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Andrew Koppelman

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# Unparadoxical Liberalism

ANDREW KOPPELMAN\*

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Larry Alexander argues that liberalism is internally incoherent because it contains a paradox: it is committed to toleration, but if it tolerates illiberal ideas and practices it betrays itself.<sup>1</sup>

The paradox does not exist. Liberalism aims to tolerate as much diversity as it can consistent with the preservation of the liberal project. It has distinctive reasons to tolerate illiberal ideas, since it aims to be adopted by the citizenry consciously and with a full understanding of the

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\* © 2017 Andrew Koppelman. John Paul Stevens Professor of Law and Professor (by courtesy) of Political Science, Department of Philosophy Affiliated Faculty, Northwestern University. Thanks to Tom Gaylord for research assistance, and to the audience at the Feb. 2016 symposium, "Can Liberals Be Tolerant? Should They Be?," at the University of San Diego School of Law. Parts of this paper previously appeared in the following articles: Andrew Koppelman, *You're All Individuals: Brettschneider on Free Speech*, 79 BROOKLYN L. REV. 1023 (2014); Andrew Koppelman, *Veil of Ignorance: Tunnel Constructivism in Free Speech Theory*, 107 NW. U. L. REV. 647 (2013); Andrew Koppelman, *Waldron, Responsibility-Rights, and Hate Speech*, 43 ARIZ. ST. L. REV. 1201 (2012).

1. See generally Larry Alexander, *Free Speech and 'Democratic Persuasion': A Response to Brettschneider*, in PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS 379 (Rowan Cruft et al. eds. 2015).

alternatives. How much diversity can, in practice, be tolerated is a contingent question dependent on the facts of any particular time and place. Whether domestic fascists, for example, need to be suppressed in order to avoid disaster, is a matter of prediction based on local knowledge. It is not a philosophical question.

### I. ALEXANDER'S ALLEGED PARADOX

Alexander's most concise statement of the alleged paradox:

If it outlaws illiberalism, its credentials as a liberal state appear to be undermined. If it permits illiberalism, it licenses Robert Frost's derogatory quip that liberalism can't take its own side in an argument. Either way, liberalism appears self-contradictory and incoherent. It must either betray its principles or betray itself (and thereby betray its principles). Liberalism both appears to be possible—we've seen it done—and impossible (it can't be done).<sup>2</sup>

The upshot is that liberalism can't coherently be theorized. "Liberalism, and its central liberties of freedom of expression, religion, and association, is a theoretical contradiction. Its successes are instead pragmatic ones."<sup>3</sup>

*Liberalism* refers to the idea that the purpose of government is not the promotion of religious, moral, or martial virtue, or the aggrandizement of the rulers or their race, but rather peace, prosperity, intellectual progress, and personal liberty. Liberal practices antedate liberal theories: people began focusing on these ends, and experiencing their value, before theorists worked out a story of why this was a good way for governments to operate.<sup>4</sup> The theories attempt to systematically state and justify the practice.

A central part of liberal practice has been the effort to appreciate human diversity, to sympathetically understand the points of view even of those most bitterly opposed to that practice.<sup>5</sup> This tendency is what Frost had in mind when he famously said: "A liberal is a man too broadminded to take his own side in a quarrel."<sup>6</sup> But Frost didn't think that this could be

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2. *Id.* at 379.

3. *Id.* at 387. The assumption that pragmatic successes cannot be theorized implies an unusually modest sense of the possibilities of theory.

4. *See generally* DEIRDRE MCCLOSKEY, *BOURGEOIS DIGNITY: WHY ECONOMICS CAN'T EXPLAIN THE MODERN WORLD* (2010).

5. *See, for example,* Gitta Sereny's exquisitely probing interviews with Nazi war criminals, *GITTA SERENY, ALBERT SPEER: HIS BATTLE WITH TRUTH* (1995); *GITTA SERENY, INTO THAT DARKNESS: FROM MERCY KILLING TO MASS MURDER, A STUDY OF FRANZ STANGL, THE COMMANDANT OF TREBLINKA* (2d ed. 1995). One benefit of this sympathetic engagement with evil is that it counteracts the illusion of one's own incorruptibility, which itself can license considerable evil. *See* Andrew Koppelman, *Reading Lolita at Guantanamo, or, This Page Cannot Be Displayed*, *DISSENT*, Spring 2006, at 64.

6. It probably was not original with him. *See* Barry Popik, "A Liberal Is a Man Too Broadminded To Take His Own Side in a Quarrel," *BIG APPLE* (Dec. 6, 2009),

developed into a serious indictment of liberalism: “I’m not saying I’m not one myself. That was what the war of our Revolution was.”<sup>7</sup>

Liberalism faces a paradox only if it stands for principles that cannot be consistently followed. It is committed to a kind of evaluative neutrality in certain contexts, but this is paradoxical only if the specification of that neutrality is inconsistent with liberal practice. An apparent paradox may merely reveal the need for further specification.

