

Cultural Controversies and the Limits of Toleration

Andrew Shorten

[DRAFT COPY ONLY]

University of Manchester

andy.shorten@gmail.com

Government, International Politics and Philosophy,
Faculty of Humanities,
University of Manchester,
Oxford Road,
Manchester,
M13 9PL
UNITED KINGDOM

March 2005

Abstract

Multicultural societies are far more likely than others to include minorities committed to the pursuit of practices that offend the majority, and treating the cultural commitments of all citizens fairly will require some set of guiding principles to distinguish tolerable ‘cultural controversies’ from intolerable ones. This paper does not directly address the *moral* question at stake here (i.e. demarcating the limits of toleration) but rather seeks to provide a *politically justifiable* normative argument to explain when tolerant restraint is necessary, permissible or prohibited. This argument emerges from a concern to treat the cultural commitments of all citizens fairly. In turn, the argument indicates a potential reconciliation of the ‘politics of toleration’ with the ‘politics of respect’.

Cultural Controversies and the Limits of Toleration

A curious, and increasingly influential, claim is that toleration - conventionally described as a quintessentially liberal virtue - is not liberal enough, since it arrogantly posits a preferable or decent perspective that benevolently consents to permit dissenting, misguided or indecent views, and that this implicit and condescending hierarchy violates or undermines liberal neutrality and/or equality. Hence a variety of authors, liberal and otherwise, have suggested that we need to move 'beyond' toleration, and instead endorse a politics of respect or recognition.¹ Although such calls are, in many respects, laudable, abandoning the discourse of toleration risks treating the cultural commitments of all citizens (both the potential tolerators and tolerated) unfairly, for four reasons. First, indiscriminate toleration neglects the duty to condemn and prohibit the morally outrageous (as far as is possible). Second, wholesale toleration of all minority practices might treat the cultural commitments of a majority unfairly - e.g. in overlooking their legitimate interest in safeguarding the integrity of their own moral culture. Third, moral dogmatism (e.g. the prohibition of all that the majority disapproves of) will often treat the commitments of dissenting minorities unfairly, demanding assimilation to the norms of a majority to an unreasonable extent. Fourth, unreflective prohibition of the culturally unfamiliar denies the majority the opportunity to reconsider the vices and virtues of their own norms, practices, commitments and beliefs, and of moral life more generally. Thus, even if liberal states should sometimes publicly support and recognise minority cultures, this is not sufficient to suggest that the concern with toleration is something that is likely to dissipate at any time in the near future. Treating cultural commitments fairly requires some coherent conceptual framework within which judgements about the kinds of practices that are legitimate candidates for toleration can be made.

¹ For example, according to Michael Walzer "[t]o tolerate someone else is an act of power; to be tolerated is an acceptance of weakness. We should aim at something better than this combination, something beyond toleration, something like mutual respect." Michael Walzer, *On Toleration* (London: Yale University Press, 1997) p. 52. See also Adeneo Addis, 'On Human Diversity and the Limits of Toleration' in Will Kymlicka and Ian Shapiro eds., *Nomos 39: Ethnicity and Group Rights* (New York: New York University Press, 1997), 112-53; Dario Castiglione and Catriona McKinnon, 'Introduction: Beyond Toleration', *Toleration: Moral and Political, Res Publica Special Issue*, 7/3, (2001) 223-230; Anna Galeotti, *Toleration as Recognition* (Cambridge: Cambridge University Press, 2002).

Cultural Controversies and the Limits of Toleration

The emphasis of this paper is not upon the wide range of practices that raise questions of toleration, but rather upon a more specific subset of 'cultural controversies'. Limiting the scope of enquiry in this fashion is intended to draw attention one potential normative argument in favour of tolerant restraint, an argument that has to do with the significance of certain kinds of individually held 'cultural commitments'. Usefully for this purpose, Bhikhu Parekh has listed twelve cultural practices that have been controversial in many liberal democracies:-

1. Female circumcision.
2. Polygamy.
3. Muslim and Jewish methods of slaughtering animals.
4. Arranged marriages, practiced mainly but not only by Asians. The practice ranges from a largely formal parental approval of their offsprings' choices of spouses to foisting ones on them.
5. Marriages within prohibited degrees of relationship; for example, Muslims can marry their first cousins, and Jews their nieces, both of which are viewed with disfavour in some western societies.
6. The practice, common among some African communities, of scarring their children's cheeks or other parts of the body as part of the initiation ceremony.
7. The Muslim practice of withdrawing their school-going girls from such activities as sports, athletics and swimming lessons that involve wearing shorts and exposing parts of their body.
8. Muslim girls wearing the *hijab* or headscarf in schools. Although it is allowed in most western countries, it continues to arouse varying degrees of opposition in some of them.
9. Sikh refusal to wear helmets rather than their traditional turbans when driving motor cycles or doing dangerous work on building sites, to take off their turbans when taking oaths in court or bowing before the speaker in the House of Commons, and to shave off their beards in places that involve handling of food.
10. Refusal by gypsies and the Amish community to send their children to schools either altogether or after reaching a certain age on the grounds that modern education is useless to them and alienates them from their community.
11. Requests by Hindus to be allowed to cremate their deceased on a funeral pyre, scatter the ashes in rivers and, in rare cases, to drown rather than cremate their corpses.
12. Subordinate status of women and all it entails including denial of opportunities for their personal development in some minority communities.²

² Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (London: Macmillan, 2000) pp. 264-5.

This selection is illustrative and not comprehensive, and it by no means exhausts the potential scope of issues, or even comes close to doing so. From the outset, it should be noted that the claim that 'it's part of my culture, my faith or my belief system' is always insufficient grounds to justify the toleration of a controversial cultural practice.³ Rather, my claim is a more nuanced one, namely that restricting a particular set of negative liberties can treat the cultural commitments of particular persons unfairly, and thereby constitute an injustice.

