University of Maryland Law Journal of Race, Religion, Gender and Class

Volume 3 | Issue 1 Article 2

Tolerance as Understanding

Jay Schiffman

TOLERANCE AS UNDERSTANDING

JAY SCHIFFMAN*

INTRODUCTION

It is commonly argued that love has no place in theories of tolerance, law or politics. The great twentieth century writer E.M. Forster believed that tolerance could not be based on love. He wrote:

> 'Love is what is needed,' we chant, and then sit back and the world goes on as before. The fact is, we can only love what we know personally. And we cannot know much. In public affairs, . . . something much less dramatic and emotional is needed, namely tolerance. Tolerance is a very dull virtue. . . . It merely means putting up with people, being able to stand things. No one has ever written an ode to tolerance, or raised a statue to her. Yet this quality . . . is the sound state of mind which we are looking for . . . .
>
> . . . .
>
> [Tolerance is] just a makeshift, suitable for an overcrowded and overheated planet. It carries on when love gives out, and love generally gives out as soon as we move away from our home and our friends, and stand among strangers in a queue for potatoes.[1]

Forster's quote represents the standard liberal account of tolerance.[2] This account of tolerance is based on a number of

---

* Ph.D., New York University, 2002; M.A., New York University, 1994; J.D., *cum laude*, New York University School of Law, 1993, B.A., University of Michigan, 1990. I want to thank Professors Anna Harvey, John Ferejohn, Pasquale Pasquino, Russell Hardin and Michael Gilligan for their insights.

1. E.M. FORSTER, TWO CHEERS FOR DEMOCRACY 45, 47 (1951).

2. The standard liberal account of tolerance is an outgrowth of the works of the great liberal thinkers. *See* THOMAS HOBBES, LEVIATHAN (1992) [hereinafter HOBBES, LEVIATHAN]; JOHN STUART MILL, ON LIBERTY (1993) [hereinafter MILL, ON LIBERTY]; JOHN LOCKE, THE POLITICAL WRITINGS OF JOHN LOCKE 390-436 (David Wootton ed., 1993) [hereinafter, LOCKE, LETTER ON TOLERATION]; JOHN LOCKE, THE POLITICAL WRITINGS OF JOHN LOCKE 186-210 (David Wootton ed., 1993) [hereinafter LOCKE, ESSAY CONCERNING TOLERATION]; RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977) [hereinafter DWORKIN, TAKING RIGHTS];

empirical assumptions, namely that controversial differences in society necessarily exist, that love cannot extend beyond close familial and social ties, and that beyond these ties, love has little power to assure that social differences do not lead to intolerance or repression.[3] Although it is undisputed that Forster's claims have historical validity, this does not mean that the empirical assumptions underlying Forster's views, specifically those regarding a person's capacity for empathy and compassion for strangers, are entirely accurate.

This article questions the empirical foundations and normative aspirations underlying liberal accounts of tolerance such as Forster's, and proposes an alternative normative framework for conceptualizing political tolerance. This alternative framework may be used to critique and advance standard liberal conceptions of tolerance. This article presents a theory called *tolerance as understanding,* which conceptualizes tolerance as a moral obligation stemming from paramount moral virtues such as empathy and compassion, rather than as a *means* for achieving liberal goals such as autonomy.[4] This article asks whether liberalism, because of its emphasis on individuality and autonomy, underrates the possibilities of empathy and compassion as organizing principles for political tolerance.

Part I of this article explores the empirical and normative foundations underlying the standard liberal account of tolerance. Part II outlines *tolerance as understanding.* This theory of tolerance relies loosely on the idea that people primarily want to be loved, understood and cared for, more than they want a given substantive matter decided in their favor. This theory is inspired by the idea that few people, including committed political activists, would exchange the love of their parents, children, significant others or friends for their favored abortion, death penalty, or euthanasia position. Part III addresses whether *tolerance as understanding* can be effectively applied in cases involving tolerance and civil rights. In Part III, *tolerance as understanding* is applied to four controversial subjects: the death

---

RONALD DWORKIN, LAW'S EMPIRE (1986) [hereinafter, DWORKIN, LAW'S EMPIRE]; IMMANUEL KANT, POLITICAL WRITINGS (H.S. Reiss ed., Cambridge Univ. Press 2d ed. 1991) (1970); JOHN RAWLS, A THEORY OF JUSTICE (1971) [hereinafter RAWLS, THEORY OF JUSTICE]; JOHN RAWLS, POLITICAL LIBERALISM (1993) [hereinafter RAWLS, POLITICAL LIBERALISM]. The definition of liberal tolerance will be developed throughout the discussion *infra* Part I.

3. *Id.* This argument is most frequently attributed to Thomas Hobbes. *See* HOBBES, LEVIATHAN, *supra* note 2.

4. The term "*tolerance as understanding*" is first introduced in this article, but it not an entirely new conception of tolerance. The political, legal and religious foundations of *tolerance as understanding* will be developed in full *infra* Part II.

penalty, gay rights, hate speech, and minority religious freedoms. Throughout the discussion of *tolerance as understanding*, the critical issue will be whether it can serve as an empirically and normatively sound foundational principle for individual moral behavior, and subsequently, whether it can be used for resolving constitutional cases concerning tolerance and civil rights.

I. LIBERAL TOLERANCE

What does it mean to be a tolerant society? The scholarly answer to this question has been surprisingly uniform. The dominant account of tolerance in constitutional jurisprudence, as well as American society more generally, is best characterized as the "Live and Let Live" credo.[5] Americans generally believe that tolerance requires them to put up with objectionable thoughts, speech, and acts of their neighbors, as long as these neighbors are not threatening.[6] This standard account of tolerance is primarily liberal.[7] It provides that because individuals have a right to believe as they choose, out of

---

5. John Stuart Mill provides the clearest statement of the "Live and Let Live" credo. *See* MILL, ON LIBERTY, *supra* note 2, at 12-13. Mill writes:

> . . . 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. That 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. His own good, either physical or moral, is not a sufficient warrant.

Id. Liberal justifications for political tolerance dominate constitutional jurisprudence. *See* DAVID RICHARDS, TOLERATION AND THE CONSTITUTION (1986) [hereinafter, RICHARDS, TOLERATION]; Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245 (1961); DWORKIN, TAKING RIGHTS, *supra* note 2; DWORKIN, LAW'S EMPIRE, *supra* note 2; RAWLS, THEORY OF JUSTICE, *supra* note 2; RAWLS, POLITICAL LIBERALISM, *supra* note 2.

6. Similarly, the political science survey research literature generally frames tolerance in liberal terms. HERBERT MCCLOSKY & ALIDA BRILL, DIMENSIONS OF TOLERANCE: WHAT AMERICANS BELIEVE ABOUT CIVIL LIBERTIES (1983) (survey research suggesting that Americans are *tolerant* -- based on standard liberal conceptions of tolerance -- in the abstract but when presented with specific contexts far less tolerant). *See also* CLYDE Z. NUNN, ET AL., TOLERANCE FOR NONCONFORMITY (1978); James L. Gibson & Richard D. Bingham, *On the Conceptualization and Measurement of Political Tolerance*, 76 AM. POL. SCI. REV. 603-20 (1982); James L. Gibson, *The Political Consequences of Intolerance: Cultural Conformity and Political Freedom*, 86 AM. POL. SCI. REV. 338-56 (1992); JOHN L. SULLIVAN, ET AL., POLITICAL TOLERANCE AND AMERICAN DEMOCRACY (1982); GEORGE E. MARCUS, ET AL., WITH MALICE TOWARD SOME (1995).

7. Liberalism is a broad tradition of political thought, which maintains that individual autonomy is central to human dignity and/or progress. *See infra* notes 35-36.

moral necessity, others must be tolerant.[8] According to this account, tolerance is conceptualized as a moral value emanating from virtues such as conscience, autonomy, and the right to pursue one's own conception of the good.[9] For most political and legal scholars, tolerance is, and can only be conceptualized as, a liberal virtue.[10] However, conceptualizing tolerance as liberal tolerance is similar to asking for Coke when one really wants a soda. Tolerance, the abstract concept, has become synonymous with only one of its brands -- the liberal brand.[11] As a normative matter, however, it is by no means a foregone conclusion that tolerance should be conceptualized exclusively in liberal terms.

A. Defining Tolerance

The concept of tolerance cannot exist outside of a normative political framework from which it derives its meaning.[12] Tolerance, in the political sense of the word, is best thought of as a normative value rather than a descriptive definition. When speaking of tolerance in political affairs, it is often said that "tolerance is," when what one should really say is "tolerance requires."[13]

---

8. *See supra* note 7.

9. *See* RICHARDS, TOLERATION, *supra* note 5. *See also* LOCKE, LETTER ON TOLERATION, *supra* note 2; LOCKE, ESSAY CONCERNING TOLERATION, *supra* note 2.

10. *See, e.g.*, David Heyd, *Introduction* to TOLERATION (David Heyd ed., 1996) [hereinafter HEYD, TOLERATION] (discussing various arguments about tolerance, *all* in relation to the liberal nature of tolerance and in a language that is predominantly liberal).

11. *Id.*

12. *Cf.* DWORKIN, LAW'S EMPIRE, *supra* note 2; DWORKIN, TAKING RIGHTS, *supra* note 2. Dworkin claims that we must understand constitutional provisions, including those promoting tolerance, in light of a foundational normative political framework. For Dworkin, this foundational principle is liberalism; specifically that branch of liberalism that promotes the principle of equal concern and respect. David Richards advances a similar argument in claiming that laws, including laws defining tolerance, exist within normative political frameworks. He argues that laws must necessarily be based on a foundational liberal framework and thus be "predictable and orderly constraints that acknowledge and express the dignity of persons and citizens as free, rational, and equal." RICHARDS, TOLERATION, *supra* note 5, at 56.

13. Tolerance is generally thought of as being a *moral or political* value, which has its greatest significance in those contexts. Some scholars argue that to treat tolerance of tastes on par with tolerance of moral, religious or political views degrades the virtuous nature of tolerance. *See, e.g.*, PETER P. NICHOLSON, *Toleration as a Moral Ideal*, *in* ASPECTS OF TOLERATION (John Horton & Susan Mendus eds., 1985) [hereinafter NICHOLSON, TOLERATION]. Though there is much validity to this point, it should not be overstated. There is a whole range of tastes that derive their significance from moral contexts, such as cultural, religious, and ethnic contexts. Perhaps no one understood this better than Jonathan Swift. In *Gulliver's Travels*, Swift shows how the *taste* for cracking open an egg on its one (and

Although scholars disagree over the precise definition of tolerance, American society generally agrees about what tolerance means and what it should mean. Put simply, Americans believe that tolerance requires people to put up with other people's tastes, wants, beliefs, speech, and sometimes, public acts.[14] This conventional definition of putting up with distasteful behavior[15] represents various empirical assumptions about individual behavior. More importantly, it represents normative assumptions about how individuals should behave.[16]

The standard liberal conception of tolerance consists of two main components, each of which is a normative requirement for regarding behavior as tolerant. First, the conventional conception requires the tolerator to disapprove of others' views, beliefs or behavior.[17] This may be called the requirement of *disapproval.*[18] Most liberal theories maintain that tolerance should only apply to those situations in which the tolerating party disapproves of the conduct or speech in question.[19] According to these theories, indifference towards another is not a sufficient precondition.[20] If an individual appreciates a difference, then this individual is not considered to be tolerant. As Peter Nicholson defines it, "Toleration is the virtue of refraining from exercising one's power with regard to others' opinion or action although that deviates from one's own over something important, *and although one morally disapproves of it.*"[21] Second, the standard conception requires the tolerator to put up with others' views, beliefs, and sometimes, behavior.[22] This may be called the

---

apparently only) proper side can easily be conflated with the *political disagreement* over which side of the egg should be cracked open. JONATHAN SWIFT, GULLIVER'S TRAVELS (Robert Demaria ed., Penguin USA 2003) (1906).

14. Paraphrased from WEBSTER'S NEW WORLD COLLEGE DICTIONARY 1407 (3d ed. 1996). Tolerance comes from the Latin word *tolerare*, meaning *to put up with. Id.*

15. *Id.*

16. These normative assumptions are discussed in detail *infra* pages 7-15.

17. Most theorists require that the tolerating person disapprove of the beliefs or conduct of the other in order for that tolerating person to, in fact, be deemed "tolerant." *See, e.g.*, NICHOLSON, TOLERATION, *supra* note 13, at 87; HEYD, TOLERATION, *supra* note 10; JOHN HORTON, *Toleration, Morality and Harm*, *in* ASPECTS OF TOLERATION, *supra* note 13; JOHN HORTON, *Toleration as a Virtue*, *in* TOLERATION, *supra* note 10.

18. "Disapproval" is the term used in this article to encapsulate the liberal requirement that the tolerator in fact disapprove of the other party's views. *See* sources cited *supra* note 17.

19. *See* sources cited *supra* note 17.

20. *See* sources cited *supra* note 17.

21. NICHOLSON, TOLERATION, *supra* note 13, at 87 (emphasis added).

22. John Stuart Mill's *On Liberty* is a restatement of the general social consensus about what it means to be tolerant, which is, to put up with others, so long as there is no direct harm.

requirement of *noninterference*.[23] Liberal theories of tolerance that only require disapproval and noninterference may be called *negative* theories of tolerance.[24] These theories are negative because they do not require affirmative behavior on the part of the tolerator other than forbearance.[25] This is not to suggest, however, that forbearance is an easy task, but simply that it is the only task.

The descriptive quality so frequently attributed to tolerance, that tolerance is restraint, is a reflection of a central empirical assumption underlying most liberal theory. This central assumption is that humanity is composed of autonomous individuals with separate, though shared, desires, wants, and interests.[26] While selfhood and individual autonomy appear to be uncontroversial empirical assumptions, they are not. The idea that individuals conceptualize themselves as individual units seems readily apparent, but the reality of that individuality is quite different.[27] Buddhism, for example, does not conceptualize people in this atomized manner.[28] Indeed, there is

---

The liberal roots of this consensus will be discussed *infra* pages 13-18. *See* MILL, ON LIBERTY, *supra* note 2; HOBBES, LEVIATHAN, *supra* note 2; LOCKE, LETTER ON TOLERATION, *supra* note 2; LOCKE, ESSAY CONCERNING TOLERATION, *supra* note 2. Contemporary scholarship on tolerance also assumes that the tolerator must put up with objectionable speech and conduct. *See* sources cited *supra* note 17.

23. "Noninterference" is the term used in this article to encapsulate the liberal requirement of putting up with objectionable behavior. *See* sources cited *supra* note 17.

24. The use of the term "negative tolerance" in this article is borrowed from Isaiah Berlin's conception of negative liberty. *Cf.* ISAIAH BERLIN TWO CONCEPTS OF LIBERTY (1958) (distinguishing between negative and positive conceptions of liberty).

25. *See* sources cited *supra* note 17.

26. *See supra* notes 2-25.

27. The empirical debate over whether humans are individual units will remain an important issue throughout our discussion; it would be presumptuous, however, to say we can resolve it. It may just be that the issue is irresolvable. Anthropology, philosophy, biology, physics, psychology, religion, and other traditions provide ample support for divergent conceptions of human nature, individuality, and autonomy. Physicists, anthropologists, philosophers and theologians cannot agree on the empirical criteria. The physicist would want to make claims about the molecular nature of human beings, the anthropologist would want to emphasize customs and rites, the philosopher would likely be concerned with epistemological matters, and the theologian, at least those in the Judeo-Christian-Islamic tradition, would be concerned with metaphysical issues relating to God. Science might support the description of humans as sub-components of a larger collective. The fact that humans are physically composed of the same chemicals and compounds that were used to create other individuals, and the fact that energy and mass can neither be created nor destroyed mitigates the certitude of any claim that humans have a physical autonomy. Anthropology and religion, with their emphasis on communal obligations, might also generally support the collective description. Post-Enlightenment philosophy, on the other hand, with its historic emphasis on the individual thought process, probably lends greater support to the individual description, as does rational choice scholarship, much of psychology and perhaps some aspects of evolutionary theory. *See supra* notes 28-34 and accompanying text.

28. A Buddhist writer summarizes the Buddhist conception:

much support for the argument that "[t]he idea that human nature is inherently and exclusively individual is itself a product of a cultural individualistic movement. The idea that the mind and consciousness are intrinsically individual did not even occur to any one for much of the greater part of human history."[29]

A corollary empirical assumption of liberal tolerance is that humanity, as a collection of autonomous individuals with the power to reason freely, generally exists in a state of conflict.[30] This argument, which is most frequently associated with Hobbes, emphasizes the impulsive and egoistic nature of individuals.[31] Most scholars in the liberal tradition, relying on this conception of humanity, argue that if people are atomized units with conflicting wants, and if resources are finite and limited,[32] then the only way to respect these different and limited wants is to require people to exercise restraint.[33] Negative tolerance is steeped in the pessimism of the Hobbesian conception of humankind and thus sees conflict as inevitable.[34]

> When the Buddha confronted the question of identity on the night of his enlightenment, he came to the radical discovery that we do not exist as separate beings. He saw into the human tendency to identify with a limited sense of existence and discovered that this belief in an individual small self is a root illusion that causes suffering and removes us from the freedom and mystery of life.

JACK KORNFIELD, A PATH WITH HEART 199 (1993). Similarly, as Buddhist scholar Nancy Wilson Ross writes:

> In Buddhism the idea of the separate self, an "ego," is considered a mere intellectual invention, not a reality but simply a convenient term for designating an ever-changing combination, or bundle, or attributes known as *skandhas*.
>
> *Skandhas*, in Buddhist thought, consist of forms, feelings, perceptions, mental formulations (ideas, wishes dreams) and consciousness. The constant interplay and interconnection among the *skandhas* has the effect of giving a false sense of personal identity and continuity -- whereas in truth there is no definite 'I' existing by itself, independent of the ever shifting relation among psychic and physical forces.