Alexander elaborates:

On the one hand, the freedoms that are emblematic of liberalism—the freedoms of expression, religion, and association—all appear to require a governmental stance of evaluative neutrality. . . . “Freedom of expression for those with whom the government agrees” is not freedom of expression . . .

Yet, here is the problem. Any philosophical account of political morality will, perforce, take a stand on what is true, right, and valuable and what is not. It will and must be “partisan” in favor of its own conclusions. Thus, it must regard as error and possibly malign those ideas that it rejects.

Liberalism in any of its renditions is no different. If liberalism is the correct political morality, all positions inconsistent with its tenets are incorrect. There is no neutral ground in these matters.<sup>8</sup>

There is no paradox. Liberalism is committed to a kind of evaluative neutrality *at the operational level* with respect to the exercise of these freedoms. Your right to speak, for instance, is unaffected by whether you agree or disagree with liberalism. Viewpoint-based restrictions on speech

[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/](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/R3MF-X3EE].

7. George Monteiro, *Robert Frost’s Liberal Imagination*, 28 IOWA REV. 104, 127 (1998) (quoting Robert Frost, Appearance at the National Poetry Festival in Washington (Fall 1962)). Frost also declared:

Now, speaking of liberal, my gibes and my jokes - one of them is to call all my liberal friends Dover Beachcombers. . . . But now, Matthew Arnold, with all my joking and gibing about him, is one of my “greats.” I can tell he is, because I quote him so often . . . And the word about his being a liberal comes to me when he says that we intellectuals “Dejectedly take our seat on the intellectual throne.” That’s a very liberal attitude. Nearly every liberal that I know of has a tendency when his enemy works up against him, stirs up against him, to try to remember if he isn’t more in the wrong than the enemy. I said in two lines of poetry a long time ago that a liberal is a person who can’t take his own side in a quarrel. That’s all, but I can say better things of a liberal than that.

*Id.* at 125 (quoting Frost, *supra*).

8. LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? 148–49 (2005).

are categorically invalid. Even Nazis have a right to free speech. But *on the level of political philosophy*, including the question of what rights there are and how to specify them, there is no evaluative neutrality in liberalism. Nazis are protected for reasons Nazis find repellent.

I can take my own side in an argument without needing to hit anyone who disagrees.<sup>9</sup> As it happens I am happy to talk with Larry Alexander, and grateful that he's willing to talk to me. I believe that these conversations, which force me to defend my ideas (and Larry is pretty damn forceful) make me a better thinker and a better person. All this even though I'm right and he's wrong.<sup>10</sup>

Alexander writes: "If it permits illiberalism, it licenses Robert Frost's derogatory quip."<sup>11</sup> He does not explain what his phrase "permit illiberalism" means. It might mean permitting practices that liberalism's own commitments prohibit, such as burning heretics. Alexander understands that liberalism won't allow this. If "a religious group believes in the necessity of theocratic rather than democratic rule," liberalism "cannot allow that group to actualize what its religion demands."<sup>12</sup> No incoherence here.<sup>13</sup>

On the other hand, liberalism will tolerate the dissemination of illiberal ideas, hate speech, etc. But it will only tolerate *harmless* Nazis who merely march around in silly uniforms.<sup>14</sup>

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9. This point is elaborated, and several arguments on which Alexander might be relying are refuted, in Jeremy Waldron, *Toleration: Is There a Paradox?*, (NYU Sch. of Law, Pub. Law Research Paper No. 12-75, 2012), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2196135](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2196135) [<https://perma.cc/848M-GFUW>].

10. The incoherence is present only if one presumes that the human will finds intolerable the existence of other beings with free will. Jean-Paul Sartre argued this, Andrew Koppelman, *Sex Equality and/or the Family: From Bloom vs. Okin to Rousseau vs. Hegel*, 4 YALE J.L. & HUMAN. 399, 427–28 (1992), but he wasn't a liberal.

11. Alexander, *supra* note 1, at 379.

12. ALEXANDER, *supra* note 8, at 149.

13. Karl Popper, perhaps the first to use the term "paradox" in this context, thought that there was a potential "paradox of tolerance," but that it was a danger that could be avoided: "If we extend unlimited tolerance even to those who are intolerant, if we are not prepared to defend a tolerant society against the onslaught of the intolerant, then the tolerant will be destroyed, and tolerance with them." KARL POPPER, 1 THE OPEN SOCIETY AND ITS ENEMIES: THE SPELL OF PLATO 265 (5th ed. 1966). By "onslaught" he evidently was referring to actions more potent than illiberal speech. "In this formulation, I do not imply, for instance, that we should always suppress the utterance of intolerant philosophies; as long as we can counter them by rational argument and keep them in check by public opinion, suppression would certainly be most unwise." *Id.*

14. Stephen Macedo observes that American Nazis must "respect the property, the political rights, and freedoms of Jewish Americans," they have to keep order when they march, and otherwise they must "be law-abiding Nazis" or else suffer at the hands of the law. In short, "they cannot *be* Nazis at all but only play at it." STEPHEN MACEDO, LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM 260 (1991).