To make this suggestion, and to demonstrate some of its political implications, I will begin by surveying some of the relevant aspects of the literature on toleration so as to form a purely conceptual definition, emphasising some of its most crucial features. Second, building upon this I will outline the structural pre-requisites of a normative argument for toleration, rehearsing certain salient aspects of the classical liberal defence of toleration against a number of opposing views. Third, I will consider two potential arguments in favour of toleration, one based on a liberal principle of respect for persons and the other based on consequentialist reasoning, arguing that neither treats cultural commitments fairly. Finally, I will propose an alternative approach that provides a set of general principles from which (political) decisions about toleration can be made. Because the argument is political, and not moral, the concern is to establish the appropriate standards of public justification required to make valid decisions about cultural controversies. In particular, this is done by way of a contextually grounded reconciliation of the competing cultural commitments at stake, guided by a principle of fair treatment.

Definition

Instances of toleration occur under specific conditions:-

³ Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge: Polity, 2001) pp. 252-8; Peter Jones, 'Bearing the Consequences of Belief' in Robert Goodin and Philip Pettit eds., *Contemporary Political Philosophy* (Oxford: Blackwell, 1997) 551-563; Jeremy Waldron, 'Cultural Identity and Civic Responsibility' in Will Kymlicka and Wayne Norman eds., *Citizenship in Diverse Societies* (Oxford: Oxford University Press, 2000), 155-74 , pp. 164-5, pp. 169-71.

Cultural Controversies and the Limits of Toleration

x can be said to be tolerating y 's performance of z when x disapproves of y doing z , when y has freely chosen that she wants to do z , and when x has the capacity to prevent y from performing z , and yet chooses not to.⁴

The question of toleration is one faced by x when he is deciding whether or not to permit y to do z , and it occurs under particular circumstances, summarised by Susan Mendus as “diversity coupled with disapproval, dislike or disgust.”⁵ This combination of fact and feeling - or diversity and disgust – is characterised by four features. First, tolerable actions include only those over which the performing agent has some control; for y to choose to do z means that y must be able to not do z , and to adopt different practices if she wants to. Hence x can tolerate repugnant acts, strange behaviour, or an outlandish dress sense, but “to claim to tolerate the fact that someone is black is as non-sensical as saying that one tolerates that the sun rises in the morning and sets at night.”⁶ Second, the range of potentially disapproved of actions (i.e. those that could conceivably count as z) include both those that are potentially objectionable because they harm wider society (e.g. polluting rivers that run through non-owned land) and those that are potentially objectionable in themselves (e.g. the cruel treatment of animals, inhumane punishments, practices that expose individuals to exceptionally high risks like some initiation rites). Third, to allow the different practices of others - whilst not objecting to them, disapproving of them, or finding them repugnant - is not to display tolerance, but to favour liberty.⁷ Toleration presumes that the x has formed a “reactive attitude” that inspires a negative

⁴ This definition is descriptive, and normatively neutral. It contains no explanation of what motivates tolerant behaviour, nor when and where it is appropriate or inappropriate, justified or unjustified, obligatory or forbidden.

⁵ Susan Mendus, *Toleration and the Limits of Liberalism* (Macmillan: Basingstoke, 1989) p. 8.

⁶ Richard Bellamy, ‘Toleration, Liberalism and Democracy: A Comment on Leader and Garzon Valdes’, *Ratio Juris*, 10 (1997) 177-86, p. 177.

⁷ “Toleration is a disagreeable subject. This is because the question of toleration arises only in connection with disagreeable things: heresy, subversion, prostitution, drug-abuse, pornography, abortion and cruelty to animals. It can hardly be said to be edifying for the mind to dwell on such subjects. But if there were not things we disapproved of, the concept of ‘toleration’ need not be introduced at all. It would be enough to talk about ‘liberty’ or ‘freedom’. When we speak of people’s liberty or freedom, no criticism is implied of the use to which they put their freedom... but only the undesirable – or at any rate, the undesired, is a candidate for toleration.” Maurice Cranston, ‘John Locke and the Case for Toleration’ in David Edwards and Susan Mendus eds., *On Toleration* (Clarendon: Oxford, 1987) 101-121, p. 101.

judgement (e.g. feelings of anger or resentment that generate disapproval) towards y doing z .⁸ Hence x can only tolerate ideas and actions that she finds unpleasant, painful, or immoral - since otherwise there would be no sense in which she can be said to form the required reactive attitude and thereby put up with them.⁹ Fourth, x cannot tolerate things of which she is ignorant, or over which she has no power or control. Toleration can only occur if x is in a position to approve or disapprove, forbear or prevent, the attitudes or behaviour in question. If she is forced to bear witness to acts she considers immoral, then she is not tolerating y doing z but is being oppressed by it. That x must be in a position to influence the behaviour of the y , however, does not require x to have any kind of legal power over y , and as Mendus notes, "Mill's 'tyranny of public opinion' is as much a manifestation of intolerance as was the Sexual Offences Act prior to 1967."¹⁰

Reasons for Acting Tolerantly

Toleration is a restrained response to an action considered wrong or offensive, it involves a willing suspension of the natural reaction (the desire to impose one's own standards upon others) in favour of a more conciliatory or permissive attitude. Tolerant restraint is an *intentional* gesture and not a disposition, and to possess a tolerant character is just to possess (either naturally or by cultivation) the personal qualities that make the intentional response of restraint easier. Toleration, then, is actually a question, it requires a mental process of deliberation guided by reasoning and decision, and tolerant restraint must be principled, supported by reason and intentionally chosen. However, that toleration requires a choice in no way implies that tolerant restraint is necessarily a utility-maximising course of, and there is always a kind of suffering involved in toleration, whether it be of the kind that an employee endures when tolerating the racist taunts of her boss, or the kind that "people who

⁸ Peter Strawson, 'Freedom and Resentment' in Strawson, *Freedom and Resentment and Other Essays* (Methuen: London, 1974)

⁹ Mendus, *op. cit.*, pp. 18-21. According to Peter Nicholson, only *moral* reasons for disapproval count. See Peter Nicholson, 'Toleration as a Moral Ideal' in John Horton and Susan Mendus eds. *Aspects of Toleration: Philosophical Studies* (Methuen, London, 1985) 158-173, p. 160. Conversely, Warnock thinks that simple dislike is sufficient. Baroness Warnock, 'The Limits of Toleration' in David Edwards and Susan Mendus eds., *On Toleration* (Clarendon: Oxford, 1987) 123-139.

