensure fair access. Other measures of empowerment that are more affirmative than regulations of expression could show real promise in addressing silencing and exclusion, at least as much promise as restricting pornography. In particular, alongside efforts to address the general unjust inequalities of men and women—to overcome the division of household labor and the labor-market segregation of

women[116]—alternative ways to meet the problems of silencing directly should be explored. Earlier, for example, I mentioned a tort of domestic sexual harassment, regular public hearings on sexual abuse, perhaps subsidies for women's organizations to hold such hearings, and easier access of women to broadcast licenses.

Indeed, it is not clear that MacKinnon would disagree about the plausibility of these remedies. Responding to the Brandeisian idea of addressing the harms of speech with more speech, she asks, "would more speech remedy the harm [of pornography]?" Her response is instructive: "In the end, the answer may be yes, but not under the *abstract system* of free speech, which only enhances the power of pornographers while doing nothing to guarantee the free speech of women, for which we need civil equality."[117] MacKinnon is right in saying that a serious commitment to freedom of expression cannot be sharply distinguished from a program of civil equality. For that reason, the proposals I have mentioned are not exclusively about "the abstract system of free speech"; they aim directly to enhance the speech of women and are part of a program of "civil equality." So it is unclear why they should be expected to do less well than a restrictive strategy for addressing the harms at issue.

5. Hate Speech, Pornography, and Subcategorization

At several points in the discussion—for example, in my remarks on regulating the pornographically obscene—I have suggested that a commitment to stringent protections of expressive liberty is consistent with a certain style of restriction on expression. Other examples of the style, apart from regulations of pornographic obscenity, are regulations of racist fighting words or "sexually derogatory fighting words."[118] The idea of such regulations is to restrict expression within a less important class (obscenity, fighting words) by targeting a particular subcategory (pornographic, racist, sexually derogatory) of the broader class on grounds of the special harmfulness of that subclass. For example, rather than targeting fighting words generally, regulations focus on racially insulting fighting words; rather than targeting obscenity generally, they focus on obscenity that erotizes violence. Subcategorization is a distinctive and controversial style of regulation because, to put the point abstractly, the defining features of the subcategory would not provide a permissible basis for regulation outside the less protected category. To be a little less abstract, the strategy raises the following question: why is it permissible to regulate hateful fighting words or pornographic obscenity while acknowledging that a general regulation of hate speech or pornography would not be acceptable?

The acceptability of subcategorization will be important to my concluding comments on the Stanford regulation. But it was the target of sharp criticism by Justice Scalia, writing for the Court in the 1992 case of *R. A. V. v. St. Paul*. Although I am not concerned here with the constitutional issue as such, Scalia's objection raises important issues about regulating expression that are not narrowly constitutional.

Background

The facts in *R. A. V. v. St. Paul* are straightforward and uncontested. Robert A. Viktora (a juvenile at the time of prosecution) and his friends burned a cross in the yard of a Black family; he was arrested and charged under a St. Paul bias-motivated crime ordinance. The ordinance provides that "Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor."[119] Viktora challenged the ordinance, arguing that it was overbroad and impermissibly content-based. The Minnesota Supreme Court rejected the challenge. Central to the court's holding was its construction of the phrase "arouses anger, alarm or resentment in others" as restricted to "fighting words." As defined in *Chaplinksy v. New Hampshire*, fighting words are directed to individuals, they form "no essential part of any exposition of ideas," and their "very utterance inflicts injury" or "tends to incite an immediate breach of the peace."[120] Assuming that the First Amendment does not protect fighting words,[121] the Minnesota court held that the ordinance was neither overbroad nor an impermissible form of content regulation.

The U.S. Supreme Court rejected the conclusions of the Minnesota court and agreed unanimously on the infirmity of the St. Paul ordinance. This consensus, however, emerged from a convergence of two distinct lines of argument about the sources of that infirmity. Writing for the Court, Justice Scalia maintained that the regulation, understood to be restricted to fighting words, was an impermissible form of content discrimination; rejecting this contention, the separate concurrences by Justices White and Stevens held that it was not really restricted to fighting words and so was objectionably overbroad.[122] I am concerned here with the majority's claim: *even as restricted to fighting words*, the regulation is impermissibly content-discriminatory. To state the problem more exactly, assuming, as the majority does, that fighting words are a proscribable category of expression, is it permissible to focus a regulation on the

particular subcategory of fighting words mentioned in the ordinance? Let us call the subcategory "hateful fighting words." We have two competing proposals, then: (1) regulating hateful fighting words represents an impermissible regulation of subject matter (and perhaps viewpoint); and (2) regulating hateful fighting words represents a permissible targeting of a subcategory of concededly low value and regulable expression on grounds of the special injuriousness of that subcategory.

Three Points of Agreement

To situate the disagreement between these two proposals more precisely, we need first to clarify three points of common ground.

First, proscribable expression is not without protection. From the fact that the government could proscribe a whole category of expression, say, child pornography, it does not follow that every less-inclusive regulation proscribing a subclass and permitting the rest is also acceptable: think of a child pornography statute restricted to that in which at least one actor wears an "I like Dan Quayle" button; or a regulation of obscenity produced after supper. Regulations targeted on those subcategories are unacceptable. So the argument for restricting hateful fighting words cannot count among its premises the claim that every subcategory of a proscribable category can permissibly be targeted.

Second, subcategories can sometimes be restricted on the basis of their content. Agreeing that fighting words (along with obscenity and defamation) are proscribable because of their content, the majority accepts further that regulations can target certain subcategories of proscribable expression in virtue of the distinctive content of those subcategories. The federal government, for example, can "criminalize only those threats of violence that are directed against the President."[123] So the argument against regulating hateful fighting words cannot count among its premises the claim that *all* content-based regulations of subcategories of fighting words are impermissible.

Taking these first two points together, the disagreement is about the specific subcategory singled out by the St. Paul ordinance. That disagreement, in turn, is sharpened by a third point of agreement between the two positions: It is impermissible to proscribe all speech that arouses anger, alarm, or resentment on the basis of race, color, creed, religion, or gender.[124] Such a regulation would aim at, and almost certainly produce, an unacceptable "suppression of ideas." The issue, then, is whether a regulation targeted specifically at *fighting words* that "arouse anger, alarm, or resentment" is acceptable.

Regulating Hateful Fighting Words

With these three points in place, we can fix the precise disagreement and assess the alternative positions.

The first view is that a regulation of hateful fighting words triggers exactly the same suspicion about the suppression of ideas as would be triggered by a *general* hate-speech regulation, directed to all speech that arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender. The underlying principle that bars a general regulation of hate speech (the third point of agreement) is that hateful messages are not proscribable because of their content. They do not forfeit that immunity because they travel in a vehicle that is, for reasons other than the hate message, dangerous. Thus, immediate provocative speech can be regulated. But the fact that a hateful message is conveyed, for example, in an immediately provocative way does not make it permissible to target it as distinct from other messages conveyed in an equally (or more) provocative way.

Content regulation threatens us with the official suppression of ideas; so the question is always whether the "official suppression of ideas is afoot."[125] That question, according to the first view, loses none of its force when a regulation is targeted on a proscribable category of speech; the fact that expression falls into a less-protected category does not make it permissible to use a regulation of such expression as a device to restrict concededly protected messages.[126]

The alternative view is that there is indeed less concern about content discrimination, less concern about the suppression of ideas, when regulated speech falls into a proscribable category. Why? The neatest answer would be this: "How could there be any concern about the suppression of ideas? Expression in proscribable categories conveys no ideas." But that will not do; different obscene movies, for example, can convey competing ideas about the pleasures of different sorts of sex.[127] More to the point, if hateful fighting words did not communicate anything, there would be no point in targeting them. Nor would it be right simply to insist that if a category is proscribable then we are less concerned about protecting it. That is of course true in some way. But it does not indicate any reason for reduced concern about content discrimination, and it threatens to fly in the face of the first point of agreement noted earlier, that proscribable expression has some protection. The explanation for the reduced concern about content regulation cannot lie in the bare fact that expression belongs to a proscribable category but must instead be provided by the reason for treating it as proscribable in the first place.

Consider, then, the category of fighting words. Such words are provocations directed to individuals and comprise "no essential part of the exposition of ideas." For that reason, concerns about the official suppression of ideas are naturally reduced when regulations are targeted on them; it is, intuitively, difficult to see how a regulation targeted on expression that is no essential part of the exposition of ideas could seriously threaten to drive certain ideas, topics, or viewpoints from the marketplace of ideas or the forum of political debate.[128]

More specifically, recall the reasons for being especially troubled about regulations targeted on content (pp. 192ff.): they represent especially serious threats to the deliberative and expressive interests; the relative precision of their targeting raises the specter of the abuse of power in an especially acute way; and, even if such regulations are targeted on real evils, the fact of reasonable persuasion should lead us to trust more speech to address those evils.

Fighting words, however, are insults or provocations directed to individuals. So they do not make a significant contribution to discussion. The threat to deliberative interests seems, then, relatively small. Moreover, insofar as they serve as vehicles for expression, for advancing the expressive interest, proscribing them leaves a wide range of alternative vehicles. And the reasons for expression in the form of fighting words do not seem especially substantial. Taking these points together, it seems much less plausible that a regulation targeted on hateful fighting words would severely suppress ideas or would be motivated by a desire to suppress them than that a regulation targeted on hate speech generally would have that unacceptable effect or illegitimate motivation. So there does appear to be a substantial difference in the fears about suppression that would reasonably be triggered by a general regulation of hate speech and a regulation targeted specifically on the hateful subset of fighting words.

Of course, given the facts of power, easy offense, and abuse, concerns about suppression could be revived if a regulation were focused on a relatively insignificant harm. But racial subordination, for example,[129] is a serious evil, and it is at least plausible that racist fighting words play some role, perhaps a significant role, in maintaining racial inequality. They contribute to an environment of fear, suspicion, hostility, and mistrust that makes racial division so resistant to remedy. So the regulation does not pick out an arbitrary class of fighting words but a class that is especially damaging to fundamental political values, for example, the value of racial equality. Finally, it seems especially implausible that the injuries produced by hateful fighting words can be remedied with more speech. The anger, fear, and suspicion that they produce is not easily addressed by verbal reassurances.