John Rawls offered a simple and elegant case for toleration of the intolerant.<sup>15</sup> He thought that the liberty of intolerant groups “should be restricted only when the tolerant sincerely and with reason believe that their own security and that of the institutions of liberty are in danger.”<sup>16</sup> The intolerant have no right to complain because “[a] person’s right to complain is limited to violations of principles he acknowledges himself.”<sup>17</sup> Nonetheless, they should be tolerated if this is safely possible: “justice is infringed whenever equal liberty is denied without sufficient reason.”<sup>18</sup> In assessing the dangers, “the natural strength of free institutions must not be forgotten.”<sup>19</sup>

This Article argues that liberalism has even stronger reasons than Rawls articulates to protect the speech of the intolerant: it aims to expose citizens to illiberal ideas so that they can choose liberalism deliberately.<sup>20</sup> The availability of bad ideas is a good for the liberal. There are also other familiar arguments for free speech, rooted in the unhappy history of government censorship. But Rawls’s case is coherent on its own terms.

Alexander writes: “Liberalism can be neutral only toward those religions and religious views that are compatible with the tenets of liberalism [in practice, he should have written: they can teach intolerance, as the Catholic Church did in America in the nineteenth century, so long as they are impotent to carry it out]. Which is to say that if liberalism is defined in part by neutrality toward religious beliefs, liberalism is impossible.”<sup>21</sup> It depends on what kind of “neutrality toward religious beliefs” liberalism is committed to. Neutrality is available in a huge variety of specifications.<sup>22</sup> The peculiar American form of liberal neutrality regards religion as

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15. JOHN RAWLS, A THEORY OF JUSTICE 193 (Harvard Univ. Press rev. ed. 1999).

16. *Id.* Alexander writes: “The relation between liberalism and illiberal views, therefore, if liberalism is to avoid paradox and incoherence, must be a modus vivendi relation of qualified and limited tolerance rather than a relation in which illiberal views have rights as a matter of principle.” Larry Alexander, *Alexander on Koppelman on Alexander*, 54 SAN DIEGO L. REV. 339 (2017). Here Alexander assumes that “a matter of principle” must be absolutely consequence-insensitive. This passage of Rawls, however, states a principle in the ordinary semantic sense of that word.

17. RAWLS, *supra* note 15, at 190.

18. *Id.* at 191.

19. *Id.* at 193.

20. See discussion *infra* at Part II.

21. ALEXANDER, *supra* note 8, at 164.

22. See Andrew Koppelman, *The Fluidity of Neutrality*, 66 REV. POLITICS 633, 635 (2004).

a good, and, because that good can be corrupted by state manipulation, bars the state from any explicit endorsement of religious propositions.<sup>23</sup>

Of course, any human behavior whatsoever impliedly *rejects* some religious propositions. This cannot be impermissible. Ought implies can. Government can and does give reasons for what it does without embedding its actions in any particular religious narrative. It is possible to defend the law against murder without saying anything at all about Aztec theology. Perhaps some religious orthodoxy is in some sense implicit in the stop sign at an intersection; at a minimum, it excludes the proposition that God wants you to speed through the intersection without slowing down. But there are many theologies that can and do coincide in rejecting this proposition. People with radically differing theological views can have adequate reasons for obeying both laws.<sup>24</sup> Whatever objections one might have to carrying on in this way, it is not paradoxical.

Similarly, with Alexander's allegation of paradox within liberals' embrace of free speech:

Freedom of expression is paradoxical within any plausible normative theory. That is because the requirement of evaluative neutrality is the core of any right of freedom of expression, but evaluative neutrality cannot coexist with *any* normative theory. Any normative theory, liberal or not, will perforce take positions on what ought to be done given our best judgment of what the world is like. To the extent that expression . . . threatens to produce states of affairs inconsistent with those the normative theory prescribes, to that extent the normative theory must, as a matter of logical consistency, rule the expression to be pernicious and of negative value.<sup>25</sup>

Alexander is correct that no theory of free speech can maintain absolute epistemological humility. Even a theory that made freedom of expression so absolute as to override all other human interests “would face a paradox in dealing with expression that threatened to undermine *it*.”<sup>26</sup>

Alexander's point is devastating only if free speech theory must take the form he describes, as committed to absolute evaluative neutrality. However, the style of reasoning that is officially committed to absolute evaluative neutrality is a fairly recent development in free speech theory.<sup>27</sup>

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23. ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 66 (2013); Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831, 1907 (2009).