NANCY WILSON ROSS, BUDDHISM: A WAY OF LIFE AND THOUGHT 28 (1980).

29. JOHN DEWEY, THE QUEST FOR CERTAINTY, 18-19 (1980).

30. *See* HOBBES, LEVIATHAN, *supra* note 2.

31. *Id.*

32. This is a common auxiliary assumption under Hobbesian liberal theory. HOBBES, LEVIATHAN, *supra* note 2.

33. Much of social contract theory, particularly Hobbesian and Lockean theory, is based on the premise that without legal norms requiring restraint, these conflicting wants could not be resolved in a peaceful manner. *See, e.g.*, HOBBES, LEVIATHAN, *supra* note 2; LOCKE, LETTER ON TOLERATION, *supra* note 2; LOCKE, ESSAY CONCERNING TOLERATION, *supra* note 2; RAWLS, THEORY OF JUSTICE, *supra* note 2.

34. *See* sources cited *supra* note 33.

The negative conception of tolerance also relies on related normative claims about how societies can best address this Hobbesian empirical assumption. The empirical and normative assumptions are incestuous and thus difficult to divorce. The liberal position that individualism and autonomy are the paramount virtues of a just society is an integral part of negative tolerance.[35] The requirements of noninterference and disapproval are merely by-products of the normative position that individuals are most fully realized when they possess the freedom to reason and act autonomously; this is the bedrock of liberal justice.[36] It is important to recognize that noninterference and disapproval are meaningless concepts without the liberal empirical assumptions about individuality and conflict, and the liberal normative assumptions about the value of autonomy and individualism. The ultimate theoretical success of negative tolerance lies in its ability to demonstrate the merit of these assumptions. As Bernard Williams states, "if [negative] toleration as a practice is to be defended in terms of it being a value, then it will have to appeal to substantive opinions about the good, in particular, the good of individual autonomy."[37]

---

35. Liberalism is not a monolithic tradition. *Compare, for example*, LOCKE, LETTER ON TOLERATION, *supra* note 2 *with* RAWLS, THEORY OF JUSTICE, *supra* note 2. But what ties most liberal theories together are the normative and empirical claims concerning autonomy and individuality. It is important at the outset to briefly point out two basic categories of liberal thought, each of which justifies the liberal values of autonomy and individualism in different ways. *Deontological liberals*, such as Kant and Rawls, believe that the greatest human capacity is to freely reason and make decisions autonomously. RAWLS, THEORY OF JUSTICE, *supra* note 2, at 22-34. Human dignity, according to deontological liberals, resides in making autonomous decisions, *even when the consequences of those decisions are not beneficial to the actor. Id. Utilitarian liberals*, like Mill, also believe that autonomous decision-making is the foundation of human dignity. *Id.* However, unlike deontological liberals, utilitarian liberals believe that autonomy is a core value *because* of its beneficial consequences. RAWLS, THEORY OF JUSTICE, *supra* note 2, at 22-34. For utilitarians, autonomy is generally the highest social value because it generally leads to the greatest collective good. *See, e.g.*, MILL, ON LIBERTY, *supra* note 2. Thus, for deontological liberals, the right (autonomous individual action) precedes the good, but for utilitarian liberals the good precedes this same right. RAWLS, THEORY OF JUSTICE, *supra* note 2, at 22-34.

36. David Heyd argues that tolerance rests in part on the principle of the "intrinsic value of individual integrity." HEYD, TOLERATION, *supra* note 10, at 13. Heyd's argument draws from Kant and Rawls, as well as most of liberal thought on the subject. Kant writes that in order for humans to be most fully realized, they must "[h]ave courage to use [their] *own* understanding!" KANT, POLITICAL WRITINGS, *supra* note 2, at 54. John Rawls agrees: "Kant held, I believe, that a person is acting autonomously when the principles of his action are chosen by him as the most adequate possible expression of his nature as a free and equal rational being." RAWLS, THEORY OF JUSTICE, *supra* note 2, at 252.

37. BERNARD WILLIAMS, *Auto-da-Fé: Consequences of Pragmatism*, *in* READING RORTY: CRITICAL RESPONSES TO PHILOSOPHY AND THE MIRROR OF NATURE AND BEYOND 25 (Alan Malachowski ed., 1990). I qualified Bernard Williams' quote by adding the word

It is easy to see why restraint (noninterference) is a virtue in negative theories. At the very least, under circumstances in which an angry "tolerator" wants to beat another with a pipe, restraint is the more virtuous course. The more troubling requirement is disapproval. Why do most negative theories insist that individuals disapprove of a behavior in order for them to be considered tolerant?[38] The vast majority of liberal theorists claim that tolerance should only apply to those situations in which the tolerating party disapproves of the conduct or speech in question.[39] One possible reason for this claim lies in the liberal view that it is morally right for individuals to disapprove of others because they hold views that are either immoral or antithetical to their own.[40] The highest form of liberty, according to John Stuart Mill, consists of liberty of "the inward domain of conscience"[41] and the freedom of "pursuing our own good in our own way."[42] Mill frequently argued that humanity's greatest virtue is its protection of the "liberty of thought and feeling" and the "absolute freedom of opinion and sentiment on all subjects."[43]

Negative theories of tolerance assume that it is a moral virtue, if not an obligation, for individuals to live their lives according to their inner conscience.[44] Regardless of the thoughts and belief systems comprising this inner conscience, the mere possession of a conscience is often considered virtuous.[45] This freedom to think as one chooses, to freely discriminate against objectionable ideas, critically judge

---

"[negative]" because he incorrectly assumes that *all* forms of tolerance will have to be defended in terms of the value of individual autonomy. As we will see, some conceptions of tolerance do not place great emphasis on the value of autonomy.

38. *See supra* notes 13-21 and accompanying text.

39. *See supra* notes 13-21 and accompanying text.

40. *See supra* note 36 and accompanying text.

41. MILL, ON LIBERTY, *supra* note 2, at 15-16.

42. *Id.*

43. *Id.*

44. John Locke claims that it is a moral sin for individuals not to live their lives according to their inner consciences or to arrive at their own views about what is just. *See* LOCKE, ESSAY CONCERNING TOLERATION, *supra* note 2, at 189 (". . . if God . . . would have men forced to heaven, it must not be by the outward violence of the magistrate on men's bodies, but the inward constraints of his own spirit on their minds, which are not to be wrought on by any human compulsion."); LOCKE, LETTER ON TOLERATION, *supra* note 2, at 395 ("[T]rue and saving religion consists in the inward persuasion of the mind, without which nothing can be acceptable to God.").

45. LOCKE, ESSAY CONCERNING TOLERATION, *supra* note 2, at 189 (". . . men must in this necessarily follow what they themselves thought best, since no consideration could be sufficient to force a man from or to that which he was fully persuaded was the way to infinite happiness or infinite misery."). *See also* RICHARDS, TOLERATION, *supra* note 5 (arguing that the right to conscience is a good in itself).

different conceptions of the good, and challenge grossly immoral individuals,[46] seems as though it should be an unquestionable freedom, but on closer examination, there are reasons to question this premise. Some eastern religions, such as Buddhism and Hinduism, teach that it is unhealthy and unjust for individuals to disapprove of others' views merely because these views are antithetical or even immoral.[47] The state of disapproval, although unavoidable at times, is a state that many devout Buddhists and Hindus train much of their lives to avoid.[48] It would be foolish to argue that individuals should not have inner consciences. However, it is important to recognize that many religious traditions suggest that having an inner conscience is virtuous, but only as long as it fits within the moral parameters of other values, like recognizing the inherent value of others[49] or "loving thy neighbor."[50] Negative theories of tolerance place personal autonomy upon a pedestal, thus giving the act of disapproval a certain moral status.[51]

Although the requirement of noninterference is less controversial than the requirement of disapproval, noninterference is based on normative values that are also troubling. Negative theories begin with a strong presumption that interference with an individual's mind or body must be justified.[52] To borrow from physics, as Hobbes

---

46. *See, e.g.*, LOCKE, LETTER ON TOLERATION, *supra* note 2.

47. The writings of Buddhist scholar Thich Nhat Hanh are instructive in this regard. For those who are unfamiliar with Thich Nhat Hahn, he is a famous Buddhist monk who has written extensively on Buddhism, fought against the Vietnam War, and was nominated for the Nobel Peace Prize by Martin Luther King. Throughout his numerous works, Thich Nhat Hahn has stressed the importance of thinking deeply about the ephemeral nature of difference and the problems that result from seeing others' views as being both distinct and antithetical from one's own. THICH NHAT HAHN, LOVE IN ACTION (1993); THICH NHAT HAHN, LIVING BUDDHA, LIVING CHRIST (1995); THICH NHAT HAHN, THE HEART OF THE BUDDHA'S TEACHING (1998). *See also* KORNFIELD, A PATH WITH HEART, *supra* note 28; ROSS, BUDDHISM: A WAY OF LIFE, *supra* note 28, at 28; Ruth Colker, *Feminism, Theology and Abortion: Toward Love, Compassion and Wisdom*, 77 CAL L. REV. 1011-75 (1989) [hereinafter, Colker, *Feminism*].

48. *See* sources cited *supra* note 47 and accompanying text. *See generally The Dhammapada* (1967); *The Bhagavad Gita* (1985).

49. *See* sources cited *supra* note 48.

50. This reference is to Jesus Christ's commandment of brotherly/sisterly love. "A new commandment I give unto you, That ye love one another; as I have loved you, that ye also love one another." *John* 13:34 (King James) (unless otherwise noted, all references to the Bible are taken from *The Bible* (*Authorized King James Version*) (Robert Carroll & Steven Prickett eds., 1997)).

51. *See supra* notes 36-44 and accompanying text.

52. The central premise of liberalism is that autonomy -- the right not to be interfered with -- is the essential feature of humanity. Mill, for example, argues that "[t]he only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself,

and others who view individuals as atoms do, the individual at rest -- that is without the gravitational pull of others' morality -- is the natural state of affairs.[53] Therefore, interference is unnatural and must be explained.[54]

The principle of noninterference rests on the values of autonomy and freedom, and if those values are called into question, so too is the negative requirement of noninterference.[55] Consider how a liberal would answer the following question: should a superior moral being, like God or a human saint, be allowed to encroach upon an individual's autonomy for the sake of improving that person's well-being? If Millian liberalism is taken seriously, then as long as the individual is not causing herself or another any life-threatening harm, the superior being should not be allowed to encroach on their autonomy.[56] This is so even though the encroachment improves that individual's well-being.[57] Liberalism considers autonomy and individualism good in themselves and thus they are given a paramount moral status.[58]

When a scholarly argument describes a theory as a *negative* theory, invariably there is a positive or affirmative counterpart.[59] Before developing a full critique of the negative conception of tolerance, it is important to briefly introduce what one might call the

---

over his own body and mind, the individual is sovereign." MILL, ON LIBERTY, *supra* note 2, at 12-13. *See also* HOBBES, LEVIATHAN, *supra* note 2, at 91-111 (outlining broad political norms prohibiting society from interfering with individuals); LOCKE, LETTER ON TOLERATION, *supra* note 2 (arguing that the sovereign has no right to interfere with worship of its Christian citizens).

53. Hobbes writes:

> The Right of Nature, which Writers commonly call *Jus Naturale*, is the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing, which in his own Judgement, and Reason, he shall conceive to be the aptest means thereunto.
>
> By Liberty, is understood, according to the proper signification of the word, the absence of externall Impediments: which Impediments, may oft take away part of a mans power left him, according as his judgement, and reason shall dictate to him.

HOBBES, LEVIATHAN, *supra* note 2, at 91.

54. Hobbes suggests that the interference with a man's natural right to preserve his life, liberty, and property is in most measures unnatural. *Id.*

55. MILL, ON LIBERTY, *supra* note 2, at 12-13. *See also* HOBBES, LEVIATHAN, *supra* note 2, at 91-111; LOCKE, LETTER ON TOLERATION, *supra* note 2.

56. *See supra* note 5.

57. *Id.*

58. *See supra* notes 36-44 and accompanying text.

59. *Cf.* ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY (1958).

affirmative conception of tolerance.[60] Affirmative theories of tolerance propose a different standard for assessing the merits of tolerant behavior.[61] They require that the tolerator respect, recognize or accept the other party and his or her behavior.[62] Affirmative theories of tolerance require the tolerator to refrain from disapproval, while respecting or recognizing the inherent value in another's speech or actions. Contrary to negative theories, affirmative ones are deeply skeptical of foundational differences, which lead to disapproval and states of mind in which noninterference is the last resort, short of violence.[63] Affirmative theories conceptualize tolerance as a practice of avoiding intense disapproval of others.[64] A tolerator may build up respect for another viewpoint prior to the onset of a disagreement, and thus, intense disapproval may never arise.[65] Negative theories generally hold that there is an inverse relationship between the intensity of disapproval and the ability to restrain.[66] In contrast, affirmative theories suggest that through respect, recognition and acceptance, an intense disapproval may be overcome prior to needing to exercise restraint, thus mitigating the difficulty in exercising restraint.[67]

---

60. *See supra* note 24.

61. The theory of tolerance advocated in this article, *tolerance as understanding*, is an example of an affirmative theory of tolerance. Similarly, religious bases of tolerance, for example, a Christian notion of "loving thy neighbor" is an affirmative conception of tolerance. The affirmative/negative distinction, however, is not a strict dichotomy. Rather, it is best thought of as a continuum. For example, as we will explore later in this section, liberals such as Rawls and Kant present a "more affirmative" conception of tolerance than Mill, Locke or Hobbes. *See infra* Part II.A-B.

62. The requirement of respect, recognition or acceptance is discussed *infra* Part II, in the context of *tolerance as understanding*.

63. *See* discussion of *tolerance as understanding infra* Part II.

64. *See supra* notes 47-50 and accompanying text.

65. Many scholars write of tolerance as if negative tolerance is the only plausible conception of tolerance. One author writes:

> First, tolerance is not the same as acceptance. Tolerance requires, with regard to freedom of expression, that we respect the right of people to express their views; it does not require that we uncritically accept those views. It would, in fact, be a very foolish form of tolerance which accepted all viewpoints as being equally valid.

MICHAEL CORBETT, POLITICAL TOLERANCE IN AMERICA 7 (1982). *See also* NUNN, ET AL., TOLERANCE FOR NONCONFORMITY, *supra* note 6 (suggesting that people might be prejudiced toward a certain group, yet because they respect their civil liberties, they are tolerant).

66. *See* sources cited *supra* note 17.

67. Furthermore, affirmative theories would not permit certain grounds for disapproval. If disapproval relates solely to a particular characteristic beyond the reasonable control of the party (for example skin color or gender), it violates the *de minimis* requirement of recognition and respect, because there is nothing that party can do to change the "offensive quality." The disapproval does not relate to a behavior that the tolerated party can change. Negative theories

Negative and affirmative conceptions of tolerance will be explored throughout this article. The starting point for a discussion about negative tolerance is John Stuart Mill's *On Liberty*, as it aptly articulates the most common justifications for negative tolerance.[68] Mill's commitment to liberal tolerance results from his empirical assumption that individual character is essential for the progress of society.[69] Mill claims that, all things being equal, strong natures are better than weak ones.[70] It is not apparent, however, why this should be so. Strong natures may be less likely to believe they are wrong, more inclined to harshly question others, and less accepting of views differing from their own.

John Locke, in line with the Millian view, suggests that individuals must be allowed to think for themselves and practice their own inner religious beliefs, because without this internal individualized approach to faith, the individual cannot attain salvation.[71] Like Mill, Locke justifies tolerance in terms of the utilitarian benefits of conscience.[72] Locke suggests that it is better to have an individual conscience, even one that is misdirected, than to

---

claim that a tolerator should refrain from interfering with others. What this generally means is that the tolerator should not interfere with the *other's behavior or views*. Even if we were to accept the negative requirement of noninterference, it loses its meaning when applied to situations involving immutable characteristics. What is the *thing* that the tolerator is not interfering with, a person's manifestation of a skin color? A black person is not engaging in the behavior of having black skin. In other words, if the other party cannot change the grounds for disapproval, then the "tolerant" party cannot be considered to be exercising restraint with respect to a behavior or view; thus they cannot be deemed tolerant. This is analogous to the "immutable characteristics" concept in equal protection jurisprudence. *See* Weber v. Aetna Cas. & Sur., 406 U.S. 164 (1972) (holding that race and gender are immutable characteristics and thus legislation based on these characteristics must be closely scrutinized).

68. *See* MILL, ON LIBERTY, *supra* note 2.

69. Mill writes:

> A person whose desires and impulses are his own -- are the expression of his own nature . . . -- is said to have a character. One whose desires and impulses are not his own, has no character, no more than a steam-engine has character. If, in addition to being his own, his impulses are strong, and are under the government of a strong will, he has an energetic character. Whoever thinks that individuality of desires and impulses should not be encouraged to unfold itself, must maintain that society has no need of strong natures -- is not the better for containing many persons who have much character -- and that a high general average of energy is not desirable.

Id. at 70.

70. *Id.*

71. *See* sources cited *supra* notes 45-47. *See also* Amy R. McReady, *The Ethical Individual: An Historical Alternative to Contemporary Conceptions of Self*, 90 AM. POL. SCI. REV. 90-102 (1986) (explaining the importance of individual conscience to Locke's theories).

72. *See* sources cited *supra* notes 45-47 and accompanying text.

have no strong conscience at all.[73] According to Locke, without a strong individual conscience, an individual has no prospect of attaining salvation.[74] For example, if a good-natured individual allows another to decide which religion the individual should practice and in what manner, the good-natured individual will not be saved because that individual is not thinking about God for him or herself. According to this foundational premise of Lockean liberal theory, allowing others to correctly decide matters of faith for you is as great a sin as wrongly deciding these matters for yourself.[75] Disapproval is based on the Hobbesian and Millian empirical assumption that difference and conflict are inherent human qualities that, far from being primarily harmful, are necessary for human advancement.[76] Disapproval is more than just an empirical assumption. It is an acceptance of this reality and a normative argument in favor of difference and character.