The regulation, then, is targeted on a category with only a minimal connection with the fundamental deliberative and expressive interests, and within that category it focuses on a subcategory that is plausibly more injurious than other elements of the category and whose effects are plausibly more recalcitrant to expressive cure. There are three responses to this argument, each of which aims to reinstate suspicions about the suppression of ideas in a regulation of hateful fighting words.

The first is that there is a straightforward basis for the suspicion: it is agreed, as I indicated earlier, that a *general* hate-speech regulation would threaten us with the suppression of ideas. But if it is unacceptable to single out hateful words for special regulation, why is it not also unacceptable to restrict the hateful subset of fighting words? Contrast that restriction with one that singles out the fighting words that are especially likely to incite breach of the peace. Fighting words are low value in part because they tend to incite breach, so there could be no objection to singling out those fighting words that threaten, in more extreme form, the very evil that prompts the reduced protection in the first place.[130] But a regulation of hateful fighting words (arguably) does not pick out the especially provocative. So it is objectionable.

The problem with this objection is that it fails to take into consideration the bases for reduced protection for fighting words and the reasons for special concerns about content regulation. The category of fighting words is such that restricting expression within the category does not present a substantial threat of the suppression of ideas. But the suppression of ideas is the main threat posed by content regulation. So the explanation of the reduced protection for fighting words also explains why regulating hateful fighting words does not threaten the suppression of ideas and so accounts for the legitimacy of a form of content discrimination that would be unacceptable outside the limited context of fighting words.

A second reason for the concern might be a familiar "camel's nose" concern: once we allow the suppression of some subcategory of hate speech, we will be tempted to regulate hate speech generally. But that regulation is not legitimate.

The problem here is that the argument proves too much: it provides a case for an absolute ban on content regulation, a position that no one in the debate occupies (see the second of the three points of agreement noted above). Moreover, although the concern about excessive regulation is real, the point of carving out such less-protected categories as fighting words, obscenity, and commercial speech is precisely to address that concern. To endorse the strategy of categorization as a device against temptations to overregulate and then to revisit concerns about

those temptations in the context of regulating subcategories strikes me as an exaggerated form of distrust, and one that runs up against the premise, accepted by the Court majority, that fighting words themselves are low value.

The third reason is that, although hateful fighting words are certainly offensive and insulting, even gross offensiveness and insult cannot provide a basis for regulation.[131] But to say that the "price" is offensiveness represents a tendentious misstatement of the harms. The harms of hateful fighting words are several and include the role of such words in sustaining racial division and preserving racial inequality.[132] This is a very great harm. Of course, not every restriction of expression that contributes to avoiding it is, for that reason, acceptable. But a regulation that might contribute, and do so without threatening to suppress ideas (for example, a regulation of hateful fighting words), is acceptable.

Pornographic Obscenity

In introducing this discussion of regulations of hateful fighting words, I presented such regulations as one example of the more general strategy of regulation by subcategorization. I have now indicated why the strategy is, as a general matter, unobjectionable. To clarify the basis of this view, I want now to say more about an example I discussed earlier, the case of pornographic obscenity.

I will assume the *Miller* test for obscenity.[133] According to that test, a work is obscene just in case it meets three conditions: the average person, applying community standards, finds that the work taken as a whole appeals to the prurient interest; the work presents an offensive depiction of sexual conduct; and it lacks serious literary, artistic, political, or scientific value. The intuition is that sexually preoccupied, offensive junk does not merit stringent constitutional protection. It is an interesting question, which I will not pursue here, why the sexual preoccupation makes a difference.[134] It does not appear to diminish the value of the expression, which by stipulation is not very great; furthermore, because the costs lie in offensiveness and expression can be offensive without being sexually preoccupied, the sexual content is not required for the costs. So why is it not permissible to regulate violence-preoccupied, offensive junk? Or offensive junk preoccupied with frightening people? Or with moneymaking? Or with cruelty? Leaving these questions for another occasion, I assume for the sake of argument that obscenity merits reduced protection. I want to ask about the implications of that assumption for regulating subcategories of the obscene.

Consider, then, three obscenity regulations. The first targets all obscene forms of expression. The second targets obscene expression in which women are subjected to violence, what I referred to earlier as the "pornographically obscene." I stipulate a regulation covering all obscenity in which women are subjected to violence, rather than obscenity in which that violence is applauded, because I want the regulation to be content-based but viewpoint-neutral.[135] The third regulation targets "grossly" obscene expression, by which I mean expression that is obscene and *grossly* offensive by the lights of the community: perhaps golden-shower movies and movies featuring oral sex with animals fall into this class.

Paralleling the earlier discussion of hateful fighting words, I distinguish two natural responses to these regulations. The first is constructed on analogy with a view that accepts a regulation targeted on extremely provocative fighting words but not one targeted on hateful fighting words. So it would accept regulations of all the obscene or of only the grossly obscene, but not of only the pornographically obscene.

Why would a regulation focused on the grossly offensive subcategory be acceptable? Although the determination of gross offensiveness is a matter of content (prohibitions on golden-shower movies and movies displaying oral sex with animals are subject-matter restrictions), and content regulations are generally objectionable, offensiveness is precisely the reason for reducing the protection of the obscene in the first place. So if it is permissible to target all offensive, prurient junk without engendering concern about suppressing ideas, then surely it is permissible to target the *grossly* offensive, prurient junk without engendering such suspicion.

A regulation of the pornographically obscene is, like a regulation of the grossly obscene, not subject-matter-neutral. But, this first line of response emphasizes, it singles out for regulation a subcategory of the obscene on the basis of considerations other than those that render it obscene in the first place; the subclass of the violent might not correspond to the subcategory that is either *especially* prurient or *grossly* offensive in its prurience. Moreover, a general regulation of pornography seems unacceptable, for the reasons I indicated earlier. Because the feature that defines the subcategory is unrelated to obscenity, and because that feature *would* trigger concern about the suppression of ideas if applied outside the context of obscenity, it might be thought to trigger that concern here. Defenders of the regulation will, to be sure, argue that the regulation is justified by reference to the distinctive harms of the pornographically obscene. But if those alleged harms cannot justify regulating pornography generally, then why should they provide an acceptable rationale for regulating the pornographically obscene?

Here again we meet the central concern: the fact that a whole category

of expression is proscribable does not imply a reduced concern about the evil of a kind of content discrimination that would be unacceptable if applied to a wider category of expression.

Once more, however, an alternative view—constructed on analogy with the position that approves regulating hateful fighting words—seems more plausible. This alternative would accept the regulation of the pornographically obscene.[136] The contention fueling this second line of argument is that *if* obscenity is low value in the first place, then it is permissible to restrict pornographically obscene representations on grounds that such representations are injurious,[137] *even though* the alleged injuries would be insufficient to sustain the regulation of pornography generally. The reason is that regulating pornography generally does, for reasons I discussed earlier, present a substantial threat to fundamental expressive and deliberative interests. (This might be conceded even by those who argue that the threat is overpowered by injuries reasonably attributed to pornography.) But the basis for treating obscenity as low value is that it contributes little to the fundamental interests, thus, regulating it would not present a substantial threat to those interests. Because it would not, the concerns that provide the basis for opposing content discrimination are diminished. Because they are diminished, the injuries associated with the fusing of sex and violence by the pornographically obscene provide sufficient basis for regulation. Indeed, there is a better case for this regulation, which is focused on genuine harms, than for regulating either obscenity generally or grossly offensive obscenity. Those regulations aim to prevent the uncertain evil of offensiveness rather than the genuine evil of injuries to women.

6. Reflections on the Stanford Case

Finally, I come back to the Stanford regulation. At the beginning of this article, I promised to fit a pallid endorsement of it into the conception of freedom of expression I have outlined here. Everything I have said should suffice to explain the lack of enthusiasm (though I will add a few more considerations later on). What are the bases for the endorsement?

Recall that the regulation restricts "speech or other expression" that is (1) *intended* to insult or stigmatize individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin; (2) addressed *directly* to the individual or individuals whom it insults or stigmatizes; and (3) makes use of insulting or "fighting words" or nonverbal symbols that are "commonly understood to convey direct and visceral hatred or contempt for human beings on the basis of their sex, race, etc."

My endorsement reflects three features of the regulation, each of which indicates sensitivity to the case for stringent protection that I have presented here:

1. The regulation is directed to remarks that are *intended* to insult, and the insult must be directed to an individual or small group. So the regulated expression bears at most a loose connection to the fundamental expressive and deliberative interests.

2. The insult must be conveyed through fighting words, particularly words that insult or stigmatize on the basis of sex, race, color, and so on. Because of the requirement of immediate provocation and injury associated with fighting words, some of the costs are direct and there is no deflecting them with "more speech."

3. The rule singles out an exceptional category and does not represent an open-ended invitation to balancing the benefits and costs of expression. So it is attentive to concerns about vulnerability.

Given the minimal interests, direct costs, and attention to potential abuse, the supports for protection are substantially reduced, and it seems appropriate (or at least permissible) to shift the burden of restraint to the speaker.

To be sure, the regulation is not without its troubles, principally because (as interpreted) it would be viewpoint-discriminatory; for example, racist remarks addressed to Black students could (depending on conditions) count as a form of discriminatory harassment; racist remarks to white students do not.[138] Is the general presumption against such discrimination rebuttable in this case?

In assessing the troublesomeness of the viewpoint discrimination, we need to keep in focus the requirements of intent and fighting words and the stipulation that the words be directed to an individual or group with the intent to insult or stigmatize. Expression meeting these conditions has only a marginal claim to protection in the first place. So, as I indicated in the discussion of hateful fighting words, it seems *permissible* to deny protection to a subcategory of it in order to promote the substantial value of ensuring equality of educational opportunity for the groups singled out in the regulation.