¹⁰ Mendus, *op. cit.*, p. 9.

Cultural Controversies and the Limits of Toleration

believe that abortion should be allowed in their society, and might even one day need one,... suffer from pro-lifers' aggressive behaviour, although not as directly as women whose entrance to an abortion clinic is obstructed."¹¹ To tolerate is, in a certain sense, masochistic.

Some of the most compelling arguments against toleration refer to its paradoxical nature. Because moral judgements involve some kind of claim to universality, it seems odd to suggest that toleration is a virtue, or even a permissible choice, when its primary aim is to permit things that are, or are thought to be wrong.¹² For x to justifiably tolerate y doing z , she must simultaneously hold that y doing z is wrong and that it is nevertheless right to permit y to do z . On the one hand some suggest that to hold both of these things is simply incoherent. If x genuinely believes that y doing z is morally wrong, then she will not permit y to do z . Permission (or what x calls 'toleration') is really just a confession that x actually doesn't think that y doing z was morally wrong after all.¹³ On the other hand, others assume that toleration might be coherent, but vicious. Allowing error, falsehood, vice and immorality to flourish unopposed is not just careless, but dangerous.¹⁴ However, on the current argument I am simply going to assume that x 's toleration of y doing z is normatively justifiable *provided that* x believes two things at once about y doing z , and that these two beliefs are compatible:-

¹¹ Hagit Benbaji and David Heyd, 'The Charitable Perspective: Forgiveness and Toleration as Supererogatory', *Canadian Journal of Philosophy*, 31 (2001) 567-86, p. 576.

¹² "[T]o disapprove of something is to judge it to be wrong. Such a judgement does not express a purely subjective preference. It claims universality; it claims to be the view of any rational agent. The content of the judgement, that something is wrong, implies that the something may properly be prevented. But if your disapproval is reasonably grounded, why should you go against it at all? Why should you tolerate torture?" David Raphael, 'The Intolerable' in Susan Mendus ed., *Justifying Toleration: Conceptual and Historical Perspectives* (Cambridge: Cambridge University Press, 1988), 137-153, p. 139.

¹³ Barbara Cohen 'An Ethical Paradox', *Mind*, 76 (1967) 250-9; Stanley Fish 'Why Can't We All Just Get Along', *First Things*, 60 (1996) 18-26; Stanley Fish, 'Boutique Multiculturalism or Why Liberals Are Incapable of Thinking About Hate Speech', *Critical Inquiry*, 23 (1997) 378-395; Mary Midgely, *Can't We Make Moral Judgements* (Bristol: Bristol Press, 1991).

¹⁴ Robert George, *Making Men Moral: Civil Liberties and Public Morality* (Oxford: Oxford University Press, 1993); Tara Smith, 'Tolerance and Forgiveness: Virtues or Vices?' *Journal of Applied Philosophy*, 14 (1997) 31-41.

(a) *x's reason for disapproving of y doing z is not necessarily an overriding reason for preventing y doing z; it is only a prima facie reason for preventing y doing z.*

(b) *x's reason for not preventing y doing z can be an overriding reason.*

Numerous reasons could count as 'overriding' reasons. For instance, it could be that *x's* disapproval of *z* applies only to some agents doing *z*, and not to *y* doing *z*. Hence a Methodist might disapprove of certain practices (e.g. drinking or gambling) but also think them permissible (even if morally damaging) for non-believers. Likewise, religious law governing areas of personal morality might apply to some but not all members of society (e.g. as in Saudi Arabia). But these may not be instances of toleration in the strictest sense, but rather examples of when people – and states – refrain from forcing controversial ethical views upon non-believers. More generally, *x* might hold (for moral reasons) that the individual liberties of choice and conscience should be held in higher regard than some other moral principles (about, in this case, the wrongness of *y* doing *z*). In such cases, what is important is that *x*, in addition to having a reason for disapproving of *y* doing *z*, also has a reason to permit *y* to do *z*, and that this second reason is an overriding one. The following sections will consider two potential overriding reasons, before proposing a (hopefully) superior alternative grounded in a concern to treat the cultural commitments of all citizens fairly.

Indifference and Scepticism as Overriding Reasons

One potential overriding reason is that *x's* belief about *y* doing *z* might be misguided. Her reactive attitude, for example, might not be grounded in reason, or perhaps she has overestimated the dangers of *y* doing *z*. As such, *x* might tolerate what she thinks to be the erroneous values of *y* because of her belief in human fallibility (she might even tolerate those who deny this), or because she thinks that the determination of truth is better left to the marketplace of ideas. Karl Popper, for instance, argues that the recognition of human fallibility, when coupled with the belief that rational discussion may help us correct our mistakes, generates a presumption in favour of toleration.¹⁵ Similarly, Locke's *Letter on Toleration* argues that intolerance in the

¹⁵ Karl Popper, 'Toleration and Intellectual Responsibility' in David Edwards and Susan Mendus eds., *On Toleration* (Oxford: Clarendon, 1987).

case of religious belief is fundamentally irrational, since people cannot be compelled to hold religious orthodoxies at odds with the beliefs that they do in fact hold.¹⁶ More generally, advocates of free speech claim that we can only arrive at the truth through the largest possible circulation of opinions. Hence we should not suppress an opinion that we believe to be false because, in the end, it may turn out to be true: we should tolerate purveyors of apparent mistruths, even those we think to be immoral, lest we replicate the fate of Socrates or Jesus.¹⁷ Likewise, scepticism encourages us to remember why we believe what we do, and why it is so valuable.¹⁸ Furthermore, intolerance is often at its most morally vicious when *x* oversteps the boundaries of legitimate interference. One reason why states should not prohibit sexual practices between consenting adults in private, for example, is because intolerance in this sense involves using a power that the state – or any particular individual – does not legitimately possess. Hence a related argument for toleration emerges from the idea that *indifference* is the proper attitude that *x* – and the state – should have towards the diverse cultural practices of others.¹⁹

Toleration grounded on mutual indifference or scepticism has served some fairly notable aims (e.g. scepticism about religion contributed to the rise of toleration in early modern Europe²⁰) and even some critics of scepticism or indifference as the proper foundation of tolerance concede that these attitudes can support “toleration as

¹⁶ John Locke, ‘A Letter Concerning Toleration’ in John Horton and Susan Mendus eds., *A Letter Concerning Toleration in Focus* (London: Routledge, 1991) 12-56.