It can be argued, however, that disapproval has no moral status or normative underpinning. It can further be argued that requiring disapproval is merely a practical way of identifying circumstances in which exercising restraint is more virtuous than not exercising restraint.[77] In other words, disapproval is not a virtue, but a *condition precedent* signaling the need for restraint.[78] According to this argument, disapproval is a means for assessing the difficulty in exercising restraint. Moreover, it assumed that there is an inverse relationship between the intensity of the disapproval and the ability to restrain.[79] In other words, the more intolerable the behavior, the less likely the tolerator will be able to exercise restraint.

Although there is some merit to this argument, it must be recognized that liberals, as a matter of moral necessity, require people to disapprove of one another in order to be deemed virtuous.[80]

---

73. *See* sources cited *supra* notes 45-47 and accompanying text. *See also* RICHARD VERNON, THE CAREER OF TOLERATION: JOHN LOCKE, JONAS PROAST, AND AFTER (1997) [hereinafter VERNON, THE CAREER OF TOLERATION]; SUSAN MENDUS, TOLERATION AND THE LIMITS OF LIBERALISM (1989) [hereinafter MENDUS, THE LIMITS OF LIBERALISM].

74. *See supra* notes 45-47 and accompanying text.

75. *See supra* notes 45-47 and accompanying text.

76. For Mill, human society advances, in part, through our right to judge and disapprove of others' beliefs. MILL, ON LIBERTY, *supra* note 2, at 67-78. For Locke, we attain salvation through our unfettered right to search our own consciences. LOCKE, ESSAY CONCERNING TOLERATION, *supra* note 2, at 186-93.

77. *See, e.g.*, HEYD, TOLERATION, *supra* note 10.

78. *Id.*

79. *Id.*

80. LOCKE, ESSAY CONCERNING TOLERATION, *supra* note 2. *See also supra* note 21 and accompanying text.

Because of the emphasis on autonomy and reason, liberals place a higher moral status on the act of critically disapproving of some moral claim, but exercising restraint, than the act of never being judgmental in the first place.[81] Under liberal tolerance, a racist who disapproves of certain people based solely on their skin color may be commended for his restraint, while those who are truly incapable of disapproving based on race are not even conceptualized as "tolerant."[82] Paradoxically, a person who is accepting of different views or is incapable of racism is deemed less tolerant than the racist.[83] The reason for this is that liberals require individuals to have character and to exercise critical judgment about fundamental matters.[84] Disagreement is not only unavoidable, according to this perspective, it is a necessary virtue for discriminating between moral and immoral beliefs and promoting individual character, as well as social progress.[85] The requirement of disapproval is not just a pragmatic requirement needed to give meaning to restraint. Rather, it is a moral extension of the liberal premise that regardless of the substance of a person's views, that person should have the right to exercise his or her innermost thoughts and personal conscience.[86]

B. Mill, Locke, Kant, and Rawls

It is to Mill, Locke, Kant and Rawls that liberal tolerance is most in debt. John Stuart Mill's *On Liberty* presents a negative conception of tolerance closely paralleling the "Live and Let Live" credo.[87] Mill makes numerous utilitarian arguments for why one

81. *See* sources cited *supra* notes 41-44 and accompanying text.

82. JOHN HORTON, *Toleration as a Virtue*, *in* TOLERATION, *supra* note 10 (questioning the virtue of describing the self-restrained bigot as tolerant).

83. *Id.*

84. *See supra* note 36 and accompanying text.

85. *See supra* notes 36, 41-45, 52-56 and accompanying text.

86. *See supra* notes 36, 41-45, 52-56 and accompanying text.

87. Early on in his essay, Mill gives his reader a cogent synopsis of his essay:

should tolerate difference. First, he claims that suppression of diverse viewpoints deprives humanity of potential truths, and that given the individual's propensity for fallibility, suppression of truths will be all too frequent a phenomenon.[88] Second, he claims that even if the viewpoint is wrong, immoral, or untruthful, its suppression limits our ability to see the clarity of our own truths through a thoughtful examination and juxtaposition of falsehoods.[89] Individuals, according to this argument, cannot appreciate a truth to its full extent by merely accepting its validity. Individuals must experience it by wading through the truths and untruths of an issue.[90] In a similar vein, it is often the case that wrong beliefs will consist of part truths, which may complement one's partially true beliefs. Suppression of these beliefs keeps one from realizing the entirety of his or her own truths. Third, Mill posits the provocative idea that suppression and social intolerance increase the resiliency and tenacity of faulty ideas that would otherwise die out.[91] That suppression may actually strengthen the resolve of repressed ideas and raise otherwise unpersuasive outsiders to the status of courageous martyrs.[92] According to Mill, there is less to fear by permitting individuals to publicly articulate unpersuasive untruths, than outright suppressing them.[93]

> The object of this Essay is to assert one very simple principle, . . . that 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. That 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. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right . . . . The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

MILL, ON LIBERTY, *supra* note 2, at 12-13.

88. *Id.* at 21 (". . . the opinion which it is attempted to suppress by authority may possibly be true.").

89. *Id.* at 25 (". . . [t]he steady habit of correcting and completing his own opinion by collating it with those of others, so far from causing doubt and hesitation in carrying it into practice, is the only stable foundation for a just reliance on it . . . .").

90. *Id.*

91. *Id.* at 38-39.

92. *Id.*

93. Even though Mill states that it is less dangerous to tolerate untruthful ideas, than to suppress them, he does not unequivocally argue, as many often wrongly suggest he does, that truth will prevail in a free marketplace for ideas. Rather, he writes, "It is a piece of idle sentimentality that truth, merely as truth, has any inherent power denied to error, of prevailing

Although eloquent and at times persuasive, Mill's theory raises a number of concerns. Mill conceptualizes people as individual units with firmly established "rights of noninterference."[94] These rights of noninterference are not, however, without significant cost. The fact that an individual has a right to prohibit some other individual from interfering with him or her, also means that the other individual is prohibited from interacting with him or her, even though they might both mutually benefit from that interaction. Stated differently, Mill prioritizes the right of noninterference over the right of the interfering party to engage or commune with the party exercising his or her right of noninterference.[95] There is no principled reason to believe that one right should be prioritized over the other unless circumstances exist in which engagement outweighs noninterference.[96]

John Locke promotes a similar conception of tolerance, though based on different reasons. Whereas Mill was concerned more with freedom of expression and speech, Locke, a devout Puritan, was writing at a time when religious intolerance was the utmost issue, and therefore was more concerned with religious toleration.[97] Locke's entire theory of tolerance rests on the notion that individuals must be free to worship as they choose, so that they may pursue eternal salvation in the way they see fit.[98] In *An Essay Concerning*

---

against the dungeon and the stake." MILL, ON LIBERTY, *supra* note 2, at 34. *See also* KARL POPPER, *Toleration and Intellectual Responsibility*, *in* ON TOLERATION (Susan Mendus & David Edwards eds., 1987) (agreeing with Mill's argument that a free marketplace may not necessarily lead to truth).

94. MILL, ON LIBERTY, *supra* note 2, at 34. Mill's maxim is: "The individual is not accountable to society for his actions, insofar as these concern the interests of no person but himself." *Id.* at 108.

95. *See* discussion *infra* Part II giving reasons why moral obligation of engagement may outweigh noninterference.

96. This Millian view of noninterference is prevalent in constitutional law, as well as American political culture more generally. It would be thought absurd if a municipality passed an ordinance requiring individuals to listen politely for a reasonable amount of time to a canvassing Jehovah's Witness who rings one's doorbell. In fact, even though freedom of speech is a favored liberal value, where it encroaches upon the individual's private bubble, of which one's home is an extension, it can be tightly regulated. *See, e.g.*, Martin v. City of Struthers, 319 U.S. 141 (1943).

97. David Wootton, *Introduction* to JOHN LOCKE, THE POLITICAL WRITINGS OF JOHN LOCKE 7-122 (David Wootton ed., 1993) [hereinafter Wooton, *Introduction to* JOHN LOCKE]. *See also* VERNON, THE CAREER OF TOLERATION, *supra* note 73; MENDUS, THE LIMITS OF LIBERALISM, *supra* note 73; LOCKE, ESSAY CONCERNING TOLERATION, *supra* note 2; LOCKE, LETTER ON TOLERATION, *supra* note 2.

98. Locke writes:

> That in speculations and religious worship every man hath a perfect, uncontrollable liberty which he may freely use, without, or contrary to the magistrate's command, without any guilt or sin at all; provided always that

Toleration, Locke states that opinions relating to the manner in which God is to be worshiped should be entitled to "complete" toleration.[99] Locke argued that as a matter of law, the magistrate's duties were limited to civil matters, such as the preservation of peace.[100] The magistrate's duties did not extend to an individual's relationship with God.[101] In addition to lacking this *de jure* power over heavenly matters, the magistrate also lacked the *de facto* power.[102] In other words, if the magistrate coerced his subjects into making an improper decision regarding the proper manner of worship, he had no ability to rectify matters in the other world.[103] Also, because Locke believed that the magistrate was just as fallible as his subjects, and equally powerless with respect to rectifying mistakes in the other world, the magistrate could not properly force his subjects to accept a particular conception of Christianity.[104] Hence, Locke defends tolerance on the basis that the magistrate is incapable of truly persuading someone to be faithful.[105]

> it be all done sincerely and out of conscience to God, according to the best of his knowledge and persuasion.

LOCKE, ESSAY CONCERNING TOLERATION, *supra* note 2, at 190-91.

99. *Id.* at 202-03. These opinions do not include opinions denying the existence of God, as Locke believed that one could not be an atheist and at the same time be moral. Locke considered God the foundation of all morality and a belief in God was required to be a moral citizen, that is, one who could uphold contracts and swear oaths. Toleration extended to the *manner* in which people worshiped -- their formal ceremonies, the time and place of their worship and their beliefs about matters not fundamental to Christianity or the existence of God. *Id.*

100. *Id.* at 186-87.

101. *Id.* Locke argues that it would be an "absurdity if not a contradiction" for a Christian to think of a monarch as having an absolute power with respect to matters relating to God. Locke claims that the power of the magistrate is limited to the preservation and welfare of his subjects *on earth*. *Id.* *See also* LOCKE, LETTER ON TOLERATION, *supra* note 2, at 394-96.

102. *See supra* note 101 and accompanying text.

103. LOCKE, ESSAY CONCERNING TOLERATION, *supra* note 2, at 188 ("Whatever evil I suffer by obeying him in other things he can make me amends in this world, but if he forces me to a wrong religion he can make me no reparation in the other world . . . ."). *See also* LOCKE, LETTER ON TOLERATION, *supra* note 2, at 394-96.

104. LOCKE, ESSAY CONCERNING TOLERATION, *supra* note 2, at 188 (The magistrate has "no more certain or more infallible knowledge of the way to attain [salvation] than I myself, where we are both equally inquirers, both equally subjects, and wherein he can give me no security that I shall not, nor make me any recompense if I do, miscarry."). *See also* LOCKE, LETTER ON TOLERATION, *supra* note 2, at 394-96.

105. Locke's theory of tolerance is a puzzling one, in part, because he is arguably the father of modern liberalism, yet his views on tolerance lack a true coherent liberal structure. Wootton, *Introduction* to JOHN LOCKE, *supra* note 97, at 7, 9-12, 38-41. Unlike most liberal theories of tolerance (Mill's for example), Locke does not have a compelling argument for why tolerance is a *moral liberal virtue*. As Susan Mendus notes, it is not so much that tolerance is a virtue, but that intolerance is unnecessary, because coercing individuals into a

Mill and Locke's theories of tolerance fall squarely within the negative conception of tolerance. But other liberal theories, such as those of Immanuel Kant, John Rawls, and Ronald Dworkin, overlap with affirmative conceptions of tolerance.[106] Kant, Rawls, and Dworkin's theories share more in common with affirmative conceptions because they emphasize the concept of equality.[107] Therefore, they regard respect and recognition as important components of a just society.[108] Tolerance, according to Kant, Rawls, and Dworkin is not just a function of the individual's right to conscience or autonomy, as Locke and Mill might contend, but a function of the individual's right to be treated fairly and equally.[109]

Kant's theory of morality grows out of his famous categorical imperative: reason dictates that individuals should act according to just laws that can be universally willed. Kant states:

> No-one can compel me to be happy in accordance with his conception of the welfare of others, for each may seek his happiness in whatever way he sees fit, so long as he does not infringe upon the freedom of others to pursue a similar end which can be reconciled with the freedom of everyone else within a workable general law

---

religious belief, even the correct one, will not allow them to achieve salvation. MENDUS, THE LIMITS OF LIBERALISM, *supra* note 73; LOCKE, ESSAY CONCERNING TOLERATION, *supra* note 2; LOCKE, LETTER ON TOLERATION, *supra* note 2. Also confounding the analysis of Locke is his great skepticism about the ability of individuals to find the true path to salvation. VERNON, THE CAREER OF TOLERATION, *supra* note 73. Tolerance, for Locke, is necessary because leaders will more times than not lead individuals towards an incorrect path, which results in eternal damnation. *Id.*

106. DWORKIN, TAKING RIGHTS, *supra* note 2; DWORKIN, LAW'S EMPIRE, *supra* note 2; KANT, POLITICAL WRITINGS, *supra* note 2; RAWLS, THEORY OF JUSTICE, *supra* note 2; RAWLS, POLITICAL LIBERALISM, *supra* note 2.

107. Kant's categorical imperative qualifies autonomy in terms of equality, KANT, POLITICAL WRITINGS, *supra* note 2, at 74. Dworkin's provides a similar qualification:

> The central concept of my argument will be the concept not of liberty but of equality . . . . Government must not only treat people with concern and respect, but with equal concern and respect. It must not distribute goods or opportunities unequally on the ground that some citizens are entitled to more because they are worthy of more concern.

DWORKIN, TAKING RIGHTS, *supra* note 2, at 272-73. Rawls also qualifies autonomy in a similar fashion. *See generally* RAWLS, THEORY OF JUSTICE, *supra* note 2.

108. KANT, POLITICAL WRITINGS, *supra* note 2, at 74; DWORKIN, TAKING RIGHTS, *supra* note 2, at 272-73; RAWLS, THEORY OF JUSTICE, *supra* note 2.

109. *See* sources cited *supra* note 108.

> -- i.e., he must accord to others the same right as he enjoys himself.[110]

Kant claims that the capacity to decide one's conception of the good, regardless of what that choice is, is the highest expression of humankind.[111] By obeying the universal laws of reason, rather than perceptions of individual benefits, a person strives to be a fully realized, autonomous, moral creature.[112] This justification for liberal tolerance is much richer, and consequently more persuasive than either Mill's or Locke's theory, because equality tempers autonomy.[113] Kant suggests that autonomy is constrained by the value of equal concern for everyone's right to autonomy, as well as the moral concern for a duty-bound system of justice.

John Rawls, in his seminal work, *A Theory of Justice*, builds on Kant's views of equality in fashioning a theory of justice.[114] Rawls' theory of justice is based on the mental construct of the "original position,"[115] a hypothetical initial situation in which rational individuals agree on the principles of justice.[116] Individuals in this social contract situation choose their principles of justice without knowing their social positions, material wealth, natural attributes, or other features of their identity.[117] Because individuals in the original position do not know what their religious and moral views will be, or whether they will be a member of a majoritarian religion, political, or ethnic group, they agree in the original position to protect rights such as freedom of conscience, religion, and speech.[118] Tolerance is

---

110. KANT, POLITICAL WRITINGS, *supra* note 2, at 74.

111. *Id.*

112. Kant writes:

> [Man] must indeed make every possible conscious effort to ensure that no *motive* derived from the desire for happiness imperceptibly infiltrates his conceptions of duty. To do this, he should think rather of the sacrifices which obedience to duty (i.e. virtue) entails than of the benefits he might reap from it, so that he will comprehend the imperative of duty in its full authority as a self-sufficient law, independent of all other influences, which requires unconditional obedience.

Id. at 64.

113. DWORKIN, TAKING RIGHTS, *supra* note 2, at 266-78. *See also* RICHARDS, TOLERATION, *supra* note 5, at 55-57. The arguments for why a tolerance where equality tempers autonomy is normatively more desirable will be developed more fully in the next section. *See infra* Part II.B.

114. RAWLS, THEORY OF JUSTICE, *supra* note 2.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

justified on the grounds that it allows individuals, within reasonable bounds, to pursue their own conception of the good, so that they may have the opportunity to fulfill their highest moral obligation.[119]

In *Political Liberalism*, the follow-up to *A Theory of Justice*, Rawls expands and elucidates his theory of justice as fairness.[120] Rawls' political liberalism calls for a society in which conceptions of the good are allowed to differ, but in which there is an "overlapping consensus" on the fundamental principles of justice and the fundamental structures of state.[121] Rawls tries to create a political system that ensures that there will be political consensus over fundamental matters of justice and political tolerance for matters that are less fundamental in this regard.[122] His is a sophisticated theory which nobly attempts to include everyone in a public discussion about the universal principles of justice, while preserving for each individual a very real enclave in which their religious, moral, and philosophical views can be practiced.[123] To the extent Rawls' theory is found wanting, it is due to the fact that he creates a formal division, one that is empirically untenable, between religious political morality and secular political morality.[124]

---

119. Rawls, as well as other liberal thinkers, has been criticized by communitarian thinkers for his treatment of abstracted individuals. Although not a monolithic school of thought (see for example, RUSSELL HARDIN, ONE FOR ALL 183-213 (1995)), communitarians generally claim that liberals incorrectly regard individuals as abstracted beings capable of generating their own conception of the good through a reasoning process that is disconnected from their social environment. MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (Cambridge Univ. Press 2d ed. 1998) (1982); CHARLES TAYLOR, PHILOSOPHY AND THE HUMAN SCIENCES (1985); ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY (1981). Individuals, according to Charles Taylor and Alasdair MacIntyre, are defined and constituted by their social roles as mothers, doctors, Americans, farmers, friends, etc. Their goals and understanding of the good are shaped by, if not determined by, their identification with these social roles and the cultures they live in. *Id.*

120. *See generally* RAWLS, POLITICAL LIBERALISM, *supra* note 2, at 4-22.

