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Why Liberal Tolerance, Rightly Understood, Is Coherent and Defensible

WILLIAM A. GALSTON*

“A liberal is a man too broad-minded to take his own side in a quarrel.”

—Robert Frost¹

“This will always remain one of the best jokes of democracy, that it gave its deadly enemies the means by which it was destroyed.”

—Joseph Goebbels²

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1. Frost appears to have used these words in discussing the newly-elected John F. Kennedy, whom he did not regard as a liberal in this sense. He may well have gotten the thought behind these words from a close friend, Harvard philosophy professor William Ernest Hocking, whose book *What Man Can Make of Man*, contains the line, “He lends himself to the gibe that he is ‘so very liberal, that he cannot bring himself to take his own side in a quarrel.’” William Ernest Hocking, *What Man Can Make of Man* 45 (2d ed. 1942); see also THE WORDSWORTH DICTIONARY OF QUOTATIONS 133 (Connie Robertson ed., 1998); Barry Popik, *Entry from December 06, 2009*, BARRYPOPIK.COM: THE BIG APPLE (Dec. 6, 2009), http://www.barrypopik.com/index.php/new_york_city/entry/a_liberal_is_a_man_too_broad_minded_to_take_his_own_side_in_a_quarrel/ [<https://perma.cc/DC4B-XKZ3>].

2. Judith Wise, *Dissent and the Militant Democracy: The German Constitution and the Banning of the Free German Workers Party*, 5 U. CHI. L. SCH. ROUNDTABLE 301, 301 (1998) (citing Gregory Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT’L L.J. 1, 1 (1995)).

TABLE OF CONTENTS

I.	THE LIMITS OF LIBERAL TOLERANCE	200
II.	TOLERANCE AS AN ATTITUDE.....	202
III.	TOLERANCE AS A PRACTICE	203
IV.	TOLERANCE AS A CIVIL AND POLITICAL PRACTICE	208
V.	TOLERANCE AND THE FORCE OF CIRCUMSTANCES.....	212

I. THE LIMITS OF LIBERAL TOLERANCE

One of the most familiar criticisms of liberal democracy is that it cannot defend itself against its enemies while remaining true to its principles.³ This criticism is odd as well as unjust because theorists regarded as arch-liberals offer compelling reasons to reject it.⁴

In *On Liberty*, John Stuart Mill asserts that

In this and most other civilized countries, . . . an engagement by which a person should sell himself, or allow himself to be sold, as a slave, would be null and void; . . . The reason for not interfering, unless for the sake of others, with a person's voluntary acts, is consideration for his liberty. His voluntary choice is evidence that what he so chooses is desirable, or at least endurable, to him, and his good is on the whole best provided for by allowing him to take his own means of pursuing it. But by selling himself as a slave, he abdicates his liberty; he foregoes any future use of it, beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself. . . . The principle of freedom cannot require that he should be free not to be free. It is not freedom, to be allowed to alienate his freedom.⁵

Mill's account of liberalism, then, is anything but neutral. Freedom is the highest good, and it is self-limiting.⁶ In American rights lingo, it is unalienable.⁷

As Mill notes, his reasoning is of far wider application. One such extension is of particular relevance for the purposes of this conference. Not only is individual freedom self-limiting, so is collective freedom. A people cannot alienate its right to self-determination. Nor must it accept individuals' or groups' acts that would weaken or undermine that right. Taking freedom and

3. See, e.g., LIBERAL DEMOCRACY AND THE LIMITS OF TOLERANCE: ESSAYS IN HONOR AND MEMORY OF YITZHAK RABIN 1–2 (Raphael Cohen-Almagor ed., 2000).

4. See, e.g., Paul Starr, *Why Liberalism Works*, AM. PROSPECT, Apr. 2007, at 34–40; see also Stephen R.C. Hicks, *Liberalism: The Fifteen Best Arguments*, 37 REASON PAPERS 108, 111–32 (2015).

5. JOHN STUART MILL, ON LIBERTY 198–99 (Ticknor & Fields 2d ed. 1863) (1859).

6. *Id.*

7. See *id.* at 199.

self-determination seriously provides a principled basis for limiting the scope of tolerance.

This logic dovetails neatly with the Declaration of Independence. All individuals have unalienable rights, the Declaration asserts, the securing of which is the purpose of government, rightly understood.⁸ All government, in turn, derives its just powers from the consent of the governed.⁹ The people always remain free to withdraw that consent whenever the institutions they have created threaten to undermine the purpose for which they were created.¹⁰ They are free, therefore, to suppress any forces that would weaken genuinely rights-promoting institutions.

To avoid undermining the liberty they seek to protect, the people must assess these threats coolly and impartially, a standard that is hard to meet in times of alarm and fear. But the possible abuse of the right of collective self-protection does not negate the right. It points, rather, to the importance of institutions that will reduce, so far as possible, the incidence of such abuses.

My second arch-liberal reaches a similar conclusion. In a section of *A Theory of Justice* titled “Toleration of the Intolerant,” Rawls enquires into the circumstances, if any, that would give tolerant groups adequate warrant not to tolerate intolerant groups.¹¹ The mere existence of intolerant groups, he argues, is not enough.