Of course "permissible" does not imply "recommended." Other considerations are relevant to deciding that issue. How much injurious expression would actually be avoided? Would the regulation be at all effective in combating the underlying problems reflected in hate speech? Furthermore, apart from addressing these questions about the regulation itself, we need to consider the wisdom of focusing energy and attention on regulating hate speech (or pornography) rather than on taking more affirmative measures to combat the harms that the regulation aims to avoid.

The focus on regulating expression has at least three defects: it can distract energy from other measures; it divides people who are allied in their commitment to equality; and it suggests a depressingly profound loss of constructive, egalitarian, political and social imagination.

Together, these considerations strike me as good grounds for skepticism. To be sure, such skepticism is not costly for those of us who are not now targets of hate speech.[139] This point has some force, and so I do not treat my skepticism about effectiveness as a basis for rejecting the regulations as inconsistent with a commitment to stringent protections of expressive liberty.

But ineffectiveness could in turn lead to pressure for more stringent regulations in the name of equality. And this could represent a serious challenge to the conception of freedom of expression I have sketched here. If the harms of subordination cannot be fought with more speech and other nonrestrictive remedies, then, the world being as it is, a commitment to substantive equality simply cannot be reconciled with a strong affirmation of expressive liberties. If my account of the basis of freedom of expression is correct, then that conclusion would not show that we ought to give up on the value of equality, because, as I indicated early on, nothing in the defense turns on a freestanding preference for liberty over all competing values, particularly a freestanding preference for liberty over equality. Nor would it show that we ought to give up on the value of liberty. Instead, we would face a grim standoff between concerns about expressive liberty and concerns about equality.

So those of us who celebrate the values of equality, toleration, and expressive liberty—and the remedial powers of speech in reconciling these values—ought to conduct our celebration by getting to work.

Notes

* An earlier version of this paper appeared in *Philosophy and Public Affairs* 22, 3 (summer 1993): 207–63. I have made exclusively editorial and stylistic changes in preparing this version and wish to thank Carol Roberts for her many helpful suggestions. In particular, I have not modified the paper to take account of the February 1995 decision of Santa Clara County Superior Court in *Corry v. Stanford* to overturn the Stanford speech code, which I discuss below at pp. 173–74 and 212–14. The court's decision relied on Justice Scalia's opinion in *R. A. V. v. St. Paul*, 112 S. Ct. 2538 (1992). I criticize that opinion in section 5. I have presented talks based on earlier drafts of this paper at Haverford College, the University of California (Davis), the John F. Kennedy School of Government, Wellesley College, the University of Illinois (Chicago), Northwestern University, Amherst College, New York University, the Inter-Africa Group Symposium "On the Making of the New Ethiopian Constitution," and the Society for Ethical and Legal

Philosophy. I am grateful to my audiences for their criticisms and suggestions. I also thank C. Edwin Baker, Randall Forsberg, John Rawls, John Simmons, and Cass Sunstein for comments on previous versions, and Archon Fung for his research assistance. More generally, I am very much indebted to Thomas Scanlon's papers on freedom of expression, in particular his "Freedom of Expression and Categories of Expression," *University of Pittsburgh Law Review* (1979): 519–50.

1. See Charles Lawrence, "If He Hollers Let Him Go: Regulating Racist Speech on Campus," *Duke Law Journal* (1990): 431–83; Mari Matsuda, "Public Response to Racist Speech: Considering the Victim's Story," *Michigan Law Review* 87 (1989): 2320–81; Richard Delgado, "Campus Antiracism Rules: Constitutional Narratives in Collision," *Northwestern University Law Review* 85 (1991): 343–87.

2. See, for example, George Will, "Curdled Politics on Campus," *Newsweek*, May 6, 1991, 72; Chester E. Finn, "The Campus: 'An Island of Repression in a Sea of Freedom,'" *Commentary* (September 1989): 17–23.

3. *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Michigan, 1989).

4. See ibid. at 865–66 for discussion of cases of enforcement against comments made in the course of classroom discussion.

5. See David Kretzmer, "Freedom of Speech and Racism," *Cardozo Law Review* 8 (1987): 445–513; Eric Stein, "History against Free Speech: The New German Law against the 'Auschwitz'–and Other 'Lies,'" *Michigan Law Review* 85 (1986): 275–324; Kenneth Lasson, "Racism in Great Britain: Drawing the Line of Free Speech," *Boston College Third World Law Journal* 6 (1987): 161–81; Robert Sedler, "The Constitutional Protection of Religion, Expression, and Association in Canada and the United States: A Comparative Analysis," *Case Western Reserve Journal of International Law* 20 (1988): 577–621; Matsuda, "Public Response to Racist Speech"; Delgado, "Campus Antiracism Rules."

6. But it does appear to be inconsistent with the current view of the Supreme Court on permissible forms of state regulation of speech. See *R. A. V. v. St. Paul*, 122 S. Ct. 2538 (1992). I discuss this view in section 5.

7. In saying that it is not very restrictive, I do not mean to say that it is, therefore, an acceptable restriction. "No one whose first name includes the letters *z* and *y* may criticize impressionist painting" is not very restrictive but is also not acceptable.

8. *Doe v. University of Michigan* at 853, 868, emphases added. Cohn did not indicate the sorts of measures that might be consistent with the First Amendment.

9. As much in informal conversations about these issues as in the legal and philosophical literature.

10. See Stanley Fish, "There's No Such Thing as Free Speech," *Boston Review* 17 (January–February 1992): 3–4, 23–26. I do not mean "nihilistic" as tendentious labeling or as a term of criticism, but only as a way to capture the "there is no such thing" point in the quotation in the text. The view could be called "pragmatism" about expression, but this misses its critical edge.

11. Ibid., p. 26.

12. For a response to nihilism, see below, pp. 195–97.

13. See, for example, Vincent Blasi, "The Pathological Perspective and the First Amendment," *Columbia Law Review* 85 (1985): 449–514.

14. For an argument based more fundamentally on mistrust, see Richard Epstein, "Property, Speech, and the Politics of Distrust," *University of Chicago Law Review* 59 (1992): 41–90. For criticisms, see Frank Michelman, "Liberties, Fair Values, and Constitutional Method," *University of Chicago Law Review* 59 (1992): 91–114.

15. Cass Sunstein criticizes my view along these lines. He suggests that legal principles emerging from it might be "too complex, ad hoc, and unruly." See Sunstein, *Democracy*, p. 146. I address this concern in my discussion of specific issues in sections 4 and 5.

16. For the suggestion that it does so depend, see Ronald Dworkin, "Two Concepts of Liberty," in *Isaiah Berlin: A Celebration*, ed. Edna Ullmann-Margalit and Avishai Margalit (London: Hogarth Press, 1991), pp. 100–109.

17. In this connection, I thank Ed Baker for pointing out a number of blunders that marred the penultimate draft of the paper.

18. The classic statement of the general concern is Justice Marshall's in *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95–96 (1972): "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." On viewpoint discrimination, see *Texas v. Johnson*, 491 U.S. 397, 414 (1989). For discussion, see John Hart Ely, "Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Decisions," *Harvard Law Review* (1975): 1482–1508; Geoffrey Stone, "Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions," *University of Chicago Law Review* 46 (1978): 81–115, and "Content-Neutral Restrictions," *University of Chicago Law Review* 54 (1987): 46–120; and T. M. Scanlon, Jr., "Content-Regulation Reconsidered," in *Democracy and the Mass Media*, ed. Judith Lichtenberg (Cambridge: Cambridge University Press, 1990), pp. 331–54.

19. For example, on incitement, see *Brandenburg v. Ohio*, 395 U.S. 444 (1968); on commercial speech, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), *Central Hudson Gas and Electric v. Public Service Commission of New York*, 447 U.S. 557 (1980), *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 106 S. Ct. 2968 (1986); on fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); on child pornography, *Ferber v. New York*, 458 U.S. 747 (1982).

20. I emphasize that I am using this protean term exclusively as a label for the approach to content regulation described here.

21. For doubts about the virtues of categorization and corresponding skepticism about categorically formulated prohibitions on content regulation, see John Paul Stevens, "The Freedom of Speech," *Yale Law Journal* 102 (1993): 1293–1313.

22. For a subtle discussion of the structure of argument about content-neutral regulations and of the extent to which the thumb gets put on the balance for different sorts of regulations, see Stone, "Content-Neutral Restrictions."

23. By "costs" or a "price," I mean, quite generically, conditions that it is reasonable to want to avoid.

24. See *Schneider v. State*, 308 U.S. 147 (1939) (on cleanup costs); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (on reputational injury); *Cohen v. Califor-*

nia, 403 U.S. 15 (1971) (on offense); *Hustler v. Falwell*, 485 U.S. 46 (1988) (on intentional infliction of emotional distress).

25. Say, a fine for leaving a pile of leaflets sitting on a bench for people to pick up.

26. *New York Times v. Sullivan*, 376 U.S. 254, 279–80 (1964).

27. *Hustler v. Falwell*, 485 U.S. 46, 50 (1988).

28. On the idea of the value of a liberty, see John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), pp. 204–5. On the rationale for requiring a fair value for political liberty in particular and the permissibility of (content-neutral) regulations of political speech in order to ensure that fair value, see John Rawls, "The Basic Liberties and Their Priority," *Political Liberalism* (New York: Columbia University Press, 1993), lecture 8, secs. 7, 12.

29. See Frank Michelman, "Universities, Racist Speech, and Democracy in America," *Harvard Civil Rights–Civil Liberties Law Review* 27 (1992): 352.

30. See, for example, Catharine MacKinnon, "Francis Biddle's Sister," in *Feminism Unmodified* (Cambridge, Mass.: Harvard University Press, 1987), pp. 163–97; for discussion of the silencing argument, see Frank Michelman, "Conceptions of Democracy in American Constitutional Argument: The Case of Pornography," *Tennessee Law Review* 56 (1989): 291–319; and the critical appraisal in Ronald Dworkin, "Two Concepts of Liberty."

31. For an extended elaboration of the importance of this point for free speech doctrine, see Cass Sunstein's discussion of a New Deal for speech in "Free Speech Now," *The University of Chicago Law Review* 59 (1992): 255–316, esp. 263–77, 316.