121. The society is one based on cooperation and the virtues of citizenship. Citizenship morally obligates individuals to be *reasonable* -- that is they must understand that principles of justice should be capable of being universalized. *Id.* at 58-72. And citizens must be *rational*, that is they must understand their own conception of the good. *Id.* at 72-77. These two principles of citizenship are the pillars on which Rawls develops his understanding of *public reason*. *Id.* at 212-54. If citizens are endowed with these capacities, they may effectively participate in a forum of public reason, a forum in which they rationally debate issues concerning constitutional matters and the principles of justice. *Id.*

122. *Id.*

123. *Id.*

124. *See, e.g.*, MICHAEL J. PERRY, LOVE AND POWER (1991) [hereinafter PERRY, LOVE AND POWER] (criticizing political liberalism for being antagonistic towards conceptions of the good based on religious morality). *See also* Gary Remer, *Humanism, Liberalism, & the Skeptical Case for Religious Toleration*, XXV POLITY No. 1, at 21, 37 (1992) ("For contemporary liberals like Rawls, religious truth lies outside the realm of common sense . . . . ").

In concluding this section, it is important to highlight the differences between the Millian brand of liberalism[125] and the Kantian-Rawlsian brand.[126] In defense of the Millian brand, political theorist Richard Sinopoli contends that Millian liberalism "grounds rights in interests and takes liberty to be the principle political value because it is so vital to advancing our interest as autonomous (or potentially autonomous beings)," whereas Kantian liberalism "grounds rights not in interests but in . . . our *status* as persons."[127] Sinopoli sides with Millian liberalism because, according to him, the Millian view does not require us to foster others' self-respect.[128] According to this reasoning, the Millian view is better because we are not concerned with self-respect, but rather with taking what we need from other individuals in order to further our own goals.[129] Like Mill and other liberals, Sinopoli supports a thick-skinned version of liberal tolerance best characterized as "Live and Let Live."[130] The sections that follow will compare this version of tolerance with a version based on norms of understanding.

II. TOLERANCE AS UNDERSTANDING

This section of the article advances *tolerance as understanding* as a theoretical device for critiquing and improving upon standard liberal accounts of tolerance. Furthermore, it addresses whether *tolerance as understanding* is a viable theory for individual moral

---

125. *See supra* pp. 16-18.

126. *See supra* pp. 20-23.

127. Richard Sinopoli, *Thick-Skinned Liberalism: Redefining Civility*, 89 AM. POL. SCI. REV. 612, 612-13 (1995).

128. *Id.* at 618-19.

129. Sinopoli writes:

> Respect for others does not require that we affirm their ends or buck up their self-esteem, only that we take them seriously and recognize that they may have something to teach us. At some further point . . . disgust, revulsion -- indeed, a full range of emotions associated with moral disapprobation -- may be in order. If we are wrongly subjected to expressions of such emotions, Mills urges us to be thick-skinned enough to carry on our plan of life against popular pressures. To fail to do so is a moral failure of timidity, not simply an understandable psychological response. Yet it is also a failure of timidity not to lend our wisest counsel to others who are too ready to conform or to challenge themselves to lead more satisfactory lives.

Id.

130. MILL, ON LIBERTY, *supra* note 2, at 12-13.

behavior. Although the theory of tolerance developed in this section shares much in common with liberal tolerance, this section will attempt to highlight the primary differences between the two theories to examine their relative strengths and weaknesses. In light of this, this section will present a stylized account of liberal tolerance, which is primarily negative in nature, and a stylized account of tolerance based on norms of understanding, which is primarily affirmative in nature. As will be discussed, the most important difference is that *tolerance as understanding* claims that compassion, empathy, humility and other values associated with understanding, are the paramount moral principles for individual behavior, whereas liberal tolerance claims that autonomy and reason are the paramount virtues. Another significant difference is that liberal tolerance generally purports to be neutral with respect to individuals' moral choices, whereas *tolerance as understanding* promotes a specific form of morality based on principles of understanding.[131] *Tolerance as understanding* is primarily grounded in mutual obligations, such as understanding, whereas liberal tolerance is primarily grounded in the rights individuals have to autonomously pursue their own conception of the good.[132]

131. It is important to briefly point out, at the onset, that those liberal thinkers that claim liberalism is a "neutral" theory of how humans may pursue their own good, strongly overstate their position. *See* SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE, *supra* note 119 (arguing that liberalism is not neutral). Liberal theories of tolerance and law derive legitimacy from claims about their neutrality with respect to an individual's pursuit of her own good. But, at best, liberalism, and the norms of law and tolerance it engenders, may only claim a *qualified neutrality*. First, liberal theories promote *substantive moral values* such as individual autonomy, personal conscience, private decision-making, free speech and other values. *Id. See also* HERBERT MARCUSE, *Repressive Tolerance*, *in* A CRITIQUE OF PURE TOLERANCE (1969). Liberalism, for example, is not neutral with respect to an individual's consensual desire to relinquish her own autonomy in exchange for a communal identity. Charles Taylor, *The Politics of Recognition in* MULTICULTURALISM: THE POLITICS OF RECOGNITION (Amy Gutterman ed., 1994). Mill, for example, claims that one cannot rightfully cede this liberty interest of autonomy. MILL, ON LIBERTY, *supra* note 2. Second, liberal procedures and norms (such as "free speech for all") that result in substantive inequalities can hardly be considered "neutral," if that term is thought to mean fair, non-arbitrary or just. Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980). If facially non-arbitrary and impartial procedures continually result in the entrenchment of an unjust status quo or result in substantive inequalities, then the claim on behalf of these procedures that they are neutral, and thus virtuous, is unsound. *Id.*

132. *See, e.g.*, *supra* notes 2-6, 36-43.

A. Defining Understanding: Religious Notions of "Ecumenical Love"

In order to gain insight into how individuals have historically justified and practiced values associated with understanding, one must first try to define the concept of ecumenical love. The definition of "love" presented here is similar to certain religious definitions of love, principally, certain forms of Buddhist and Christian "brotherly" love.[133] These religious or spiritual conceptions of love are utilized herein because, as a matter of historical practice, they are the most well defined and accessible.[134] Moreover, some people have demonstrated a reasonable capacity to live according to them.[135] This section begins with the Christian conception of love, as Christianity has been the dominant religion in America.[136] The Book of John

---

133. *See infra* notes 137-38.

134. Anthony E. Cook, *The Death of God in American Pragmatism and Realism: Resurrecting the Value of Love in Contemporary Jurisprudence*, 82 GEO. L.J. 1431, 1434 (1994) [hereinafter Cook, *Value of Love*]; STEPHEN CARTER, THE CULTURE OF DISBELIEF 23 (1993); LOCKE, ESSAY CONCERNING TOLERATION, *supra* note 2; LOCKE, LETTER ON TOLERATION, *supra* note 2.

135. Religious arguments are generally banned from academic discussions. Interestingly, however, Anthony Cook writes:

> There was a time in Western history in which a discussion of the common good independent of religious "truth" was considered ludicrous. Today, the presumption is reversed. The development of Western liberal secularism has relegated religious discourse to a subordinate status among the otherwise legitimate views of what the common good entails.

Cook, *Value of Love*, *supra* note 134, at 1434. In a similar vein, law professor Stephen Carter amusingly notes, "One good way to end a conversation -- or start an argument -- is to tell a group of well-educated professionals that you hold a political position (preferably a controversial one, such as being against abortion or pornography) because it is required by your understanding of God's will." CARTER, THE CULTURE OF DISBELIEF, *supra* note 134, at 23.

Notwithstanding the foregoing, because the greatest insights into understanding and love and the interdependent human obligations that flow from them are from religious traditions, the theory of tolerance developed in this Part draws from these traditions. I do not, however, attempt to "justify" *tolerance as understanding* using religious arguments. The reliance on religious principles should not trouble moral theorists, particularly liberal ones. In the same way that a liberal theorist might dismiss John Locke's religious views, but accept those liberal ideals that were only made possible by Locke's rigid assumptions about God and religion, a theorist may value the moral claims underlying *tolerance as understanding*, without accepting the associated implications about God and religion. LOCKE, ESSAY CONCERNING TOLERATION, *supra* note 2; LOCKE, LETTER ON TOLERATION, *supra* note 2.

136. The notion that tolerance in America may be based on mutual obligations arising from understanding was not lost on the Founders. In the Virginia Constitutional Convention of 1776, George Mason, the initial drafter of the religious liberty clause for Virginia's Constitution, proposed the following clause:

> . . . all men should enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience, unpunished and unrestrained by the magistrate, unless, under colour of religion, any man disturb the peace,

indicates that Christ said, "A new commandment I give unto you, that ye love one another; as I have loved you, that ye also love one another." Christ consistently preaches the virtues of "loving thy neighbor" throughout the New Testament.[137]

Buddhism defines "love," or the Buddhist term "loving-kindness," with a similar referent, "God's love of humans."[138] The *Dhammapada*, a Buddhist holy text, asks individuals to practice a "godlike" or "Christ-like" level of compassion: "[b]e gentle with anger, do good to evil; be generous to the miser, truthful to the liar."[139] In line with Buddhism and Christianity, the *Bhagavad Gita*, the Hindu holy text, holds that God is in everyone.[140] It states: "I am the Self in the heart of every creature."[141] Similarly, the Koran, Islam's holy text, states "[l]et the good which ye bestow be for parents, and kindred, and orphans, and the poor, and the wayfarer; and whatever good ye do, of a truth God knoweth."[142] And the *Talmud*, Jewish law, requires Jews to emulate God -- that is they are required to be merciful, just and

---

> the happiness, or safety of society. And that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.

City of Boerne v. Flores, 521 U.S. 507, 555 (1997) (O'Connor, J., dissenting) (citing Committee Draft of the Virginia Declaration of Rights, 1 Papers of George Mason 284-5 (R. Rutland ed., 1970)) (emphasis added).

137. In the Book of Matthew, we are told that Christ said:

> Thou shalt love the Lord thy God with all thy heart, and with all thy soul, and with all thy mind. This is the first and great commandment. And the second *is* like unto it, Thou shalt love thy neighbor as thyself. On these two commandments hang all the law and the prophets.

Matthew 22:37-40. *See also John* 13:34; *John* 15:13, 15:17; *Matthew* 22:37-40; *Mark* 12:30-31; *John* 4:7-16; *Romans* 13:8.

The New Jerusalem version of the Bible states Christ's command even more forcefully, "you must love one another, just as I have loved you." This famous injunction comes from the Old Testament, "thou shalt love thy neighbour as thyself." *Leviticus* 19:18. The view that humans should try to love each other *as God or Christ* loves humans, however, is an even stronger obligation. *Compare John* 13:34, *with Leviticus* 19:18.

138. Thich Nhat Hanh, writes, "When we see someone overflowing with love and understanding . . . we know that they are very close to the Buddha and to Jesus Christ." THICH NHAT HAHN, LIVING BUDDHA, LIVING CHRIST 145 (1995). *See also* THICH NHAT HAHN, LOVE IN ACTION (1993); THICH NHAT HAHN, THE HEART OF THE BUDDHA'S TEACHING 7 (1998). *See also* KORNFIELD, A PATH WITH HEART, *supra* note 28, at 7; ROSS, BUDDHISM: A WAY OF LIFE, *supra* note 28, at 28; Colker, *Feminism, supra* note 47, at 1011-75.

139. *The Dhammapada* 115 (1967).

140. *The Bhagavad Gita* (1985).

141. *Gita* 10:20. The *Gita* also teaches that individuals should be concerned with others' welfare and restrain their anger towards others. "Strive constantly to serve the welfare of the world; by devotion to selfless work one attains the supreme goal of life. Do your work with the welfare of others always in mind." *Gita* 3:19-20.

142. *The Koran* 2:215-18 (Alan Jones ed., 1994).

compassionate.[143] According to Jewish law, "[l]ove of one's fellow man which is not motivated and nourished by the realization that man was created in God's image, is doomed to failure."[144]

Based on these religious conceptions, ecumenical love may be conceptualized as a moral requirement to try to treat others with a "godlike" level of reverence and compassion. In other words, to the extent humanly possible, we should care about others, including those we do not like, as we believe God cares about us. For those who do not believe in God, love may be conceptualized as an aspirational mindset in which we should care about others in the same way that we would want a fictional or idealized god, one who is supremely compassionate and forgiving, to care about us.

Because ecumenical love and understanding are abstract concepts it is important to give these concepts some concrete human expression.[145] That is, it is important to delineate some specific individual moral obligations arising from norms of understanding. This article suggests five moral obligations that are representative of obligations under possible theories of tolerance based on understanding. These five obligations are not intended to be the only possible list of obligations. Rather, they are merely one interpretation of tolerance as the practice of understanding. The five moral obligations are *empathetic reasoning,*[146] *compassion,*[147] *sacrifice,*[148] *forgiveness,*[149] and *humility.*[150]

B. Empathetic Reasoning, Compassion, Sacrifice, Forgiveness and Humility

Empathetic reasoning requires a tolerator to empathize with the other party, that is, to identify with the concerns of the other party, as if those concerns were the tolerator's own concerns.[151] Generally, this

---

143. ZELIG PLISKIN, LOVE YOUR NEIGHBOR 143, 385, 428 (1977).

144. *Id.* at 19.

145. It is important to recognize, however, that ecumenical love and understanding are no more abstract than the liberal conception of autonomy or reason.

146. *See infra* note 151 and accompanying text.

147. *See infra* note 165 and accompanying text.

148. *See infra* note 172.

149. *See infra* note 176 and accompanying text.

150. *See infra* note 182 and accompanying text.

151. The conventional understanding of empathy conveys the basic notion of empathy I wish to examine here. The dictionary defines empathy as "the projection of one's own personality into the personality of another in order to understand the person better . . . ." WEBSTER'S NEW WORLD COLLEGE DICTIONARY 445 (3d ed. 1996). I would qualify this by

means that the tolerator must attempt to step outside of himself or herself to view the contested moral issue from the perspective of the tolerated party.[152] Ideally, an effective practitioner of empathetic reasoning would be able to explain the tolerated party's moral position, social circumstances, world-views, and empirical evidence as skillfully as their own. The practitioner must justify the benefits of the beliefs, behaviors, or lifestyles to the other person. The effort used to understand one's own views should be equal to the effort used to understand alternate views. According to the obligation to reason empathetically, it would be morally unacceptable to contest a moral position without first making a reasonable effort to understand that position.[153]

Stepping outside of one's self to view a contested moral issue is a difficult, if not impossible, task for many theorists.[154] However, in Buddhist and Hindu traditions, religious individuals strive daily to remove themselves from personal identities and desires, which may lead to substantive disagreements with others.[155] The core principle of non-attachment or detachment in these religious traditions suggests that stepping outside of one's self to appreciate another's conception of the world is supremely virtuous and beneficial to both sides of a

---

suggesting that empathetic reasoning requires the understanding of another by viewing a contested moral issues from that person's perspective.

152. As will be discussed throughout this section, I draw on a number of sources in support of the importance of empathetic reasoning to tolerance. Among others, I draw on religious texts, see sources cited *supra* notes 142-48; legal scholars who discuss the value of empathy in law, for example, Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987), and Cook, *Value of Love*, *supra* note 134; feminist jurisprudence and political theory, for example, Colker, *Feminism*, *supra* note 47, and Sibyl A. Schwarzenbach, *Rawls, Hegel and Communitarianism,* 19 POL. THEORY 539-71 (1991) [hereinafter, Schwarzenbach, *Communitarianism*]; the deliberative dialogue literature, for example, PERRY, LOVE AND POWER, *supra* note 124; some liberal writings, IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS (H.J. Paton trans., 1964) [hereinafter KANT, METAPHYSIC OF MORALS]; RAWLS, THEORY OF JUSTICE, *supra* note 2, at 337-38; HEYD, TOLERATION, *supra* note 10, at 12; and other writings justifying political tolerance in terms of empathy for others, for example, MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT (1964); MARTIN LUTHER KING, JR., THE TRUMPET OF CONSCIENCE (1968); MARTIN LUTHER KING, JR., I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD (James M. Washington ed., Harper Collins 1992) (1986); MARTIN LUTHER KING, JR., THE WISDOM OF MARTIN LUTHER KING, JR. (Alex Ayres ed., 1993); ROBERT MCAFEE BROWN, UNEXPECTED NEWS: READING THE BIBLE WITH THIRD WORLD EYES (The Westminster Press 1984) (1920).

153. *See* sources cited *supra* note 152.

154. For Rawls, the obligation can only be treated as a hypothetical endeavor. *See* RAWLS, THEORY OF JUSTICE, *supra* note 2 (discussing the initial situation). For others, like Sandel, Taylor, and MacIntyre, the obligation to step outside one's self is nothing more than an incomprehensible fiction. *See* source cited *supra* note 119.

155. *See* sources cited *supra* notes 29, 48.

dispute.[156] Support for non-attachment or detachment may also be found in the deliberative dialogue literature,[157] as well as some liberal thought.[158]

This process of empathetic reasoning relies heavily on the notion of "decoupling" sin from the sinner.[159] There is an important

---

156. As Thich Nhat Hanh writes:

> We have to believe that by engaging in dialogue with the other person, we have the possibility of making a change within ourselves, that we can become deeper. Dialogue is not a means for assimilation in the sense that one side expands and incorporates the other into its "self." Dialogue must be practiced on the basis of the "non-self." We have to allow what is good, beautiful, and meaningful in the other's tradition to transform us.