A more stringent condition is required: there must be some considerable risks to our own legitimate interests. Thus just citizens should strive to preserve the constitution with all its equal liberties as long as liberty itself and their own freedom are not in danger. They can properly force the intolerant to respect the liberty of others But when the constitution itself is secure, there is no reason to deny freedom to the intolerant.¹²

Two discrete elements, then, define the limit of tolerance—a principle of self-limitation and an empirical determination that the conditions triggering the application of that principle have been met. The ability to make such determinations must be lodged somewhere. Moved by prejudice or ignorance, the people empowered to make them will sometimes go astray. The attorney-general of California requested the mass internment of Japanese-Americans, the president of the United States authorized it, and

8. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

9. *Id.*

10. *Id.*

11. JOHN RAWLS, A THEORY OF JUSTICE 190–94 (Harvard Univ. Press rev. ed. 1999) (1971).

12. *Id.* at 192.

the Supreme Court of the United States ratified it.¹³ But the united judgment of Earl Warren, Franklin Roosevelt, and six justices—including Hugo Black, William O. Douglas, and Felix Frankfurter—did not make it right.¹⁴

If individuals of this caliber, representing diverse jurisdictions and branches of government, could get it so wrong, we are forced to conclude that no human contrivances can eliminate the possibility of error. The alternative is to bind ourselves with categorical prohibitions that could deprive liberal democracies of their ability to defend themselves. As Arthur Goldberg, another unimpeachably liberal justice, wrote in *Kennedy v. Martinez-Mendoza*, “[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact.”¹⁵

II. TOLERANCE AS AN ATTITUDE

In rushing to the defense of liberal tolerance as a coherent practice, I have bypassed its definition and justification. I begin with tolerance as an inner sentiment.

In ordinary language, tolerance is often used as a synonym for acceptance. The tolerant person, we say, is “broadminded,” not fazed by the kinds of novelties that bring the rest of us up short. Where most people are “judgmental,” we regard the tolerant person as indifferent to the kinds of differences that *make* a difference for less tolerant persons.

In this case, however, customary usage leads us astray. Tolerance is not the same as acceptance or indifference.¹⁶ Consider a father who disapproves of his daughter’s latest boyfriend but thinks that other factors also should shape his attitude toward the relationship. He may believe, for example, that it would be better for his daughter to arrive—through her own experience—at a more accurate assessment of her boyfriend’s qualities. Or he may fear that expressing his views openly may trigger what psychologists call “oppositional behavior,” driving his daughter more firmly into her boyfriend’s arms.¹⁷

The attitude of tolerance rejects any direct inference from one’s evaluation of X to the stance one should adopt toward X. It reflects, rather, an

13. *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944).

14. *See id.*

15. *Kennedy v. Martinez-Mendoza*, 372 U.S. 144, 160 (1963).

16. *See, e.g.*, Jay Schiffman, *Tolerance as Understanding*, 3 UNIV. MD. L.J. RACE, RELIGION, GENDER & CLASS 1, 15 (2003); *see also* Gila Stople, “A Rank of Usurpation of Power” – *The Role of Patriarchal Religion and Culture in the Subordination of Women*, 15 DUKE J. GENDER L. & POL’Y 365, 394–95 (2008).

17. *See, e.g.*, AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 462–63 (5th ed. 2013).

individual's openness to the full range of considerations relevant to selecting the most thoughtful stance.¹⁸

It may appear that the attitude of tolerance is one of disapproval modified by prudence.¹⁹ I think it is more complicated than that. We hold almost all our beliefs on some basis short of certainty. If someone whose character we despise or judgment we mistrust approves something we disapprove, we are not inclined to change our mind. But if someone of good character disagrees with our assessment, we have some reason to rethink it. So the tolerant father will pause to ask himself whether his besotted daughter is seeing something that he himself is not. Beneath the boyfriend's surly demeanor may beat a tender heart. He may look like a slacker, but Steve Wozniak probably did too.²⁰

Tolerance also requires an awareness and assessment of risk.²¹ The father may think there is a 50/50 chance that the boyfriend will end up breaking his daughter's heart while believing that he should tolerate the relationship. But if he thinks there is a significant chance that the boyfriend at some point will physically assault his daughter, tolerance would manifest inadequate concern for his daughter. The nature of the potential harm defines the limit of permissible risk. A tolerant attitude implies a kind of capaciousness, but it is not boundless.²²

III. TOLERANCE AS A PRACTICE

As distinct from the attitude, tolerance as a practice is more clearly triadic, as follows: Although (1) B disapproves of X, (2) B refrains from suppressing X even though (3) B has the power to suppress X.²³

18. See Schiffman, *supra* note 16, at 15.

19. See, e.g., Karen Knop et al., *From Multiculturalism to Technique Feminism, Culture, and the Conflict of Laws Style*, 64 STAN. L. REV. 589, 650 (2002) (quoting Martha Minow, *Tolerance in an Age of Terror*, 16 S. CAL. INTERDISC. L.J. 435, 457 (2007)).

20. Steve Wozniak is a programmer, developer, and entrepreneur who co-founded Apple with Steve Jobs in 1976. See *About Steve Wozniak aka "The Woz,"* WOZ.ORG, <http://www.woz.org/about> [<https://perma.cc/RRS6-87JM>].

21. See RAWLS, *supra* note 11, at 192.

22. See, e.g., *The Limits of Tolerance*, N.Y. TIMES: THE MORAL OF THE STORY (Apr. 14, 2009, 11:30 AM), <https://ethicist.blogs.nytimes.com/2009/04/14/limited-tolerance/> [<https://perma.cc/6AKQ-G7UJ>].