24. Andrew Koppelman, *No Expressly Religious Orthodoxy: A Response to Steven D. Smith*, 78 CHI.-KENT L. REV. 729, 734 (2003).

25. ALEXANDER, *supra* note 8, at 177.

26. *Id.*

27. Andrew Koppelman, *Veil of Ignorance: Tunnel Constructivism in Free Speech Theory*, 107 NW. U. L. REV. 647, 656–58, 706–07 (2013). And neutralist liberalism, which disclaims reliance on any contestable conception of the good, is a similarly recent, related development. See RONALD DWORKIN, A MATTER OF PRINCIPLE 191–92 (1985).

Milton, Mill, Hand, Holmes, Brandeis, Meiklejohn, and Emerson were not committed to absolute evaluative neutrality. They did aspire to a field of neutrality—any conception of any kind of liberty will do that—but within limits. They were unapologetically devoted to certain substantive values. It was from those substantive values that they derived their commitment to free speech, and so they had no problem limiting speech in the way that Alexander describes.<sup>28</sup>

Alexander offers a different formulation of liberalism that is more faithful to the actual liberal tradition (rather than certain failed late-twentieth-century attempts to codify that tradition): liberalism may be understood as “a way of life, a vision of the Good, a partisan view among partisan views.”<sup>29</sup> It strives to realize that way of life, to create and maintain a free society. And so a line must be drawn: “To the extent that expression . . . threatens to produce states of affairs inconsistent with those the normative theory prescribes, to that extent the normative theory must, as a matter of logical consistency, rule the expression to be pernicious and of negative value.”<sup>30</sup>

Here, normative political philosophy cannot offer rules but only standards. There is no way to know which expression threatens to bring about those bad states of affairs without local knowledge of the circumstances in which the expression occurs. Nazi speech is, of course, censored in Germany

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28. *Id.*

29. ALEXANDER, *supra* note 8, at 169. He declares it unattractive because “cosmopolitanism inevitably tends to homogenize and shallow out the various ways of life.” *Id.* I have responded:

This is Nietzsche’s old complaint that a liberal society does not produce heroic or admirable characters, but merely meek bourgeoisie who do not take anything very seriously. I will here simply record my view that liberalism has its own heroes and deeply felt ideals (some of which are described here), and that Alexander does not specify which alternative to liberalism he finds preferable. Some admirers of Nietzsche have been less circumspect.

Koppelman, *Veil of Ignorance*, *supra* note 27, at 729–30 n.465.

30. ALEXANDER, *supra* note 8, at 177.

and Austria,<sup>31</sup> and it is far from clear that this is not justified.<sup>32</sup> The intolerant sect, Rawls sensibly observes, “presents a practical dilemma which philosophy alone cannot resolve. Whether the liberty of the intolerant should be limited to preserve freedom under a just constitution depends on the circumstances.”<sup>33</sup>

By considering the ideals specific to the liberal way of life, we can add two provisos to Rawls. First, liberalism demands that some dangerous speech be tolerated, because it aims that, to the extent feasible, citizens be exposed to all manner of ideas, even evil ones. Second, although speech may legitimately be suppressed when this is necessary to prevent harm, one kind of disutility cannot even be counted as a harm for purposes of deciding whether any particular speech is harmful: the moral distress induced by exposure to unwelcome ideas.

## II. NOT BY THEIR PRINCIPLES, BUT BY OURS

The importance of exposure to illiberal ideas has been a persistent theme in free speech theory. There is nothing paradoxical about it, any more than there is anything paradoxical about a general studying the enemy’s captured plans. Consider the role of antiliberal ideas in three major figures in the free speech tradition: John Milton, John Stuart Mill, and Alexander Meiklejohn.

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31. See LEGISLATING AGAINST DISCRIMINATION: AN INTERNATIONAL SURVEY OF ANTI-DISCRIMINATION NORMS 328–30 (Nina Osin & Dina Porat eds., 2005) (German statutes); *Id.* at 86–87 (Austrian statutes); ERIC BARENDT, FREEDOM OF SPEECH 166–67 (2d ed. 2005); Walter F. Murphy, *Excluding Political Parties: Problems for Democratic and Constitutional Theory*, in GERMANY AND ITS BASIC LAW: PAST, PRESENT, AND FUTURE – A GERMAN-AMERICAN SYMPOSIUM 173, 180–81 (Paul Kirchhof & Donald P. Kommers eds. 1993).

