

## *What the Liberal State Should Tolerate Within Its Borders*<sup>1</sup>

ANDREW JASON COHEN  
Georgia State University  
Atlanta GA 30302-4089  
USA

I have previously argued that toleration is best understood as *an agent's intentional and principled refraining from interfering with an opposed other (or their behavior, etc.) in situations of diversity, where the agent believes she has the power to interfere* (see my 2004a). Though I think this is the best

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available definition, it is *only* a definition and presents no normative claims about when toleration is warranted — i.e., about what is to be tolerated. As Peter Nicholson notes, ‘Toleration as a moral ideal cannot be value-neutral, and for this reason too it must be distinguished from the descriptive concept of toleration which can and should be value-neutral’ (1985, 161). Having previously offered a value-neutral account of the descriptive concept, I use that analysis here to discuss the moral ideal.

In this paper, I try to show what a full commitment to toleration requires within a state. I do so by offering two normative principles of toleration, one individual-regarding and the other group-regarding. My aim is to determine how liberals, who I assume are committed to toleration, should want toleration manifested within a state; I do not try to justify toleration.<sup>2</sup>

The paper proceeds as follows. In the first section I discuss John Stuart Mill’s harm principle in order to place toleration in liberal moral theory; this leads to a discussion about the relationship between autonomy and toleration and the possibility of autonomous sacrifice of autonomy in section two. There I argue that the liberal state should tolerate autonomous sacrifices of autonomy, including instances where an individual chooses to become a slave, to be lobotomized, or to be killed. In section three, I discuss group toleration and finally, in section four, I discuss groups that do not promote autonomy by considering what Will Kymlicka calls ‘internal restrictions’ and ‘external protections’ as well as a series of objections from Susan Moller Okin. I argue that the liberal state should tolerate groups that may hinder autonomy and should not engage in any protections meant to preserve groups.

## I Harm and Toleration’s Place in Normative Thought

A useful place to begin an exploration of toleration’s place and limits is John Stuart Mill’s *On Liberty* — which, along with John Locke’s ‘A Letter Concerning Toleration,’ is one of the two seminal texts on the subject. Mill’s famous harm principle reads: ‘the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection ... the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others’ (Mill, 1859, 9). This can be read as a principle of non-interference — in-

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2 For a defense of toleration, see my ‘The Value of Toleration’ *ms.*

deed, a principle of toleration. Warnock notes that ‘Mill’s contention is that the only limit to toleration, the only valid reason for not tolerating a kind of behavior, is that this behavior causes harm to people other than those who practise it’ (1987, 123). So long as an agent does not harm a non-consenting other, the agent is not to be interfered with — her action is to be tolerated. That is to say, we (individually or collectively) are to intentionally refrain from interfering with the opposed other in this situation of diversity, although we have and believe we have the power to interfere — and this because of a principled commitment to toleration or the value of the other’s autonomy. This does not mean that we can not try to dissuade the agent from her actions. It means only that power — taken as physical force or coercion — must not be used.

There are two limits built into the harm principle: (1) it forbids only physical force or coercion, not persuasive rational argument and (2) physical force or coercion are legitimate in cases where an agent is harming or is going to harm a non-consenting other.<sup>3</sup> These limits are important; commitment to toleration does not prohibit us from trying to dissuade others of ill-advised actions, trying to persuade them of beneficial actions, or interfering with their attempts to harm non-consenting others. Thus one commentator tells us that although we must allow individuals to pursue their own projects, these must ‘meet a threshold standard of moral justification’ such that, for example, they do not require the agent to harm others (Selznick, 1995, 125; see also Barry, 2001, 131 and Lomasky, 1987, 250).

A problem with the harm principle remains: what exactly is ‘harm’? Though Mill distinguishes between direct and indirect harms late in *On Liberty*, that distinction is far from clear and it is also never clear whether he means to construe ‘harm’ narrowly to include only physical harm or more broadly to include, for example, psychological harms. Despite the ambiguity, I will assume that Mill was right to distinguish between direct and indirect harms and that only the former warrant interference according to the harm principle. This still leaves the second distinction — between harm narrowly understood as physical harm and more broadly understood as including psychological harms. If it is construed narrowly, the harm principle will fail to justify restrictions on actions which some would wish to restrict, but if it is construed too broadly, it may justify too much interference (cf. Mendus, 1989, 123). Examples: a narrow construal of harm may require that we not interfere

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3 Linguistic behavior can be coercive, but rational persuasion can not. One only tries to rationally persuade another if one respects the other. Still, while Mill is concerned to allow demonstrations of moral disapprobation, he is opposed to many forms of social pressure — some of which may not be coercive.

with an employer that allows its management to require sexual favors for promotions and pay raises; a broad construal may require that we not permit a wife to condemn her husband's sexual performance. So we have an 'indeterminacy of scope' in defining harm (Mendus, 1989, 129). As we shall see, that indeterminacy is unavoidable.<sup>4</sup>

According to Joel Feinberg, who has done more to further our understanding of harm than anyone, there are two forms of harm. In the first, 'harm is conceived as the thwarting, setting back, or defeating of an interest' where to 'have an interest' is to 'have a kind of stake' (1984, 33; see also Hare, 1972 and 1976). One's 'interest,' understood as well-being, requires that one's 'interests,' understood as those things one has an interest in, are not thwarted (Feinberg, 1984, 34). In the second sense, harm is understood normatively such that '[t]o say that A has harmed B ... is to say much the same thing as that A has wronged B, or treated him unjustly' (Feinberg, 1984, 34).<sup>5</sup> Feinberg claims that the 'sense of 'harm' as that term is used in the harm principle must represent the overlap of [these two] senses ... only setbacks of interest that are wrongs, and wrongs that are setbacks to interest, are to count as harms in the appropriate sense' (1984, 36).

Wrongs, of course, are normative; hence, given what has just been said, normativity will necessarily enter into a proper understanding of harm. One of Feinberg's examples makes this clear: 'the person who, figuratively speaking, can be blown over by a sneeze cannot demand that other people's vigorous but normally harmless activities be suspended by government power' (1984, 50). We would not declare that the government should interfere with sneezing even if we knew a particular individual who could be blown over by a sneeze. The individual would certainly suffer a setback of interests: being knocked down prevents one from accomplishing the (intermediate) goal one pursues. Just as clearly, this is unfortunate. It is hardly appropriate, though, to say the 'sneezer *wronged* the person blown down.' Clearly, defining wrongs involves normative reasoning. With Dees, we can add that because 'we cannot define *harm* in a value-neutral manner ... the limits of [the harm principle and] toleration will be determined by the needs of a particular context. The demands of toleration must be balanced against other values in the society that help us define what constitutes a *harm*' (1995,

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4 I see no reason to deny there can be genuine psychological harm or that such would warrant interference. In any particular case, though, the existence of a genuine harm — as defined below — would have to be clearly demonstrated.

5 Feinberg identifies a third form of harm according to which *objects* can be harmed. Breaking a window harms the window's owner, but it can also be said that the window is harmed 'in a derivative and extended sense' (1984, 32).

46). Some take this to be a criticism: 'there is no uncontroversial way in which such a distinction [between harmful and non-harmful actions] can be drawn and, therefore, any attempt to justify toleration which relies on such a supposedly agreed distinction is likely to be seriously defective' (Horton, 1985, 114).

Horton claims that 'the cogency of the liberal's position will depend upon the plausibility of an uncontroversial conception of harm' (1985, 116). His concern, though, is not with the *conception* of harm but with its extension. He cites J. R. Lucas as indicating paradigm cases of harm and argues that even these may sometimes be controversial (Horton, 1985, 118). This, though, is not a fatal flaw for surely there are paradigmatic instances of harm even if there may be other instances of the same sort of thing that would not uncontroversially count as harms; that is, there are uncontroversial tokens, if not uncontroversial types of harms. There is no reason, then, not to accept that there is a normative component to harm and that this component affects whether tokens are considered harms. This means only that we will inevitably face some indeterminacy of scope regarding harm and thus that 'the boundaries of tolerance are indeterminate' (Scanlon, 1996, 236; see also Oberdiek, 2001, 58). We can, nonetheless, use the harm principle as a normative principle of toleration. I do so here, recognizing the remaining indeterminacy.