23. See Lois Eveleth, *John Locke and the Problem of Toleration*, 28 FAC. & STAFF – ARTICLES & PAPERS 17, 20–21 (2007); Polycarp Ikuenobe, *Diverse Religious Practices and the Limits of Liberal Tolerance*, in DEMOCRACY AND RELIGION 309, 318 (David Odell-Scott ed., 2004).

If B approves of X, it is an abuse of speech to say that B tolerates X. Other than outright perversity, B has no motive for suppressing X. But tolerance implies self-restraint in the face of motives for acting without restraint.²⁴

In a similar vein: if B does not have the power to suppress X, then it would be odd to say that B tolerates X, because B has no choice. As a practice, tolerance is a voluntary act within a hierarchical power relationship.

When we move from description to normative judgment, further implications emerge. If we regard tolerance as a good or virtuous practice, then one of its limits is the line separating the tolerable from the intolerable. If you have the power to suppress X and X is rightly regarded as intolerable, then forbearance in the face of X is wrong. Standing by while someone is being assaulted is shameful.

It follows, I suggest, that tolerance presupposes a distinctive structure of the normative world.²⁵ The bare idea of a normative triad is hardly new. For millennia, philosophers have distinguished between good, bad, and indifferent. We are to promote the good, discourage the bad, and choose freely among those things that are indifferent from a moral point of view. Except as a matter of episodic prudence, forbearance has no role in this three-fold way.

Tolerance requires a further distinction within the category of the bad. Some bad things are simply intolerable and require us to act against them as best we can. But there is another category of bad things such that we are not required to act against them. Indeed, we are required *not* to act against them. This is what tolerance as forbearance means, and it is what gives the practice of tolerance its air of paradox.²⁶

It is possible to dispel the paradox by dissolving the problem that gives rise to it. If we wrongly regard X as bad when it is in fact good—or at least indifferent—then our failure to act against X is hardly paradoxical but rather straightforwardly justified, even if it rests on confusion. If all occasions of tolerance were of this character, then much liberal discourse would be otiose.

But to proceed categorically down this path would be to dismiss too much everyday experience. Consider childrearing practices. There are laws prohibiting child abuse and neglect and allowing public authorities to intervene against adults who act in this manner.²⁷ These laws define the public perimeter of the intolerable in adult-child relationships.

24. See Eveleth, *supra* note 23, at 20–21.

25. See Stopler, *supra* note 16, at 394–95.

26. See HANS OBERDIEK, *TOLERANCE: BETWEEN FORBEARANCE AND ACCEPTANCE* 12 (2001).

27. See, e.g., CAL. PENAL CODE §§ 11164–11174.3 (Deering 2008).

But this is not to say that everything outside this perimeter is either good or indifferent. There are practices that we have good reason to regard as mistaken and less than optimal, perhaps even harmful, for the development of children's intellectual, emotional, and moral capacities but against which the law gives us no power to act.²⁸ There is a zone, we believe, within which parents may act according to their best lights—even when those lights are pretty dim.²⁹

You might say that my argument turns back on itself: if tolerance requires us to stand by while things we regard as bad are happening, then tolerance is a moral mistake. Better to return to the pre-liberal triad of good, bad, and indifferent. Resisting or preventing the bad has the virtues of clarity and simplicity, and it is a source of inner satisfaction as well.

As a normative practice, tolerance stands or falls with the reasons for forbearance. Some are prudential. The effort to suppress what is bad may generate more harm than it abates.³⁰ In the face of disagreement about what good childrearing is, for example, imposing a comprehensive standard could undermine social cohesion and generate intractable controversy.³¹ Taken to its limit, the rejection of forbearance obliterates the line between public and private.³² Everything becomes subject to public scrutiny and public law.³³ But liberalism rests on a distinction between what is public and what is not. Regimes that reject that distinction almost always lapse into fanaticism and tyranny—or so the experience of the past two centuries suggests.³⁴

There are also epistemological reasons for forbearance. Beyond a limited number of fixed points—slavery is wrong, for example—our moral beliefs often outrun our moral knowledge.³⁵ Justice Holmes may have come uncomfortably close to comprehensive skepticism, but his famous dissent

28. See Len Biernat & Dr. Christine Jax, *Limiting Mobility and Improving Student Achievement*, 23 *HAMLIN L. REV.* 1, 19–26 (1999).

29. See *id.*

30. See JAMES KALB, *TYRANNY OF LIBERALISM: UNDERSTANDING AND OVERCOMING ADMINISTERED FREEDOM, INQUISITORIAL TOLERANCE, AND EQUALITY BY COMMAND* 5–7 (2008).

31. See *id.*

32. *Id.* at 5–6.

33. See *id.* at 5–7.

34. *Id.*

35. See, e.g., OBERDIEK, *supra* note 26, at 48–49.

in *Abrams* stood on solid ground: time has indeed upset many fighting faiths.³⁶

And there are some standard moral arguments for forbearance. If liberty interests give individuals moral claims beyond their (equal) weight in the aggregate calculus of harm and benefit, then forbearance will be mandatory in a wide range of cases.³⁷ Liberty entails the right to be wrong and to do wrong—within limits.³⁸ In a similar vein, anti-paternalism often will require forbearance when an individual's mistaken understanding of her well-being, or failure to act on a correct understanding, affects only herself.³⁹

That said, I have always harbored doubts about John Stuart Mill's famous harm principle. In the first place, it is notoriously difficult to draw a bright line between harm to self and to others. Consider a man who overeats to the point of obesity. He will be hard-put to perform military service, no matter how dire the emergency.⁴⁰ Over time, he will find it harder to maintain steady employment and contribute to his family's finances than if he had kept himself in reasonable shape.⁴¹ And he is more likely to suffer from chronic conditions that few individuals can afford to treat without public subsidies.⁴² The amount each of us chooses to eat is among the most personal choices we make, and yet it affects others in myriad ways.