32. DAVID ART, THE POLITICS OF THE NAZI PAST IN GERMANY AND AUSTRIA 55 (2006).

In 1952, 37 percent of Germans agreed with the statement that “it would be better for Germany not to have any Jews in the country,” while only 20 percent disagreed . . . In 1953, 55 percent of Germans disagreed with the statement that “German soldiers of the last war can be reproached for their conduct in the occupied countries.”

*Id.* Neither of these questions concerned free speech, but both answers are probative of the difficulties of creating a liberal, speech-protective culture in postwar Germany. A democracy is, of course, better functioning if respect for individual rights emerges from an unfettered electoral process rather than being imposed from above. See COREY BRETTSCHEIDER, DEMOCRATIC RIGHTS: THE SUBSTANCE OF SELF-GOVERNMENT 136–59 (2007). But that does not entail that the German-Austrian approach is wrong, in context.

33. RAWLS, *supra* note 15, at 219.

## A. Milton

Milton's principal reason for opposing the licensing of printing is religious: free will means the freedom to choose evil.<sup>34</sup> Salvation is to be achieved only by struggle against temptation.<sup>35</sup> "Assuredly we bring not innocence into the world, we bring impurity much rather: that which purifies us is trial, and trial is by what is contrary."<sup>36</sup> It follows that "all opinions, yea errors, known, read, and collated, are of main service and assistance toward the speedy attainment of what is truest."<sup>37</sup> There's nothing paradoxical here. Errors are needed because they are useful: "were they but as the dust and cinders of our feet, so long as in that notion they may yet serve to polish and brighten the armoury of Truth, even for that respect they were not utterly to be cast away."<sup>38</sup> Milton thought that even correct religious doctrine would not bring about salvation if it was the consequence of blind conformity rather than active engagement with religious questions.<sup>39</sup> "A man may be a heretic in the truth; and if he believe things only because his pastor says so, or the Assembly so determines, without knowing other reason, though his belief be true, yet the very truth he holds becomes his heresy."<sup>40</sup>

There is a limit. "I mean not tolerated popery and open superstition, which, as it extirpates all religions and civil supremacies, so itself should be extirpate . . . that also which is impious or evil absolutely, either against

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34. JOHN MILTON, *Areopagitica*, in COMPLETE POEMS AND MAJOR PROSE 728 (Merritt Y. Hughes ed., 1957) [hereinafter MILTON, *Areopagitica*].

35. *Id.*

36. *Id.*

37. *Id.* at 727. The importance of a free choice between good and evil is likewise emphasized in JOHN MILTON, *Paradise Lost*, in *supra* note 34, at 173, 260. The speaker here is God the Father, explaining why it was right to allow the rebel angels and, later, Adam to transgress:

Freely they stood who stood, and fell who fell.  
Not free, what proof could they have giv'n sincere  
Of true allegiance, constant Faith or Love,  
Where only what they needs must do, appear'd,  
Not what they would? what praise could they receive?  
What pleasure I from such obedience paid,  
When Will and Reason (Reason also is choice)  
Useless and vain, of freedom both despoil'd,  
Made passive both, had serv'd necessity,  
Not me.

38. MILTON, *Areopagitica*, *supra* note 34, at 748.

39. *Id.* at 739.

40. *Id.*

faith or manners, no law can possibly permit, that intends not to unlaw itself.”<sup>41</sup> It is not clear why he draws the line here. Did he think that the Catholics, because they did not themselves believe in—and indeed aimed to subvert—toleration, were therefore not entitled to it?<sup>42</sup> Did he think that Catholic speech was not about a matter reasonably in doubt, and so could not contribute to the advancement of truth?<sup>43</sup> Was tolerance only for the “neighboring differences” of those committed to Protestantism?<sup>44</sup> Was Milton simply betraying his own principles?<sup>45</sup> It is impossible to know.

The answer most consistent with what Milton does say, in my view, is that he thought Catholicism really was too dangerous to tolerate. He believed that there was a Catholic conspiracy to enslave England, and “swallowed whole the stories of Irish massacres of English Protestants.”<sup>46</sup> Although it was generally important to expose people to all sorts of evil ideas, Catholicism had to be suppressed in order to protect the project of Protestant liberalism. If this reading is correct, then his limitation upon toleration does not look very different from Rawls’s.<sup>47</sup>

### B. Mill

Mill likewise values “the clearer perception and livelier impression of truth produced by its collision with error.”<sup>48</sup> If the reasons for even a true opinion are held without understanding the arguments both for and against it, “it will be held as a dead dogma, not a living truth.”<sup>49</sup> Truth held dogmatically “is but one superstition the more, accidentally clinging to

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41. *Id.* at 747.