## II Liberalism, Individual Autonomy, and Toleration

Many theorists, including Kant and J.S. Mill (perhaps), and more recently, John Rawls, Joseph Raz, and Will Kymlicka, take autonomy to be the central value of liberalism. Others, including Jean Hampton and Chandran Kukathas (in some works),<sup>6</sup> take toleration to hold that place. In contrast, I contend that autonomy and toleration are equi-primary and mutually supporting in a proper comprehensive liberalism.<sup>7</sup> This is not to say that they are derived from one another in a vicious circle. It is, rather, to say that each can be independently defended and that once defended, the presence of each in a liberal theory gives additional support to the other in that theory (and the presence of each in a society helps to bolster the presence of the other there). I cannot fully defend

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6 In 2003 (and later), he takes freedom of conscience as preeminent (Kukathas, 2003, 17).

7 It is a mistake, on my view, to equate autonomist liberalism with comprehensive liberalism (the former is merely a type of the latter). On comprehensive liberalism, see Rawls 1989 in 1999b (esp. 480-481), his 1988 in 1999b (esp. 450-451), and his 1987 and 1985 (both also in 1999b).

this claim here; my concern, rather, is to use autonomy as a means to further elucidate toleration. Still, a brief indication of what I have in mind may be useful.

Autonomy and toleration serve different purposes in a comprehensive liberal theory. Comprehensive theories, after all, are meant to be able to address all areas of social life, providing much room for different purposes. Consideration of these purposes is instructive. Toleration is a behavior that one may only engage in when in society with others (see my 2004a). By contrast, however autonomy is understood, it is a trait of persons — whether in society with others or not. Given just this difference, it is clear that while the former is primarily political, the latter is primarily moral. My suggestion, then, is that autonomy is the root value of liberal moral theory while toleration is the root value of liberal political theory. We need autonomy to have morality and it provides differences and so possible objects of toleration. Given that, we need toleration to have a liberal polity. As Rawls notes, ‘By publicly affirming the basic liberties citizens in a well-ordered society express ... their recognition of the worth all citizens attach to their way of life’ (1993, 319).

We can understand ‘autonomy’ (literally: self-rule) to combine ‘voluntarism,’ or the ability to choose one’s ends (see my 1998), with independence, such that the autonomous agent chooses for herself, without dependence on others (see my 1999). Thus understood, autonomy is a capacity that at least some can exercise; for better or worse, we can also fail to exercise it. I take this form of autonomy to be of both instrumental and intrinsic value. As Mill argued, it is instrumentally valuable as a means to promoting rationality, justification of beliefs, project pursuit, and societal progress. Others have noted its intrinsic value. It ‘is intrinsically valuable because it is an essential ingredient and a necessary condition of the autonomous life’ (Raz 1986, 409; see also Mills 1998, 163).<sup>8</sup> On my own view, as I’ve said, autonomy is at the core of morality — one can not be a moral agent without it. Also in my view, though, it is toleration that is at the core of a liberal polity.

It is, I hope, clear that when an agent is tolerated, autonomy is protected. This follows from the harm principle, which, though, also makes clear that there are things one should not tolerate (cf. Dees, 1995, 45).

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8 All other things equal, an autonomous life is more valuable than a non-autonomous life (see my 2004b, 415-418). This, however, does not mean its value is so significant as to allow the abridgement of all other values. Moreover, all other things are rarely equal and an autonomous life is not necessarily the only sort of valuable life (I am grateful to Loren Lomasky for suggesting the need for this caveat). Toleration does not offer a means to weigh one against the other.

Although Paul must tolerate Luke's crying, he need not tolerate Steven's punching. Although the state must tolerate Laura's anti-statist publications, it need not and should not tolerate Sam's murderous rampage. Importantly, appeals to the autonomy of the actors will not explain the difference. Sam may be acting just as autonomously as Laura. There is, though, a clear difference in the results of their behavior. Simply put, Laura's behavior infringes no one's autonomy (in fact, it may aid the autonomy of some) while Sam's behavior does. Preventing Sam's behavior — that is, not tolerating it — protects the autonomy of those he would otherwise murder. As we must protect autonomy, we do not tolerate Sam's behavior.

When one person harms or (credibly) threatens to harm another, he infringes upon the other's autonomy and it becomes permissible for others to interfere.<sup>9</sup> Importantly, though, that does not reduce us to a principle requiring the maximization of autonomy. The harm principle requires that *unless* one person harms or threatens to harm another, we not interfere. In part, its goal is *prevention* of autonomy infringement (and all harms) and thus prohibits *any* such infringements, rather than requiring the fewest possible interferences.<sup>10</sup> Put another way, it is the first infringement which is forbidden, regardless of the overall autonomy that would be maintained or disallowed without that prohibition. Moreover, moral toleration (as indicated by the harm principle) requires allowing people to do things opposed to the Good, however one conceives it — even if one conceives of it as autonomy. It is decidedly illiberal to insist on forcing people to be autonomous. Liberalism grants respect to all persons whether they act on their autonomy or not. The harm principle requires even that we not interfere if one autonomously sacrifices her own autonomy.<sup>11</sup>

Despite what I have just said, Mill claims (in *On Liberty*) that one cannot autonomously sacrifice autonomy; more specifically, he says

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9 All harms to persons, I think, include infringements of autonomy. I suggest that there are some harms that are only infringements of autonomy, but most harms to persons include something else (e.g., theft or battery). There may be non-autonomy-infringing harms regarding non-persons. For example, while bees are not autonomous, they have interests (in protecting the hive, for example) that can be setback — and, plausibly, *wrongfully* setback.

10 As Ten points out, Mill's principle is best read as regarding reasons for intervention rather than classes of action. That is, the harm principle does not so much rule out types of acts as it rules out types of justifications for interferences (Ten, 1980, 62). What I say here is meant to accord with Ten's interpretation.

11 For perhaps surprising agreement, see John Rawls, 1963, 83 (in 1999b).

that freedom 'is not freedom to alienate ... freedom' (1859, 101).<sup>12</sup> But Mill provides no argument for this and it seems clear that it is possible that an agent can rationally and autonomously alienate herself from her freedom and that there may be times when this is morally worthwhile. Feinberg suggests various scenarios in which this may happen. Perhaps the strongest case is the agent who enters into an unlimited duration enslavement contract that has the to-be 'owner' paying the agent's loved ones or chosen charity \$10 million (Feinberg, 1986, 80). Such an agent would not be coerced and may have good reason to think it is in her interest to agree to the contract. Admittedly, there is a 'strong general presumption of nonvoluntariness' (Feinberg 1986, 79) if we hear of someone entering into a slave contract, but that is reason to insist on a strict test of competent informed consent and not necessarily reason to rule out the contract. Put another way, something that makes us *question* another's competence does not indicate a *necessary* lack of competence.<sup>13</sup>

The reasons against allowing slave contracts — within which autonomy is sacrificed — are generally consequentialist or eudaimonistic and, I think, not consistent with the harm principle. Even claims of maximizing autonomy are consequentialist in nature — they sacrifice some instance of autonomous choice for greater autonomy later. But, as Feinberg says, 'whether an autonomous person's life is interfered with in the name of his own good or welfare, his health, his wealth, or even his future options ... it is still a violation of his personal sovereignty' (1986, 68). If an agent autonomously enters into enslavement, it 'would be misleading to describe the career consequent upon that choice as one of 'living autonomously,' but it would be an autonomously chosen life in any case and to interfere with its choice would be to infringe the chooser's autonomy at the time he makes the choice, that is to treat him in a manner precluded by respect for him as an autonomous agent' (Feinberg 1986, 78; see also 1984, 116-17). We can add that it is a manner that fails to tolerate activity not harmful to any non-consenting other and so violates the harm principle. Hence, moral toleration requires that we not interfere with an agent's decision to waive or relinquish her own autonomy (so long as this causes no harm to non-consenting

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12 (a) I am unsure if Mill is here thinking of freedom as a capacity or as a bundle of exercise rights. (b) I developed the argumentation of this and the next two paragraphs in my response to David Garren's 'Freedom Not To Be Free: What is Right With Slavery' (a presentation at the Pacific Division APA Conference in 1999).