THICH NHAT HAHN, LIVING BUDDHA, LIVING CHRIST 9 (1995). Christ's *Sermon on the Mount* suggests a similar foundation for empathetic reasoning: "Love your enemies, bless them that curse you, do good to them that hate you, and pray for them which despitefully use you, and persecute you." *Matthew* 5:44.

157. In *Love and Power*, Michael Perry writes:

> Any community or person for which or whom love of neighbor is a constitutive ideal should understand that openness to the Other -- to the stranger, the outsider -- in deliberative dialogue facilitates as well as expresses such love: I can hardly love the Other -- the *real* other, in all her particularity -- unless I listen to her . . . .

PERRY, LOVE AND POWER, *supra* note 124, at 50.

158. Kant similarly writes:

> [We should acquire] the mental habit . . . of detaching ourselves from the subjective and personal conditions of our judgment, which cramp the mind of so many others, and reflect upon our judgment from a *universal point of view* which we can do only by adopting the point of view of others.

KANT, POLITICAL WRITINGS, *supra* note 2, at 255 (quoting IMMANUEL KANT, CRITIQUE OF JUDGMENT I, 2 § 40; AAV, 294f). *See also* KANT, METAPHYSIC OF MORALS, *supra* note 152. Rawls likewise believes that "to respect another as a moral person is to try to understand his aims and interests from his standpoint and to present him with considerations that enable him to accept the constraints on his conduct." RAWLS, THEORY OF JUSTICE, *supra* note 2, at 338. And David Heyd writes:

> I call toleration a perceptual virtue, because it involves a shift of attention rather than an overall judgment. Tolerant people overcome the drive to interfere in the life of another not because they come to believe that the reasons for restraint are weightier than the reasons for disapproval, but because the attention is shifted from the object of disapproval to the humanity or the moral standing of the subject before them.

HEYD, TOLERATION, *supra* note 10, at 12.

159. In his autobiography, Mahatma Gandhi states that "hating the sin and not the sinner" is a "precept which, though easy enough to understand, is rarely practised, and that is why the poison of hatred spreads in the world." MOHANDIS K. GANDHI AUTOBIOGRAPHY: THE STORY OF MY EXPERIMENTS WITH TRUTH 242 (1983). Similarly, Martin Luther King consistently preached throughout his life and works that sin and sinner should be separated. *See, e.g.*, MARTIN LUTHER KING, JR., THE TRUMPET OF CONSCIENCE 74 (1968). Martin Luther King wrote:

> I've seen too much hate to want to hate, myself, and I've seen hate on the faces of too many sheriffs, too many white citizens' councilors, and too many Klansmen of the South to want to hate, myself; and every time I see

distinction, however, between a liberal decoupling and empathetic decoupling. Liberal decoupling is generally a dispassionate decoupling based on concerns for human autonomy.[160] However, with empathetic decoupling, sin is separated from the sinner out of understanding for the sinner.[161] Gandhi's political and moral conception of individuality and crime is useful in understanding this difference.[162] In line with Buddhism and Hinduism, and contrary to much of liberal thought, Gandhi relies on the empirical claim that individual substantive differences may be transcended by devaluing the very foundational nature of "individuality," "other-ness," or even "moral conviction."[163]

Like empathetic reasoning, compassion should be an integral component of any theory of tolerance based on understanding.[164]

> it, I say to myself, hate is too great a burden to bear. Somehow we must be able to stand up before our most bitter opponents and say: 'We shall match your capacity to inflict suffering by our capacity to endure suffering. We will meet your physical force with soul force. Do to us what you will and we will still love you.'

Id.

160. Mill advocates a liberal form of decoupling when he writes:

> If he displeases us, we may express our distaste, and we may stand aloof from a person as well as from a thing that displeases us; but we shall not therefore feel called on to make his life uncomfortable. We shall reflect that he already bears, or will bear, the whole penalty of his error; if he spoils his life by mismanagement, we shall not, for that reason, desire to spoil it still further . . . .

MILL, ON LIBERTY, *supra* note 2, at 91.

161. *Id.*

162. Gandhi's theory of non-violent resistance and truth-searching, *satyagraha*, requires its followers to refrain from hating others, even those that steal or kill. The cornerstone of Gandhi's practice of *satyagraha* is *ahimsa*, which means a loving, non-violent attitude towards others, including those that have committed wrongs. MOHANDIS K. GANDHI, SATYAGRAHA (1951). He explains how to transform our understanding of thieves:

> [I]t is better to endure the thieves than to punish them. The forbearance may even bring them to their senses. By enduring them we realize that thieves are not different from ourselves, they are our brethren, our friends, and may not be punished. But whilst we may bear with the thieves, we may not endure the infliction. That would only induce cowardice. So we realize a further duty. Since we regard the thieves as our kith and kin, they must be made to realize the kinship. And so we must take pains to devise ways and means of winning them over. This is the path of *ahimsa*. It may entail continuous suffering and the cultivating of endless patience. Given these two conditions, the thief is bound in the end to turn away from his evil ways. Thus step by step we learn how to make friends with all the world; we realize the greatness of God -- of Truth.

Id. at 41.

163. *See* sources cited *supra* notes 29, 48.

164. The notion of compassion developed here is based on similar sources as that of empathetic reasoning -- legal, religious, moral and political understandings of tolerance. *See*

Compassion is the ability to experience the hardship of others, to commiserate with their suffering, and to show them sympathy without dogmatism or pity.[165] Tolerance should not be conceptualized as the negative act of restraining our disapproval.[166] It should be conceived as the affirmative act of reaching out to others, even those who are perceived as immoral, to show them that society is concerned with their well-being.[167] Compassion requires individuals to extend beyond self-regard.[168] Some political theorists argue that compassion is lacking in American political theory and American society more generally.[169] They argue that American political theory should be

---

supra note 157.

165. *Compassion* is defined as "sorrow for the sufferings or trouble of another or others, accompanied by an urge to help; deep sympathy; pity." WEBSTER'S NEW WORLD COLLEGE DICTIONARY 284 (3d ed. 1996). With the exception of common and dictionary descriptions of compassion as "pity," these conventional understandings of compassion are similar to the notion of compassion described herein.

166. The *Bhagavad Gita* states, "When a person responds to the joys and sorrows of others as if they were his [or her] own, he [or she] has attained the highest state of spiritual union." *Gita* 6:32. This is the central idea underlying compassion. Contrary to the liberal claim that autonomy makes humans moral creatures, *tolerance as understanding* claims that compassion is the bedrock of human morality.

167. *Id.*

168. A compassionate society is not centrally concerned with law, order and defense, but concerned with providing for others and satisfying their basic needs. *See* Schwarzenbach, *Communitarianism*, *supra* note 152, at 564 ("[w]hen I hear of a child abused next door, the death of a loved one, or of a peoples' rights being systematically violated . . . *I* am (or at least should be) altered.").

A similar basis for a state-centered compassion is Justice Blackmun's dissent in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989) (Blackmun, J., dissenting). In that case, the Court had to decide whether a child, Joshua, and his mother could bring a civil rights action against a government actor, Winnebago County's Child Services, for failing to come to the aid of the Joshua, who endured repeated beatings at the hands of his father, and as a result, suffered severe brain trauma. Winnebago County's Child Services knew that the father was beating the child. In dissent, Justice Blackmun wrote:

> Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by [the State] who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes, "dutifully recorded these incidents in [their] files." It is a sad commentary upon American life, and constitutional principles -- so full of late of patriotic fervor and proud proclamations about "liberty and justice for all" -- that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded.

Id. at 213 (internal citations omitted).

169. *See, e.g.*, Schwarzenbach, *Communitarianism*, *supra* note 152. Schwarzenbach writes:

> My own view is that if we are to think deeply about community (about what it is that holds a just society together), we can no longer overlook the important communal activities which women

redefined according to certain feminist principles advocating compassion.[170] The obligation to be compassionate requires that individuals devalue the apparent discreetness of others' suffering.[171]

Sacrifice should also be considered a core component of *tolerance as understanding*. Sacrifice is best expressed as the foregoing of some valued thing for the sake of something of greater value.[172] The foregoing of some valued thing, according to *tolerance as understanding*, is individualized wants.[173] The greater value is the virtue derived from understanding, empathizing, and caring for others. The religious notion that individuals are not solitary entities, but parts of God, suggests that sacrificing for "another" is not truly a sacrifice in the way this word is ordinarily used.[174] The sacrifice here is for a

---

> have traditionally performed within the private sphere, for instance, interpreting and responding to the concrete needs of others, an activity that goes far toward binding people to one another.

Id. at 563.

170. *Id.*

171. Ruth Colker provides an account of the "self," which she calls the "authentic self," which diverges dramatically from liberal conceptions of the self, especially the Millian or rugged individualist self. *See* Colker, *Feminism*, *supra* note 47. The authentic self relies on the idea that distinctions between individuals are illusory, and to the extent these distinctions are exaggerated, normatively undesirable. The authentic self also relies on the idea that the self is always moving towards its aspirations, the highest of which, is love. The compassionate self is developed through "meditation (communication with our self) and dialogue (communication with others)." *Id.* at 1020.

Anthony Cook similarly develops the idea that compassion requires a devaluing of the very notion of selfhood:

> Through the spirit of love we should meet the oppressed where they are, with all their richness, diversity, hopes, and fears. In the complicated matrix of that interaction, something remarkable, even mystical, often happens. We experience the other not as other, but as self. Their possibilities and limits become our own as we struggle together to find a common way. A proper spirit of love is crucial, for the application of the letter of love depends on a proper spirit. Without it, our applications will ossify, turn oppressive and self-serving, and defeat the very concerns that love is sworn to uphold.

Cook, *Value of Love*, *supra* note 134, at 1516.

172. WEBSTER'S NEW WORLD COLLEGE DICTIONARY 1180 (3d ed. 1996).

173. *Id.*

174. If this argument is extended to its natural conclusion, then sacrifice would require that we sometimes forego valued things, such as our opinions about the immorality of a certain person's actions, so that we may have the opportunity to interact with that person, which might bring about an even greater value (communion) than our right to disapprove of his conduct. In this vein, Anthony Cook writes that we sacrifice our individual wants for others because this devaluation of self, and prioritization of communion, gives humanity higher meaning. He writes:

> The will of God is that we love [God] fully and love our neighbor as

higher morality, which both individuals in the sacrifice share. For example, a nursing mother who shares her milk with her child, or another child, is not merely exchanging material wants, but also transcending her individuality in an effort to realize a higher moral relationship. She wants to bond with the child. This notion of sacrifice occurs when individuals exchange material and emotional wants, while simultaneously trying to bond with each other for a greater qualitative good.[175]

Forgiveness, the fourth obligation to be discussed, is a state of mind in which one person desires to absolve another of some subjective wrong.[176] Religious conceptions of forgiveness, particularly the "turn the other cheek" philosophy from Christ's Sermon on the Mount, suggest that we should be willing to weather the injustice of others, because we see justice and goodness in them and acknowledge our own faults.[177] Subsumed within this concept of forgiveness is the idea that when someone wrongs us, they too are wronged.[178] They may feel guilt over their action, remorse, or the pain

---

> ourself. Thus, the will of God is that we consume ourselves at every level of existence with a love of God that transforms our self-love into a liberating love for others. Sin, then, is selfishness, a love for self that draws us out of communion with God and humanity.

Cook, *Value of Love*, *supra* note 134, at 1480-81.

175. *Id.*

176. The notion of forgiveness I rely on here is drawn from religious sources. *See* sources cited *supra* notes 88-89, 91, 97, 103. For example, on being crucified, Luke tells us that Jesus said, "[God], forgive them; for they know not what they do." *Luke* 23:34. In a less dramatic passage, the Book of Luke provides: "Be ye therefore merciful as your [God] also is merciful. Judge not, and ye shall not be judged: condemn not, and ye shall not be condemned: forgive, and ye shall be forgiven." *Luke* 6:36-37. *See also Dhammapada* 115 (explaining the need for forgiveness).

Martin Luther King's writings and life work demonstrate a marked commitment to Christian forgiveness. For example, even after being wrongly imprisoned after a civil rights march, Martin Luther King's *Letter from Birmingham Jail* stresses the importance of forgiving racists. MARTIN LUTHER KING, JR., I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD, 84-100 (James M. Washington ed., Harper Collins 1992) (1986). His letter speaks eloquently of the frustrations living day in and day out in a racist society; yet the *Letter from Birmingham Jail* concludes with a monument to forgiveness, Christ's "love your enemies" speech. *Id.* Equally as pointed was that after King's house was bombed on the anniversary of the death of Gandhi, King convinced an angry crowd not to seek vengeance, but rather to forgive. JAMES A. COLAIACO, MARTIN LUTHER KING, JR.: APOSTLE OF MILITANT NONVIOLENCE 13 (St. Martin's Press 1993) (1988).

177. *See* sources cited *supra* notes 88-89, 91, 97, 103, 176.

178. *See* Gandhi's discussion of why we should forgive the "sinner," *supra* note 104. *See also* THICH NHAT HAHN, LOVE IN ACTION 76-77 (1993) (arguing that we need to replace the idea of "enemy" with the notion that the immoral person is someone who is suffering a great deal and who needs our compassion and forgiveness).

Martin Luther King, building on the "love your enemies" norm, promotes a similar

that results when one believes there are no viable prospects for redemption.[179] By practicing forgiveness, individuals are taught to recognize that they are often motivated by ill-conceived wants and desires, and that they themselves are often the creators of injustice.[180]

Finally, like forgiveness, *humility* is based on the concept that human beings are fallible and ill-equipped to realize truth.[181] Humility, which embraces both intellectual and moral modesty, is a necessary component of true understanding.[182] It is important to note here that intellectual and moral humility is not the same as relativism, nihilism, or skepticism.[183] As the political works of Mahatma Gandhi

---

conception of forgiveness:

> [T]he Christian virtues of love, mercy and forgiveness should stand at the center of our lives . . . . This love might well be the salvation of our civilization . . . . Not through violence; not through hate; no, not even through boycotts; but through love. It is true that as we struggle for freedom in America we will have to boycott at times. But we must remember as we boycott that a boycott is not an end within itself; it is merely a means to awaken a sense of shame within the oppressor and challenge his false sense of superiority. But the end is reconciliation, the end is redemption; the end is the creation of the beloved community. It is this type of spirit and this type of love that transform opposers into friends.

MARTIN LUTHER KING, I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD 21-22 (James Washington ed., 1992) (1986).

179. *See supra* notes 176-78 and accompanying text.

180. *See supra* notes 176-78 and accompanying text.

181. WEBSTER'S NEW WORLD COLLEGE DICTIONARY 658 (3d ed. 1996) ("the state or quality of being humble; absence of pride or self-assertion."). There is a long tradition in Western philosophy concerning humanity's inability to realize truth. *See, e.g.*, RICHARD H. POPKIN, THE HISTORY OF SKEPTICISM FROM ERASMUS TO SPINOZA (1979) (discussing the history of skepticism).

182. *See supra* note 162 and accompanying text. Mahatma Gandhi's, and others' conception of "sin" is helpful. *Id.* Under *Satyagraha*, punishment of others, solely for the sake of punishment alone, is generally impermissible because humans are not capable of knowing absolute truth, and thus, are not competent to punish. MOHANDAS K. GANDHI, SATYAGRAHA 3 (1951).

Buddhism's notion of humility towards moral claims stems from its view that individuals are conceptions -- ever-changing relational constructs. ROSS, BUDDHISM: A WAY OF LIFE AND THOUGHT, *supra* note 28, at 28 (". . . in truth there is no definite 'I' existing by itself, independent of the ever shifting relation among psychic and physical forces."). Individuals and their knowledge are in constant flux. *Id.* Perceptions of morality, for example, are developing and changing. When we combine the idea that "individuality" is a construct with the idea that self-awareness and knowledge are constantly changing, we see that humility about moral claims is essential. *Id.*

183. In this regard, Karl Popper's artful distinction between what he calls *fallibilism*, which accepts truth, and relativism, which does not, is instructive:

> To answer and to reject relativism is, in my opinion, of the greatest importance. And it is quite simple. Human fallibility means that we all may err, and that we must not rely on what appears to us as true, or as morally right, because it may not be true, or morally right. But this implies that there is such a thing as truth, and that there are actions that are

and much of Buddhist thought suggests, humility is a way to challenge the certitude of our own views, so that we can be open to other views.[184]

C. Tolerance: A Means or an End?

As the previous discussion suggests, an important distinction between liberal tolerance and *tolerance as understanding* is that liberalism treats tolerance as a means whereas *tolerance as understanding* treats it as an ends.[185] Millian liberals treat tolerance as a means for advancing social progress, whereas Kantian liberals treat tolerance as a *means* for fostering human autonomy and freedom.[186] Unlike these two liberal approaches, *tolerance as understanding* claims that tolerance, and the obligations of empathy and compassion, are noble ends in themselves.

In making such a claim, it is important to consider whether individuals can in fact be motivated to act in a manner where empathy and compassion are their main obligations, and whether individuals should act in this manner.[187] The empirical component of this question, whether individuals can practice *tolerance as understanding*, is a difficult question.[188] First, it must be accepted that as a matter of historical record, *tolerance as understanding* has rarely been practiced beyond the social structure of the nuclear family, extended family and

---

> morally right, or very nearly so. Fallibilism certainly implies that truth and goodness are often hard to come by, and that we should always be prepared to find that we have made a mistake. On the other hand, fallibilism implies that we can get nearer to the truth, or to a good society. Now we certainly cannot avoid acting, or taking sides; for even inaction is an action, and amounts to taking sides. What all this teaches us is that we must never stop our critical -- a highly critical -- search for truth, always trying to learn from those who hold a different view. We must try to listen to others, and to learn from others, and especially from our opponents, if we seriously wish to get nearer to the truth, or to discover the best kind of action within our reach. And precisely for this reason, we must reject relativism.