42. *See infra* note 44 (noting that analogous arguments were made in the mid-twentieth century to justify withholding free speech protection from Communists).

43. Ernest Sirluck, *Introduction* to THE COMPLETE PROSE WORKS OF JOHN MILTON (Ernest Sirluck ed. 1959), *reprinted in* VINCENT BLASI, IDEAS OF THE FIRST AMENDMENT 124, 125–26 (2006).

44. Willmoore Kendall, *How to Read Milton’s Areopagitica*, 22 J. POL. 439, 464 (1960).

45. Thomas N. Corns, *John Milton: The Prose Works* (1998), *reprinted in* BLASI, *supra* note 43, at 126–28.

46. CHRISTOPHER HILL, MILTON AND THE ENGLISH REVOLUTION 155 (1977).

47. Stanley Fish takes up Rawls’s question, “How is it possible for those affirming a religious doctrine . . . based on religious authority . . . also to hold a reasonable political conception that supports a just democratic regime?” Stanley Fish, *Where’s the Beef?*, 51 SAN DIEGO L. REV. 1042–43 (quoting JOHN RAWLS, POLITICAL LIBERALISM xxxvii (extended ed. 2005)). Fish concludes: “The answer is that it is not possible,” at least with respect to “strong, that is uncompromising, religions.” *Id.* at 1043, 1038. These are strange claims coming from one of our preeminent expositors of Milton.

48. JOHN STUART MILL, ON LIBERTY 76 (Gertrude Himmelfarb ed., 1974) (1859); *see also id.* at 95.

49. *Id.* at 97.

the words which enunciate a truth.”<sup>50</sup> The pursuit matters more than the attainment: “Truth gains more even by the errors of one who, with due study and preparation, thinks for himself, than by the true opinions of those who only hold them because they do not suffer themselves to think.”<sup>51</sup> Even when a question is settled, “[t]he loss of so important an aid to the intelligent and living apprehension of a truth, as is afforded by the necessity of explaining it to, or defending it against, opponents, though not sufficient to outweigh, is no trifling drawback from, the benefit of its universal recognition.”<sup>52</sup>

As John Durham Peters observes, Mill’s ideal of character is an unstable mix of Stoicism and romanticism.<sup>53</sup> As listeners, citizens must be willing to subject their dearest beliefs to challenge and criticism, and learn to articulate views the opposite of their own.<sup>54</sup> Yet as speakers, they must present their ideas powerfully and with conviction.<sup>55</sup>

The valuable traits of character promoted by a regime of free speech have a negative counterpart in the malign effects of censorship. “The greatest harm done is to those who are not heretics, and whose whole mental development is cramped, and their reason cowed, by the fear of heresy.”<sup>56</sup> The consequence is “a low, abject, servile type of character,”<sup>57</sup> and Mill bombards it with nasty metaphors: automatons in human form, apes, cattle, sheep; he even borrows Milton’s metaphor of a “stagnant pool.”<sup>58</sup>

For Mill, the limits of tolerable speech are a function of context: “An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer.”<sup>59</sup> Once more, as in Rawls, it depends on the circumstances.

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50. *Id.*

51. *Id.* at 95.

52. *Id.* at 106.

53. JOHN DURHAM PETERS, *COURTING THE ABYSS: FREE SPEECH AND THE LIBERAL TRADITION* 130–36 (2005).

54. *Id.* at 130–32.

55. *Id.* at 130–36.

56. MILL, *supra* note 48, at 95.

57. *Id.* at 114.

58. *Id.* at 129.

59. *Id.* at 119.

C. Meiklejohn

Alexander Meiklejohn directly confronted, in a more sustained way than either Milton or Mill, the question whether those who reject liberalism are entitled to free speech.<sup>60</sup> His response was that “a government is maintained by the free consent of its citizens only so long as the choice whether or not it shall be maintained is recognized as an open choice, which the people may debate and decide, with conflicting advocacies, whenever they may choose.”<sup>61</sup> His argument is essentially the same as Milton’s: in order for the choice of good to be authentic, there must be a real option to choose evil.

His clearest answer to the alleged paradox of tolerating the intolerant is this:

Shall we, then, as practitioners of freedom, listen to ideas which, being opposed to our own, might destroy confidence in our form of government? Shall we give a hearing to those who hate and despise freedom, to those who, if they had the power, would destroy our institutions? Certainly, yes! Our action must be guided, not by their principles, but by ours. We listen, not because they desire to speak, but because we need to hear. If there are arguments against our theory of government, our policies in war or in peace, we the citizens, the rulers, must hear and consider them for ourselves.<sup>62</sup>

If we were allowing ourselves to be guided by their principles, we would indeed be caught in a paradox. Their principles aren’t ours.