13 The latter point is made in bioethics literature by Buchanan and Brock (1986).

others).<sup>14</sup> Admittedly, the greater the forfeiture (in terms of duration or scope of that forfeited), the stricter the needed test of competent informed consent we are likely to think required. If such a test is unworkable — something I doubt — that would be reason to exclude legal consensual slavery.<sup>15</sup>

Let's consider further the possibility of legal consensual slavery, assuming the required competence tests are possible. Consenting to one particularly pernicious form of slavery requires alienating oneself from one's agency (completely destroying it). Thinking that we cannot give up agency may be the dominant view but that view is not defensible. It is surely conceptually possible to give up one's agency — one need only think of an individual getting a full lobotomy. No science fiction is needed in such cases, although adding such can make it more interesting: one has a lobotomy and has implanted in their brain a chip allowing someone else to fully control the now agentless body. We would then have what we can call a 'morally lobotomized slave.' Considering such an extreme case should allow us to avoid concerns about degrees of autonomy that one may have or that one may forfeit — if one can give up all of one's autonomy, presumably one can give up a part of it.

I take it that the important objection here is not about conceptual impossibility but about moral impossibility — that sacrificing agency is immoral. Certainly Kant and Mill would think that (as would Plato, and Locke, and ...). While I agree that absent very good reason such sacrifices would be at least suberogatory (see footnote 14) and likely even morally impermissible, there can be cases with reasons that defeat that judgment. As already noted, Feinberg presents the sorts of cases where

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14 Some will say that even if Sarah autonomously offers herself into enslavement, accepting would be immoral and that there is no absolute freedom of contract. The latter claim is true: I cannot contract with you to kill Hans (without his consent) and expect the contract to be upheld. That, though, is because satisfaction of the contract would violate the harm principle; the contract with Sarah would not—assuming competent informed consent. Indeed, with that assumption, I'm inclined to think the liberal state must uphold the contract. Nonetheless, I do think there is a (weak) sense in which I might be said to be morally wrong to accept it. Doing so may belong to a category of actions sometimes called suberogatory: things which are morally bad but not morally impermissible (see Driver, 1992).

15 Some might suggest the state could prohibit cruelty to or killing of slaves, as it prohibits cruelty to animals. If I am right, though, I can consent to a relationship wherein my 'master' hurts me (e.g., a sado-masochistic relationship) or where someone kills me (e.g., euthanasia) and such would have to be tolerated. I should be clear that I do not like slavery; I simply think we can not justifiably make its *consensual* form illegal. We can and should use our powers of persuasion to prevent its occurrence (and can, should, and do, outlaw its non-consensual forms).

sacrificing agency wouldn't be thought immoral: in the simplest case, the individual, who will die soon anyway, agrees to lose his agency in exchange for a suitably large sum of money being paid to his family.

There is, it will be objected, a problem with the sort of contract the agent-to-become-slave would have to sign. Simply put, no contracts can currently compel performance of a particular deed (the doctrine of *specific performance* is no longer accepted).<sup>16</sup> An agent who violates a contract may have to compensate the other party or parties to it; but the agent cannot be required to perform as the contract stipulates. This is a standard in American law for the very good reason that it accords with our view of the individual as free and responsible and avoids abuse. But the morally lobotomized slave is not a free and responsible individual and to insist on treating him as such is simply a mistake. The individual has lost his agency and is no longer a moral agent (I shall not take up the question of what such a moral *patient* would be due). Hence, there can be no question of a right to exit the contractually created relationship once it is in place. The question is thus about the signing of the contract.<sup>17</sup>

What is the morally correct legal condition here? S's signing an enslavement contract with O is her sacrificing her right to protection against O. Because the state is the likely candidate to protect S against O, if S is deemed competent to sign the enslavement contract and signs it, this is *de facto* sacrifice of any claim-right for help by the state — and hence reason for the state to insist on a strict test of competence. After signing the contract, the individual is no longer a person with legal standing — she is property.<sup>18</sup> The morally lobotomized slave can't be anything else.

What if we are not referring to an agent becoming a morally lobotomized slave, but instead becoming what we can call a 'no-rights slave,' one who maintains her autonomy but forfeits her right to act on it? I spoke of the morally lobotomized slave to avoid problems concerning degrees of autonomy, but perhaps it is actually the easier case.

Feinberg's case, again, shows that an individual agreeing to a contract sacrificing her rights is a conceptual and moral possibility. What

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16 I owe this point to both (separately) Chandran Kukathas and John Simmons. I am grateful to both for conversations about this and other ideas.

17 Unless otherwise noted, I include in 'signing' 'consenting to and entering the contractually defined relationship.'

18 On my view, the state has a presumed obligation to protect all persons living in its domain, be they citizens or not, legally in its domains or not. In (at least some) cases of legal enslavement, that presumption is defeated.

should the legal condition be for such cases? Assuming that the to-be-slave, S, has passed the requisite competence test, the contract has to be upheld if we are to take the *volenti non fit injuria* principle seriously — and we should, lest we make it unacceptable for athletes to hurt each other when they consent to play sports together.<sup>19</sup> Now assume also that the enslavement contract S is about to sign is of a limited duration. This may be thought to cause a paradox: without rights S might be forced to sign a further contract signing away her rights for a longer duration (or signing away more of her rights, if she has retained any). This is mistaken; though S can *physically* sign such a contract, it can have no meaning. The state would have to respect S-ante-contract as an individual temporarily giving up her rights (particularly claims to aid) so that these rights would return to S when the contract expires. While the contract is in force, she could not meaningfully sign a further contract as she has signed away the right to do so, albeit temporarily. If one gives up one's right to sell a lamp, one cannot rightfully sell it. If one has sacrificed one's rights to decide what one will do, one cannot rightfully decide what to do.<sup>20</sup>

It might be objected that an individual cannot relinquish responsibility for his actions, that a no-rights slave who murders is responsible for the murder even if he was following orders. I suspect this is right, but that it only limits the sort of contract that can create a no-rights slave. No contract that creates an obligation to harm a third party should be upheld, but that leaves us with enslavement contracts that exclude such requirements.<sup>21</sup>

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19 We don't want a system wherein O would be guilty of rape, so the test of competence must make S fully aware that she would receive no protection from the state and, indeed, that the state would have to help O against anyone trying to help S (this sort of situation has been put as an objection to consensual enslavement). S's considering such a contract with these facts made clear provides *prima facie* reason to doubt her competence, but as already discussed, *only prima facie* reason. The test of competency must include both a psychological test and full disclosure of what the contract requires as S must be competent and fully informed to genuinely consent, but she may be able to.

20 I conceive of enslavement contracts as involving the alienation by the to-be-slave of all rights (and, in some cases, certain capacities) *excepting* any explicitly maintained. Exceptions might require reference to another contract with a third party with rights to enforce them. Of particular interest: the right to litigate disputes interpreting the contract.

21 If a no-rights slave commits a harm without being ordered to, she should be held responsible. If this involves imprisonment, it could cause her to violate the enslavement contract, a further harm. (I owe this point to James Taggart.) The contract creating a morally lobotomized slave is different; as the signer becomes a

Some will suggest there are inalienable rights and that we can see this by recognizing that if P's attempt to alienate himself from his right R would harm S, we would rightfully interfere (see McConnell, 2000, 29-30). This only matters, though, if P's alienating himself from R *necessarily* harms S. If — as is likely — it is a contingent matter, then all we can say is that *in particular cases, P can't alienate himself from R*, not that P can *never* alienate himself from R. Put another way, I may have a right R as well as a right R\* to sacrifice R. Exercising R\* is alienating myself from R. There may be tokens of the exercising of R\* that are impermissible for various reasons external to the possession of R\* — including possible harm to a third party. In those cases, one would not be allowed (morally) to exercise R\*. But that does not mean that R is inalienable. It just means that in certain cases the alienation is justifiably prohibited. Similarly, I can exercise my right to play with my knives, but not if it would cause harm to another.

Terrence McConnell provides an argument in defense of inalienable rights (presumably including an inalienable right against enslavement).<sup>22</sup> His concern, though, is with legal rather than moral alienability. He claims 'that in the *morally best legal system*, certain rights are *legally* inalienable.' On his view, 'if there are tokens of exercising R\* that are impermissible for external reasons, and if it is difficult (if not impossible) for outsiders (i.e., persons not a part of the relationship) to pick out the impermissible tokens from the permissible ones, then the legal system should not allow consent alone to count as a justification for infringing that right.' His is a rule-consequentialist argument (see his 2000, 41). Even limiting the argument to 'rights whose objects are goods

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non-agent, she cannot be responsible for actions post-operation (she may want a clause in the contract prohibiting certain uses of her body; see previous footnote). In any case, should such a slave be made to murder, its owner would be responsible (and punishable). The state may require the destruction of the slave, but not as punishment of the slave. For discussions of related historical jurisprudence, see Epstein, 2000, 416-422 and Nicholas, 1962, 201-204. (Micah Schwartzman graciously pointed me to these sources for help.)