It turns out, moreover, that Mill could not hew consistently to his own principle, as his bridge hypothetical makes clear. It goes like this: a man is approaching a bridge in danger of collapse. Knowing this, an observer forcibly prevents him from crossing this bridge. Mill's stated justification: "Liberty consists in doing what one desires, and he does not desire to fall into the river."⁴³

Note the difficulties of Mill's position. First, the observer assumes that the man does not know that the bridge is dangerous.⁴⁴ Perhaps he does and seeks to take his own life. Although certain actions usually reflect specific intentions, we cannot infer intention from action in individual cases. Unless Mill believes (oddly) that one can never desire to commit suicide, his argument fails.

36. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

37. *See* Mill, *supra* note 5, at 23, 186.

38. *See id.* at 186.

39. *See id.*

40. *See* Andrea E. Chernov, *Weight Discrimination: The Effects of Obesity on Employment and Promotion*, 4 HOHONU 107, 108 (2006).

41. *See id.* at 108, 111.

42. *See generally* Ross A. Hammond & Ruth Levine, *The Economic Impact of Obesity in the United States*, 3 DIABETES, METABOLIC SYNDROME & OBESITY 285 (2010).

43. *See* Mill, *supra* note 5, at 186.

44. *See id.*

In addition, there are many circumstances in which there is a gap between action and desire. We all do things whose results diverge from the outcomes we want. Often we know they will diverge, and yet we go on repeating the actions that frustrate our desires. Others may be aware of our frustrated desire as well. If others may justifiably intervene in our lives whenever they have compelling reasons to believe that our actions are contradicting our desires, then the writ of liberty is much narrower than Mill's official doctrine suggests, and the scope of justified paternalism is much wider.

The deepest problem with Mill's position—the harm principle modified by the bridge exception—is that it proves too much. As the philosopher Thomas Christiano has pointed out, religious believers can use the modified harm principle to justify intolerance.⁴⁵ As Christiano puts it, the intolerant believer can argue that “the unbeliever is ignorant of facts that are crucial to his well being, namely the facts concerning to the transcendent interests in adhering to the one true faith and the disastrous consequences of adhering to a false faith or no faith at all. Thus the unbeliever is acting involuntarily when he fails to adhere to the true faith.”⁴⁶ And the analogy to Mill's bridge may be extended: “There is a sense in which the unbeliever is in a significant danger that he will learn from his mistakes too late, since it is quite possible that he will not learn his mistake until he experiences the sufferings of the damned.”⁴⁷

The only way to defeat this argument is to deny its core premise, that we can know the determinants of spiritual harm with the same confidence as the determinants of physical harm. If so, liberal tolerance would rest on some distinction between knowledge and faith.

No doubt believers would claim that faith is on a par with knowledge. No believer can sincerely aver that the case for his faith is no stronger than the case for other faiths. To do so would be to undercut faith.

But believers may be able to accept that what is evident to them may not be equally evident to others. Demonstrating to others the truth of one's faith is not the same as demonstrating in a laboratory the truth of a proposition about chemical reactions. Indeed, Christians are taught that “faith is the

45. See Thomas Christiano, *Does Religious Tolerance Make Any Sense?*, in *CONTEMPORARY DEBATES IN SOCIAL PHILOSOPHY* 171, 179 (Laurence Thomas ed., 2008).

46. *Id.* at 179.

47. *Id.*

substance of things hoped for, the evidence of things unseen.”⁴⁸ Not every doubting Thomas can receive the proof he seeks.⁴⁹

I suspect that much of what we take to be religious tolerance rests on epistemological considerations. From a point of view internal to faith, believers should be able to understand why doubters who seek proof without receiving it find it so difficult to take a leap of faith, and some believers do understand. For their part, many skeptics argue that what each faith counts as evidence is internal to that faith, with no external standpoint from which competing claims can be assessed.

IV. TOLERANCE AS A CIVIL AND POLITICAL PRACTICE

Tolerance does not require acceptance of differences within voluntary organizations.⁵⁰ If certain opinions and practices define membership in a group, and if membership in that group is a qualification for membership in a voluntary organization, then the group is not acting intolerantly when it excludes individuals who do not share those views and participate in those practices.⁵¹

There is room for argument, however, about identifying the opinions and practices that define the group’s core identity. For example, the Anglican Church is currently embroiled in a debate about homosexuality and same-sex marriages.⁵² For conservative bishops, opposition to homosexuality is part of the biblical teaching at the heart of the Anglican denomination.⁵³ For more liberal bishops—including the head of the church, the archbishop of Canterbury—it is not.⁵⁴ If the two sides cannot find a formula that permits sustainable coexistence under a single denominational roof, the Church may split.⁵⁵ Within voluntary associations, the practice of tolerance means the disposition of their members to remain together despite their differences.

48. *Hebrews* 11:1 (King James).