¹⁷ John Stuart Mill, *On Liberty* (Harmondsworth: Penguin, 1982).

¹⁸ One intriguing consequence of this view is that if our truth-discerning capacities were to become too highly developed, we would be well advised to promote or subsidize views known to be erroneous, in order to obtain the benefits of error. But as James Gordley observes: “if there were a shortage of plausible sounding racial bigots, the state wouldn’t subsidize bigotry and the development of plausible arguments for it simply to ensure their citizens were exposed to them.” James Gordley, ‘Morality and the Protection of Dissent’ *Ave Maria Law Review*, 127 (2003) 127-157, p. 140.

¹⁹ There is an important sense in which indifferent attitude is not really a tolerant one. As Paolo Commanducci points out, an indifferent toleration is as meaningless as an enthusiastic toleration, since after all it makes no sense to utter the following: “I am tolerating with enthusiasm a rendez-vous with Kim Basinger”. Toleration always implies a *prima facie* attitude of dislike or of disapproval. To accept something with enthusiasm, or to be indifferent toward it, is not to tolerate it, but to favour liberty.

Paolo Commanducci, ‘Some Comments on Toleration’, *Ratio Juris*, 10 (1997) 187-92, p. 187.

²⁰ Alan Levine, *Early Modern Scepticism and the Origins of Toleration* (Oxford: Lexington Books, 1999)

a matter of political practice.”²¹ Moreover, multicultural communities might be particularly well served by these kinds of attitudes, since they stand apart from any controversial philosophical or comprehensive moral doctrine, and could thus be endorsed by an overlapping consensus.²² Indeed, as a political programme, this kind of toleration might be able to protect against the most corrosive effects of inter-group rivalries and deep disagreement, and numerous writers have suggested that multicultural peaceful co-existence might be achieved by regimes that withhold judgement about the various truth claims endorsed by the different cultural and religious communities they contain.²³ Thus the multinational empires that contained autonomous (or semi-autonomous) communities living alongside one another with relatively little interaction (e.g. Persia, Ptolemaic Egypt, the Roman Empire, the Ottoman millet system etc...) might serve as an excellent model for political toleration.²⁴ If indifferent toleration is viable, then the politics of recognition might be entirely misguided: mutual subjection rather than mutual respect might be the key to peaceful co-existence.²⁵

Certain contemporary treatments of liberalism seem to resemble indifferent or sceptical arguments for toleration. Rawls, for example, wants to extend Locke’s argument for religious toleration, combined with a Kantian principle of respect for persons, so that the principle of tolerance applies to other controversial questions about the “meaning, value and purpose of life.”²⁶ Part of his reason for doing this has to do with what he calls the “burdens of judgement”.²⁷ These burdens are not an

²¹ Bernard Williams, ‘Toleration: An Impossible Virtue?’ in David Heyd ed., *Toleration: An Elusive Virtue* (Princeton: Princeton University Press, 1996) 18-25, p. 20.

²² John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993).

²³ Walzer, for example, thinks that toleration might work as well “with any attitude on the continuum of resignation, indifference, stoicism, curiosity, and enthusiasm.” Walzer, *op. cit.*, p. 92.

²⁴ For an argument against this view, see Will Kymlicka, ‘Two Models of Pluralism and Tolerance’ in David Heyd ed., *Toleration: An Elusive Virtue* (Princeton: Princeton University Press, 1996) 81-105.

²⁵ According to Walzer, it is important that subjection be equalised: “When subjection isn’t an experience shared equally by all the incorporated groups, toleration among them is less likely... If one group feels a special affinity with the imperial center and is able to form an alliance with its local representatives, then it will often try to dominate the others – like the Greeks did in Roman Alexandria. In the imperial case, power is most effective in promoting toleration when it is distant, neutral and overwhelming.” Walzer, *op. cit.*, p. 53.

²⁶ Rawls, *op. cit.*, p. xxviii. See also William Galston ‘Two Concepts of Liberalism’, *Ethics*, 105 (1995) 516-534.

²⁷ Rawls, *op. cit.*, pp. 55-8.

exhaustive account of the causes of moral and political disagreement - prejudice, self-interest, irrationality and stupidity all play a role too – but they explain how *reasonable* disagreement over divergent conceptions of the good comes about. However, Rawls, importantly, does not actually endorse scepticism or indifference, but rather a form of justificatory neutrality with regard to certain social spheres and practices (e.g. religion, lifestyles, conceptions of the good, cultural preferences and so on), and his reasons for this illustrate one of the major problems of using scepticism or indifference as overriding reasons for tolerant restraint. To put this claim in a straightforward fashion, even if *x* begins from an attitude of indifference or scepticism, she will, at some point, be confronted with the question of when toleration must be limited,²⁸ and it is at this point that scepticism and indifference will become less useful. For example, human rights violations are certainly not things that *x* should be indifferent about, and nor should she tolerate them if she is in a position to do so.

Recently, an interesting line of criticism has been advanced against this final suggestion.²⁹ On this view, the ‘question of toleration’ – i.e. should *x* tolerate *y* doing *z* – is unfair, since it unreasonably (and falsely) presumes some form of consensus about the legitimacy of controversial cultural practices.³⁰ If we are going to take sceptical toleration seriously,³¹ then we need to take a quite different view about how public or general moral standards should be arrived at, imagining instead a society in which there is no common standpoint of morality.³² On this approach, the reign of

²⁸ Amongst others, see Lord Scarman, ‘Toleration and the Law’ in David Edwards and Susan Mendus eds., *On Toleration* (Oxford: Clarendon, 1987); Friedrich Hayek ‘Individual and Collective Aims’ in David Edwards and Susan Mendus eds., *On Toleration* (Clarendon: Oxford, 1987); Warnock, op. cit.; Mendus, op. cit..