- 22 By 'inalienable rights,' McConnell means rights that can neither be taken from us nor given up with mere consent. He thinks, though, that one might 'be required to sacrifice the good' 'protected by an inalienable right' (2000, 42). While a right to X can remain even if X must be sacrificed (the badness of the sacrifice being overridden) this does lessen the impact of inalienability. Following Shue (1980, 187 note 13), we might better call these 'alienation-prohibited rights.' (I thank Terrence McConnell for gracious correspondence that helped me understand his view and improve what I say here.)

of a very central type (like life and freedom),’ as McConnell is willing to, I think it is contentious.<sup>23</sup>

Undoubtedly, it will be difficult in some cases to determine if the token alienation is permissible — cases where it is questionable whether there is genuine informed consent — but in some cases it will not. If the alienation is consented to and we can determine this unambiguously, *volenti* demands that we accept it. McConnell tells us of two cases, at least one of which (the first) I think (he does not) fits the bill: the cases are of Susan Potempa in 1993 and Sharon Lopatka in 1996. Potempa, who lived in excruciating pain, sought and found — after at least four other attempts — someone to kill her. Lopatka, the more likely of the two to need psychological counseling, left her husband, leaving him a note asking him ‘not to pursue the person who would kill her’ and noting that even if her body was never recovered, he should know she was ‘at peace.’ She had met a man in an on-line chatroom with whom she had exchanged over a hundred email messages. In their chat and correspondence, he promised to sexually torture and kill her; more than one person in the chat room ‘tried to convince her not to act on her deathwish’ (for both cases, see McConnell, 2000, 8-9). A recent German case is also relevant. In 2001, Armin Meiwes killed and partially ate Bernd Juergen Brandes, who responded to Meiwes’ advertisement looking for someone to consent to this act (Brandes was the fifth person to respond to the ad and the only one it is known that Meiwes killed — previous respondents testified that they were chained up, but released when they changed their mind). In all three of these cases, there appears to be some form of consent and, to repeat, in at least the first, it seems plausibly genuine informed consent. McConnell would claim these alienations of rights should not be accepted by the legal system. While I agree that there are reasons to doubt the consent of Lopotka and Brandes, it seems clear that terminally and painfully ill people like Potempa could rationally want to end their suffering. It may be, moreover, that after counseling the other ‘victims’ would have genuinely (and rationally) consented as well.<sup>24</sup> In any case, as I’ve indicated, I agree a test

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23 The quotes in the paragraph are from correspondence with McConnell; the italics are mine. McConnell provides a second argument against the permissibility of alienation of rights but as it relies on ‘Kantian assumptions that themselves are controversial,’ he does not commit to it (2000, 41).

24 I am not endorsing a hypothetical consent model, but claiming that if a person wants to engage in a behavior and passes the needed psychological assessment (as per footnote 19) and makes a genuine and informed decision, they should be allowed to. I do think that if one is in severe pain and knows there is no hope of alleviating the pain, one has good reason to want to end one’s life.

of competence would be mandatory. I do not think such a test is completely implausible. Moreover, requiring such a test by a state-recognized authority would lessen the possibility of a murderer concocting evidence of consent where none exists.<sup>25</sup> Still, if the test is impossible or too expensive, that might justify legal prohibition.

What we have seen is that the harm principle (combined with *volenti*) requires that we not interfere with the autonomous sacrifice of autonomy. That, perhaps paradoxically, protects autonomy by prohibiting interference in an agent's informed and consensual activities. In arguing that an agent can autonomously sacrifice autonomy and that prohibiting such actions would be to act in a manner 'precluded by respect for him as an autonomous agent,' I am indicating that we are *not required to actively promote autonomy*<sup>26</sup> — at least when this infringes on the autonomy of the very person in whom autonomy would be promoted.<sup>27</sup>

Thus far, I have only considered what must be tolerated of individuals. A full discussion of what commitment to toleration requires within a state also requires discussion of group activities. I turn to that now.

### III Group Toleration

Group toleration, as a species of toleration, explicitly incorporates and has as its defining characteristic, that it deals with institutional groups, or, we might say, *factions*. The majority may tolerate a minority (or fail to), one minority may tolerate another minority (or fail to), and a minority may tolerate a sub-minority (or fail to).<sup>28</sup> Perhaps most importantly,

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25 Legal euthanasia need not increase the murders of sick and elderly people as there can be good restrictions on such acts (in the Netherlands, for example, the Royal Dutch Medical Association developed guidelines to that end in 1973 (see Battin, 1999, 282-284)). There is no reason similar restrictions (in the form of a strict competency test) could not be put in place to prevent abuses of a legal code that allows consensual slavery.

26 I say *actively* promote to allow that toleration may passively promote autonomy by leaving people to themselves. Kukathas makes a similar point about reason in his 2003 (130). Barry, in other ways critical of this sort of view, concurs (2001, 120 and 121). See also Schmidtz 2006, 170.

27 I should admit I *hope* there is at least one legitimating reason for interference other than violation of the harm principle: violation of a principle of parental responsibility (a 'PPR;' see Steinbock and McClamrock, 1999).

28 When group toleration deals with individuals, they are seen as members of a group.

the state can fail to tolerate a group within its jurisdiction — typically a minority.

Making use of the conceptual definition of toleration mentioned earlier, we can define group toleration as: *group A's (or its members') intentional and principled refraining from interfering with an opposed group B (or its members, or its or their behavior, etc.) in situations of diversity, where group A (or its members) believes it has the power to interfere.* This is an extension of the definition of toleration; it is not a normative principle. The harm principle is a normative principle of toleration; we need a similar normative principle of group toleration.

Given the harm principle and recognizing that for a society to embrace toleration it must refrain from imposing a way of life on those who reject it, we might take the following as a normative principle of group toleration: *W, we (group A) will respect you (group B) and let you live as you choose so long as you do not violate our basic rules; any conflict between us will be discussed in our terms (our laws, our courts, etc.).* This captures a common intuition about what toleration requires: letting the other live as they choose. It also makes explicit that toleration will only extend so far as the rules of the tolerating group are not infringed and that any question about such an infringement would be framed in the terms of the tolerating group (cf. Rorty, 1991, 190). (Should group A's rules exclude bribes, for example, a member of group B operating within group A's confines cannot claim not to have broken the rules when he commits an act that group A, but not group B, considers an act of bribery.) As a principle, *W* gives clear limits to what should be tolerated; those limits involve harm, as understood by the tolerating group.

The state (taken to be the dominant group A) adhering to principle *W* will allow individuals (from any group within its borders) to pursue any conception of the good they happen to have, provided that pursuit does not violate the state's basic laws. Any such violation would then be tried in the state's courts in terms it has set up (i.e., crimes are defined by the state, not by the individual or her self-proclaimed community). This sort of toleration is largely adhered to in contemporary liberal democracies.<sup>29</sup> There are times, however, when we go further to tolerate.<sup>30</sup> Such seems appropriate, for if *W* is the adopted principle, a government could not tolerate the practices of a minority that go

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29 It is also how Rawls understands toleration in the international arena (1999a; for my critique of that, see my 'What Liberals should Tolerate Internationally,' *ms*).

30 See Macedo (1995) for a discussion of how the federal government has not imposed its (our) belief in the value of education in cases where a cultural minority felt it threatened their way of life.

against the government's values even when the transgression does not directly affect anyone not in the minority (cf. Kukathas 1997, 78 and 2003, 125-128).

Not allowing one's child to attend school or receive health care may be criminal according to the dominant culture (i.e., 'in its terms'). Some minority cultures may not recognize such activities as problematic and if *W* were adhered to, such minorities would be subject to government interference. Aboriginal groups might be forced to adopt the laws of the wider cultures in which they find themselves, thereby having to sacrifice their traditions (cf. Kymlicka 1995, 39). We often prefer — rightly, I think — to tolerate the minority culture in many of these sorts of cases. As Galston indicates, this requires a 'principled refusal to use coercive state instruments to impose one's views on others' (1995, 528). So we need a stricter principle, one that provides a wider berth of freedom for (sub)cultures.