49. *See John* 20:24–29 (King James).

50. T.M. SCANLON, *The Difficulty of Tolerance*, in *THE DIFFICULTY OF TOLERANCE: ESSAYS IN POLITICAL PHILOSOPHY* 187, 194 (2003).

51. *Id.*

52. *See, e.g.,* Harriet Sherwood, *Gay Rights and Same-Sex Marriage Will Dominate C of E Summer Synod*, *GUARDIAN* (Feb. 15, 2016, 8:02 PM), <https://www.theguardian.com/world/2016/feb/15/gay-rights-and-same-sex-marriage-will-dominate-c-of-e-summer-synod> [<https://perma.cc/GJR7-XXJ7>].

53. John Bingham, *Church of England Parishes Consider First Step to Break Away Over Sexuality*, *TELEGRAPH* (Aug. 26, 2016, 10:00 PM), <http://www.telegraph.co.uk/news/2016/08/28/church-of-england-parishes-consider-first-step-to-break-away-ove/> [<https://perma.cc/4KDH-NFR4>].

54. *See id.*

55. *See Anglican Church Avoids Split Over Gay Rights*, *WEEK UK* (Jan. 15, 2016), <http://www.theweek.co.uk/68598/anglican-church-avoids-split-over-gay-rights> [<https://perma.cc/7ZPL-4962>].

Many Orthodox Jews believe that Reform Jews are not really Jewish at all.⁵⁶ They are free to say why they believe that to be the case, to proselytize among Reform Jews, and even to impede religious marriages between members of the Orthodox community and Reform Jews who do not qualify as Jews under Jewish law.⁵⁷ Tolerance does not require any group, religious or secular, to abandon or water down beliefs and practices that define their group identity—which is not to say that other considerations might not require them to make such changes.⁵⁸

This brings us to tolerance as a political practice, which at its core means refraining from using public power to suppress beliefs and actions to which the state objects.⁵⁹ A number of limits to tolerance, so understood, enjoy wide acceptance.

- Certain kinds of conduct—public displays of nudity, for example—may be offensive to longstanding social norms.⁶⁰ Norms of decency evolve, of course.
- Actions that harm others do not enjoy immunity just because they define a group’s identity.⁶¹ A neo-Aztec group may believe that failing to sacrifice virgins annually will disrupt the cosmic order, but the state must act to prevent this practice—even if the virgins have signed consent forms.⁶²
- More broadly, the state may invoke a range of civil concerns to suppress acts that might otherwise be protected. A liberal state cannot suppress the ritual use of animal slaughter just because a majority disapproves of the practice. But if there

56. For an especially conspicuous example, see Isabel Kershner, *Israeli Minister Says Reform Jews Are Not Really Jewish*, N.Y. TIMES, July 8, 2015, at A8.

57. See Ephraim Tabory, *The Identity Dilemma of Non-Orthodox Religious Movements: Reform and Conservative Judaism in Israel*, in TRADITION, INNOVATION, CONFLICT: JEWISHNESS AND JUDAISM IN CONTEMPORARY ISRAEL 135, 140 (Zvi Sobel & Benjamin Beit-Hallahmi eds., 1991).

58. See Russell Powell & Steve Clarke, *Religion, Tolerance, and Intolerance: Views from Across the Disciplines*, in RELIGION, INTOLERANCE, AND CONFLICT: A SCIENTIFIC AND CONCEPTUAL INVESTIGATION 1, 6 (Steve Clarke et al. eds., 2013).

59. See Ikuenobe, *supra* note 23, at 317–18.

60. J. BUDZISZEWSKI, TRUE TOLERANCE: LIBERALISM AND THE NECESSITY OF JUDGMENT 82 (1992).

61. See John F. Catherwood, *An Argument for Intolerance*, 26 J. MED. ETHICS 427, 429 (2000).

62. See *id.*

is evidence that it constitutes a threat to public health, state intervention is justified.⁶³

- More broadly still, a liberal democracy may outlaw actions, expressive or otherwise, that threaten the overall practice of tolerance. Suppose that a political party advocates the outright suppression of Islamic worship—by denying mosques zoning and construction licenses and criminalizing Islamic services even in private homes.⁶⁴ If the anti-Islam party remains on the fringe, without public support, the government may choose to leave it undisturbed, in Thomas Jefferson’s words, as a monument “of the safety with which error of opinion may be tolerated where reason is left free to combat it.”⁶⁵ But if reason proves unequal to the task, I suggest, the state may step in before it is too late.
- Most broadly, a liberal democracy may prevent practices, religious or secular, that could undermine the liberal democratic order itself. In two key 19th century Mormon cases, the government argued that polygamy and autocracy go together, as do monogamy and democracy.⁶⁶ There is room for debate about how the historical record is best read. But if sustained by the evidence, the form of the government’s argument is appropriate and warrants the suppression of polygamous practices, despite their centrality for early Mormonism.⁶⁷

Tolerance as a political practice does not require anything like what some call “neutrality.”⁶⁸ It is not intolerant for a liberal democracy to espouse

63. See generally KIMBERLY K. SMITH, *GOVERNING ANIMALS: ANIMAL WELFARE AND THE LIBERAL STATE* (2012).

64. This example is adapted from China’s efforts to suppress the Falun Gong. See James Griffiths, *Why China Fears the Falun Gong*, L.A. DAILY NEWS (July 14, 2014, 5:34 PM), <http://www.dailynews.com/general-news/20140714/why-china-fears-the-falun-gong> [<https://perma.cc/35MY-438G>]; Rick Rojas, *Falun Gong Followers Protest Chinese President Xi in Desert Visit*, L.A. TIMES (June 8, 2013, 5:15 AM), <http://www.latimes.com/local/lanow/la-me-ln-falun-gong-xi-protest-20130607-story.html> [<https://perma.cc/YFC3-VFCS>].

65. Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT’L L.J. 1, 1 (1995) (quoting Thomas Jefferson, First Draft of the Inaugural Address (Mar. 4, 1801), in 8 THE WRITINGS OF THOMAS JEFFERSON 1, 3 (Paul Leicester Ford ed., 1897)).

66. See WILLIAM A. GALSTON, *PUBLIC MATTERS: POLITICS, POLICY, AND RELIGION IN THE 21ST CENTURY* 131, 133 (2005) (citing *Latter-Day Saints v. United States*, 136 U.S. 1, 48–49 (1890); *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

67. See *id.* at 132.

68. See Ikuenobe, *supra* note 23, at 317–18.

tolerance and defend it against its adversaries. It is not always intolerant for the liberal state to deny intolerant individuals and groups the ability to express their views. Consistent with tolerance, the Supreme Court could have taken a stand against the notorious Nazi march through Skokie, Illinois.⁶⁹

Nor does tolerance require a level playing field. A liberal state may advocate what it cannot mandate and criticize or even disadvantage what it cannot forbid. Groups whose internal practices violate public norms of tolerance may have the right to exist, but denying them public privileges such as tax exemptions, as the Supreme Court did in *Bob Jones University v. United States*, is not *per se* incompatible with tolerance.⁷⁰ Conversely, several European democracies offer financial and legal benefits to some but not all religions.⁷¹ While there may be sound policy and political reasons for abandoning these preferential practices, they do not amount to a breach of tolerance as I understand it.

There is a hard-to-define point, however, at which asymmetrical policies do shade over into outright intolerance. Reform, Conservative, and Reconstructionist Jews are not prohibited from establishing congregations in Israel.⁷² But the quasi-established status of strict Orthodoxy creates powerful barriers.⁷³ Orthodox rabbis are entitled to state support; non-Orthodox rabbis are not.⁷⁴ The law, moreover, empowers the Orthodox rabbinate to control the legal processes of marriage, divorce, and conversion.⁷⁵

Israel's most important statute, The Law of Return, grants every Jew in the world the right to settle in Israel.⁷⁶ But who is a Jew? Section 4B states that "For purposes of this Law, 'Jew' means a person who was born of a

69. See *Nat'l Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43, 43–44 (1977).

70. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 595–96, 605 (1983) (holding that the IRS properly denied Bob Jones University tax-exempt status due to the University's religiously-motivated, racially-discriminatory admissions criteria).

71. See RELIGARE, SUMMARY REPORT OF THE RELIGARE PROJECT 27, 33 (Marie-Claire Foblets & Katie Alidadi eds., 2013), http://www.religareproject.eu/system/files/RELIGARE%20Summary%20Report_0.pdf [<https://perma.cc/4DB9-7T4T>].

72. See Tabory, *supra* note 57, at 139.

73. See *id.* at 140, 142–43.

74. See *id.* at 135, 143.

75. See Uriel Heilman, 'We Want Equal Rights in Israel,' *Non-Orthodox Jewish Leaders Tell Rivlin*, TIMES ISR. (Dec. 12, 2015, 2:22 AM), <http://www.timesofisrael.com/we-want-equal-rights-reform-and-conservative-leaders-tell-rivlin/> [<https://perma.cc/TA34-3C8S>].

76. See Gershon Gorenberg, *How Do You Prove You're a Jew?*, N.Y. TIMES MAG. (Mar. 2, 2008), http://www.nytimes.com/2008/03/02/magazine/02jewishness-t.html?_r=1 [<https://perma.cc/SR3M-KFFL>].

Jewish mother or has become converted to Judaism.”⁷⁷ Matrilineal descent excludes a substantial number of Reform Jews; when a mother’s status is challenged, it must be certified by the legally recognized Rabbinat. ⁷⁸ The alternative route to guaranteed admission—conversion—is entirely under the control of the Rabbinat. ⁷⁹ In principle, then, immigration to Israel—the principal determinant of its population since 1948⁸⁰—is regulated by the legally empowered representatives of the established religion of a state that defines itself in religious terms. ⁸¹ Israel is a robust democracy, but it is not exactly a liberal democracy, and its religious practices do not meet the test of tolerance as I have defined it.

V. TOLERANCE AND THE FORCE OF CIRCUMSTANCES

Why is tolerance as a political practice desirable? Obviously, restraining ourselves from translating disagreement into coercive suppression is a good thing whenever we lack an adequate basis for doing so. But in a well-known essay, the philosopher Thomas Scanlon offers a more directly political answer. ⁸² Because every society, no matter how homogeneous, is bound to contain people who disagree about how to live and how to shape their country’s common life, then something like tolerance is necessary if the idea of common citizenship is to be possible. ⁸³ Without recognizing others as entitled to contribute to the definition of our society, Scanlon argues, we are “just rival groups contending over the same territory.”⁸⁴

77. *Israel’s Basic Laws: The Law of Return*, JEWISH VIRTUAL LIBR., http://www.jewishvirtuallibrary.org/jsource/Politics/Other_Law_Law_of_Return.html [<https://perma.cc/S8KN-X2WK>] (stating that Section 4B was added in 1970 as an amendment to the original law, which was enacted in 1950).