32. Ronald Dworkin, "Do We Have a Right to Pornography," in *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985), pp. 335–72. For an excellent discussion of the limits of this argument, see Rae Langton, "Whose Right? Ronald Dworkin, Women, and Pornographers," *Philosophy and Public Affairs* 19 (1990): 311–59. Dworkin's recent discussions of expressive liberty seem less minimalist. In "What Is Equality? Part 3: The Place of Liberty," he ties the value of expressive liberties to the formation of "authentic preferences" (*Iowa Law Review* 72 [1987]: 34–36). In "The Coming Battles over Free Speech," he notes the importance of an active side to personal responsibility (*New York Review of Books*, June 11, 1992, 57).

33. For criticism of the project of founding an account of freedom of expression on a prior expression action distinction, see T. M. Scanlon, "A Theory of Freedom of Expression," *Philosophy and Public Affairs* 1 (1972): 205–8.

34. Indeed, as Scanlon emphasizes, the central task for a theory of freedom of expression is to explain why this should be so. See ibid., p. 204.

35. See *Schneider v. State*, 308 U.S. 147, 161 (1939).

36. To put the point in a constitutional slogan: you cannot derive the First Amendment from the equal-protection clause of the Fourteenth Amendment.

37. The maximalist need not hold that the value is intrinsic, nor that there is just a single value associated with expression. I am indebted to Connie Rosati for urging this clarification.

38. See, for example, Scanlon's listener-autonomy theory in "A Theory of Freedom of Expression," pp. 204–26, and his criticisms of that theory in "Free-

dom of Expression and Categories of Expression," pp. 534–35. In "Persuasion, Autonomy, and Expression," *Columbia Law Review* 91 (1991): 334–71, David Strauss aims to rescue a version of Scanlon's theory from these criticisms. Strauss condemns restrictions of speech justified by reference to the harmful results of the speech's persuasive power as inconsistent with listener autonomy.

39. This complaint is registered in Scanlon, "Freedom of Expression and Categories of Expression"; Steven H. Schiffrin, *The First Amendment, Democracy, and Romance* (Cambridge, Mass.: Harvard University Press, 1990), chap. 4. On the contrast between the complexity of the terrain and the simplicity of familiar theories, see Harry Kalven, *A Worthy Tradition: Freedom of Speech in America*, ed. Jamie Kalven (New York: Harper and Row, 1988), p. 23.

40. In "Persuasion, Autonomy, and Expression," Strauss argues that persuasion is "a process of appealing, in some sense, to reason" (p. 335) and that we ought not to regulate expression when its harmful effects come from its power to persuade. Thus false advertising gets reduced protection because it does not work by persuasion, as though we were in no danger of being persuaded by liars; nonobscene pornography is protected because it does work by persuasion, as though the scenes of the Washington Monument and American flag featured at the start of some triple-*X*-rated movies were representative. Here I lose my hold on his conception of persuasion, and so of his argument about commercial speech.

41. See, in general, Thomas Emerson, *The System of Freedom of Expression* (New York: Random House, Vintage, 1971). Lee C. Bollinger emphasizes as well the importance of encouraging tolerance in *The Tolerant Society* (Oxford: Oxford University Press, 1986); and Vincent Blasi examines the role of freedom of expression as a check on official misconduct in "The Checking Value in First Amendment Theory," *American Bar Foundation Research Journal* 3 (1977): 521–649.

42. For fuller discussion, see my "Moral Pluralism and Political Consensus," in *The Idea of Democracy*, ed. David Copp, Jean Hampton, and John Roemer (Cambridge: Cambridge University Press, 1993), pp. 281–87; also see Rawls, *Political Liberalism*, pp. 35–38.

43. There is, for example, this logical distinction: two inconsistent views can both be fully reasonable, though they cannot both be true.

44. I take this formulation from Mark Johnston.

45. I say "perhaps" because expression often has nothing to do with communication. See C. Edwin Baker, *Human Liberty and Freedom of Speech* (Oxford: Oxford University Press, 1989), pp. 51–54. I am grateful to Randall Forsberg for her helpful comments on an earlier draft in which I characterized the expressive interest much too narrowly.

46. My emphasis on reasons in the description of the expressive interest distinguishes my treatment from conventional discussion of the value of self-expression and self-fulfillment. When someone fulfils what they take to be an obligation (as specified by their moral views, for example), it is wrong to treat this as a matter of self-expression or self-fulfillment.

47. Here I follow a suggestion advanced in Rawls's discussion of liberty of conscience: the rationale for liberty of conscience lies in obligations that religious

and moral views assign to those who hold them, and this rationale can in some measure be extended to other liberties. See *Theory of Justice*, p. 206.

48. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

49. See, for example, *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991) (White, J., dissenting).

50. See Kathy Acker, "Devoured by Myths: An Interview with Sylvère Lotringer," in *Hannibal Lecter, My Father* (New York: Semiotext(e), 1991), and the interview of Acker in *Angry Women*, ed. Andrea Juno and V. Vale (San Francisco: Re/Search, 1991), pp. 184–85.

51. Cited in Edward de Grazia, *Girls Lean Back Everywhere: The Law of Obscenity and the Assault on Genius* (New York: Random House, 1992), pp. 459–60.

52. See his "Free Speech Now" and *Democracy and the Problem of Free Speech* (New York: Free Press, 1993).

53. See, in particular, his four reasons for special protection for political speech, only the first of which is concerned specifically with constitutional interpretation, in *Democracy*, pp. 132–37. Of course, his view is also controversial as constitutional interpretation.

54. Ibid., p. 134.

55. Sunstein, "Free Speech Now," p. 308.

56. Just for the record, I think it is neither instructive nor raving.

57. Expression that falls outside the upper tier is not for that reason without protection. Thus the formulation in terms of "level of protection."

58. See Sunstein, *Democracy*, pp. 134–35.

59. Absent a precise delineation of the category of political speech, the empirical issue is hard to adjudicate. But some reasons for doubting the case for special vulnerability are suggested in de Grazia, *Girls Lean Back Everywhere*, and William Noble, *Bookbanning in America* (Middlebury, Conn.: Erikson, 1990).

60. On the issue of American constitutional tradition, Sunstein associates his own conception of freedom of expression with Brandeis's focus on deliberation rather than Holmes's marketplace of ideas. See Sunstein, *Democracy*, pp. 23–28. But Brandeis's concurrence in *Whitney v. California* is perhaps the classic statement of the very great constitutional weight of the interests protected by the right to freedom of expression; it is not about the special vulnerability of political speech to government restriction. 274 U.S. 357, 373–78 (1927).

61. This is the force of Mill's contention that censorship robs the human race and that for this reason is does not matter whether all censor one or one censors all. Mill does not focus on the harm or robbery to the person who is censored. See the first paragraph of *On Liberty*, chap. 2, par. 1.

62. Robert Post has suggested a tension among various conditions required for satisfying the deliberative interest in a diverse community. In particular, deliberation depends on civility, but requiring civility puts the community in danger of making one particular understanding of civility authoritative for the community. I am not sure how deep this tension goes. To be sure, civility has its place in public deliberation. But so do anger, disgust, bitter criticism, and open expressions of

hostility. Post's immediate concern is with a parody of Reverend Jerry Falwell in Larry Flynt's *Hustler* magazine. Suffice it to say here that the parody of Falwell was, in my view, a contribution to public debate, even if it was not civil and not an invitation to Falwell to have a conversation with Flynt. See Robert Post, "The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and *Hustler Magazine v. Falwell*," *Harvard Law Review* 103 (1990): 601–86.

63. Joseph Raz proposes that part of the case for a right to freedom of expression turns on the "fundamental need for public validation of one's way of life" together with the fact that acts of expression serve the purpose of "validation" in three ways: they inform the public about "ways of life common in certain segments of the public"; they reassure "those whose ways of life are being portrayed that they are not alone"; and they provide a "stamp of public acceptability" for those ways of life. See Raz, "Free Expression and Personal Identification," *Oxford Journal of Legal Studies* 11 (1991): 311, 324. I agree with Raz about the importance of the interest in validation, but believe that it can be accounted for in terms of the expressive, deliberative, and informational interests.

64. *Abrams v. U.S.*, 250 U.S. 616, 629 (1918) (Holmes, J., dissenting).

65. Cited from Kalven's notes in the editor's introduction to *A Worthy Tradition*, p. xxii.

66. See, in particular, Matsuda, "Public Response to Racist Speech"; Lawrence, "If He Hollers Let Him Go"; Delgado, "Campus Antiracism Rules."

67. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942). Or, where the "evil" is "created by the medium of expression itself," as in the case of signs posted on utility poles, as distinct from leaflets handed to individuals. See *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984).

68. A work environment, for example, can be actionably hostile under Title VII of the Civil Rights Act either because of the severity or the pervasiveness of conduct. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986). For discussion of severity and pervasiveness, see *Ellison v. Brady*, 924 F.2d 872 (9th Circuit, 1991).

69. Scanlon discusses the importance of "linking empirical beliefs" in arguments about right to expressive liberty. His discussion overstates, I believe, the importance of beliefs specifically about the role of government in suppressing expression. See "Freedom of Expression and Categories of Expression," p. 534.

70. For a general discussion of the tendency of legal-doctrinal argument to suppress reference to background factual assumptions, see Roberto Unger, *The Critical Legal Studies Movement* (Cambridge, Mass.: Harvard University Press, 1982). In the case of freedom of expression, Bollinger claims that the "fortress model" of speech protection presumes a set of irrational tendencies to suppress speech that conflicts with the assumption of rational competence that drives the ideal of an open market of ideas. So the conjunction of these two doctrines in a justification of free expression is untenable because it requires inconsistent background beliefs. See *The Tolerant Society*, pp. 92–93.

71. *Whitney v. California*, 274 U.S. 357, 375–76, 377 (1927) (concurring).

72. Cited in *New York Times v. Sullivan*, 376 U.S. 254, 271 (1964).

73. On the problems of regulating outrageous insults, see *Hustler v. Falwell*, 485 U.S. 46 (1988).

74. This is of course true of public officials but hardly unique to them. It is commonly said that they are especially untrustworthy, but I know of no evidence for the claim that political power breeds arrogance more surely than economic power.