KARL POPPER, *Toleration and Intellectual Responsibility*, *in* ON TOLERATION, *supra* note 93, at 25-26.

184. *See supra* notes 162, 182 and accompanying text.

185. *See supra* notes 47-130 and accompanying text.

186. *See supra* notes 88-129 and accompanying text.

187. Critics of *tolerance as understanding* would certainly criticize it on the grounds that it is "utopian." *See, e.g.*, THOMAS NAGEL, EQUALITY AND PARTIALITY (1991) (arguing that the problem with utopian theories is that human beings cannot be motivated to live according to them).

188. *See supra* note 28.

close friends. But, the central issue is not whether humanity has ever practiced *tolerance as understanding*, but rather, whether individuals are capable of practicing such a form of tolerance.

Although this question cannot be definitively answered, the fact that many individuals have successfully practiced variants of *tolerance as understanding*, such as Mahatma Gandhi and Martin Luther King, demonstrates that it is possible for individuals to do so.[189] Moreover, there are countless examples of lesser-known religious and charitable individuals who regularly practice variations of *tolerance as understanding*. Finally, the fact that individuals do practice forms of *tolerance as understanding* among their nuclear and extended families, as well as close friends, suggests that if the perception of who constitutes "family" and "friends" moves beyond these groups, *tolerance as understanding* may be practiced on a much wider scale.

It is important to recognize that most Americans analyze the prospects of using *tolerance as understanding* as an organizing principle through the prism of our liberal traditions and cultures.[190] We attempt to fit *tolerance as understanding* into an existing liberal framework of social conventions, institutions, and incentives.[191] There is also the related problem that we often tend to conflate our normative view of human nature as autonomous creatures with the empirical claim that people are in fact most easily motivated by individual concerns.[192] Our present political culture conflates what our

189. This section has pointed to a number of examples of individuals advocating and practicing such forms of tolerance. This anecdotal evidence, at a minimum, supports the possibility of humans practicing *tolerance as understanding*. In addition to King and Gandhi's writings and actions, Thich Nhat Hahn's life illustrates the possibilities of *tolerance as understanding*. *See* THICH NHAT HAHN, LIVING BUDDHA, LIVING CHRIST (1995). For example, during the Vietnam War, one of Thich Nhat Hahn's disciples was spit on by an American soldier. There was no reason for the soldier to spit on this non-violent monk other than the racism and hatred that war breeds. The young monk wanted to quit the monastery in order to join the National Liberation Front to defend his country against such hatred and violence. Through his meditations on compassion and forgiveness, Thich Nhat Hanh was able to see the American soldier as a victim of war in the same way that he saw his disciple as a victim of the war. He then led his disciple through similar meditations on understanding. Eventually, Thich Nhat Hahn succeeded in teaching his disciple to see the young American soldier as a product of the war, and ultimately, succeeded in persuading his disciple to remain a monk. *Id.*

190. *See* sources cited *supra* notes 6, 65.

191. *See* sources cited *supra* notes 6, 65.

192. Anthony Cook recognizes this in writing about Locke:

> Why should Locke's characterization of humans as universally rational appropriators of private property be accepted? Critics have contended that Locke is reading into human nature the attributes . . . he most wanted to

motivations can be with what we want them to be.[193] Thus, it is difficult to divorce the normative liberal aspirations of the society from the empirical claims about how individuals in that society can be motivated to act.[194] Whether individuals can be sufficiently inculcated with the values underlying *tolerance as understanding*, and whether social incentives may be put in place to foster these values cannot be answered with any reasonable degree of certainty. But it must be recognized that historically, many individuals have been motivated to act according to a theory of tolerance based on understanding and that such a theory, which conceptualizes tolerance as a paramount end of individual moral behavior, is conceptually viable.

III. UNDERSTANDING IN CONSTITUTIONAL DISPUTE RESOLUTION

This section of the article addresses the question of whether *tolerance as understanding* can serve as an empirically and normatively sound principle for resolving cases, primarily those involving issues of tolerance and civil rights. In order to highlight the significant differences between liberal tolerance and *tolerance as understanding*, a highly stylized account of each will again be presented. As has been suggested throughout, autonomy and understanding are assumed to be the paramount virtues of each of the respective paradigms.[195] Thus, in deciding cases, legal institutions would be guided by these paramount virtues. A liberal jurisprudence would more strongly emphasize the rights of individuals and the value of individuals autonomously pursuing their own conception of the good, whereas a jurisprudence promoting understanding would more strongly emphasize mutual obligations that individuals have and the value of caring for others.[196] Based on these core ideas, this article

---

> extol and justify. Thus, Locke's rational appropriator of private property is merely an abstraction from his own emerging market society . . . .

Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985-99 (1990) (internal citations omitted) [hereinafter, Cook, *Reconstructive Theology*]. *See also* JOHN DEWEY, FREEDOM AND CULTURE 21 (1939) ("The idea that human nature is inherently and exclusively individual is itself a product of a cultural individualistic movement. The idea that the mind and consciousness are intrinsically individual did not even occur to any one for much the greater part of human history.").

193. *See supra* note 192.

194. *See supra* note 192.

195. *See supra* notes 47-130 and accompanying text.

196. Although we want to exercise caution in categorizing complex normative moral and

suggests some principles of dispute resolution based on *tolerance as understanding* and compares them with their liberal counterparts.

The table below compares some adjudicative principles derived from norms of understanding with principles derived from liberalism. These core ideas are not intended to be exhaustive, but rather illustrative of some core concepts in possible institutional legal theories based on understanding.

TABLE: NORMS OF ADJUDICATION[197]

Tolerance as Understanding		***Liberal Tolerance***	
1. Understanding		1. Autonomy and Freedom	
2. Emphasis on Mutual Obligations		2. Emphasis on Individual Rights	
3. Affirmative Norms	a. empathetic reasoning	3. Negative Norms	a. right to judge other's morality
	b. compassion		b. restraint towards others
	c. sacrifice		c. individual autonomy
	d. forgiveness		d. individual responsibility
	e. humility		e. thick-skinned notion of own good

From these general principles, some assumptions may be made about how legal institutions might approach substantive issues under *tolerance as understanding*, as compared with liberalism. First, a jurisprudence based on *tolerance as understanding* would likely emphasize the empathetic narratives of individuals over formal legal

jurisprudential theories, we can more or less safely say that certain jurisprudential concepts and theories are more closely aligned with the liberal camp and some are more closely aligned with norms of understanding. *Compare, for example*, DWORKIN, TAKING RIGHTS *supra* note 2, DWORKIN, LAW'S EMPIRE, *supra* note 2, RAWLS, THEORY OF JUSTICE, *supra* note 2, *and* RAWLS, POLITICAL LIBERALISM, *supra* note 2, *with* Cook, *Value of Love*, *supra* note 134, Colker, *Feminism*, *supra* note 47, Schwarzenbach, *Communitarianism, supra* note 152, *and* PERRY, LOVE AND POWER, *supra* note 124.

197. The norms of adjudication are drawn from the previous two sections and are essentially a composite of the arguments put forth therein.

rights.[198] Abstract individual rights, neutrality, formalism, and textualism would be secondary to specific narratives of individuals and groups requiring empathy and compassion. The values served by a seemingly neutral and formalized set of legal rules, which often serve to foster the stability of status quo norms, would be weighed against specific concerns of compassion and empathy.[199] Second, a jurisprudence based on *tolerance as understanding* might emphasize the normative idea that individuals should not be conceptualized as being primarily autonomous.[200] In other words, to the extent practicable, legal institutions should emphasize the interconnectedness

---

198. Empathy and compassion, as well as the empirical argument that "otherness" and "individuality" are wrongly overemphasized, require individuals to look deeply into the other party's actions, in a way that formalisms generally do not permit. *See supra* notes 166-82, 189. As legal scholar Lynne Henderson notes:

> Much in the nature of legality can block empathic understanding. The structures and beliefs about law that constitute 'legality' may allow legal decisionmakers to be relatively unreflective about their choice to ignore empathic phenomena. A value of legality in American culture is that the Rule of Law opposes some Hobbesian free-for-all. The Rule of Law is the reification of rules governing rights and duties to which we pay homage: thus, this is a 'government of laws, not men'; the Rule of Law transcends humans and is superior to them.

Henderson, *supra* note 152, at 1587 (internal citation omitted). *See also* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL 101-04 (1992) (explaining how legal formalisms tend to mask the real social inequalities and injustices that effect individuals).

199. *See supra* note 198.

200. *See supra* notes 166-82, 189. As Anthony Cook notes:

> The individual is not, by nature, an autonomous and acquisitive being desiring to dominate others and appropriate property. Rather, her alienation and loneliness are socially produced. Individuals long for a genuine connection with others, a mutual acknowledgment of their humanity and need for empowerment. However, socially imposed roles temper their desires for connection with fears of rejection. The regime of liberal rights establishes many of these roles through the distribution of abstract rights and duties that distance us from ourselves and others whom we long to experience in more meaningful ways than our present social existence permits . . . .
>
> We are lonely because our relationships with each other are distorted by these [liberal] abstractions, and thus the potential for genuine connection is always limited by the socially contrived roles we adopt. Landlord/tenant, employer/laborer, professor/student, bank teller/customer, and judge/lawyer are all roles that distance us, diminish our intersubjectivity, and decrease the likelihood of a sustained sense of community. The liberal state, however, provides us with an alternative community that really is no community at all. To mediate the threat posed by others to ourselves, the state fosters an illusion of a community consisting of rights-bearing citizens said to be equal before the law and thus members of a community of equals.

Cook, *Reconstructive Theology*, *supra* note 192, at 1007-08 (internal citations omitted).

between disputing or antagonistic individuals, and highlight common interests.[201] And third, a jurisprudence based on understanding might emphasize the idea that legal causality cannot generally be reduced to autonomous individual actions and autonomous morality.[202] Put simply, an individual's social circumstances may outweigh his individual culpability and responsibility. Humility would require that legal institutions remain highly skeptical about attributing moral culpability to single individuals or single interests in society.[203]

The *Norms of Adjudication* and the three corollary principles discussed above will be used to compare how the two paradigms might address four controversial constitutional issues, the death penalty, gay rights, hate speech, and minority religious freedom. Each of these four constitutional issues provides a different lesson about liberalism and *tolerance as understanding.* Hate speech, gay rights, and minority religious freedom are traditional tolerance or civil rights issues, and each has been selected because it demonstrates important conceptual similarities and differences between the two paradigms.[204] The death penalty, which is generally not thought of as a classic example of tolerance, was selected for two reasons. First, from the theoretical standpoint of *tolerance as understanding*, the death penalty is in fact an issue concerning tolerance.[205] The requirements of tolerance, empathy, compassion and humility, are central to the issue of whether an individual should receive the death penalty.[206] Second, the death penalty debate serves as a useful theoretical vehicle for highlighting significant differences between core liberal jurisprudential themes and core themes based on *tolerance as understanding*.[207]

A. Death Penalty

The central concern in this section is to distinguish between *tolerance as understanding's* emphasis on empathetic reasoning, compassion, forgiveness, and humility, and liberalism's emphasis on autonomous moral action and individual culpability. These two different emphases are best thought of as legal presumptions or default

201. *Id.*

202. Again, the Buddhist and Hindu challenge to "otherness" and "individuality" illustrates this principle. *See supra* notes 166-82, 189 and accompanying text.

203. *See supra* notes 166-82, 189 and accompanying text.

204. *See supra* notes 47-130 and accompanying text.

205. *See supra* notes 137-82 and accompanying text.

206. *See supra* notes 137-82 and accompanying text.

207. *See supra* notes 47-130 and accompanying text.

positions. The liberal presumption is that individuals are autonomous, or at least should be conceptualized as such, and that their actions are the products of an autonomous decision-making process and autonomous morality.[208] In contrast, *tolerance as understanding* begins with a different legal presumption -- that individuals are often not individually responsible for illegal or immoral conduct, and that social circumstances often play a determining role in such conduct. At a minimum, *tolerance as understanding* makes the normative claim that the causes of immorality and illegal conduct should not be conceptualized as primarily resulting from individual decision-making.

To crudely illustrate the different legal presumptions, the following example of racism will be used. Assume that a sixteen-year-old child who has grown up in a highly racist family is more likely to be racist than another sixteen-year-old who grew up in a family which taught that racism was wrong. If the first child was sufficiently inculcated with racist values from birth to young adulthood, that child would likely be racist. However, assuming that this child acted on these indoctrinated beliefs, it would be a stretch to argue that his racist actions are primarily reducible to his own culpability. Nevertheless, as a general proposition, a liberal legal system would hold the child responsible for any actions taken as a result of his racism.[209] In fact, a liberal legal system would generally regard the first and second child as having similar backgrounds. Each child would be judged against some abstract standard of behavior and subsequently held responsible for his actions.[210]

However, a jurisprudence based on *tolerance as understanding* might conceptualize the moral culpability of the children in a different manner. Assume further that the first child is able to make gains in overcoming his racist background, whereas the second child becomes more racist over time. The first child's progress, in fact, equals the decline in the second child's views; but the first child's overall attitudes are still more racist. Because of this progress, the first child refuses to join a violent gang of racist skinheads and instead joins a separatist group that promotes peaceful coexistence between blacks and whites. Meanwhile, the second child refuses to join this separatist group, instead joining a somewhat less racist group. Is the first child

208. *See supra* notes 2-6, 37, 43-47 and accompanying text.

209. *See, e.g.*, Stanford v. Ky., 492 U.S. 361 (1989); Saffle v. Parks, 494 U.S. 484 (1990). *See also* Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662 (1986).

210. *See* sources cited *supra* note 209.

who joined the more racist group, more blameworthy than the second child? Although there may be pragmatic reasons for suggesting that the first child is more worthy of censure, for example, deterring racism, a jurisprudence based on norms of understanding would strongly consider the first child, who overcame more than the second child, to be less blameworthy.

This example suggests an important conceptual distinction between the two jurisprudences. Whereas liberal legal norms, particularly norms relating to criminal behavior, are based on retribution for individual action, norms based on understanding are deeply skeptical of retribution, and thus are firmly grounded in deterrence alone.[211] Holding a teenager culpable because he or she was inculcated with racist values from birth to young adulthood makes little sense, unless one is doing so to deter similar conduct from that child or others. Without the pragmatic component of deterrence, the first child should be considered less blameworthy than the second. If the first and second child's social circumstances were controlled, in that they had similar exposure to non-racist attitudes, the first child would be the less racist.

This general proposition concerning individual culpability would also guide a death penalty jurisprudence based on *tolerance as understanding*. The central point of this discussion is that a jurisprudence based on *tolerance as understanding* would begin with the presumption that rarely, if at all, are people so independently culpable as to bear the burden of death, especially given an intellectual and moral humility about putting one to death.

The case of *Stanford v. Kentucky* demonstrates the main difference between *tolerance as understanding* and liberalism.[212] In *Stanford*, Justice Scalia wrote the majority opinion.[213] The Court held that it was not cruel and unusual punishment under the Eighth Amendment to impose the death penalty on sixteen-year-old offenders.[214] Sixteen-year-old Heath Wilkins brutally murdered Nancy Allen.[215] Allen was a twenty-six-year old mother of two who was working behind the sales counter of the convenience store that she

211. *See, e.g.*, van den Haag, *supra* note 209 (examining justifications for the death penalty).

212. 492 U.S. 361 (1989).

213. *Id.*

214. *Id.*

215. *Id.* at 366.

and her husband owned.[216] There can be no dispute that Nancy Allen and her family suffered an enormous tragedy. Any desirable theory of jurisprudence would have to demonstrate a foremost empathy for such suffering. But the requirement of empathy, and in particular decoupling, should also extend to Heath Wilkins.[217] A theory of jurisprudence based on *tolerance as understanding*, would not defend Wilkins' actions, but would empathetically and compassionately examine the life of the troubled sixteen-year-old in assessing blameworthiness.[218] In the case of Heath Wilkins, his life was beyond tragic. He "had been in and out of juvenile facilities since the age of eight for various acts of burglary, theft, and arson, had attempted to kill his mother by putting insecticide into Tylenol capsules, and had killed several animals in his neighborhood."[219] The report of the state-appointed psychiatrist, which is heavily relied upon by the empathetic dissent of Justice Brennan, gives a detailed narrative of Heath Wilkins' life, and provides a vivid account of the circumstances in his life that contributed to his crime.[220]

---

216. *Id.* Justice Scalia recounted the details of this senseless murder:

> The record reflects that Wilkins' plan was to rob the store and murder 'whoever was behind the counter' because 'a dead person can't talk.' While Wilkins' accomplice, Patrick Stevens, held Allen, Wilkins stabbed her, causing her to fall to the floor. When Stevens had trouble operating the cash register, Allen spoke up to assist him, leading Wilkins to stab her three more times in her chest. Two of these wounds penetrated the victim's heart. When Allen began to beg for her life, Wilkins stabbed her four more times in the neck, opening her carotid artery. After helping themselves to liquor, cigarettes, rolling papers, and approximately $450 in cash and checks, Wilkins and Stevens left Allen to die on the floor.

Id.

217. *See supra* notes 164-68. It is also worth pointing out how difficult, yet possible, empathy for those who commit immoral acts is. An example of the difficulty yet promise of decoupling is the empathy a relative of a child molester might feel towards the molester. I can think of few better examples of intolerance in America than the way in which Americans treat child molesters and criminals in general. The act of child molestation is so horrific, so alien to our own conceptions of morality, that most Americans are unable to show the slightest degree of understanding with respect to the perpetrators. Yet, often, a loving relative of a child molester may go to great extremes to sympathize with the molester, even though the relative thinks the act itself abhorrent. The relatives of molesters who show compassion are no less inclined than the rest of us to find molestation repugnant. Nevertheless, their love allows them to separate the actions from the individual.