²⁹ Chandran Kukathas, ‘Cultural Toleration’ in Will Kymlicka and Ian Shapiro eds., *Nomos 39: Ethnicity and Group Rights* (London: New York University Press, 1997) 69-104; Chandran Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom* (Oxford: Oxford University Press, 2003).

³⁰ A similar view has originated in the work of those seeking to demonstrate that liberal tolerance is capricious when applied to illiberal, or non-individualistic, cultures – e.g. those that cherish group solidarity or cultural purity and repudiate ideals of individual freedom and personal autonomy. See Vernon Van Dyke, ‘The Individual, the State, and Ethnic Communities in Political Theory’ in Will Kymlicka ed., *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1995) 31-56.

³¹ For Kukathas, like Popper, toleration is valuable “because it checks or counters moral certitude.”

Kukathas, ‘Cultural Toleration’, p. 79

³² Kukathas thus asks that we begin “without presuming that it is already established that there is a ‘we’ who are faced with the problem of determining how far to tolerate particular groups in ‘our’ midst.”

Cultural Controversies and the Limits of Toleration

toleration is absolute, and x has no single source of normative authority from which to issue decisions about whom or what to tolerate.³³ Instead, what she has is a procedure of mutual adjustment and accommodation among the groups or communities that constitute the larger society.³⁴ However, numerous critics have suggested that a maximally tolerant regime of relatively autonomous cultural communities could exasperate the vulnerability of weaker group members if those communities themselves are intolerant of the diversity they contain.³⁵

The problem here, as shall be argued later, comes about because of a mistaken focus upon cultural *communities* and not *commitments*. Community might be the source of some of our commitments, and even our most deeply held attachments, but communities do not motivate practices, commitments do, and a valid justification (or overriding reason) for tolerant restraint (i.e. non-interference in controversial cultural practices) will not follow from a respect for memberships *per se*, but from an understanding of the importance of such commitments for specific (and not necessarily all) members. Furthermore, no liberal theory can simply ‘imagine away’ the *question* of toleration, since liberal principles themselves place at least three constraints upon the kinds of peoples and practices (or y s and z s) to whom x should not be indifferent about, or sceptical about her grounds for disapproval; (i) those who would themselves deny tolerance to others, (ii) those who would employ tolerance to suppress rational argument and thus presume their own infallibility, and (iii) those wishing to perform practices that verifiably violate the harm principle.

Kukathas, ‘Cultural Toleration’, p. 71.

³³ The commonly cited criticism here is that significant ‘inner-group’ injustices look to be candidates for toleration: “The problem is that different cultural communities have different conceptions of what individuals are due or are entitled to, and in many cases, these conceptions will not value those freedoms and equalities which figure prominently in liberal conceptions of justice...by liberal standards there may be injustice within some cultural communities: Freedom of worship may not be respected; women may have opportunities closed off to them; and the rights of individuals to express themselves may be severely restricted.” Chandran Kukathas, ‘Cultural Toleration’ in Will Kymlicka ed. *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1995) 228-256, p. 251.

³⁴ Barry, *op. cit.*, p. 133.

³⁵ Susan Moller ‘Feminism and Multiculturalism: Some Tensions’ *Ethics*, 108 (1998) 661-684; Susan Moller Okin *Is Multiculturalism Bad for Women?* (Princeton: Princeton University Press, 1999); Ayelet Shachar *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge: Cambridge University Press, 2001).

Consequentialist Overriding Reasons

A second potential overriding reason for tolerant restraint is that it brings about certain benefits to those who tolerate. For instance, Jane may choose to tolerate Tony's racist remarks because Tony is Jane's boss, a shopper might tolerate poor service so as to appear polite, or a taxi driver might tolerate a smoking customer for the sake of a quiet life. In these cases, x disapproves of y doing z (i.e. articulating racist beliefs, poor service, smoking customers) and feels no general obligation to permit y 's behaviour. In other words, x is neither indifferent about y doing z nor sceptical about the epistemological grounds for her disapproval. Rather, x tolerates y doing z because x wishes for some further end (i.e. to climb the career ladder, to appear polite, or to keep the peace). The further end 'overrides' the initial disapproval because x believes it to be more beneficial, or justifiable on some similar consequentialist grounds. Thus toleration is virtuous on this view if the further end is itself virtuous, and permissible provided that some more important end is not violated.

Generating preferable ends is often a sound basis for some political forms of toleration. Tolerating y doing z , for instance, may engender public order and stability, or further our economic interests, or prevent a great harm.³⁶ In such cases, to withhold our tolerance might be selfishly indulgent, satisfying our own consciences at the expense of more important goods. Hence, like epistemological neutrality or mutual indifference, consequentialist tolerant restraint might also be conducive to peaceful co-existence, delivering a *modus vivendi* between partisans of different conceptions of the good because it appeals to the instinct that it would be better to live in a society where your practices are tolerated than in one in which they are not. However, and also like scepticism and indifference, prudential and instrumentalist overriding reasons are not particularly useful in seeking to demarcate politically justifiable limits to tolerant restraint, especially with regard to the cultural controversies that are the current subject. This is because consequentialist overriding reasons can tell x nothing

³⁶ Cranston, for example, emphasises the place that the economic advantages of accepting and tolerating refugees played in Locke's justification of toleration, whilst Scarman connects the dangers associated with cultural diversity to a prudential defence of tolerance. Cranston, op. cit.; Scarman, op. cit..

about when she *ought* to act *intolerantly*, it simply tells her when she *can*. Perhaps more importantly, for *y* prudential toleration is less a right than a gift bestowed by an apparently benevolent majority, and unlike a normal gift it can be revoked. Those who are tolerated because doing so brings consequential benefits can never feel secure, and as such may never feel as if they are full members of the political community if there remains the possibility that a once generous majority could decide to reclaim its endowment on a whim. What was prudential or beneficial then may not be necessary now. Why would a majority tolerate practices it finds disgusting if it need not?³⁷