75. As Mill put it, "No one acknowledges to himself that his standard of judgement is his own liking." See *On Liberty*, chap. 1, par. 6. The point is not that standards of judgment are, in general, simply matters of liking and disliking but rather that, even when they are, we do not see them that way.

76. Bollinger in effect argues that there is a fundamental conflict between appealing to the facts of reasonableness and to the unhappy facts of life. See *The Tolerant Society*, pp. 92–93. I do not see the conflict.

77. Paraphrasing Justice Roberts in *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

78. Alexander Meikeljohn, *Political Freedom* (New York: Harper and Brothers, 1960), p. 27.

79. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1968).

80. Here I disagree with the defense of group libel laws in "A Communitarian Defense of Group Libel Laws," *Harvard Law Review* 101 (1988): 682–701. The main reason for rejecting regulations of group libel is not that such libel is harmless. See, for example, Justice Black's dissent in *Beauharnais v. Illinois*, 343 U.S. 250 (1952). Black does not deny the costs but emphasizes the extensive "inroads" on expression that would result from accepting regulations of group libel.

81. Edwin Baker proposes that commercial speech ought to have no First Amendment protection in part because such speech reflects the coercive logic of profit maximization rather than the choice of the speaker. This explanation strikes me as a strained defense of the idea that regulations of commercial speech are less burdensome, not least because it suggests that advertising by price-setting monopolists, which is less subject to the coercive demands of profit maximization, ought to be more protected. See *Human Liberty and Freedom of Speech*, chap. 9.

82. See *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (note 24) (1976), and 777–81 (Stewart, J., concurring).

83. My discussion here is influenced by Ely, "Flag Desecration," pp. 1496–1502.

84. This concern is expressed in *Hustler v. Falwell*, 485 U.S. 46 (1988).

85. Fish, "There's No Such Thing," p. 23.

86. See ibid., p. 26. I am indebted to Duncan Kennedy for discussion of this point.

87. Ibid.

88. Black, "The Bill of Rights," *New York University Law Review* 35 (1960): 879.

89. Fish, "There's No Such Thing," p. 26.

90. Ibid.

91. I take this example from my "Moral Pluralism and Political Consensus," p. 286.

92. It is an analog to "creation science," operating in the domain of salvation. The proper response is the same in both cases.

93. Most fundamentalists are not rationalist fundamentalists and would, I think, agree with this response.

94. I offer the rationalist fundamentalist simply as one illustration. The case of the nonrationalist fundamentalist, who affirms that the basis of religious conviction lies in faith, is more complicated. The latter might wish to distinguish truths delivered by faith from the bases of political justification, and so might be prepared to acknowledge expressive and deliberative interests, at least in the context of political argument.

95. See *Hustler v. Falwell*, 485 U.S. 46 (1988).

96. See *Cohen v. California*, 403 U.S. 15 (1971).

97. Indianapolis, Ind., City-Council General Ordinance No. 35 (June 11, 1984), cited in MacKinnon, *Feminism Unmodified*, p. 274, n. 1. I present a more detailed account of pornography regulation in "Liberty, Equality, Pornography," in *Justice and Injustice in Law and Legal Theory*, ed. Austin Sarat and Thomas Kearns (Ann Arbor: University of Michigan Press, 1996, forthcoming).

98. Lisa Duggan, Nan Hunter, and Carole Vance, "False Promises: Feminist Antipornography Legislation," in *Caught Looking: Feminism, Pornography and Censorship* (East Haven, Conn.: Long River Books, 1992), p. 82. The authors were members of the Feminist Anti-Pornography Task Force.

99. Though the rationale for the regulations was emphatically not moral. See Catharine MacKinnon, "Not a Moral Issue," in *Feminism Unmodified*.

100. I take the proposal from Duncan Kennedy, "Sexual Abuse, Sexy Dressing and the Eroticization of Domination," *New England Law Review* 26 (1992): 1318.

101. For a more general discussion of associative approaches to reconciling egalitarian and liberal commitment, see Joshua Cohen and Joel Rogers, "Secondary Associations and Democratic Governance," *Politics and Society* 20 (1992): 393–472.

102. See, for example, Cass Sunstein's proposal in "Pornography and the First Amendment," *Duke Law Journal* 4 (1986): 589–627. He sharply narrows the class of pornographic expression, defining the class in a way that aims to make it low value. It amounts, more or less (and implicitly), to substituting "erotizes violence and subordination" for "offensive" in the definition of obscenity.

103. There was, for example, no suggestion that Falwell was really responsible for the distress because of a hypersensitivity to accusations of sin.

104. *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J., concurring).

105. Ibid., 375.

106. As, for example, in Rawls's argument that reflection on the ideal of natural liberty leads to the ideal of democratic equality. See *Theory of Justice*, pp. 65–74; and my discussion of the bootstrapping strategy in "Moral Pluralism and Political Consensus," pp. 278–79.

107. Reasoning of broadly this kind can be found in *Metro Broadcasting, Inc. v. FCC*, 100 S. Ct. 2997 (1990), where the Court upholds an FCC program aimed

at increasing broadcast diversity by increasing the number of minorities holding broadcast licenses. For criticisms, see Charles Fried, "*Metro Broadcasting, Inc. v. FCC*: Two Concepts of Equality," *Harvard Law Review* 104 (1990): 107–27.

108. See Owen Fiss, "Silence on the Street Corner," *Suffolk University Law Review* 26 (1992): 13–14.

109. Current tendencies in doctrine are, more or less, opposite to the suggestion here. See *U.S. v. Kokinda*, 110 S. Ct. 3115 (1990); and the discussion in Fiss, "Silence on the Street Corner."

110. For an argument—close to the perspective in this article—that the current private scheme of campaign financing violates requirements of equal protection, and a sketch of alternative directions of reform, see Jamin Raskin and John Bonifaz, "Equal Protection and the Wealth Primary," *Yale Law and Policy Review* 11 (1993): 273–335. For an instructive discussion of campaign finance that focuses more or less exclusively on the deliberative interest, see Charles Beitz, *Political Equality* (Princeton, N.J.: Princeton University Press, 1989), chap. 9.

111. *Buckley v. Valeo*, 424 U.S. 1 (1976). It is consistent with *Buckley* to move to a system of voluntary public financing, with matching funds for candidates whose opponents opt for private contributions, or to spend their own money. For a sketch of such a system, see Ellen S. Miller, "Money, Politics, and Democracy," *Boston Review* 18 (March/April 1993): 5–8.

112. *Buckley v. Vale*, 424 U.S. 1, 48–49 (1976).

113. Ibid.

114. Ibid.

115. MacKinnon, "Francis Biddle's Sister," p. 193.

116. For discussion, see Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989).

117. MacKinnon, "Francis Biddle's Sister," p. 193 (my emphasis).

118. I take the term from *R. A. V. v. St. Paul*, 112 S. Ct. 2538, 2546 (1992).

119. Minnesota Legislative Code §292.02 (1990), cited in ibid., 2541.

120. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942). For a recent statement of doubts about the fighting-words doctrine, see "The Demise of the *Chaplinsky* Fighting Words Doctrine: An Argument for Its Interment," *Harvard Law Review* 106 (1993): 1129–46.

121. This is the basis of the reasoning by the Minnesota court. Scalia's opinion emphatically rejects this claim. See *R. A. V. v. St. Paul*, 112 S. Ct. 2543.

122. The Minnesota court said it was restricted to fighting words. But the concurrences rejected that court's construal of the fighting-words test. Ibid., 2558–60.

123. Ibid., 2546.

124. See ibid., 2558–60 (White, J., dissenting). This point is not very controversial, even among defenders of hate-speech regulations. See, for example, Lawrence, "If He Hollers Let Him Go."

125. *R. A. V. v. St. Paul*, 112 S. Ct. 2547.

126. Even this misses the full subtlety of the majority view. They suggest that the Title VII ban on hostile work environment sex discrimination "may" permissibly regulate "sexually derogatory 'fighting words', among other words" (ibid., 2546). But it is permissible to regulate sexually derogatory fighting words in the

workplace only as an "incidental" effect of a general protection against hostile work environments. The fact that the regulation of speech was an incidental part of a general code of conduct would immediately answer the concern that the speech itself was being regulated because of its message rather than because of its harmful effects.

127. Thus Scalia's firm distinction between "no part" of the exposition of ideas and "no essential part." Ibid., 2544. Implicit in these remarks is that the suggestion that the concurrences endorse the tempting but implausible view I note in the text.

128. There is certainly no "prohibition of public discussion of an entire topic." *Boos v. Barry*, 485 U.S. 312, 319 (1988).

129. I say "for example," because the St. Paul ordinance was not simply addressed to racial hate speech nor, more particularly, to racial hate speech targeted on African Americans or other groups subordinated on the basis of race. For the suggestion that such a narrower and "openly asymmetric regulation" might have been less constitutionally suspect, in light of the Thirteenth Amendment ban on badges of servitude, see Akhil Reed Amar, "Comment: The Case of the Missing Amendments: *R. A. V. v. City of St. Paul*," *Harvard Law Review* 106 (1992): 155–61. See also my discussion of the asymmetry in the Stanford regulation, below pp. 212ff.

130. See *R. A. V. v. St. Paul*, 112 S. Ct. 2545: "When the basis for the content discrimination consists entirely of the very reason the entire class of speech is proscribable, no significant danger of idea or viewpoint discrimination exists."

131. This appears to be the force of Scalia's remark that "What makes the anger, fear, sense of dishonor, etc. produced by violation of this ordinance distinct from the honor fear, sense of dishonor, etc. produced by other fighting words is nothing other than the fact that it is conveyed by a distinctive idea, conveyed by a distinctive message." Ibid., 2548.

132. Here I agree with Amar that a cleaner focus on the nature of the harms and a more discriminating discussion of the differences among the categories mentioned in the ordinance—"race, color, creed, religion, or gender"—would have sharpened both the regulation and the Court's assessment of it. See Amar, "The Case of the Missing Amendments," pp. 155–60.