Consider now a stronger normative principle of group toleration:<sup>31</sup>

T=(i) Group A (and its members) will accept and respect the moral right of group B (and its members) to their own basic principles so that (ii) group A (and its members) will not interfere with group B (or its members) living according to their principles whatever they are. (iii) (i) and (ii) hold at least as long as group B (and its members) reciprocate in practice — that is as long as group B (and its members) abides by (ii) and does not interfere with group A (and its members) living according to *their* principles, whatever they are. (iv) Neither group (nor any of their members) need agree to accept the principles of the other group as binding on themselves as this would not be to tolerate but to transform the ways of one group into the ways of the other group. (v) Any dialogue between the two groups will be carried out in neutral terms.<sup>32</sup>

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31 I do not offer a conclusive argument that T is the correct normative principle — or even the correct normative principle for liberalism. I am not sure what such an argument would be, but one possibility is that it would require arguing against all competitor principles. I take myself to be offering a somewhat more limited defense of T.

32 A principle of legitimacy of groups may be thought necessary. If I were persuaded of this, I would likely endorse a fairly lenient principle — perhaps some sort of self-determination principle. The theory Christopher Wellman offers for the international arena may be similar to what I have in mind here for the domestic arena (see his 2005). (I thank Allen Buchanan for pushing me to indicate what sort of principle of legitimacy I would endorse.)

T, in effect, is the harm principle writ large. It means that each group can allow actions within its confines that would not be permitted in the confines of the other group (just as the harm principle allows you to do something to yourself that it would disallow your doing to me). It also means that each group must prevent its members from committing actions that infringe upon the other group according to that group's basic rules — that is, each group must prohibit its members from engaging in cross-cultural rule violation (it, like the harm principle, prevents harm to others). Rules that may go unheeded within one community must be respected when their transgression would impinge upon the other group.

Three immediate concerns can easily be addressed. First, some would suggest that the 'basic principles' discussed in (i) and (ii) be limited to those that are rationally consistent. This, though, would be to fall back to the weaker principle W that specifies an end to toleration at the point where the other's basic rules run against one's own. It is, on that suggestion, *our* principles — here, a principle of rational consistency — that determine our relations. Second, regarding (v), some would suggest that the dialogue should be in 'our terms.' This, again, pushes the strong principle toward the weak — and for the same reason.<sup>33</sup> Third, some might suggest that the respect indicated by (i) is not necessary so long as there is no interference. This, though, would reduce T to a mere *modus vivendi* principle as it would then not require the 'toleration' be based on principle (as required by our conceptual definition). The harm principle forbids interference with individuals not harming non-consenting others because they are persons and hence due respect (even if we do not respect their views); the same is true of T (and it, too, does not require respect for the other group's beliefs). Still, it is significant that the respect need not be mutual; that is, group A can tolerate B while B merely refrains from interfering with group A. Group B need not respect group A's right to its own basic principles unless it wants to tolerate group A — so long as group B refrains from interfering with group A ('reciprocates in practice'), group A must tolerate group B if it intends to adhere to principle T (and just as violation of the harm principle allows but does not require interference, violation of this practical reciprocity allows but does not require interference).

It may be objected that it is unclear in (v) what 'neutral' terms are. Indeed, some would argue that there are no such terms, that language

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33 Others might suggest that the dialogue should be carried on *the others'* terms. As with the caveat (iv) of the principle, this would not be toleration but transformation — one would accept the other's terms as more fundamental than one's (supposed) own.

is necessarily value-laden.<sup>34</sup> I can not enter that debate here and suggest it is not necessary; I suggest that we do not need to be concerned about what the terms of the dialogue are at all. Individuals and groups of associated individuals naturally enter into dialogue with one another when the proximity requires, and naturally — we might say *spontaneously* — develop rules of interaction wherein they do not interfere in each other's actions. In the process, I suggest, they intersubjectively develop neutral terms.<sup>35</sup> This view admittedly rules out the possibility of toleration with dialogue (according to T) when two groups first come in contact with each other as time is needed for the development of intersubjective terms. This is no small problem, and leads to the additional problem of knowing when the terms used are intersubjectively accepted, but this is primarily an epistemological issue and I cannot delve into it here.<sup>36</sup> For my purposes, I am prepared to admit that toleration with dialogue is not possible upon 'first contact' and that a learning period will be necessary before it is. What is required for that learning period to end, I will not try to specify. Prior to the end of the learning period, though, there can only be toleration if no dialogue is required.

An example may help to make the point clear. In some regions of the US, sarcasm is prevalent; in others, it is virtually non-existent. This seems culturally significant even if mundane. Should a New Yorker, for example, travel to rural Virginia, he might find himself in a physical altercation if he sarcastically rejects an offer by a Virginian. Here, there might be disagreement as to whether sarcastic comments count as hostilities (presumably because deceptive). If they do, the New Yorker is responsible for starting the altercation by violating (iii); if they do not, the Virginian (who threw the first punch) is. I will not here try to solve this problem, but note that it should not be solved from one perspective rather than the other and that until the question is settled, we can not know what is necessary for toleration. If the New Yorker violated (iii), Virginia police can arrest him without violating T; if he did not, they can not. Again, if there is no dialogue, it is easy for the Virginians to tolerate the New Yorker; with dialogue, things are more difficult.

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34 Rawls (e.g., 1971, 1993, 1999a), Kymlicka (e.g., 1989, 1995), and Fitzmaurice (1993a) seem to think the terms of debate between cultures must be the terms of the dominant culture. This, as I've said, is to fall some of the way back to the weaker principle, W.

35 I believe I take this idea from a conversation with Chandran Kukathas and thank him for it.

36 One way to avoid the epistemological worry is to insist that the terms are to count as neutral when all relevant parties accept them. This, of course, invites problems with what counts as 'acceptance of' ('consent to') the terms.

It might be suggested that some may reasonably reject toleration. I have not, in fact, tried to defend toleration as a value — though I have been assuming it is. I can not here offer a full argument for toleration,<sup>37</sup> but consider this: if George claims we should not value toleration, it is likely that *he* wants not to tolerate others and wants *us* to aid him in the process. If he wants actively not to tolerate the others, he wants to suppress or change them and likely wants our help in doing so. Of course, he will want *his* way of life tolerated. He will value toleration of *him*. We all want our own ways to be tolerated. The point of this simple example is that it is unfortunate that political commentators, theorists, and philosophers often think of toleration as something granted to others, without acknowledging that they want their own ways of life tolerated.<sup>38</sup> They assume that no one would have any reason to want to eliminate *their* ways of life. This is an ego-centric and dangerous assumption. One reason we should all value toleration is that we each want to be tolerated ourselves.<sup>39</sup> Recognizing this may help spur a hopefully resounding rejection of the significance of the desire of some individuals to be free not to tolerate others. This is ‘the substantive heart of liberalism’ (Hampton, 1989, 802) — the belief that my way of life — and yours — *must* be tolerated so long as it does not harm others against their will — regardless of what anyone else thinks of the way of life in question. This means that any individual’s desire not to tolerate my (harmless to others) behavior warrants no political merit and it means that even if you wish to develop a community in which autonomy is limited, I must tolerate your choice — provided you do not develop that community by coercing others to join (hence not tolerating their choices).

What has just been said provides an answer to those that object to my considering the state as the dominant group for purposes of discussing group toleration — those who take issue with the claim that we can see the state as just one more group. ‘Maybe it is a group,’ a critic might say, ‘but it is certainly not *merely* that.’<sup>40</sup> We can now see though, why

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37 See my ‘The Value of Toleration’ *ms*.

38 T. M. Scanlon is an exception: ‘I am content to leave others to the religious practices of their choice provided that they leave me free to enjoy none’ (1996, 230).

39 Many have commented that we do not want to be merely tolerated but want to be embraced or at least fully respected. Note, though, that we are never dissatisfied with being tolerated if we are not; it is only when we are at least tolerated that we think we want more (and some may never want more).

40 Others might object that ‘groups’ are not the sorts of things that can be the subject of evaluation. Yet, however transient and malleable groups may be, they engage in the sorts of activities that concern us — activity that fails to tolerate. For one account of groups compatible with my discussion, see May, who defines social

the state should be seen as a group: George wants to claim allegiance to a group (or wants it to claim allegiance to him) so that he could use its power to suppress another group. The state is not *just* one more group — it is the one group with a supposedly legitimate claim to coercive power. Its agreement to not tolerate is thus all the worse. Recognition that the state is not *merely* another group is not an objection to defining group toleration as concerned with institutional groups. Rather, it shows how important group toleration by the state is.

We have come some way in understanding the relationship between group toleration and liberal theory. I have discussed the harm principle, its conceptual limits, and the limits it implies for toleration (sections I and II) and introduced a parallel normative principle of group toleration (section III), but only began to discuss the limits it implies. I now further that discussion.