For a long time in American law, the rule was that speech could be suppressed whenever it had a tendency to bring about law violation.<sup>63</sup> This generated a *real* paradox. “Every denunciation of existing law,” Justice Brandeis observed, “tends in some measure to increase the probability that there will be violation of it.”<sup>64</sup> If, however, it is impermissible to say that the laws on the books are bad and that the incumbent officeholders ought

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60. See Carl A. Auerbach, *The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech*, 23 U. CHI. L. REV. 173, 186–89 (1956); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 31 (1971).

61. Alexander Meiklejohn, *What Does the First Amendment Mean?*, 20 U. CHI. L. REV. 461, 468 (1953). Another, similarly Miltonic formulation: “If men are not free to ask and to answer the question, ‘Shall the present form of our government be maintained or changed?’; if, when that question is asked, the two sides of the issue are not equally open for consideration, for advocacy, and for adoption, then it is impossible to speak of our government as established by the free choice of a self-governing people.” ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 123 (1960).

62. MEIKLEJOHN, *POLITICAL FREEDOM*, *supra* note 61, at 57.

63. See MICHAEL KENT CURTIS, *FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE”*: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 9–12, 385–89, 395–402 (2000); DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 129–176 (1997).

64. *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

to be replaced, then the enforcement of democratically enacted law deprives the law of its own democratic legitimacy.<sup>65</sup> A test that turned on the probability of harm was adopted by the Supreme Court in the mid-twentieth century, with lamentable results.<sup>66</sup> Those results pushed the law toward the current requirement that before speech can be suppressed as incitement, it must be “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>67</sup> We have had that rule for nearly half a century without untoward results, but its appropriateness from here on is contingent on the success of probabilistic judgments based on local conditions that may change.<sup>68</sup> Rawls is right that philosophy alone cannot resolve the question of how much intolerant speech is tolerable.<sup>69</sup>

### III. MORAL DISTRESS

A last issue is the harm caused by speech—a question that is relevant to the contemporary hate speech debate. Some hate speech does incite lawbreaking and even violence, and of course the law cannot be indifferent to that. More controversial is the question of how to respond to the mental distress caused by exposure to hateful ideas. These have lately become salient in the idea that college students should be given “trigger warnings” to enable them to avoid reading descriptions of especially distressing events,<sup>70</sup>

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65. James Madison thus made a sound argument from paradox to show that the Seditious Act of 1798 was unconstitutional. See JAMES MADISON, *The Virginia Report*, in THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 243, 263–67 (Marvin Meyers ed., rev. ed. 1981).

66. See generally MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 175–83 (1984) (providing an historical overview of the judicially created clear and present danger test, including its tendency to suppress or restrict free speech).

67. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

68. Koppelman, *Veil of Ignorance*, *supra* note 27, at 665–66.

69. See RAWLS, *supra* note 15, at 192–93.

70. See, e.g., Todd Gitlin, *Please Be Disturbed: Triggering Can Be Good for You, Kids*, TABLET (Mar. 13, 2015), <http://www.tabletmag.com/jewish-news-and-politics/189543/trigger-warnings-on-campus> [<https://perma.cc/8GY3-3MMN>]; Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, ATLANTIC (Sept. 1, 2015), <https://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/> [<https://perma.cc/BL2T-DG6R>]. On the other hand, such warnings can be used in a smart way, to provoke students to closer engagement with the material. Aaron R. Hanlan, *The Trigger Warning Myth*, NEW REPUBLIC (Aug. 14, 2015), <https://newrepublic.com/article/122543/trigger-warning-myth> [<https://perma.cc/R6P2-BQ48>].

or that gay people should not have to see messages indicating that other citizens regard their sexual activities as abhorrent.<sup>71</sup>

As Jeremy Waldron has emphasized, when Mill balances liberty against harm, he cannot count as harm the moral distress of having your most cherished views denounced, or of contemplating ways of life antithetical to your own.<sup>72</sup> A core value of free speech is that it will and must induce such distress. Mill, and liberalism more generally, places great value on “ethical confrontation—the open clash between earnestly held ideals and opinions about the nature and basis of the good life.”<sup>73</sup> Moral distress, “far from being a legitimate ground for interference . . . is a positive and healthy sign that the processes of ethical confrontation that Mill called for are actually taking place.”<sup>74</sup> Part of the reason for protecting illiberal ideas is that they promise to induce that distress, and so contribute to the education of citizens.