133. *Miller v. California*, 413 U.S. 15 (1973).

134. See *Roth v. United States*, 354 U.S. 476, 512 (Douglas, J., dissenting); and Harry Kalven, "The Metaphysics of the Law of Obscenity," *The Supreme Court Review: 1960*, ed. Philip B. Kurland (Chicago: Univeristy of Chicago Press, 1960), 18–19.

135. I am not sure that an obscene movie could present violence against, or humiliation of, women in an unfavorable light, because by so doing, it would plausibly have serious political value, thus defeating the categorization as obscene.

136. Indeed, I suspect that many who hold this second view would be more inclined to regulate the pornographically obscene than the grossly obscene. But I will put this matter to the side.

137. But not on grounds of viewpoint.

138. According to clarification offered in a debate in the Faculty Senate. See the discussion in Nadine Strossen, "Regulating Racist Speech," *Duke Law Journal* (1990): 494 n. 110, and accompanying text; and the less measured discussion in Charles Fried, "The New First Amendment Jurisprudence: A Threat to Liberty," *University of Chicago Law Review* 59 (1992): 22ff.

139. I say "not now," because I was not infrequently called "kike," "bagel bender," etc., when I was growing up.

12

The Difficulty of Tolerance

T. M. SCANLON

1. What Is Tolerance?

Tolerance requires us to accept people and permit their practices even when we strongly disapprove of them. Tolerance thus involves an attitude that is intermediate between wholehearted acceptance and unrestrained opposition.[1] This intermediate status makes tolerance a puzzling attitude. There are certain things, such as murder, that ought not be tolerated. There are limits to what we are able to do to prevent these things from happening, but we need not restrain ourselves out of tolerance for these actions as expressions of the perpetrators' values. In other cases, where our feelings of opposition or disapproval should properly be reined in, it would be better if we were to get rid of these feelings altogether. If we are moved by racial or ethnic prejudice, for example, the preferred remedy is not merely to tolerate those whom we abhor but to stop abhorring people just because they look different or come from a different background.

Perhaps everything would, ideally, fall into one or the other of these two classes. Except where wholehearted disapproval and opposition are appropriate, as in the case of murder, it would be best if the feelings that generate conflict and disagreement could be eliminated altogether. Tolerance, as an attitude that requires us to hold in check certain feelings of opposition and disapproval, would then be just a second best—a way of dealing with attitudes that we would be better off without but that are, unfortunately, ineliminable. To say this would not be to condemn tolerance. Even if it is, in this sense, a second best, the widespread adoption of tolerant attitudes would be a vast improvement over the sectarian bloodshed that we hear of every day, in many parts of the globe. Stemming this violence would be no mean feat.

Still, it seems to me that there are pure cases of tolerance, in which it is not merely an expedient for dealing with the imperfections of human nature. These would be cases in which persisting conflict and disagreement are to be expected and are, unlike racial prejudice, quite compatible with full respect for those with whom we disagree. But while respect for each other does not require us to abandon our disagreement, it does place

limits on how this conflict can be pursued. In this article, I want to investigate the possibility of pure tolerance of this kind, with the aim of better understanding our idea of tolerance and the difficulty of achieving it. Because I particularly want to see more clearly why it is a difficult attitude and practice to sustain, I will try to concentrate on cases in which I myself find tolerance difficult. I begin with the familiar example of religious toleration, which provides the model for most of our thinking about toleration of other kinds.

Widespread acceptance of the idea of religious toleration is, at least in North America and Europe, a historical legacy of the European Wars of Religion. Today, religious toleration is widely acknowledged as an ideal, even though there are many places in the world where, even as we speak, blood is being spilled over what are at least partly religious divisions.

As a person for whom religion is a matter of no personal importance whatever, it seems easy for me, at least at the outset, to endorse religious toleration. At least this is so when toleration is understood in terms of the twin principles of the First Amendment to the Constitution of the United States: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Accepting these principles seems to be all benefit and no cost from my point of view. Why should I want to interfere with other people's religious practice, provided that they are not able to impose that practice on me? If religious toleration has costs, I am inclined to say, they are borne by others, not by me.

So it seems at first (although I will later argue that this is a mistake) that for me religious toleration lacks the tension I just described: I do not feel the opposition it tells me to hold in check. Why should I want to tell others what religion to practice, or to have one established as our official creed? On the other hand, for those who do want these things, religious toleration seems to demand a great deal: if I thought it terribly important that everyone worship in the correct way, how could I accept toleration except as an uneasy truce, acceptable as an alternative to perpetual bloodshed, but even so a necessity that is to be regretted? Pure toleration seems to have escaped us.

I want to argue that this view of things is mistaken. Tolerance involves costs and dangers for all of us, but it is nonetheless an attitude that we all have reason to value.

2. What Does Toleration Require?

This is a difficult question to answer, in part because there is more than one equally good answer, in part because any good answer will be vague in important respects. Part of any answer is legal and political. Tolerance requires that people who fall on the "wrong" side of the differences I have

mentioned should not, for that reason, be denied legal and political rights: the right to vote, to hold office, to benefit from the central public goods that are otherwise open to all, such as education, public safety, the protections of the legal system, health care, and access to "public accommodations." In addition, it requires that the state not give preference to one group over another in the distribution of privileges and benefits.

It is this part of the answer that seems to me to admit of more than one version. For example, in the United States, the requirement that each religious group is equally entitled to the protections and benefits conferred by the state is interpreted to mean that the state may not support, financially or otherwise, any religious organization. The main exception, not an insignificant one, is that any religious organization can qualify for tax-exempt status. So even our idea of "nonestablishment" represents a mixed strategy: some forms of support are prohibited for *any* religion, others are allowed provided they are available for *all* religions. This mixture strikes me more as a particular political compromise than as a solution uniquely required by the idea of religious toleration. A society in which there was a religious qualification for holding public office could not be accounted tolerant or just. But I would not say the same about just any form of state support for religious practice. In Great Britain, for example, there is an established church, and the state supports denominational as well as nondenominational schools. In my view, the range of these schools is too narrow to reflect the religious diversity of contemporary Britain, but I do not see that just any system of this kind is to be faulted as lacking in toleration. Even if it would be intolerant to give one religion certain special forms of support, there are many different acceptable mixtures of what is denied to every religion and what is available to all. The particular mixture that is now accepted in the United States is not the only just solution.

This indeterminacy extends even to the area of freedom of expression, which will be particularly important in what follows. Any just and tolerant society must protect freedom of expression. This does not mean merely that censorship is ruled out, but requires as well that individuals and groups have some effective means for bringing their views before the public. There are, however, many ways of doing this.[2] There are, for example, many ways of defining and regulating a "public forum," and no one of these is specifically required. Permitted and protected modes of expression need not be the same everywhere.

Let me now move from the most clearly institutional aspects of toleration to the less institutional and more attitudinal, thereby moving from the indeterminate to the vague. I have said that toleration involves "accepting as equals" those who differ from us. In what I have said so far, this equality has meant equal possession of fundamental legal and political rights, but the ideal of equality that toleration involves goes beyond

these particular rights. It might be stated as follows: all members of society are equally entitled to be taken into account in defining what our society is and equally entitled to participate in determining what it will become in the future. This idea is unavoidably vague and difficult to accept. It is difficult to accept insofar as it applies to those who differ from us or disagree with us, and who would make our society something other than what we want it to be. It is vague because of the difficulty of saying exactly what this "equal entitlement" involves. One mode of participation is, of course, through the formal politics of voting, running for office, and trying to enlist votes for the laws and policies that one favors. But what I now want to stress is the way in which the requirements of toleration go beyond this realm of formal politics into what might be called the informal politics of social life.

The competition among religious groups is a clear example of this informal politics, but it is only one example. Other groups and individuals engage in the same political struggle all the time: we set and follow examples, seek to be recognized or have our standard-bearers recognized in every aspect of cultural and popular life. A tolerant society, I want to say, is one that is democratic in its informal politics. This democracy is a matter of law and institutions (a matter, for example, of the regulation of expression.) But it is also, importantly and irreducibly, a matter of attitude. Toleration of this kind is not easy to accept—it is risky and frightening—and it is not easy to achieve, even in one's own attitudes, let alone in society as a whole.

To explain what I have in mind, it is easiest to begin with some familiar controversies over freedom of expression and over "the enforcement of morals." The desire to prevent those with whom one disagrees from influencing the evolution of one's society has been a main motive for restricting expression—for example, for restricting religious proselytizing and for restricting the sale of publications dealing with sex, even when these are not sold or used in a way that forces others to see them. This motive supports not only censorship but also the kind of regulation of private conduct that raises the issue of "the enforcement of morals." Sexual relations between consenting adults in the privacy of their bedrooms are not "expression," but it is no mistake to see attempts to regulate such conduct and attempts to regulate expression as closely related. In both cases, what the enforcers want is to prevent the spread of certain forms of behavior and attitude both by deterring it and, at least as important, by using the criminal law to make an authoritative statement of social disapproval.

One form of liberal response has been to deny the legitimacy of any interest in "protecting society" from certain forms of change. (The analog of declaring religion to be purely a private matter.) This response seems to me to be mistaken.[3] We all have a profound interest in how prevailing customs and practices evolve. Certainly, I myself have such an interest,

and I do not regard it as illegitimate. I do not care whether other people, individually, go swimming in the nude or not, but I do not want my society to become one in which nude bathing becomes so much the norm that I cannot wear a suit without attracting stares and feeling embarrassed. I have no desire to dictate what others, individually, in couples or in groups, do in their bedrooms, but I would much prefer to live in a society in which sexuality and sexual attractiveness, of whatever kind, was given less importance than it is in our society today. I do not care what others read and listen to, but I would like my society to be one in which there are at least a significant number of people who know and admire the same literature and music that I do, so that that music will be generally available, and so that there will be others to share my sense of its value.

Considered in this light, religious toleration has much greater risks for me than I suggested at the beginning of this article: I am content to leave others to the religious practices of their choice provided that they leave me free to enjoy none. But I will be very unhappy if this leads in time to my society becoming one in which almost everyone is, in one way or another, deeply religious, and in which religion plays a central part in all public discourse. Moreover, I would feel this way even if I would continue to enjoy the firm protection of the First Amendment. What I fear is not merely the legal enforcement of religion but its social predominance.