78. See Gorenberg, *supra* note 76 (describing one woman’s struggle to satisfy the Rabbinat of her mother’s Jewishness in order to marry in Israel).

79. See Bernard Avishai, *A Missed Opportunity to Support Secular Life in Israel*, NEW YORKER (May 6, 2016), <http://www.newyorker.com/news/news-desk/a-missed-opportunity-to-support-secular-life-in-israel> [<https://perma.cc/QLV5-L8NV>].

80. See *Israel at 68: A Statistical Glimpse*, ISR. MINISTRY FOREIGN AFF. (May 8, 2016), <http://mfa.gov.il/MFA/AboutIsrael/Spotlight/Pages/Israel-at-68-A-statistical-glimpse.aspx> [<https://perma.cc/Q5D3-4APH>].

81. Amanda Borschel-Dan, *All I Want Is to Have a Jewish Family, Says US Convert Rejected by Israeli Rabbinat*, TIMES ISR. (July 5, 2016, 9:59 AM), <http://www.timesofisrael.com/all-i-want-to-do-is-have-a-jewish-family-says-us-convert-rejected-by-israeli-rabbinat/> [<https://perma.cc/FNU7-3B68>] (illustrating that, because the Rabbinat controls who is recognized as being Jewish, the Rabbinat indirectly influences immigration).

82. See generally SCANLON, *supra* note 50.

83. *Id.* at 193.

84. *Id.* Iraq and Syria offer vivid examples of this alternative. See Lyse Doucet, *Iraq Seeks More Help as It Sets Sights on Mosul*, BBC NEWS (July 20, 2016), <http://www.bbc.com/news/world-middle-east-36845694> [<https://perma.cc/UMF8-SPRE>].

In this respect, citizenship in a political community differs from membership in a voluntary association.⁸⁵ To the extent that associations are organized around shared goods, doctrines, or practices, the group must condition membership on agreement, or at least on confining disagreement within strict limits.⁸⁶ But the goods of political society, such as the right to vote, hold office, and participate in public discussions, Scanlon asserts, “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.”⁸⁷

Although Scanlon’s thesis has intuitive force, it cannot be accepted as it stands. In the first place, no political community is just an ensemble of institutions and procedures; each rests on shared understandings and purposes.⁸⁸ Often this agreement is tacit, but on occasion it becomes explicit. Consider the process of “naturalization” through which foreigners become U.S. citizens.⁸⁹ It culminates with the Oath of Allegiance, in which each new American pledges not only to defend the Constitution and laws against all enemies, foreign and domestic, but also to bear “true faith and allegiance” to them.⁹⁰ That means, among other things, accepting in one’s mind and heart the “republican form of government”⁹¹ in which, as James Madison put it, all legitimate powers are derived directly or indirectly from the people.⁹² And because the Constitution excludes all religious tests for public office, new citizens cannot take the oath sincerely without abjuring all

85. See SCANLON, *supra* note 50, at 194.

86. See *id.*

87. *Id.* at 194–95.

88. In comments on my conference paper, Thomas A. Smith cites the Amish to argue that the search for shared values in a liberal society is bound to fail and that we end up with what Scanlon and I reject—namely, a geographical space shared by contending factions. *Id.* at 193 (referring to Scanlon’s comment about “rival groups contending over the same territory”); Thomas Smith, Brookings Inst., Comments at Inst. for Law and Religion Conference (Feb. 5–6, 2016). I cheerfully concede that the Amish are a good example of diversity at the level of principle. In this respect, they are more like resident aliens who obey the law without necessarily subscribing to its underlying principles. The majority can accommodate this precisely because the Amish are such a small and unthreatening minority. If they were much larger or less pacific, the majority’s calculus would be different and—depending on the facts—perhaps, justifiably so.

89. See U.S. CITIZENSHIP & IMMIGR. SERVS., A GUIDE TO NATURALIZATION 31 (2016), <https://www.uscis.gov/sites/default/files/files/article/M-476.pdf> [<https://perma.cc/N2C5-YZBT>].

90. *Id.* at 28.

91. U.S. CONST. art. IV, § 4.

92. THE FEDERALIST NO. 39, at 251 (James Madison) (Jacob E. Cooke ed., 1961).

thoughts of theocracy.⁹³ Although native-born Americans attain citizenship without oaths or conditions, they are bound as citizens to the same affirmations and prohibitions that apply to naturalized citizens.