#### IV Internal Restrictions, External Protections and Exit<sup>41</sup>

Will Kymlicka provides a useful distinction ‘between two kinds of claims that an ethnic or national group might make. The first involves the claim of a group against its own members; the second involves the claim of a group against the larger society ... call the first “internal restrictions,” and the second “external protections”’ (1995, 35; see also Narveson, 1991, 332). Internal restrictions are rules imposed by groups on their members; external protections are state devices designed to aid survival of particular groups. Our question is which, if either, is entailed by, or compatible with, principle T. We are helped in answering this by our discussion of autonomy in section II and recognition that toleration does not require multiple cultural groups.

Toleration may make *possible* the continued existence of multiple cultural groups, but will not *guarantee* their survival. Toleration is not reliant on the existence of multiple cultural groups for its defense. Diversity is conceptually necessary for toleration (see my 2004a) and in-

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groups as ‘collections of persons which are interrelated in such ways as to be able to engage in joint action or to have common interests’ (1987, 29; see also Narveson, 1991, 333-35).

41 The argument in this section defends a view that shares much with that of Kukathas. My arguments, though, are very different from his and there are at least two major differences in our conclusions: I admit that exit may require state aid and I admit that an individual can sacrifice her autonomy and thus her right to exit (as per section II). As I understand Kukathas’s view, he believes that the state need only protect the right to exit and that the right is not a right we can give up.

dividuals must have room to make choices for themselves, but even if it were true — which I doubt — that this required being subject to multiple influences (i.e., so as to have genuine options), there will be multiple influences even within a (relatively) homogeneous society, for such homogeneity generally refers to religious or cultural heritage and not all of the details of individual lives. As Walzer notes, ‘liberal society doesn’t require a multiplicity of ethnic or religious communities. Its existence, even its flourishing, is entirely compatible with cultural homogeneity’ (1997, 9). While toleration allows for peaceful cultural difference, the latter is not necessary for the former.<sup>42</sup>

To properly tolerate a group B, group A must voluntarily refrain from interference in group B’s activities so long as B’s activities do not require interference in group A that would violate A’s rules. Group toleration is especially important if one of the groups being tolerated is a subgroup within the group doing the tolerating — especially if the larger group controls the government.<sup>43</sup> Thus, in what follows, we consider what is required of the state for it to tolerate (sub)groups within its borders; the same should hold for non-state groups.

There can be no justification from principle T for failure to tolerate internal restrictions of a subgroup. T explicitly requires that group A *not* interfere with group B’s use of its own basic principles (condition (ii)) (cf. Galston, 1995, 532). Some will immediately say that this is precisely why distinguishing between toleration of individuals and toleration of groups is misguided; even if *group* toleration does not exclude internal restrictions, moral toleration (as specified by the harm principle) does — and that, of course, has political ramifications. The argument, then, is that the harm principle excludes internal restrictions. It is not, however, clear that this is correct.

The harm principle, remember, excludes interference with others so long as they do no harm (in the appropriate sense) to another. In the sort of situation we are now interested in, the subgroup would be interfering with the activity of one of its members though that activity was not harmful to any others. An example is needed: in fictional religious

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42 In a society with no diversity at all (*per impossibile*), toleration would not come into play. In such societies individuals would have limited options and so may become less able to use autonomy.

43 This requires that a group within a group can have rules the larger group does not and can lack rules the larger group has. This may sound odd until we consider actual cases. Certain religious groups do not value the (same sort of) education that is valued (and required) by the state. Their rejection of the rule ‘all must attend school until 18 years old’ does not mean they are not within the larger (state) group in any morally significant sense.

group D (for 'devil-worship'), there is an internal restriction that prohibits entrance into any building with a hanging crucifix. Under ordinary circumstances, entering such a building causes no harm at all. This is a clear example of the sort of activity that the harm principle would not permit interference with, so some will wonder how it can be that a normative principle of group toleration would allow such interference (in the form of toleration of the subgroup's enforcement of its internal restriction). This, supposedly, is a paradox of toleration: the dominant group (perhaps us) may have to tolerate behavior that fails to tolerate behavior it would tolerate.

The paradox and objection only have pull when it is assumed that although the behavior interfered with — here entering the building with the crucifix — is autonomous, the agent's belonging to group D is not. If her belonging to the group is autonomous, then by the volenti principle, there is no harm rendered her by the group. If I voluntarily partake in a group's activities, I cannot claim they harm me in the activity. Of course, it is not the case that everyone within a group's confines has autonomously consented to the group. In cases such as that now being considered, though, the member is (*ex hypothesi*) acting autonomously by violating the internal restriction and if the member autonomously violates the internal restriction, she is likely to be able to (try to) exit the community and thus her continued presence in the community lends support to the view that she is a member autonomously. That is also important; if she is autonomously within the (sub)group, we must understand her as consenting to its rules, including the rule that she refrain from entering any building with a crucifix. Thus understood, there is no paradox and no objection: the state cannot interfere (nor can any other group) in the actions of an agent that do not harm a non-consenting other. Here the relevant agent is the (sub)group and the individual being prohibited from entering the church consents to its rules. Its behavior — the internal restriction prohibiting church entrance — must thus be tolerated.

The critic will nonetheless insist that the individual wanting to enter the church has not consented to the group or its internal restrictions. This looks like an old question. Many believe — as I do — that David Hume successfully showed that consent is not the foundation for political legitimacy (see Hume 1777). In our case, this may seem to mean that the (sub)group cannot claim legitimacy based on its members' consent. This, though, is mistaken, for we are not discussing the legitimacy of a state, but the right of a cultural subgroup *within a state* to levy internal restrictions. Since such a right may not be made legitimate in the same way a state is, it may be that it is made legitimate by consent.

We are assuming that the state in which the subgroup exists is itself liberal and so will protect individual autonomy. This means, in turn,

that should the individual indicate that she wishes to exit the subgroup, the subgroup will not be able to prohibit her exit — as that would be a clear violation of the harm principle (the subgroup would be wrongfully thwarting the individual's interest in pursuing her own projects) and the sort of violation that will not be tolerated by a liberal state. Thus, assuming the subgroup is in a liberal state that protects the right to exit, that she remains in the subgroup is indicative of a form of consent by the member that legitimates the subgroup (cf. Kukathas, 1992, 124 and Barry, 2001, 149).

We must admit, of course, that there are costs to exit; nonetheless, it hardly seems unreasonable to assume that an autonomous agent consents to her group if she makes no attempt to exit. That she consents because unwilling to pay the cost of exit does not mean she does not consent. To argue, on the other hand, that she must be protected because unable to even try exiting is to degrade her — to assume she has no will of her own.<sup>44</sup> Assuming she has an autonomous will, the view defended here requires that if the individual is trying to opt out, her choice be protected. Hence, we have an important limit to permissible internal restrictions: exit from the group (and thus those restrictions), must be protected by the state. That protection may require the expenditure of state resources — perhaps in the form of police personnel — but should not become *promotion* of exit. The latter would, I assume, be a matter of the state instructing the individual about the best way to live — presumably, according to the liberal ideal of autonomy. As discussed in § II, though, a liberal state must protect, but need not promote, autonomy.

Barry rightly claims that 'Liberals are fully committed to freedom of association. This includes freedom of association for groups whose norms would be intolerable if they were backed by political power but are acceptable provided that membership in the group is voluntary' (2001, 150). The question, again, will be about what constitutes voluntary membership and, particularly, whether one can be said to voluntarily stay in a group if the cost of exit is at some particular level. Barry, for example, thinks we may have to force the group to offset the costs of exit (e.g., 2001, 153). In cases of expulsion from the group, this is plausible. In cases where the member chooses to leave, it is less plausible. If the exiting member had agreed to his prior membership and then

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44 Obviously, brain-washing (if such is possible) is not permissible as a means of keeping members within a group. We can assume such would be coercive. Though determining what counts as brain-washing may be difficult, it seems clear that merely continuing in the path of one's culture is not enough to demonstrate its presence.

decided to leave, it is by no means clear why he should not bear the costs and the group should. Even in cases of expulsion, the requirement that the group 'pick up the tab' must be limited — the idea, for example, that members of the group must continue any business they were previously engaged in with the expelled member (Barry, 2001, 153) is questionable. Requirements that group members maintain business ties with someone they expelled (perhaps paying him for a product they wish to get elsewhere or paying him a higher price than they can get elsewhere) do not allow for the freedom *not* to associate. Surely, the group should not be allowed to do its former member further damage, but severing ties is a matter of (dis-) association and is permissible.