So I see nothing mistaken or illegitimate about at least some of the *concerns* that have moved those who advocate the legal enforcement of morals or who seek to restrict expression in order to prevent what they see as the deterioration of their society. I might disagree with them in substance, but I would not say that concerns of this kind are ones that anyone should or could avoid having. What is objectionable about the "legal enforcement of morals" is the attempt to restrict individuals' personal lives as a way of controlling the evolution of mores. Legal moralism is an example of intolerance, for example, when it uses the criminal law to deny that homosexuals are legitimate participants in the informal politics of society.

I have not tried to say how this informal politics might be regulated. My aims have been, rather, to illustrate what I mean by informal politics, to point out what I take to be its great importance to all of us, and to suggest that for this reason toleration is, for all of us, a risky matter, a practice with high stakes.

3. The Value of Tolerance

Why, then, value tolerance? The answer lies, I believe, in the relation with one's fellow citizens that tolerance makes possible. It is easy to see that a tolerant person and an intolerant one have different attitudes toward

those in society with whom they disagree. The tolerant person's attitude is this: "Even though we disagree, they are as fully members of society as I am. They are as entitled as I am to the protections of the law, as entitled as I am to live as they choose to live. In addition (and this is the hard part) neither their way of living nor mine is uniquely *the* way of our society. These are merely two among the potentially many different outlooks that our society can include, each of which is equally entitled to be expressed in living as one mode of life that others can adopt. If one view is at any moment numerically or culturally predominant, this should be determined by, and dependent on, the accumulated choices of individual members of the society at large."

Intolerant individuals deny this. They claim a special place for their own values and way of life. Those who live in a different way—Turks in Germany, for example, Muslims in India, and homosexuals in some parts of the United States—are, in their view, not full members of their society, and the intolerant claim the right to suppress these other ways of living in the name of protecting their society and "its" values. They seek to do this either by the force of criminal law or by denying forms of public support that other groups enjoy, such as public subsidies for the arts.

What I have just provided is description, not argument. But the first way of making the case for tolerance is simply to point out, on the basis of this description, that tolerance involves a more attractive and appealing relation between opposing groups within a society. Any society, no matter how homogeneous, will include people who disagree about how to live and about what they want their society to be like. (And the disagreements within a relatively homogeneous culture can be more intense than those within a society founded on diversity, like the United States.) Given that there must be disagreements, and that those who disagree must somehow live together, is it not better, if possible, to have these disagreements contained within a framework of mutual respect? The alternative, it seems, is to be always in conflict, even at the deepest level, with a large number of one's fellow citizens. The qualification "even at the deepest level" is crucial here. I am assuming that in any society there will over time be conflicts, serious ones, about the nature and direction of the society. What tolerance expresses is a recognition of common membership that is deeper than these conflicts, a recognition of others as just as entitled as we are to contribute to the definition of our society. Without this, we are just rival groups contending over the same territory. The fact that each of us, for good historical and personal reasons, regards it as *our* territory and *our* tradition just makes the conflict all the deeper.

Whether or not one accepts it as sufficient justification for tolerance, the difference that tolerance makes in one's relation to those who are "different" is easy to see. What is less obvious, but at least as important, is the difference tolerance makes in one's relation with those to whom one

is closest. One's children provide the clearest case. As my children, they are as fully members of our society as I am. It is their society just as much as it is mine. What one learns as a parent, however, is that there is no guarantee that the society they will want is the same one that I want. Intolerance implies that their right to live as they choose and to influence others to do so is conditional on their agreement with me about what the right way to live is. If I believe that others, insofar as they disagree with me, are not as entitled as I am to shape the mores of our common society, then I must think this of my children as well, should they join this opposition. Perhaps I hold that simply being *my children* gives them special political standing. But this seems to me unlikely. More likely, I think, is that this example brings out the fact that intolerance involves a denial of the full membership of "the others." What is special about one's children is, in this case, just that their membership is impossible to deny. But intolerance forces one to deny it, by making it conditional on substantive agreement with one's own values.

My argument so far is that the case for tolerance lies in the fact that rejecting it involves a form of alienation from one's fellow citizens. It is important to recognize, however, that the strength of this argument depends on the fact that we are talking about membership in "society" as a political unit. This can be brought out by considering how the argument for tolerance would apply within a private association, such as a church or political movement.[4] Disagreements are bound to arise within any such group about how their shared values are to be understood. Is it then intolerant to want to exclude from the group those with divergent views, to deny them the right to participate in meetings and run for office under the party label, to deny them the sacraments, or stop inviting them to meetings? It might be said that this also involves the kind of alienation I have described, by making others' standing as members conditional on agreement with our values. But surely groups of this kind have good reason to exclude those who disagree. Religious groups and political movements would lose their point if they had to include just anyone.

In at least one sense, the ideas of tolerance and intolerance that I have been describing do apply to private associations. As I have said, disagreements are bound to arise within such groups, and when they do it is intolerant to attempt to deny those with whom one disagrees the opportunity to persuade others to adopt their interpretation of the group's values and mission. Tolerance of this kind is required by the very idea of an association founded on a commitment to "shared values." In what sense would these values be "shared" unless there were some process—like the formal and informal politics to which I have referred—through which they evolve and agreement on them is sustained?[5] But there are limits. The very meaning of the goods in question—the sacraments, the party label—re-

quires that they be conditional on certain beliefs. So it is not intolerant for the group as a whole, after due deliberation, to deny these goods to those who clearly lack these beliefs.

Tolerance at the level of political society is a different matter. The goods at stake here, such as the right to vote, to hold office, and to participate in the public forum, do not lose their meaning if they are extended to people with whom we disagree about the kind of society we would like to have, or even to those who reject its most basic tenets. One can become a member of society, hence entitled to these goods, just by being born into it (as well as in other ways), and one is required to obey its laws and institutions as long as one remains within its territory. The argument for tolerance that I have been describing is based on this idea of society and on the idea that the relation of "fellow citizen" that it involves is one we have reason to value. The form of alienation I have mentioned occurs when the terms of this relation are violated: when we deny others, who are just as much members of our society as we are, the right to their part in defining and shaping it.[6]

As I have said, something similar can occur when we deny fellow members of a private association their rightful share in shaping it. But the relation of "fellow member" that is violated is different from the relation of "fellow citizen," and it is to be valued for different reasons. In particular, the reasons for valuing such a relation often entail limits on the range of its application. It would be absurd, for example, for Presbyterians to consider everyone born within the fifty United States a member of their church, and it would therefore not be intolerant to deny some of them the right to participate in the evolution of this institution. But the relation of "fellow citizen" is supposed to link at least everyone born into a society and remaining within its borders. So it does not entail, and is in fact incompatible with, any narrower limits.

4. The Difficulty of Tolerance

Examples of intolerance are all around us. To cite a few recent examples from the United States, there are the referenda against gay rights in Oregon and Colorado, attempts by Senator Jesse Helms and others to prevent the National Endowment for the Arts and the National Endowment for the Humanities from supporting projects of which they (Helms et al.) disapprove, recent statements by the governor of Mississippi that "America is a Christian nation," and similar statements in the speeches at the 1992 Republican National Convention by representatives of the Christian right.

But it is easy to see intolerance in one's opponents and harder to avoid

it oneself. I am thinking here, for example, of my reactions to recurrent controversies in the United States over the teaching of evolution and "creation science" in public schools and to the proposal to amend the Constitution if necessary in order to allow organized prayer in public schools. I firmly believe that "creation science" is bogus and that science classes should not present scientific theory and religious doctrine as alternatives with similar and equal claim to the same kind of assent. I therefore do not think that it is intolerant per se to oppose the creationists. But I confess to feeling a certain sense of partisan zeal in such cases, a sense of superiority over the people who propose such things and a desire not to let them win a point even if it did not cost anyone very much. In the case of science teaching, there is a cost, as there is in the case of school prayer. But I am also inclined to support removing "In God We Trust" from our coinage and to favor discontinuing the practice of prayer at public events.

These changes appeal to me because they would make the official symbolism of our country more thoroughly secular, hence more in line with my own outlook, and I can also claim that they represent a more consistent adherence to the constitutional principle of "nonestablishment" of religion. Others see these two reasons as inconsistent. In their view, I am not simply removing a partisan statement from our official symbolism, but at the same time replacing it with another; I am not making our public practice neutral as between secularism and religiosity but asking for an official step that would further enthrone secularism (which is already "officially endorsed" in many other ways, they would say) as our national outlook. I have to admit that, whatever the right answer to the constitutional question might be (and it might be indeterminate), this response has more than a little truth to it when taken as an account of my motives, which are strongly partisan.

But why should they not be partisan? It might seem that here I am going too far, bending over backwards in the characteristically liberal way. After all, the argument that in asking to have this slogan removed from our money I am asking for the official endorsement of *ir*religiosity is at best indirect and not really very persuasive. Whereas the slogan itself does have that aggressively inclusive, hence potentially exclusive "we": "In God *We* Trust." (Who do you mean "we"?)

Does this mean that in a truly tolerant society there could be no public declarations of this kind, no advocacy or enforcement by the state of any particular doctrine? Not even tolerance itself? This seems absurd. Let me consider the matter in stages.

First, is it intolerant to enforce tolerance in behavior and prevent the intolerant from acting on their beliefs? Surely not. The rights of the persecuted demand this protection, and the demand to be tolerated cannot amount to a demand to do whatever one believes one must.

Second, is it intolerant to espouse tolerance as an official doctrine? We could put it on our coins: "In Tolerance We Trust." (Not a bad slogan, I think, although it would have to be pronounced carefully.) Is it intolerant to have tolerance taught in state schools and supported in state-sponsored advertising campaigns? Surely not, and again for the same reasons. The advocacy of tolerance denies no one their rightful place in society. It grants to each person and group as much standing as they can claim while granting the same to others.