Fair Treatment as an Overriding Reason

From the preceding analysis five preliminary conclusions can be drawn about some of the necessary requirements for a politically justifiable overriding reason that treats the cultural commitments of all citizens fairly. First, dissolving the question of toleration treats *x* unfairly, because it undermines the legitimate interest democratic citizens have in the practices of their fellow citizens and in shaping the moral norms of their society. Second, living in a tolerant society benefits *x* as well as *y* for both consequential and liberal reasons (e.g. because *x* may require that *y* extend her tolerance in the future, and because tolerant societies are compatible with more Millian experiments in living). Third, a publicly justifiable account of the limits of toleration must (in principle) be acceptable to all citizens, and epistemological scepticism, principled indifference or pragmatic consequentialism cannot provide this. Fourth, compelling overriding reasons involve some principle of respect for persons (*contra* some forms of consequentialism). Fifth, an important limitation upon the scope of the tolerable is that no single group use the public's political power – over which all citizens rightfully possess an equal share – to forcibly impose a view

³⁷ Nagel offers an argument that could plausibly circumvent this problem: “A historically significant and politically more effective argument [for toleration] is that those who have the upper hand now may not hold it forever, and that out of prudence they should refrain from imposing a sectarian view on others in exchange for the assurance that they will be treated with similar restraint if they find themselves in the minority. This is an argument for political toleration and impartiality as a second-best solution, acceptable because the best solution – political imposition of you own world view without any risk of future suppression – is not available.” Thomas Nagel, *Equality and Partiality* (Oxford: Oxford University Press, 1991) p. 157.

affecting constitutional essentials about which other citizens differ uncompromisingly.³⁸

On the current argument, the paradox of toleration is recast in the following form: ‘toleration (of y doing z) is justified (or obligatory) when it is necessary to treat the cultural commitments of y fairly, provided that doing so does not treat the cultural commitments of x unfairly’. Focussing on cultural commitments can hopefully move the terms of debate away from accounts of the incommensurability of rival moral and cultural traditions, and instead toward a more coherent account of the standards of public justification required by a potential overriding reason for tolerant restraint. In particular, there are three stages to this claim. First, a legitimate overriding reason must meet some basic standards of public justifiability. That is to say, the ‘fair treatment argument’ is not a comprehensive moral account of permissibility and impermissibility, but rather a political explanation of what might be tolerable for a particular set of citizens, in a particular place, at a particular time. Second, citizens attached to diverse cultural commitments can be treated unfairly by legislative schemes that entitle, or foreclose, a particular range of negative liberties (e.g. prohibiting or legalising the various cultural controversies listed by Parekh). Third, because this kind of unfair treatment can be unjust, a legitimate overriding reason, acceptable to all citizens, will be to avoid treating cultural commitments unfairly.

The notion of ‘unfair treatment’ driving the argument, in cases of the culturally controversial, applies to both y and z . For x , unfair treatment comes about when y doing z verifiably alienates her, prompting the feeling of ‘being torn’ or something similar, making x feel as if her community is no longer her own. Meanwhile, for y , being unable to perform z will treat her cultural commitments unfairly if it prevents her from feeling ‘at home’ in her community, making her ‘feel torn’ between her cultural commitments and her obligations toward the state. Three points should be

³⁸ Not forcibly imposing a view about which other citizens differ uncompromisingly does not mean that minority cultural communities should not seek or achieve public recognition of their attachments or commitments (e.g. state funding to enable minorities to celebrate their religious festivals or to teach the children of national minorities about the history of their ancestors etc...). Indeed, a “symbolic recognition” of the place of minority cultures in wider society may sometimes be necessary “to reverse the[ir] previous invisibility, marginality, and stigmatisation”. Galeotti, *op. cit.*, p. 194.

immediately noted about this. First, the approach utilises objectively verifiable social phenomena (i.e. alienation) to make decisions about public policy. Because this kind of unfair treatment can be identified by social scientific research, the approach avoids direct and controversial normative assessments of competing claims from what appear to be incommensurable cultural or value traditions. Second, the idea that the unfair treatment of cultural commitments is unjust could be endorsed by proponents of various conceptions of the good, distinct cultural commitments and partisans of diverse philosophical traditions.³⁹ Third, the experience of being torn is not simply a matter of subjective conviction or a reflection of how deeply one feels about an issue, but rather a certifiable fact of social reality. Thus a libertarian who profoundly disagrees with a set of laws covering taxation will not be treated unfairly in this sense. Likewise, someone who strongly opposes restrictions on drug use might feel just as deeply about the issue as do members of a community for whom peyote performs a religious function, but only in the latter case is there an already-existing and well-established regulative framework.

Relatively few of the practices that cultural (and other) minorities seek to pursue will alienate x in the sense specified. Most instances of 'y doing z' will be things toward which x is indifferent (e.g. different eating habits, different fashions, different aesthetic sensibilities and tastes etc....), and even many of those of which x disapproves will not give rise to verifiable forms of alienation. The test used to identify the relevant class of actions – i.e. to distinguish between x disapproving of y 's performance of z without being treated unfairly and x disapproving of y doing z and being treated unfairly if y actually does z – can be stated roughly as follows:-

if it is possible for x to tolerate y doing z whilst respecting y nevertheless, then y doing z will not treat x unfairly; conversely if it is not possible for x to simultaneously tolerate y doing z and respect y , then permitting y to do z will treat x unfairly.

³⁹ For instance, it could be endorsed by a Rawlsian (because participants in the Original Position would not want to be alienated), by a Habermasian (since for citizens to regard laws as legitimate and binding they must be able to think of themselves as simultaneously subject to and author of those laws), and a Walzerian (since the kind of domination associated with alienation would violate the doctrine of complex equality).

The force of this formula follows from the idea that the kinds of ‘*y* doing *z*’ that could potentially alienate *x* are so because *y* (upon performing *z*) is no longer a fellow citizen, or at least a fellow citizen that *x* could recognise as such. The test thus has to do with *x*’s capacity to distinguish between agent and act, between *y* and *z*. Others have demonstrated that the ability to distinguish between act and agent performs a crucial role in explaining the psychological motivation for tolerant restraint.⁴⁰ My further claim is that it can also perform a compelling function in the search for a normatively legitimate overriding reason that treats all cultural commitments fairly.