Second, differences of national history may warrant diverse definitions of tolerance. To pick the most conspicuous example, the collapse of the Weimar Republic and the global catastrophe that ensued moved the drafters of the post-war constitution of the Federal Republic of Germany to enact restraints on expression, assembly, and political activity designed to protect the constitutional order against attacks from extremists and totalitarians of every stripe.⁹⁴ The constitution establishes procedures through which associations and political parties determined to be threats to the regime may be banned and dissolved.⁹⁵ Another article allows the government, acting through the Constitutional Court, to deprive individuals of certain fundamental rights if they have used those rights to combat the “free democratic order.”⁹⁶ In the early years of the Federal Republic, these powers were used to disband the Nazi-style Socialist Imperial Party (SRP) in 1952 and the German Communist Party in 1956.⁹⁷

When the government applied for a court order to disband the SRP, the party defended itself by asserting its determination to comply fully with the constitution’s institutions and procedures.⁹⁸ The Constitutional Court rejected the SRP’s claim, countering that the post-war German republic was not merely a constitutional order but also a normative order requiring, “[a]t the very least, respect for the rights of man as set forth in the Basic Law, above all respect for the rights of one individual to life and free development, [and] the sovereignty of the people”⁹⁹ The Nazis had destroyed the Weimar Republic without violating its constitutional

93. U.S. CONST. art. VI, cl. 3.

94. See COLIN STORER, *A SHORT HISTORY OF THE WEIMAR REPUBLIC* 194 (2013); Wise, *supra* note 2, at 302–03.

95. See Wise, *supra* note 2, at 307, 311 (citing GRUNDGESETZ [GG] [BASIC LAW], art. 9(2), art. 21(2) (Ger.), *translation at* http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0050 [<https://perma.cc/24RQ-2GNS>]).

96. See *id.* at 307 n.45 (citing GRUNDGESETZ [GG] [BASIC LAW], art. 18 (Ger.), *translation at* http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0050 [<https://perma.cc/24RQ-2GNS>]).

97. See DONALD P. KOMMERS & RUSSELL A. MILLER, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 286, 289–90 (3d ed. 2012) (referencing and translating excerpts of BVERFG, 2 BVERFG 1, Oct. 23, 1952 (Ger.) and BVERFG, 5 BVERFG 85, Aug. 17, 1956 (Ger.)).

98. See Paul Franz, *Unconstitutional and Outlawed Political Parties: A German-American Comparison*, 5 B.C. INT’L & COMP. L. REV. 51, 56–57 (1982) (citing 2 BVERFG 1 (12) (Ger.)).

99. See *id.* at 57 (quoting 2 BVERFG 1 (13) (Ger.)).

procedures,¹⁰⁰ and the Court was determined to use the newly-entrenched substantive understanding of liberal democracy as a bulwark against any possible repetition.¹⁰¹

Four years later, when the continued existence of the German Communist Party was at issue, the Court expanded on its earlier ruling.¹⁰² Certain fundamental values, it declared, “shall be recognized as absolute values, and therefore protected against every attack.”¹⁰³ The Constitution’s principle of the dignity of man, the Court held, would trump any doctrine or party to the contrary, even if the rejection of human dignity enjoyed near-universal public support.¹⁰⁴ Political parties do not have an absolute right to exist, because each political party is a constitutional entity with a responsibility to support the fundamental norms of a liberal democratic order.¹⁰⁵

It would be an exaggeration to say that U.S. political parties enjoy an unqualified right to exist.¹⁰⁶ It is evident, nonetheless, that the German conception of political tolerance is narrower than its U.S. counterpart. Germany is not an intolerant polity or society, but its national experience has shaped its understanding of the risks that its liberal democratic institutions can safely run.

The defense of tolerance as I understand it does not imply that the drafters of the German constitution were wrong to take this experience into account.¹⁰⁷ This is to say that tolerance is a concept admitting of a range of legitimate conceptions or specifications—and that each particular conception can be more or less appropriate, depending on the circumstances of its application.

Circumstances vary across time as well as national boundaries. In ordinary times, President Lincoln’s suspension of the writ of habeas corpus would have been a tyrannical overreach.¹⁰⁸ In early 1861, it could be defended

100. See STORER, *supra* note 94, at 194 (explaining how the Nazis’ passage of the Enabling Act permitted Hitler to amend the Weimar Constitution at will).

101. See KOMMERS & MILLER, *supra* note 97, at 290–91 (quoting 5 BVERFG 85 (139) (Ger.)). For an extended account of this episode, see Wise, *supra* note 2, at 304–311.

102. See Franz, *supra* note 98, at 60 (citing 5 BVERFG 85 (139) (Ger.)).

103. *Id.* (quoting 5 BVERFG 85 (139) (Ger.)).

104. See *id.* (citing 5 BVERFG 85 (139) (Ger.)).

105. For a fuller account, see Franz, *supra* note 98, at 59–62.

106. See *id.* at 69–70. For instance, the Communist Control Act of 1954, which the Supreme Court has never ruled unconstitutional, did make the Communist Party of the United States illegal. 50 U.S.C. § 842 (2000).

107. See KOMMERS & MILLER, *supra* note 97, at 287.

108. See James A. Dueholm, *Lincoln’s Suspension of the Writ of Habeas Corpus: An Historical and Constitutional Analysis*, 29 J. ABRAHAM LINCOLN ASS’N 47, 48 (2008)

as essential to the continuation of the constitutional order.¹⁰⁹ Permitting Confederate sympathizers to obstruct the flow of men and material vital to the defense of the nation's capital would not have been an act of political tolerance, but rather a dereliction of constitutional duty.¹¹⁰

(quoting Letter from Abraham Lincoln to General Winfield Scott (Apr. 27, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 347 (Roy P. Basler et al. eds., 1953)), <http://quod.lib.umich.edu/cgi/p/pod/dod-idx/lincoln-s-suspension-of-the-writ-of-habeas-corporus.pdf?c=jala;idno=2629860.0029.205> [https://perma.cc/WP5S-YKPA].

109. See *id.* at 49–50 (quoting Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 108, at 430).

110. See *id.* at 48.