Finally, is it contrary to tolerance to deny the intolerant the opportunities that others have to state their views? This would seem to deny them a standing that others have. Yet to demand that we tolerate the intolerant in even this way seems to demand an attitude that is almost unattainable. If a group maintains that I and people like me simply have no place in our society, that we must leave or be eliminated, how can I regard this as a point of view among others that is equally entitled to be heard and considered in our informal (or even formal) politics? To demand this attitude seems to be to demand too much.

If toleration is to make sense, then, we must distinguish between one's attitude toward what is advocated by one's opponents and one's attitude toward those opponents themselves: it is not that their *point of view* is entitled to be represented but that *they* (as fellow citizens, not as holders of that point of view) are entitled to be heard. So I have fought my way to the ringing statement attributed to Voltaire,[7] that is, to a platitude. But in the context of our discussion, I believe that this is not only a platitude but also the location of a difficulty, or several difficulties.

What Voltaire's statement reminds us is that the attitude toward others that tolerance requires must be understood in terms of specific rights and protections. He mentions the right to speak, but this is only one example. The vague recognition of others as equally entitled to contribute to informal politics, as well as to the more formal kind, can be made more definite by listing specific rights to speak, to set an example through one's conduct, to have one's way of life recognized through specific forms of official support. To this we need to add the specification of kinds of support that *no* way of life can demand, such as prohibiting conduct by others simply because one disapproves of it. These specifications give the attitude of tolerance more definite content and make it more tenable. One *can* be asked (or so I believe) to recognize that others have these specific rights no matter how strongly one takes exception to what they say. This move reduces what I earlier called the vagueness of the attitude of tolerance, but leaves us with what I called the indeterminacy of more formal rights. This residual indeterminacy involves two problems.

The first is conceptual. Although some specification of rights and limits of exemplification and advocacy is required in order to give content to the

idea of tolerance and make it tenable, the idea of tolerance can never be fully identified with any particular system of such rights and limits, such as the system of rights of free speech and association, rights of privacy, and rights to free exercise (but nonestablishment) of religion that are currently accepted in the United States. Many different systems of rights are acceptable; none is ideal. Each is therefore constantly open to challenge and revision. What I will call the spirit of tolerance is part of what leads us to accept such a system and guides us in revising it. It is difficult to say more exactly what this spirit is, but I would describe it in part as a spirit of accommodation, a desire to find a system of rights that others (all those within the broad reach of the relation "fellow citizen") could also be asked to accept. It is this spirit that I suspected might be lacking in my own attitudes regarding public prayer and the imprint on our coins. I need to ask myself the question of accommodation: is strict avoidance of any reference to religion indeed the only policy I could find acceptable, or is there some other compromise between secularism and the many varieties of religious conviction that I should be willing to consider?

The second, closely related problem is political. There is little incentive to ask this question of accommodation in actual politics, and there are usually much stronger reasons, both good and bad, not to do so. Because the boundaries of tolerance are indeterminate, and accepted ways of drawing them can be portrayed as conferring legitimacy on one's opponents, the charge of intolerance is a powerful political coin.

When anyone makes a claim that I see as a threat to the standing of my group, I am likely to feel a strong desire, perhaps even an obligation, not to let it go unanswered. As I have said, I feel such a desire even in relatively trivial cases. But often, especially in nontrivial cases, one particularly effective form of response (of "counterspeech") is to challenge the limits of the system of informal politics by claiming that one cannot be asked to accept a system that permits what others have done, and therefore demanding that the system be changed, in the name of toleration itself, so that it forbids such actions.

The pattern is a familiar one. For example, in the early 1970s, universities in the United States were disrupted by protesters demanding that speeches by IQ researchers, such as Richard Herrnstein and William Schockley, be canceled. The reason given was that allowing them to speak aided the spread of their ideas and thereby promoted the adoption of educational policies harmful to minority children. Taken at face value, this seemed irrational, because the protests themselves brought the speakers a much wider audience than they otherwise could have hoped for. But the controversy generated by these protests also gained a wider hearing for the opponents. Because "freedom of speech" was being challenged, civil libertarians, some of them otherwise friendly to the protesters' cause,

others not so friendly, rushed into the fray. The result, played out on many campuses, was a dramatic and emotional event, provoking media coverage and anguished or indignant editorials in many newspapers. Whether the challenge to the prevailing rules of tolerance made any theoretical sense or not, it made a great deal of sense as a political strategy.

Much the same analysis seems to me to apply to more recent controversies, such as those generated by campus "hate-speech" rules and by the Indianapolis and Minneapolis antipornography statutes. I find it difficult to believe that adopting these regulations would do much to protect the groups in question. But *proposing them*, just because it challenges accepted and valued principles of free expression, has been a very effective way to bring issues of racism and sexism before the minds of the larger community (even if it has also had its costs, by giving its opponents a weapon in the form of complaints about "political correctness").

Challenging the accepted rules of tolerance is also an effective way of mobilizing support within the affected groups. As I have already said, victims of racist or anti-Semitic attacks cannot be expected to regard these as expressing "just another point of view" that deserves to be considered in the court of public opinion. Even in more trivial cases, in which one is in no way threatened, one often fails (as I have said of myself) to distinguish between opposition to a message and the belief that allowing it to be uttered is a form of partisanship on the part of the state. It is therefore natural for the victims of hate speech to take a willingness to ban such speech as a litmus test for the respect that they are due.[8] Even if this is an unreasonable demand, as I believe it often is, the indeterminacy and political sensitivity of standards of tolerance make it politically irresistible.

Because of the indeterminacy of such standards—because it is always to some degree an open question just what our system of toleration should be—it will not seem out of the question, even to many supporters of toleration, to demand that one specific form of conduct be prohibited in order to protect a victimized group. This can be so even when the proposed modification is in fact unfeasible because a workable system of toleration cannot offer this form of support to every group. On the other hand, because of this same indeterminacy, a system of toleration will not work unless it is highly valued and carefully protected against erosion. This means that any proposed modification will be politically sensitive and will elicit strong opposition, hence valuable publicity for the group in question.

Moreover, once this protection has been demanded by those speaking for the group—once it has been made a litmus test of respect—it is very difficult for individual members of the group not to support that demand.[9] The result is a form of political gridlock in which the idea of tolerance is a powerful motivating force on both sides: on one side, in the form of a

desire to protect potentially excluded groups; on the other, in the form of a desire to protect a workable system of tolerance. I do not have a solution to such problems. Indeed, part of my point is that the nature of tolerance makes them unavoidable. The strategy suggested by what I have said is to try, as far as possible, to prevent measures inimical to the system of tolerance from becoming "litmus tests" of respect. Civil libertarians like me, who rush to the defense of that system, should not merely shout "You can't do that!" but should also ask the question of accommodation: "Are there other ways, not damaging to the system of tolerance, in which respect for the threatened group could be demonstrated?"[10]

5. Conclusion

I began by considering the paradigm case of religious toleration, a doctrine that seemed at first to have little cost or risk when viewed from the perspective of a secular liberal with secure constitutional protection against the "establishment" of a religion. I went on to explain why toleration in general, and religious toleration in particular, is a risky policy with high stakes, even within the framework of a stable constitutional democracy. The risks involved lie not so much in the formal politics of laws and constitutions (though there may be risks there as well) but rather in the informal politics through which the nature of a society is constantly redefined. I believe in tolerance despite its risks, because it seems to me that any alternative would put me in an antagonistic and alienated relation to my fellow citizens, friends as well as foes. The attitude of tolerance is nonetheless difficult to sustain. It can be given content only through some specification of the rights of citizens as participants in formal and informal politics. But any such system of rights will be conventional and indeterminate and is bound to be under frequent attack. To sustain and interpret such a system, we need a larger attitude of tolerance and accommodation, an attitude that is itself difficult to maintain.

Notes

I am grateful to Joshua Cohen and Will Kymlicka for their helpful comments on earlier drafts of this paper.

1. As John Horton points out in his contribution to this volume.
2. More exactly, there are many ways of trying to do it. I believe that our ideas of freedom of expression must be understood in terms of a commitment both to certain goals and to the idea of certain institutional arrangements as crucial means to those goals. But the means are never fully adequate to the goals, which drive

their constant evolution. I discuss this "creative instability" in "Content Regulation Reconsidered," in *Democracy and the Mass Media*, ed. J. Lichtenberg (New York: Cambridge University Press, 1991).

3. Here I draw on points made in section 5 of my article, "Freedom of Expression and Categories of Expression," *University of Pittsburgh Law Review* 40 (1979): 479–520.

4. Here I am indebted to very helpful questions raised by Will Kymlicka. I do not know whether he would agree with my way of answering them.

5. As Michael Walzer has written, addressing a similar question, "When people disagree about the meaning of social goods, when understandings are controversial, then justice requires that the society be faithful to the disagreements, providing institutional channels for their expression, adjudicative mechanisms, and alternative distributions." *Spheres of Justice*. (New York: Basic Books, 1984), p. 313.

6. Intolerance can also be manifested when we deny others the opportunity to *become* members on racial or cultural grounds. But it would take me too far afield to discuss here the limits on just immigration and naturalization policies.

7. He is said to have said, "I disapprove of what you say, but I will defend to the death your right to say it."

8. See, for example, Mari Matsuda, "Public Response to Racist Speech: Considering the Victim's Story," *Michigan Law Review* 87 (1989). Matsuda emphasizes that legal prohibition is sought because it represents public denunciation of the racists' position.

9. I am thinking here particularly of the Salman Rushdie case. The Ayatollah Khomeini's demand that *The Satanic Verses* be banned was unreasonable. On the other hand, many Muslims living in Britian felt they were treated with a lack of respect by their fellow citizens. Even if they could see that the Ayatollah's demand was unreasonable, it was difficult for them not to support it once it had been issued. Here the situation was further complicated (and the appeal to "unfeasibility" clouded) by the existence of a British blasphemy law that protected Christianity but not Islam. The result was gridlock of the kind described in the text.

10. I do not mean to suggest that this is always called for. It depends on the case, and the group. But the difficult cases will be those in which tolerance speaks in favor of protecting the group as well as against the measure they have demanded.

Index of Names and Cases