218. *See supra* notes 137-82.

219. *Stanford*, 492 U.S. at 367.

220. The psychiatrist's report is a lengthy account of the miserable childhood of Heath Wilkins. This extended narrative, from which I can only provide a small section, provides compelling evidence of the social circumstances playing on Wilkins' culpability. The reports states, in part:

> Mr. Wilkins . . . was raised in a rather poor socioeconomic environment

The majority argued that the age and life circumstances of Heath Wilkins could not overcome the liberal presumption that Wilkins was acting autonomously and was responsible for his actions.[221] In large measure, the Justices in this case could not see Wilkins' relative lack of culpability because of their fidelity to liberal legal principles. Again, borrowing from Hobbesian "liberal physics," the individual, "at rest" and in his "natural state," has few if any forces impinging upon his individual conscience.[222] Therefore, the individual is solely responsible for the development and use of that conscience.[223]

The dissent in *Stanford*, however, adopted a position more closely aligned with a jurisprudence based on norms of understanding.[224] Justice Brennan, joined by Justices Blackmun, Marshall, and Stevens, argued that juveniles on death row, like Heath Wilkins, are most often the product of social forces well beyond their control.[225] This general evidence of the circumstances underlying

---

> [and] reportedly had [sic] extremely chaotic upbringing during his childhood. He was physically abused by his mother, sometimes the beatings would last for two hours . . . . Mr. Wilkins indicated that his mother's boyfriend had a quick temper and that he hated him. He also started disliking his mother, not only because she punished [him], but also because she stood up for her boyfriend who was unkind towards [him]. He then decided to poison his mother and boyfriend by placing rat poison in Tylenol capsules. They were informed by his brother about the situation. They secretly emptied the capsules and made him eat them. He was afraid of death and attempted vomiting by placing [his] finger down his throat. Then he ended up getting a beating from his mother and boyfriend . . . . Records from Butterfield . . . indicated that Mr. Wilkins' natural father was committed to a mental institution in Arkansas, and there was considerable amount of physical abuse that existed in the family . . . . Mr. Wilkins' brother was diagnosed to be suffering from schizophrenia when he was admitted along with Mr. Wilkins in 1982 at Crittenton Center.

Id. at 402 n.14.

221. *Id.* at 402.

222. *See supra* notes 30-34, 52-53 and accompanying text.

223. *See supra* notes 30-34, 52-53 and accompanying text.

224. *Stanford*, 492 U.S. at 383.

225. In arguing against the constitutionality of the death penalty for juveniles, Justice Brennan relied on evidence suggesting that juveniles who commit crimes are frequently are product of severe psychological trauma:

> Adolescents on death row appear typically to have a battery of psychological, emotional, and other problems going to their likely capacity for judgment and level of blameworthiness. A recent diagnostic evaluation of all 14 juveniles on death rows in four States is instructive. Seven of the adolescents sentenced to die were psychotic when evaluated, or had been so diagnosed in earlier childhood; four others had histories consistent with diagnoses of severe mood disorders; and the remaining three experienced periodic paranoid episodes, during which they would

death-row adolescents, coupled with the specific evidence of Wilkins' life, failed to persuade the majority.[226] The evidence could not overcome the presumption that individuals should be considered autonomous beings because liberalism requires individuals to express their individual character.[227]

Autonomy's dominance over understanding is no more evident than in the case of *Saffle v. Parks*.[228] In that case, the Supreme Court decided whether a trial judge could instruct a jury not to consider sympathy in determining whether a convicted criminal should receive the death penalty.[229] In *Saffle*, the state trial court judge instructed the jury: "you must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence."[230] The Supreme Court, over a strong dissent, held that an anti-sympathy instruction was permissible.[231] The pervasive nature of this liberal default position is demonstrated by the fact that of the six courts that heard this case, only one determined that there may be circumstances in which a jury could show sympathy towards a convict in a death penalty proceeding.[232] *Saffle v. Parks* demonstrates that a liberal jurisprudence is reluctant to empathetically view immoral actions in a manner that mitigates individual culpability.[233]

---

assault perceived enemies. Eight had suffered severe head injuries during childhood, and nine suffered from neurological abnormalities.

Id. at 398 (internal citations omitted).

226. *Id.*

227. *See supra* notes 2-6, 37, 43-47 and accompanying text.

228. 494 U.S. 484 (1990).

229. Among other evidence presented, Parks' counsel put on evidence that Parks' father was in a penitentiary during Parks' childhood; Parks became involved in crime at an early age; and Parks had difficulty attending school, in part because of forced bussing. In his closing remarks, Parks' counsel summed up Parks' disadvantaged childhood and asked the jury to show "kindness" when considering Parks' circumstances. *Id.* at 486.

230. *Id.* at 487.

231. *Id.* at 486.

232. This issue of whether a trial court can instruct a jury *not to engage in sympathy* first proceeded through two state courts (the trial court and the Oklahoma Court of Criminal Appeals), and then certiorari was denied by the United States Supreme Court. Thereafter, pursuant to federal habeas corpus law, this issue proceeded through another four levels of federal courts (the U.S. District Court for the Western District of Oklahoma, the U.S. Court of Appeals for the Tenth Circuit, the Tenth Circuit *en banc*, and finally, the United States Supreme Court). Of the six different courts that addressed the issue of whether a trial court can forbid a jury from engaging in sympathy, only one, the Tenth Circuit *en banc*, held that such an instruction was impermissible. Most interestingly, the issue was not even whether sympathy might, under some circumstances be a factor, but rather, whether a jury could be prohibited under all circumstances from having sympathy enter the calculus of this life and death decision. *Saffle v. Parks*, 925 F.2d 366, 367 (10th Cir. 1991) (en banc).

233. Until recently, the Supreme Court has demonstrated its fidelity to the liberal default

It is important to clarify that a death penalty jurisprudence based on norms of understanding would not argue that there is no role for assessing individual blameworthiness in criminal sentencing.[234] First, deterrence of future crimes would require judges to make distinctions between individuals and their respective culpabilities.[235] For example, based on the need for individual and social deterrence alone, a judge practicing *tolerance as understanding* would clearly need to draw distinctions between premeditated murder and manslaughter, the former requiring the harsher sentence.[236] And second, there would be nothing in a jurisprudence based on *tolerance as understanding* precluding the judge or jury from showing a greater moral disapprobation for a particular act.[237] Clearly, some crimes are more heinous than others. Thus, a judge or jury could "hate the sin" of murder more than the sin of manslaughter, so long as both are treated with similar degrees of empathy and compassion.[238] It is important to emphasize that not all criminals are equally non-culpable for their crimes. Rather, a jurisprudence based on norms of understanding presumes that rarely, if at all, are people so independently culpable as to bear the burden of death.

---

position by adhering to the view that the execution of the mentally retarded is constitutionally permissible. Prior to the Supreme Court's landmark decision last term in *Atkins v. Virginia*, 536 U.S. 304 (2002), the Supreme Court held that it was not a violation of the Eighth Amendment's Cruel and Unusual Punishment clause to execute mentally retarded individuals. *See* Penry v. Lynaugh, 492 U.S. 302 (1989). In *Penry*, the Supreme Court was unwilling to overturn the conviction of a man with an I.Q. between 50 and 60, who was the victim of horrific child abuse. Raymond Bonner & Sara Rimer, *Mentally Retarded Man Facing Texas Execution Draws Wide Attention*, N.Y. TIMES, Nov. 12, 2000, at A34 (describing how Penry's mother beat him, burned him, starved him, repeatedly threatened to cut off his genitals and forced him to eat his own feces and drink his own urine).

In *Penry*, the Supreme Court held that the evidence of severely diminished mental capacity, familial mental history and psychological childhood trauma was not enough to overcome this liberal presumption of Penry's individual culpability. The majority opinion, written by Justice O'Connor, held "I cannot conclude that all mentally retarded people of Penry's ability -- by virtue of their mental retardation alone, and apart from any individualized consideration of their personal responsibility -- inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty." *Penry*, 492 U.S. at 338.

In *Atkins*, however, the Supreme Court, following the lead of numerous state legislatures that have abolished the death penalty for the mentally retarded, held that it is unconstitutional to execute the mentally retarded. 536 U.S. 304.

234. *See supra* notes 60-67, 137-82 and accompanying text.

235. *See generally* Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662 (1986) (examining justifications for the death penalty).

236. *See supra* notes 28, 47, 162 and accompanying text.

237. *See supra* notes 28, 47, 162 and accompanying text.

238. *See supra* notes 164-68 and accompanying text.

B. Hate Speech

Hate speech cases present an even clearer example of the different jurisprudential approaches.[239] In general, liberal theories of tolerance endorse a far-sweeping freedom of speech because such a broad freedom fosters the liberal values of autonomy and freedom to pursue one's own conception of the good.[240] Perhaps the most significant liberal justification for the freedom of speech is the "marketplace of ideas" argument.[241] According to this argument, the different conceptions of the good are to be debated through a fair and neutral political process, protected by free speech norms.[242] The government, according to this rationale, should not judge these different conceptions, but should remain neutral with respect to their content, allowing the "marketplace of public opinion" to decide on the value of these various conceptions.[243] Liberals also defend freedom of speech on the related ground that it is essential for political expression and self-governance.[244] Politics is conceptualized as a town meeting, where all political points of view may be heard and deliberated upon. Based on this rationale, political forms of speech are generally afforded more protection than other forms of speech, such as pornography, commercial speech, and fighting words.

A good example of courts applying this liberal defense of free speech, particularly hate speech, is in *Skokie v. National Socialist party of America*.[245] In 1977, the United States and Illinois Supreme

---

239. The issue we will explore is whether the First Amendment protects speech that is primarily hateful in nature. The First Amendment states, "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. Although the First Amendment has become one of the cornerstones of American politics, and American political culture more generally, it was not until the latter half of the twentieth century that the First Amendment was given its robust modern meaning. *See, e.g.*, Yates v. United States, 354 U.S. 298 (1957) (overturning convictions under the Smith Act).

240. There are numerous liberal arguments supporting free speech, many of which have been touched on in Part I of this article. Mill's arguments, for example, were outlined *supra* notes 88-112. *See also* LEE BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986).

241. *See* Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting) (arguing competition in the marketplace of ideas is the best way to get to truth); MILL, ON LIBERTY, *supra* note 2 (arguing that free speech will not necessarily lead to truth, but that social progress is made through free speech); Meiklejohn, *supra* note 4 (arguing that free speech is necessary component of political dialogue and democracy).

242. *See supra* note 241.

243. *See Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) (". . . that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . .").

244. Meiklejohn, *supra* note 5; JOHN HART ELY, DEMORACY AND DISTRUST (1980).

245. *See* 69 Ill. 2d 605 (1978). *See also* Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978).

Courts had to decide whether the First Amendment protected the right of a small group of Nazis to march down the streets of Skokie, a village with a large Jewish population, including thousands of victims of the Holocaust.[246] The American Civil Liberties Union (ACLU) brought a number of significant cases on behalf of the Nazis and won every case.[247] The Illinois Supreme Court, following both the marketplace of ideas and self-governance rationales, accepted the ACLU position:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[248]

In the landmark case of *R.A.V. v. City of St. Paul* (1992), the Supreme Court, in deciding how far the foregoing free speech rationales should extend, struck down a St. Paul hate speech criminal ordinance.[249] In *R.A.V.*, a teenager, Robert A. Vicktora, was charged with violating the St. Paul Bias-Motivated Crime Ordinance for allegedly burning a cross on the front lawn of a black family's

246. *See Skokie*, 69 Ill. 2d 605; *Collin*, 578 F.2d 1197. *See also* DAVID HAMLIN, THE NAZI/SKOKIE: A CIVIL LIBERTIES BATTLE (1980). This Nazi group, the National Socialist Party of America, was a disorganized collection of individuals, led by a most curious local figure, Frank Collin. Frank Collin's motivations for choosing to march on a town where thousands of Holocaust survivors lived may be characterized as quite odd. *Id.* Not only was Frank Collin (born Frank Cohn) a Jew, his father was a survivor of the infamous Nazi concentration camp, Dachau. *Id.* When Collin announced that he was going to march his group through Skokie, many Jewish residents made clear their intention to harm Collin and his clan and asked the Village to prohibit the march. In April of 1977, Skokie obtained an injunction prohibiting Collin's group from marching. One month later, Skokie, in an attempt to solidify its anti-Nazi position, passed three ordinances that were designed to make it difficult for a group such as Collin's to get a permit to march. HAMLIN, THE NAZI/SKOKIE.

247. HAMLIN, THE NAZI/SKOKIE, *supra* note 246.

248. *Skokie*, 69 Ill. 2d at 613-15 (citing Whitney v. Cal., 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring)).

249. R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

home.[250] The Supreme Court unanimously struck down this statute on First Amendment grounds.[251] Although there was a sharp concurrence disagreeing with the majority's reasoning, the Justices agreed that the statute was unconstitutional, because the statute regulated the content of speech, as opposed to merely the time, place or manner of speech.[252] Writing for the majority, Justice Scalia began his opinion by setting forth a well-established conceptual distinction in liberal First Amendment jurisprudence, that content-based restrictions may be divided into two forms of speech, high speech and low speech.[253]

High speech consists of political, artistic and religious forms of expression and low speech consists of defamation, fighting words, obscenity, and pornography.[254] There is a heavy presumption that content-based regulations will be invalid, except in cases involving low speech.[255] The reason for this, as suggested above, is that low forms of speech are generally not associated with the two core values underlying the First Amendment, the search for truth through the marketplace of ideas, and self-governance.[256] As the *R.A.V.* majority noted, we have "permitted restrictions upon the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[257]

The Court in *R.A.V.* accepted the Minnesota Supreme Court's conclusion that the St. Paul ordinance was a content-based regulation, but one that covered only "fighting words" which was a form a "low speech" and thus could be regulated.[258] Nevertheless, the U.S. Supreme Court held that the specific ordinance was unconstitutional

---

250. The ordinance provided:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Id. at 280 (citing St. Paul Bias-Motivated Crime Ordinance, St. Paul Minn., Legis. Code § 292.02 (1990)).

251. *Id.* at 381-86.

252. *Id.* at 381.

253. *Id.* at 382-86.

254. *Id.*

255. *R.A.V.*, 505 U.S. at 382-86.

256. *Id.*

257. *Id.* at 382-83 (citing Chaplinsky v. N.H., 315 U.S. 568, 572 (1942)).

258. *Id.* at 380-81.

because it criminalized only certain types of invectives.[259] These incentives included only those directed to specified disfavored topics, like racism.[260] The majority made clear that the government may not endorse specific viewpoints by making certain speech criminal.[261] The City of St. Paul, according to the majority, could not selectively regulate only those fighting words that provoke violence on the basis of race, color, creed, religion or gender.[262] The Court stated, "The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects."[263] According to the Court, the only permissible distinction between types of fighting words are those based on the very reason this category of speech is being proscribed.[264] In other words, St. Paul might have regulated only those words which were in fact most likely to lead to "fighting"; that is, those words most threatening or noxious.[265]

Justice White, along with Justices O'Connor, Blackmun and Stevens, concurred in the judgment, but strongly disagreed with the majority's reasoning.[266] Justice White wrote, "The case could easily be decided within the contours of established First Amendment law by

---

259. *Id.* at 387-96.

260. *Id.*

261. *R.A.V.*, 505 U.S. at 387-96.

262. *Id.*

263. The Court further stated:

> The dispositive question in this case, therefore, is whether content discrimination is reasonably necessary to achieve St. Paul's compelling interests; it plainly is not. An ordinance not limited to the favored topics, for example, would have precisely the same beneficial effect. In fact the only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids. The politicians of St. Paul are entitled to express that hostility -- but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree.

Id. at 395-96 (internal citations omitted).

264. *Id.* at 388.