Epistemological scepticism and principled indifference are convincing grounds for tolerant restraint if and only if *x* is capable of separating *y* from *z*. This is because these overriding reasons, unlike consequentialism, rely more generally on a principle of respect for persons. To state this in another way, *x* has the foundation for an overriding reason to tolerate *y* doing *z* if *y* is not just a ‘doer of *z*’ but also a fellow human being otherwise worthy of respect. If *x* lacks this foundation, then the only reason that she would tolerate *y* doing *z* would be to gain some consequential benefit. The normative significance of the act-persons distinction is significant, and has been well noted in the philosophical literature on forgiveness.⁴¹ Forgiveness, like toleration, involves both the presence of a negative ‘reactive attitude’ toward *y* doing *z* and the possibility of a separation between a deed (*z*) and perpetrator (*y*). Usefully, however, because forgiveness, unlike toleration, involves the re-establishment of personal relations (between *x* and *y*), it is this second component that comes to the fore. Carrying this logic over into a discussion of toleration, Benbaji and Heyd

⁴⁰ David Heyd, ‘Introduction’ in David Heyd ed., *Toleration: An Elusive Virtue* (Princeton, Princeton University Press, 1996) 3-17, pp. 10-16.

⁴¹ For example, Joram Haber argues that it is crucial to distinguish between a wrong act and its perpetrator in order to understand the possibility of forgiveness, whilst Jeffrie Murphy cites the Augustinian distinction between the sin and the sinner as the basis for both repentance and forgiveness. More generally, Trudy Govier points out that “forgiveness is something we extend or do not extend towards *persons*; it fundamentally affects the relationship between persons. And yet, it is *deeds* which are said to be unforgivable.” Joram Haber, *Forgiveness* (Savage: Rowmann and Littlefield, 1991) p. 104; Jeffrie Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge: Cambridge University Press, 1988); Trudy Govier, ‘Forgiveness and the Unforgivable’, *American Philosophical Quarterly*, 36 (1999) 59-75, p. 65. See also Benbaji and Heyd, op. cit., p. 575.

describe tolerant restraint as involving a perceptual shift (in the sense of seeing in another light) that enables “a shift in focus from act to actor, from a legitimate judgemental perspective to an indulgent charitable one.”⁴² Just as one cannot forgive as long as one focuses on the wrongness of the act (to do so is not to forgive but to harbour resentment), voluntary tolerant restraint requires that x focus on y and not z .⁴³

Distinguishing y from z is thus a necessary, but insufficient condition of a valid overriding reason. For instance, x might disapprove of y doing z whilst being able to distinguish y from z (i.e. not be verifiably alienated or treated unfairly when y does z) and still might reasonably choose to withhold her tolerance. A sufficient overriding reason will obtain only if the previous conditions are true *and* if tolerant restraint is necessary to treat y 's cultural commitments fairly. This final stipulation follows from the fact that violations of liberty that affect our cultural commitments are especially serious violations of liberty, because they intrude upon what is most important to us - the core of a person's dignity or her sense of self - and such intrusions undermine the possibility of our flourishing. Cultural commitments count, on the fair treatment approach, because of the kinds of marginalisation, exclusion and alienation that minorities often endure in liberal democracies, and especially when citizens are ‘torn’ between their cultural commitments and their obligations toward the political community.⁴⁴

Conclusion

The paradox of toleration is most acute when y wishes to do z because z is (in some sense) a requirement of y 's cultural commitments *and* when x disapproves of y doing z because performance of z (in some sense) violates x 's cultural commitments. The conjunction of these two conditions means that if permission for y to do z is extended

⁴² Benbaji and Heyd, *op. cit.*, p. 573.

⁴³ According to Benbaji and Heyd, this will require that x consider z “against the background of the overall scheme of behaviour, the life plan of the agent,” which in turn presupposes the ‘ability of putting oneself in the other's shoes’ and thus the “imagination and sympathy [so as to] enable the tolerator to test the inner coherence, authenticity and sense of the tolerated behaviour.” Benbaji and Heyd, *op. cit.*, pp. 581-3.

⁴⁴ Jeremy Waldron, ‘One Law for All? The Logic of Cultural Accommodation’ *Washington and Lee Law Review*, 59 (2002) 3-36, pp. 24-5.

then the cultural commitments of x will be treated unfairly, whilst if permission is withheld then the cultural commitments of y will be treated unfairly. Assuming that some choice between the two options is necessary, and that y is not seeking permission to do the intolerable (in the strictest sense of the word), then one potential solution would be to equalise fair treatment across society. Doing so will require some distributive formula according to which each citizen receives an equally sized package of fair treatment: I might get my way in this decision, and not in that, but provided that no single set of cultural commitments gets to achieve dominance across society then the commitments of each citizen will be treated fairly. Sensitively applied, this strategy might provide some basis for a *modus vivendi* within which diverse citizens can forge a life in common – living according to some general principle of ‘give and take’.

By contrast, the argument that I have tried to put forward here is concerned to minimize the (potentially inevitable) unfair treatment of cultural commitments, whether they belong to x or y . Significantly, y 's cultural commitments will only count as a potential overriding reason in a particular category of cases, once it has been demonstrated that x will not be treated unfairly by y doing z . For instance, when confronted with the truly intolerable any separation between acts and persons will be fatuous, if not impossible. Systematic torture or genocide are not just monstrous deeds, but indict of the entire character of the perpetrator as corrupt or deficient. A concern to treat y 's cultural commitments only becomes relevant in cases where there exists a real choice about whether or not to extend toleration (i.e. when toleration is permissible, and not prohibited or obligatory). In these cases, x holds the relevant ‘reactive attitude’, but - possibly after some internal struggle against the tendency to impose her own standards upon z even when z is correctly held to be in the wrong – decides to behave in a more conciliatory fashion. In turn, it is the act-agent distinction - only possible in cases of y doing z that do not treat the cultural commitments of x unfairly – that points toward the possibility of reconciling the politics of recognition with the politics of toleration.⁴⁵

⁴⁵ The object of disapproval is the same as the object of toleration (i.e. y doing z). A valid overriding reason requires a necessary and additional object of respect (y as a bearer of cultural commitments), and, in the case of tolerable cultural controversies, this is distinct from the object of disapproval.