Barry says 'It cannot be denied, of course, that the right not to associate is 'burdened' ... by a requirement to pay compensation to those injured by it. But I see no reason for thinking that the liberal principle underwriting freedom not to associate has to be formulated so as to guarantee that its exercise should be costless' (2001, 154). Indeed. Moreover, contra Barry, it's not clear the exercise has to be costless for *either* party and so not clear why the group one exits should have to bare the entire cost (especially if the exit is the choice of the one who exits).

Relying on exit rights is not a new idea and is not uncontroversial. Susan Moller Okin (2002) offers a sustained critique of similar lines of argument from Raz, Galston, and Kukathas. Her criticism has persuasive force and is worth considering.<sup>45</sup> The core of her argument is that individuals (for good reason, she is concerned primarily with women) 'want, and should have the right, to be treated fairly within' their own culture of origin (Okin 2002, 207). What it means to be 'treated fairly' is difficult to discern, but Okin seems to mean that these individuals have a right to be treated as equals with the others in their culture. While I certainly prefer to live in a culture that treats all those within it as equals before the law and take that to be the default view, I cannot insist that it is impossible for people to be happy living in a group that does not so treat them or that some people cannot autonomously be in such a group. Part of the lesson from section II, in fact, is that people *can* sometimes autonomously choose to have less autonomy or less right to exercise autonomy and that is what such cases would be like.

As already admitted, there are costs to exiting one's culture of origin, but that there are costs does not mean that one has no choice (cf. Kukathas 2003, 107). If I am in a sports arena where there is only one

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45 Much of Okin's 2002 argument concerns groups not within liberal states. It is nonetheless instructive as 'cultures' (taken as external to a state) and 'subcultures' (internal to a state) can — and often do — act in similar ways. For related arguments, see Shachar 2000 and 2001, Spinner-Halev 2000, and Okin's 1998 and 1999.

vender of food and drink, I have a choice: to either purchase the food and drink from that vender or to not purchase any food or drink. I may want there to be competition within the arena, but my entrance into and presence in the arena is not made non-autonomous by the fact that food and drink will be costly. That the costs of exiting one's culture (or subculture) of origin are significant in a way that the costs of food and drink are not does not mitigate this. If I choose to stay in the cultural group, I choose to accept the costs, including the internal restrictions, and interference by the state with the enforcement of those internal restrictions against me is not warranted. It is not that exit rights help to 'legitimate the illiberal treatment of some or all group members,' as Okin (2002, 209) suggests, but that in making possible group-legitimizing consent, exit rights make interference in those illiberal treatments illegitimate. Interference is not necessarily warranted to provide a 'viable and desired option for persons treated badly by their groups' (Okin, 2002, 215; emphasis added).<sup>46</sup> It is warranted when there is no exit option for persons so treated.

Okin insists, though, that 'for girls and women especially, formal rights of exit are a less than satisfactory palliative for oppression' as (1) 'girls are often successfully socialized into the acceptance of practices they would be likely to come to regard as oppressive if they were living in a less sexist cultural context,' because (2) many cultures shortchange girls educationally and 'having an education that prepares one for alternative modes of life is surely an essential prerequisite for a realistic or substantive right of exit' and because (3) in many cultures 'families control their daughters' times of marriage and choices of husbands' and once 'a young woman is married within a culture, especially if she bears children early (as is often expected of her ...), and especially if the terms of marriage and divorce are biased against her (as is also often the case), her capacity to exit even her marriage, let alone her cultural group, is severely restricted.' She adds that 'the right of exit from one's cultural group is, surely, often not at all desired as the sole option' (Okin, 2002, 224). Each of these points carries some weight, but none are decisive.

To address Okin's first point (re: socialization): how a person is socialized is undeniably important, but it is important for many reasons. If a woman is socialized in such a way that she will not consider leaving her culture (or subculture), then this is something important about *her*

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46 Okin also talks of it being 'unthinkable' for women (in particular, a Moslem Indian student from Fiji interviewed by Laurie Olsen) to exit their culture of origin (2002, 222). This is clearly hyperbole (the young woman in question was faced with the suggestion by a teacher and it would be insensitive to insist her response was unthinking).

as the person she has become and we would fail to show her respect if we insisted that there is something wrong with her because *we think* she cannot possibly be consensually in the cultural group (cf. Meyers, 1989, xi). We must accept that she does consent. We may, of course, condemn the socialization process and seek to change it, but to insist that the individual (male or female) would not consent *if she weren't who she is* is to engage in a *non sequitar*.

Regarding Okin's second point (re: education): there can be no doubt that girls often receive less education than boys. Of course, some boys also receive quite poor educations. But this is really beside the point, for we cannot insist that every culture (or subculture) educate its children in such a way that those children can choose to exit it and join any culture at all (for similar points, see Mills, 2003). No culture could do that. Likely, though, Okin would just want cultures to educate their children so that they can join better, perhaps more liberal, subcultures — perhaps exiting their subculture and entering the broader culture. I might like that too, but it is not a position that offers any sort of respect for the competing cultures in question. Perhaps Okin would respond that such cultures do not deserve respect. While I might agree that the beliefs and practices of such cultures do not deserve respect, I am hesitant to claim that the individuals having those beliefs and engaging in those practices should not be respected and should be interfered with. Moreover, interference is worrisome as we want the other subculture to respect ours and it is unlikely to do so if we fail to respect it — especially if we interfere with it.

I suspect Okin's third point (re: family control) is the strongest, but one thing should be said: if the control by the family is in the form of socialization, we are brought back to having to respect the woman's choice even if that choice is constrained by her socialization; if the control is something else, it may be a direct violation of the harm principle and thus invite interference. If, for example, the family forces a marriage on a woman who clearly states her unwillingness to participate, or if a husband forces himself on his unwilling wife to force a pregnancy, state interference is clearly called for.<sup>47</sup> I suspect, though, that it is often control in the sense of socialization that is relevant.

As for Okin's final point here (re: the desiderata of exit), the response is simple: the liberal is not committed to providing multiple options to anyone. When Okin insists that 'Rights to exit provide no help to women or members of other oppressed groups who are deeply attached

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47 If the activity is not within its borders, a liberal state may yet have reason not to interfere (see my 'What Liberals should Tolerate Internationally,' *ms.*).

to their cultures but not to their oppressive aspects' (2002, 226-7), we agree, but indicate again that a desire to stay within one's group without the group's internal restrictions is not a desire that need be satisfied (in a very real sense it is a desire that *cannot* be satisfied since the group would be significantly different without its internal restrictions). Hard choices like those Okin discusses between submission to and alienation from one's culture (Okin, 2002, 229) may be heart-rending, but they do not justify interference. Only harm does that.<sup>48</sup> If a cultural group harms one of its members, interference is warranted. That interference should take the form of enforcing the right to exit — by helping the member to exit should she want and need such assistance. Given that, Okin is right that the liberal state should 'enforce individual rights against such groups' (2002, 229). Those rights, though, are rights to exit.<sup>49</sup>

I should stress that while I disagree with much of what Okin says about this topic, I am in complete sympathy with the broader point that exit is often either not viable or enormously costly for women. This seems undeniable. Still, non-viability and costliness are not the same and the point of the liberal state is not to eliminate all costs but to protect individuals. Importantly, it can protect individuals — including women — by guaranteeing that exit is a viable option. (Equally important: we should engage in rational dialogue to encourage beneficial change.)

Viable options need not be costless options (indeed, I do not think there are costless options). Moreover, in most real-world cases, exit is possible, even if costly. In all cultures, people sometimes leave their families. The Amish, Mennonites, and Hutterites — indeed, all cultural groups — lose community members. If it were possible for a group to make it literally impossible to exit, we would have a real worry. When a group makes it such that exit is possible only with extreme deprivation, more discussion may be needed. In the former cases, the liberal state would have to interfere to prevent any autonomous persons from being harmed. In the latter cases, difficult discussion regarding the nature of the deprivation and whether it is genuinely a harm is called for. There might well be a case for state intervention to limit the manufac-

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48 And, perhaps, violation of an appropriately explicated principle of parental responsibility if such can be defended.