This valorization of moral distress is not peculiar to Mill. It is a central part of the free speech tradition. John Durham Peters observes that, since Milton, the ideology of free speech has celebrated the ability to encounter evil ideas and come away unscathed. “Satan represents a key figure in the dramatis personae of free expression, the troublemaker who nonetheless brings about, by the very force of his negativity, good in the end.”<sup>75</sup> Pornographers, Nazis, and other transgressors of the sacred thus form a stable alliance with civil libertarians. Peters emphasizes the cultural peculiarity of this valorization of “sponsoring study-abroad sojourns in the land of fire and brimstone.”<sup>76</sup> Most cultures “do not train souls for the kind of ironic contortionism that liberal subjectivity calls for.”<sup>77</sup> Rather, most of the world’s population “cannot hear certain things without wanting to hit somebody.”<sup>78</sup>

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71. Andrew Koppelman, *A Free Speech Response to the Gay Rights/Religious Liberty Conflict*, 110 NW. U. L. REV. 1125 (2016); Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619 (2015).

72. See Jeremy Waldron, *Mill and the Value of Moral Distress*, in LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991, at 115 (1993).

73. *Id.* at 120.

74. *Id.* at 125. Waldron’s more recent call for restriction of hate speech is in tension with this argument. See Koppelman, *Waldron, Responsibility-Rights, and Hate Speech*, 43 ARIZ. ST. L. REV. 1201, 1215–21 (2012).

75. PETERS, *supra* note 53, at 84.

76. *Id.* at 14.

77. *Id.* at 93.

78. *Id.*

Liberalism, with its core commitment to free speech, is a distinctive cultural formation. It values transparency among persons,<sup>79</sup> and delights in the difficult task of engaging other minds that are committed to values that one finds repellent.<sup>80</sup> Developing facility with that task requires discipline, and that discipline is inconsistent with the notion that people are so fragile that they must be shielded from distressing or challenging ideas.

#### IV. CONCLUSION

There is nothing paradoxical about being tolerant when one's own commitments dictate tolerance.<sup>81</sup> Probably the most repressive political entity on the planet, as this is written, is the Islamic State in Iraq and Syria (ISIS), which deems it a religious duty to kill any Muslim who departs from its understanding of Islam—such as the world's 200 million Shia.<sup>82</sup> In those territories unfortunate enough to be under its control, executions of large groups of prisoners take place every few weeks.<sup>83</sup> ISIS's ongoing program of mass murder however exempts "Christians who do not resist their new government . . . as long as they pay a special tax, known as the *jizya*, and acknowledge their subjugation."<sup>84</sup> ISIS regards Christianity as false, but tolerates it, because it understands this to be a religious duty. Is there a paradox of ISIS? Is ISIS too broadminded to take its own side in a quarrel?

For the same reason, there is nothing inconsistent about liberalism being broadly tolerant toward illiberal views, or even adopting William Galston's principle of "maximum feasible accommodation of diverse legitimate ways of life."<sup>85</sup>

79. See SEANA VALENTINE SHIFFRIN, *SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW* 92 (2014).

80. IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 226–56 (1990).

81. More generally, tolerance is not a single value, but a behavior that arises in many difficult cultural contexts, often for radically different reasons. See Evan Haefeli, *The Problem with the History of Toleration*, in *POLITICS OF RELIGIOUS FREEDOM* 105, 106, 108 (Winnifred Fallers Sullivan et al. eds., 2015).

82. Graeme Wood, *What ISIS Really Wants*, *ATLANTIC*, Mar. 2015, at 8, <https://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980/> [<https://perma.cc/Z99M-RKB6>].

83. *Id.*

84. *Id.*

85. WILLIAM A. GALSTON, *LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE* 119 (2002).

Alexander is right that some formulations of liberalism have committed themselves to an unsustainable evaluative neutrality, that such a commitment would generate paradoxes, and that in fact any regime must be committed at a fundamental level to its own ends and cannot tolerate actions that subvert those ends. The smartest proponents of liberal neutrality however never advocated neutrality at the level of philosophical justification. Bruce Ackerman wrote that “it would be a category mistake to imagine that there could be a Neutral justification for the practice of Neutral justification—for Neutrality makes no sense except as part of the practice it constitutes.”<sup>86</sup> But many formulations failed to make this point clear.

Liberal neutrality has occluded the cultural specificity of liberalism, the particular pattern of norms and ideals that constitute it.<sup>87</sup> Trying to understand liberalism during the dominance of liberal neutrality theory is like trying to map one’s surroundings while passing through a fog. Alexander appears to have been misled by the fog. But fog eventually lifts.

Liberalism is not paradoxical, but it does have characteristic tensions that make it what it is. There are also tensions in a suspension bridge. The bridge would not work without the tensions. Those who would maintain it had better know what it is that they are maintaining.

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86. Bruce Ackerman, *What is Neutral About Neutrality?*, 93 *ETHICS* 372, 387 (1983).

87. There have of course been protests against this occlusion. See, e.g., WILLIAM A. GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* (1991); MACEDO, *LIBERAL VIRTUES*, *supra* note 14.