Cultural Controversies and the Limits of Toleration

Toleration is a ‘second-best’ scenario for both x (who would prefer y to not do z) and y (who would prefer that her practices were accorded respect, or at least were not disapproved of by x). Adeno Addis is correct to worry that this is “paternalistic” and “negative”, “because the toleration is one *extended* by the majority as an act of self-restraint by the majority (as an act of social generosity) to share a social space with a culture that the majority believes does not merit such social space”.⁴⁶ Because of this, it is also true that practices of toleration introduce an equality of respect problem, and Stephen Carter is right to point out that “the message of my toleration, day after day, is that it is *my* forbearance, not *your* right, and certainly not *the nation’s* commitment to equality, that frees you to [do z].”⁴⁷ In many cases, the implication of these two concerns might be that some minority cultural practices require forms of public recognition and respect in order to counterbalance the effects of their stigmatization or marginalisation within wider society. But the problem of ‘cultural controversies’ cannot be dissolved by arguing for a kind of ‘positive tolerance’ in which x should regard y as enriching the tapestry of their shared political culture, because the question of toleration only comes about when x does not feel much in the way of sympathy for y doing z .⁴⁸ When I tolerate something I do not, indeed cannot, respect it. To say that I found a play, a book, or a meal tolerable does not mean that I enjoyed it, but that I endured it, I put up with it, or that I just about had the will power to stomach it. I certainly did not leave the experience with a renewed respect for the director, the author or the chef. To confuse the language of toleration with the language of respect, (or even with the politics of recognition) can treat the commitments of x (and y) unfairly. It demands that she lie or behave inauthentically, acting as if she respects something when in fact she finds it repulsive, since if she did

⁴⁶ Addis, *op. cit.*, p. 120.

⁴⁷ Stephen Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (Basic Books: New York, 1993) p. 93.

⁴⁸ The opposing view has been put forward by numerous multiculturalists. For example, “one may discriminate between *two very different types of tolerance* toward socio-cultural value traditions: *Negative tolerance* based on *indifference*, and *positive or affirmative tolerance*, based on *appreciating*, in principle, that deep and manifold value-traditions are resources that can enrich human culture in general and the social engagement of individuals...in the face of this distinction, one may claim that the conception of a *multicultural society* is tied up with the idea of *affirmative tolerance* of cultural traditions, rather than that of mere negative tolerance.” Karl-Otto Apel, ‘Plurality of the Good? The Problem of Affirmative Tolerance in a Multicultural Society from an Ethical Point of View’, *Ratio Juris*, 10 (1997) 199-212, p. 200.

not, she would not be tolerating it in the first place. Thus, treating cultural commitments fairly requires not only that we take into account y 's desire to do z (and the connection between z and the cultural commitments of y), but also x 's disapproval about y doing z (especially when that disapproval is similarly connected to her cultural commitments).

The scope of this argument is deliberately circumscribed. It seeks to establish the extent of the tolerable, in a particular society, in a way that is compatible with, though does not presume, that minority practices are accorded public recognition or respect. Though it offers a way to reconcile the politics of toleration and the politics of respect, it does not include any specific account of when a particular practice might deserve state recognition or support, and as such does not contribute to the debates about 'positive toleration'. In this sense, the ambitions of the argument are modest, and its intention instead is to discern the conditions under which legislative schemes that permit y to do z treat the cultural commitments of x unfairly. Stated in this way, it might be suggested that *if* x can shift his gaze from the wrongness of y doing z back to y as a person, then y doing z should be permitted. However, this moves a little too quickly, and the perceptual metaphor retains the possibility that one can shift between perspectives, either focussing on the humanity of the actor or recalling the iniquity of the act. Indeed, the empirical fact that x happens to be open-minded (in the sense that he possess some quality of empathy and is able to shift his gaze), and even that x might be able to comprehend why y wants to do z and the meaning of z for y , will not necessarily have any bearing upon the question about whether or not y doing z treats the cultural commitments of x unfairly: x might understand all this and still, quite reasonably, feel that y doing z falls outside the scope of the tolerable. What the act-agent distinction does provide, however, is a vocabulary from which we can begin to make sense of the following situation: that y doing z is permissible in the broadest sense (e.g. it does not violate any rights etc...), that x disapproves of y doing z , and that y doing z does not necessarily treat the cultural commitments of x unfairly. If each of these three conditions obtains, and if they are the only relevant factors, then on this argument it may be perfectly just to prohibit y doing z (after all, x does disapprove of it). However, if performance of z has something to do with the cultural commitments of y (i.e. if prohibition would demonstrably treat her cultural commitments unfairly), then there will be good reasons to permit y doing z .

Moreover, the imperative to treat cultural commitments fairly provides further reasons in favour of toleration in general. One problem with the politics of tolerance, as critics point out, is that whilst it opens up a private space within which y is free to do z , it also risks marginalizing y 's political identity within the body politic, either because x fails to acknowledge the meaning of y doing z for y , or because x publicly disapproves of y doing z and in doing so stigmatises or marginalizes z . The outcome of this marginalisation might render the polity unable to cultivate an important virtue that Benjamin Barber has referred to as "civility (reciprocal empathy and respect)."⁴⁹ When the terms upon which toleration is extended requires that the disapproved of practices of a minority are restricted to a private sphere, it would be unlikely that x would develop empathy for y because y will remain alien and strange. Likewise, it will also be unlikely that x be able to shift her gaze from z to y in the sense elaborated. To have reciprocal empathy is first and foremost to attempt to understand one another, but there cannot be understanding without dialogue (either individual or institutional). By contrast, the fair treatment approach is considerably more compatible than consequentialism, epistemological scepticism or principled indifference with the cultivation of democratic virtues, and hopefully points to a way in which toleration will not necessarily undermine any other attempts to nurture inclusive political communities united by a shared sense of civic purpose or justice. Indeed, tolerating diverse cultural practices, and some 'cultural controversies', is likely to perform a necessary role in such a project.

⁴⁹ Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age* (London: University of California Press, 1984) p. 219.