49 I also find unconvincing Okin's claim that exit (she discusses forced exit, but the point is more general) 'prevents those within the group who might want to liberalize it from the inside from having any chance of doing so' (2002, 226). This would only be true if those who exited had absolutely no contact with those who remain. If there is *any* contact, those who exit can try to persuade those who remain to seek reform.

turing and maintenance of the hindrance — certainly, if the hindrance itself counts as a harm (rather than a mere failure to aid, for example), intervention would be called for. Given the harm principle, the group should not be allowed maliciously to do anything to add to the burdens of exit, but it should not be forced to change itself either. Where to draw the line in such cases, as I've said, will require difficult normative discussion — but that is as should be expected, given the ineliminable indeterminacy of scope in defining harm we discussed in section I.

Having dispensed with Okin's objections, note again that provided protection of exit rights, internal restrictions, including those related to religious practices, must be tolerated. That an individual must have a protected right to exit a group leaves open the possibility that she will be subject to internal restrictions of the group she chooses to remain in. Her choice to remain in the group is, in fact, a choice to remain subject to its internal restrictions (though she may be able to try to change them). The group absent those internal restrictions is not the same group and, as Galston notes, the 'personal liberty the liberal state must defend is the liberty not to be coerced into, or trapped within, ways of life,' it has naught to do with practices internal to those ways of life (1995, 522; see also 520 and Kukathas, 1992, 15). This accepts the general liberal view that individual rights are importantly primary and group rights secondary and that the former limit the latter (cf. Buchanan, 1994, 11-12). Here, the individual right of concern is a right to exit.<sup>50</sup> Any attempt to exit the group must be protected — the state must not tolerate any subgroup denying any of its members the right to exit.<sup>51</sup>

We have seen that internal restrictions must be tolerated. We must now consider external protections. It would be odd if toleration re-

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50 Per section II, on my account even that right can be sacrificed autonomously. Voluntary associations can thus require that individuals relinquish their rights to exit as a condition of membership (though it may then be foolhardy for anyone to join). Cultural groups are different in this respect since a child cannot consent and it is as children that we usually enter such groups. Still, it is conceivable that such groups could require forfeiture of the right to exit upon maturation. I thank Fred Miller for helping me to see this limit to the right to exit in this scheme.

51 Perhaps the state should send an agent to ask if any members want protected exit. A negative answer, though, must be respected (which is not to say the state can't repeat the offer). Some would suggest the state must also compensate the exiting member for her costs; I am inclined to deny this, but will not argue against it here other than to note that determining those costs would be extremely difficult. Importantly, aiding exit can include more than mere protection of the exit right without becoming compensation of all costs. Perhaps the state should provide the exiting individual a place to live (for a specified period of time), so that she can 'get her feet on the ground.'

quired external protections since they are presumably supportive and conceptually one must oppose what one tolerates (see my 2004a), but perhaps one can support in some ways what one opposes in other ways. So further consideration is needed.

External protections are meant to be state devices that aid the survival of a specific cultural group (different groups may require different protections). We have seen that the first normative principle of toleration (i.e., the harm principle) requires that individuals be guaranteed a right to exit their cultural subgroup. No external protections, then, will be permissible if they require violating individual members' protected rights to exit. There may, of course, be external protections that do not violate the right to exit and that seem to be justifiable.

Kymlicka claims that 'external protections ... do not 'place the group over and above the individual'' (1995, 44), but this is hardly clear. While external protections — if they do not violate the right to exit — may not place a group over the members of that group, they do indicate that groups are important in a way that individuals are not. Indeed, one advocate of Kymlicka's view claims that 'We cannot ignore the possibility that the interest of individuals in the existence of a supportive community might override the interests other individuals have in participating in practices or advocating views that threaten the survival of that supportive community' (Harel, 1996, 118-119). External protections protect individuals only as members of groups — as if group membership were more important than other characteristics of individuals. Moreover, individuals who are not members of the protected group may question their own lack of protected status. This is all problematic. Still, if an external protection can be devised that does not infringe the two normative principles of toleration or the right of exit, such may be justifiable.

Remembering that external protections are meant to aid survival of particular groups, the question is: may the state so aid particular groups? Recall, again, the relevant clause (ii) of T: 'group A (and its members) will not interfere with group B (or its members) living according to their principles whatever they are.' The state cannot 'interfere' — this is why internal restrictions must be tolerated; interference with them would *hinder* the group and hindrances are interferences. External protections, though, are designed to *aid* the group. In my view, aid is interference even though meant to help rather than hinder and so is similarly prohibited by T (ii). While that may be contentious, we must recognize that if the state promotes one group (or its conception of the good) without promoting others, it leaves the others in a weaker position than they would otherwise be in — i.e., it creates a (perhaps weak) barrier to their continuance. That, in turn, amounts to (hinder- ing) interference with the other groups. It follows, then, that external protections, which are essentially designed to aid particular groups

rather than all groups, will not be permitted if we retain a full commitment to toleration.<sup>52</sup>

In their separate but related critiques of Kymlicka's defense of external protections, Chandran Kukathas and John Tomasi have convincingly argued that external protections are indefensible on grounds different than — though related to — those I just utilized (see Kymlicka, 1995, 102-104 as well as 1992 and 1989, 167; Kukathas, 1992, 112-122 and 2003, 77-85, 104, 198-9, and 234; and Tomasi, 1995, 585-595). The basic argument is as follows. Cultures change from internal as well as external stimuli. There is as little reason to think we should prevent that by interfering as there is reason to think we should *stimulate* it by interfering. Toleration, note again, requires non-interference. External protections, though, often stimulate (perhaps unintended) changes within the protected group. They are means of interference and thus impermissible. The Kukathas-Tomasi line motivates this further.

External protections that are positively perceived by marginal group members (if coupled with acceptable internal restrictions) are likely to encourage those members to rejoin (or enhance their membership). External protections negatively perceived may have the reverse effect. Either way, they will likely cause changes in the group. But then the very justification for their presence undermines their presence: external protections are meant to aid survival of the particular group as it is, but end up changing the group into something different (and likely more acceptable to the broader community). Put simply, an interference that is intended to aid a group can be as problematic as an interference that is intended to hinder it. Attempts to *preserve* a culture in some supposedly pristine form are self-defeating; attempts to *conserve* a culture may succeed by allowing the culture to survive in altered form, but it is not clear the altered form will satisfy those who want the culture protected in the first place. At the end of the day, 'cultural survival cannot be guaranteed and cannot be claimed as a right ... the state should not be in the business of trying to determine which cultures will prevail, which will die, and which will be transformed' (Kukathas, 2003, 252).

External protections are ruled out for at least two reasons. First, they create burdens for other groups — and so exclude full toleration of those groups. Second, as Kukathas and Tomasi argue, they stimulate changes in the groups they are meant to protect — that is, the interfer-

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52 Two points: (i) if a state can use external protections for all groups — even if different protections for different groups — and not thereby hinder any group, it may be permissible even with a full commitment to toleration; I am skeptical. (ii) Rectification for past injustices may override these concerns (James Taggart reminded me of the latter).

ence rendered as aid alters what was to be protected and is thus self-undermining.

Our conclusion here is simple: toleration (a) requires that we not interfere with internal restrictions of cultural groups so long as the group's members have a state protected right to exit and (b) is not compatible with external protections of cultural groups. Some will object that liberals 'cannot remain indifferent if the aspirations of (some) members of nonliberal reasonable groups to reevaluate and revise their conceptions of the good, and their corresponding group practices and institutions, are thwarted by their own groups' (Tan, 1998, 290). But we do not remain indifferent — we tolerate. So long as no harm is done to a non-consenting other, that is the proper liberal response. At least, it is the only one consistent with a full commitment to toleration.

## **V Conclusion**

Beginning with an understanding of toleration as an agent's intentional and principled refraining from interfering with an opposed other (or their behavior, etc.) in situations of diversity, where the agent believes she has the power to interfere, we were able to understand normative toleration and what it requires of liberals — those who have a full commitment to toleration. Group toleration was defined as group A's (or its members') intentional and principled refraining from interfering with an opposed group B (or its members, or its or their behavior, etc.) in situations of diversity, where group A (or its members) believes it has the power to interfere. The two definitions, though, are merely definitions. Determining when toleration is properly invoked requires normative principles. Mill's harm principle and my principle T serve that purpose.

We saw that toleration permits the autonomous sacrifice of autonomy by individuals and internal restrictions within minority groups. Consistent with the former claim, the latter holds even where it means members of the minority do not have their autonomy promoted. We also saw that toleration excludes external protections of minority groups. These conclusions might be unwelcome in some quarters. They nonetheless follow from consistent commitment to toleration — which I believe is to say they follow from consistent commitment to liberalism.

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