265. For example, in the context of pornography, the Court suggests that a regulation may proscribe those forms of speech involving the most lascivious forms of pornography, as lasciviousness is the basis for regulating this type of speech in the first instance, but not certain types of pornography, like those with offensive political messages. *Id.* The Court justified its reasoning on the ground that fighting words are proscribable, in the first instance, because the manner in which the content is presented (for example, threatening or hostile) is not related to the truth of the speech, an important value underlying the First Amendment. Moreover, hostility in speech does not further the other significant First Amendment value discussed earlier, self-governance. *Id.*

266. *Id.* at 397.

holding . . . that the St. Paul ordinance is fatally overbroad because it criminalizes not only unprotected expression but expression protected by the First Amendment."[267] The concurrence took issue with the majority's "underbreadth" reasoning that if some fighting words are to be regulated then all fighting words must also be regulated.[268] Rather than relying on this "underbreadth" rationale, the concurrence argued that the statute was unconstitutional on "overbreadth" grounds: that is, the St. Paul ordinance impermissibly proscribed speech that caused "only hurt feelings, offense, or resentment."[269] Racial epithets that only cause hurt feelings, according to this rationale, may not be regulated.[270]

Two important lessons emerge from the Court's decision in *R.A.V.*[271] First, both the majority and concurring opinions make it very difficult for states and municipalities to pass hate speech ordinances, and both hold that speech that causes resentment[272] cannot be regulated.[273] Second, the *R.A.V.* majority reads the First Amendment as prohibiting the State from making distinctions about the content of various types of speech.[274] For example, statutes cannot make distinctions between a neo-Nazi burning a cross on a black person's lawn and an environmentalist planting a tree on a lumber company's property. Both of these actions are forms of "speech" under First Amendment jurisprudence, although they are very different types of expression with very different meanings. The cross burning is intended to cause harm based on an immutable characteristic, such as the color of one's skin, whereas the tree planting is intended to express a political statement about the environment. Based on the majority's holding, a court would not be able to distinguish between these two forms of speech. This reflects the liberal position that the government should remain neutral and allow the marketplace of ideas to police the content of speech.[275]

Because of the liberal emphasis on autonomy, abstract rights and the marketplace of ideas, hate speech ordinances will always be

267. *Id.* (White, J., concurring).
268. *R.A.V.*, 505 U.S. at 414.
269. *Id.*
270. *Id.*
271. *Id.* at 382-96.
272. For example, non-violent statements of racial supremacy or inferiority.
273. *R.A.V.*, 505 U.S. at 382-96.
274. *Id.*
275. *See supra* notes 246-52 and accompanying text.

closely scrutinized, rarely surviving such scrutiny.[276] To overcome this strict scrutiny, states and municipalities must demonstrate a compelling state interest and demonstrate that the means for addressing this compelling interest are narrowly tailored to address that interest only.[277] In other words, as both the majority and concurrence agree, a hate speech ordinance cannot be "overbroad," and prohibit non-proscribable speech.[278] Moreover, as the majority holds, it cannot be "underbroad," in that the State cannot proscribe only certain forms of speech to the exclusion of others.[279] Under a liberal legal system, burning a cross is conceptualized as a form of individual expression.[280] Also, since this expression is the very embodiment of the individual's autonomy, the system endows this expression with an inherent value and provides it with heightened protections.[281] However, under a jurisprudence based on *tolerance as understanding*, the presumptions disfavoring content-based regulation would not weigh nearly as heavily, and conduct antithetical to norms associated with understanding, such as cross burning, would not receive such protection.[282]

Of course, some liberals could argue that governmental regulation of cross burning would lead down a slippery slope, allowing the government to make decisions concerning a wide variety of speech. Though this argument is not without merit, it is flawed in many respects. First, it is important to recognize that the government's affirmative refusal to make distinctions between varying types of speech is not a *neutral* political policy, but rather a reflection of liberal values.[283] Having a laissez-faire approach to speech is an

276. *See supra* notes 250-73 and accompanying text.

277. *R.A.V.*, 505 U.S. at 395-96.

278. *Id.*

279. *Id.*

280. *Id.* Whether that expression, which has some First Amendment protections, may be regulated depends, in part, on whether the expression is being regulated or whether the mode or consequences of that expression is being regulated. *See* Tex. v. Johnson, 491 U.S. 397 (1989) (burning the flag is expressive conduct, which may not be regulated merely for the purposes of barring the expression itself). The Supreme Court will likely decide the issue of to what extent cross-burning may be regulated in the next term. Va. v. Black, 553 S.E.2d 738 (Va. 2001), *cert. granted*, 535 U.S. 1094 (U.S. Oct. 7, 2002) (No. 01-1107). Since the time of this writing, the Court rendered an opinion in *Virginia v. Black* on April 7, 2003. *See* Va. v. Black, No. 01-1107, 2003 WL 1791218 (U.S. Apr. 7, 2003).

281. *See supra* notes 239-48 and accompanying text.

282. *See supra* notes 239-48 and accompanying text.

283. *See* SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE, *supra* note 119; MARCUSE, *Repressive Tolerance in* A CRITIQUE OF PURE TOLERANCE, *supra* note 131; Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, *supra* note 131.

affirmative government decision to support certain political and social norms;[284] most frequently, these norms are status quo norms.[285]

Second, even if the government may impermissibly regulate certain forms of protected speech, it does not necessarily follow that an absolute bar to governmental distinctions regarding speech is the better course. For those in society who are discriminated against the most, it might be the case that a government that mistakenly restricts some beneficial speech, while zealously prosecuting hate speech, is better than one which is less zealous in its prosecution, but rarely restricts beneficial speech. By analogy, the government makes numerous mistakes with respect to many types of criminal prosecutions, yet no one would argue that there should be an absolute bar to all criminal prosecutions.

Third, in a world as complex as ours, it seems fairly apparent that social order requires that the government make distinctions. Although presumably not everyone can agree that American slavery or the Holocaust were real and tragic events, because of the need to demonstrate compassion and empathy for those who suffered, *tolerance as understanding* would strongly question those who deny it. *Tolerance as understanding* would be most concerned with the relationship between the denial of these truths and the denial of the need for a compassionate and empathetic understanding of these events. Because autonomy is not its guiding principle, *tolerance as understanding* is not hampered by an overreaching fidelity to protect one's right to speak and think as one chooses.[286]

This discussion concerning *tolerance as understanding* and hate speech leads to a number of tentative conclusions. First, if autonomy and individual conscience were not paramount virtues of society, then the First Amendment would no longer rely as heavily on

---

284. By analogy, having a laissez-faire approach to social issues or taxes is an affirmative government decision.

285. *See supra* note 283.

286. The right to "conscience," as well as the consequent rights to certain expressive forms of speech and actions, would not be permitted where they went outside the normative parameters established by the norms of empathy and compassion. Essentially, this is a challenge to the Lockean view of an unbridled right to conscience. *See* LOCKE, ESSAY CONCERNING TOLERATION, *supra* note 2, at 190-91. Locke writes:

> That in speculations and religious worship every man hath a perfect, uncontrollable liberty which he may freely use, without, or contrary to the magistrate's command, without any guilt or sin at all; provided always that it be all done sincerely and out of conscience to God, according to the best of his knowledge and persuasion.

Id.

these principles when they come into direct conflict with the obligation to practice understanding. Even if speech had some basis in truth and was political in nature, both important values in a liberal regime, this speech may not necessarily receive protection. For example, assuming that an individual calmly says at a peaceful rally of like-minded individuals, "there should be a law prohibiting any more Kikes from becoming Senators, because there are a disproportionate number of Kikes in the Senate now." This statement is a political expression, not intended as fighting words. Moreover, this statement is based on a partial truth, as over the last ten years, there has been a disproportionate amount of Jewish senators.[287] Under our present liberal system, if this statement was said in a non-threatening manner, it would be considered "high speech" and would be afforded the highest level of protection.[288] Conversely, under a system based on *tolerance as understanding*, this sort of speech would be so contrary to the core principles of understanding that it would not receive such protection. Additionally, such speech would not be viewed merely as an abstract right possessed by the individual. Rather, such speech would be conceptualized as a social interaction with attendant mutual obligations. The obligation would require individuals to use speech in manners that are not purposefully hateful towards others. Obviously, creating clear standards concerning the requisite degree of intent and the level of harm would be a difficult task.[289] But as suggested above, this difficulty exists in many places in the law and is a necessary evil in avoiding greater ills such a cross-burning, swastika-wearing, and other forms of expression, which are intended to spread hate and result in harm.[290]

---

287. In 2000, ten percent of the Senate, about four times the population of Jews of America, was Jewish. These Senators are Dianne Feinstein, Barbara Boxer, Herb Kohl, Russell Feingold, Frank Lautenberg, Paul Wellstone, Arlen Specter, Chuck Schumer, Joseph Lieberman, Carl Levin. Matt Cooper, *Good for the Jews?*, E-mail From the Trail (Aug. 4, 2000), *available at* http://www.time.com/time/campaign2000/email/email_0804c.html (last visited Apr. 11, 2003) (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class).

288. R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

289. *Id.*

290. In *R.A.V.*, the St. Paul ordinance (which clearly prohibits at least two acts -- the burning of a cross and display of a swastika) attempts to delineate both an intent standard and a level of harm standard. The ordinance provides that whoever places a symbol which "one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor." *Id.* at 380 (citing St. Paul Bias-Motivated Crime Ordinance, St. Paul Minn., Legis. Code § 292.02 (1990)). This standard is capable of being enforced and represents the mutual obligations individuals have to avoid purposeful injury to others under a system based

Finally, the real-world experiences of those who suffer as a result of an expansive freedom of speech would be given great priority under a jurisprudence based on *tolerance as understanding*. The psychological and emotional pain suffered by those who are discriminated against would be weighed against the marginal value of permitting clearly racist speech.[291] In most cases, these empathetic narratives of pain, as well as the social inequalities that are perpetuated through racist speech, would trump the right to think, speak and act as one chooses.[292] Additionally, a theory of jurisprudence based on *tolerance as understanding*, perhaps not unlike that of many liberal theories, must strongly consider the argument that racist speech has the overall effect of reducing free speech.[293] This argument must be considered because it may silence those to whom this speech is directed.[294]

Notwithstanding the foregoing arguments, it is important not to overstate *tolerance as understanding's* position on free speech. Most importantly, the bedrock principle underlying the First Amendment, that the State should not interfere with an individual's expression,[295] would be maintained under a system based on *tolerance as understanding*. There is nothing about a jurisprudence based on norms of understanding that would suggest that the State should interfere with individuals' views on politics, religion, art, sexual relations, and the like.[296]

It is only when the freedom of expression clearly impinges on the obligation for mutual understanding that speech should be curtailed.[297] Furthermore, if speech is curtailed, it should be curtailed only to the extent necessary to deter future hatred. Put somewhat

---

on *tolerance as understanding*.

291. *See, e.g.*, Mari Matsuda, *Public Response to Racist Speech: Consider the Victim's Story*, 87 MICH. L. REV. 2320, 2336 (1989) (arguing that victims of hate speech may experience post-traumatic stress disorder, hypertension, fear, psychosis and nightmares).

292. As I suggested earlier, a theory of jurisprudence based on *tolerance as understanding* strongly questions the Millian/Lockean notion that the right to think as one chooses is a value in and of itself, irrespective of the content of that individual's conscience and the consequences of that conscience. *Cf.* Akhil Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV 124 (1992) (suggesting that the Thirteenth and Fourteenth Amendment values of equality might limit First Amendment values).

293. *See supra* notes 291-92 and accompanying text.

294. John Stuart Mill, who arrives at his defense of free speech through a utilitarian analysis, never considers this argument in his utility calculus.

295. U.S. CONST. amend. I.

296. *See supra* notes 137-82 and accompanying text.

297. *See supra* notes 137-82 and accompanying text.

differently, the slight value gained by allowing speech that is predominantly hate-based is outweighed by the importance of promoting the values of understanding.

C. Gay Rights

As opposed to hate speech and the death penalty, *tolerance as understanding* and liberal tolerance share much in common with respect to gay rights. The reason for this common position in gay rights cases is that the core disagreement between the two paradigms does not come into conflict. In other words, *tolerance as understanding's* obligation to practice empathy and compassion does not come in conflict with the liberal right to pursue one's own conception of the good. As a general proposition, both jurisprudential views should be highly supportive of gay rights.[298]

Notwithstanding this general agreement, there are two potential caveats to consider. First, there is at least one Supreme Court case, *Bowers v. Hardwick*,[299] which suggests that the majority's historical and moral disapproval of homosexuality may be used to counterbalance the individual's right to pursue his or her sexual identity. But, as will be discussed below, this decision may be characterized as a non-liberal decision.[300] Second, and more importantly, in some situations, well-established liberal rights may come in conflict with one another. For example, the right to pursue one's sexual identity may come into conflict with the similarly important liberal right of the freedom of association. In *Boy Scouts of America v. Dale*,[301] the Supreme Court upheld the Boy Scouts' First Amendment freedom of association right to revoke a Scout leader's membership based on his advocacy of homosexuality, even though this

298. *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996) (holding that the Colorado legislature could not pass a referendum, and a consequent constitutional amendment, to prohibit Colorado municipalities from passing pro-gay rights legislation). The *Romer* decision is compatible with both liberal jurisprudence and *tolerance as understanding*. Both paradigms are generally skeptical of laws, which discriminate against specific groups based on moral practices that do not prohibit the majority from practicing its own morality. *See infra* notes 317-331, discussing the Millian harm principle.

299. 478 U.S. 186 (1986).

300. Moreover, there is the possibility that *Bowers* will be either overruled or circumscribed in the near future. As of the writing of this article, the Supreme Court was revisiting certain aspects of the *Bowers* decision in *Lawrence v. Texas*, 41 S.W.3d 349 (Tex. Ct. App. 2001), *cert. granted*, 123 S.Ct. 661 (U.S. Dec. 2, 2002) (No. 02-102).

301. 530 U.S. 640 (2000).

revocation violated a New Jersey anti-discrimination law.[302] This decision can be reconciled with liberal jurisprudence, but cannot be reconciled with a jurisprudence based on *tolerance as understanding.*

In *Bowers*, the Supreme Court decided whether the due process clause of the Fourteenth Amendment protected a gay man's right to engage in consensual sodomy.[303] The due process clause provides that no State shall "deprive any person of life, liberty, or property, without due process of law."[304] Although this clause appears to be primarily procedural in nature, the Supreme Court, beginning in the 1960's, began holding that the due process clause also protects certain substantive rights, such as the right to use contraception,[305] and the right to have an abortion.[306]

The *Bowers* Court was confronted with a Georgia criminal statute, which provided, in relevant part, "a person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another."[307] The 5-4 majority opinion distinguished *Griswold*[308] and *Roe*[309] as cases involving fundamental rights concerning family, marriage, and the decision to have children.[310] Homosexual sodomy, according to the Court, bore no relation to these traditional rights.[311] The Court distinguished between a homosexual man's right to engage in consensual sex and a heterosexual man's right to have sex while wearing a condom.[312]

The *Bowers* Court gave little credence to the traditional liberal argument of Michael Hardwick -- that the majority's disapproval of homosexuality is an illegitimate reason for justifying anti-sodomy statutes.[313] Instead, the majority opinion relied heavily on the claim that homosexual conduct has been traditionally disfavored and deemed

---

302. *See infra* text of the anti-discrimination statute accompanying note 335.

303. *Bowers*, 478 U.S. at 189-96.

304. U.S. CONST. amend. XIV, § 1.

305. Griswold v. Conn., 381 U.S. 479 (1965) (due process clause protects the right to use contraceptives).

306. Roe v. Wade, 410 U.S. 113 (1973) (due process clause protects the right to abortion). *Griswold* and *Roe* are part of the "modern substantive due process" lineage, which constitutionalizes the right to personal privacy.

307. GA. CODE ANN. § 16-6-62 (1984). This crime carried a minimum sentence of one year and a maximum sentence of twenty. *Id.*

308. 381 U.S. 479.

309. 410 U.S. 113.

310. Bowers v. Hardwick, 478 U.S. 186, 189-96 (1986).

311. *Id.*

312. *Id.*

313. *Id.*

immoral.[314] Of particular importance to the majority was the fact that proscriptions against homosexual sodomy have ancient roots, and that in the year the Fourteenth Amendment was ratified, all but five of the then thirty-seven states, criminalized sodomy.[315]

Justice Blackmun's dissent in *Bowers* took the contrary position. He argued that the moral and historical disapproval of homosexuality, without more, cannot be a basis for criminalizing homosexual conduct.[316] From a liberal perspective, the dissent is the more persuasive opinion. The dissent accused the majority of missing the main point of the case: that substantive due process is not designed to protect homosexuality *per se*, but the "right most valued by civilized men, namely, the right to be let alone."[317]

The dissent dismissed the Court's historically ingrained moral argument that homosexuality is wrong, relying instead on the empirical claim that homosexuality is an indispensable component of an individual's identity and autonomy.[318] This empirical claim about identity fits neatly within the modern liberal moral framework, as it holds that "a certain private sphere of individual liberty will be kept largely beyond the government."[319] The dissent persuasively argued that *Bowers* was a natural and constitutionally permissible extension of *Griswold*[320] and *Roe*.[321] Contrary to the majority's assertion, *Griswold*[322] and *Roe*[323] were not decisions designed to promote a particular moral or religious view, but rather, decisions designed to promote the individual's ability to make autonomous decisions concerning intimate private matters.[324] In short, the dissent concluded

---

314. *Id.*

315. *Id.* at 191-96.

316. *Bowers*, 478 U.S. at 199-214.

317. *Id.* at 199 (citing Olmstead v. United States, 277 U.S. 438 (1928) (Brandeis, J., dissenting)). This liberal ideal is the cornerstone of the dissent in *Bowers*. In the tradition of Millian liberalism, the dissent challenged the Court's rejection of Hardwick's moral argument and argued that for the majority to drastically penalize a minority on an issue as intimate and private as sodomy, it must have a legitimate basis well beyond old-fashioned moral repugnancy. The social side-effects of sodomy are so limited, according to this liberal argument, that the majority must have a compelling reason for regulating this almost exclusively private behavior.

318. *Id.* at 204-14.

319. *Id.* at 199 (citing Thornburg v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986)).

320. 381 U.S. 479 (1965).

321. 410 U.S. 113 (1973).

322. 381 U.S. 479.

323. 410 U.S. 113.

324. Justice Blackmun wrote:

that because Hardwick's conduct did not interfere with the rights of others, and because there was no justification beyond a history of religious and moral intolerance of homosexuals to prohibit Hardwick's private sexual conduct, Georgia's statute should be struck down.[325]

The dissent, which reflects a truer liberal position, has much in common with a jurisprudence based on *tolerance as understanding*. Homosexual and heterosexual relationships are equally capable of producing an intimacy based on compassion and mutual understanding. Thus, it would be paradoxical to treat the "right to love" differently based on whether it is homosexual or heterosexual in nature. In line with this reasoning, liberal scholar David Richards writes:

> Intimate relationships -- which give play to love, devotion, friendship as organizing themes in self-conceptions of permanent value in living -- are among the essential resources of moral independence. Protection from hostile interest thus nurtures these intimate personal resources, a wholeness of emotion, intellect, and self-image guided by the self-determining moral powers of a free person.[326]

> We protect the decision whether to have a child because parenthood alters so dramatically an individual's self-definition, not because of demographic considerations or the Bible's command to be fruitful. . . . we protect the family because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households.

Bowers, 478 U.S. at 205.

325. Interestingly, if at least one Justice in the majority was more empathetic to the concerns of homosexuals, the decision may have relied on a broader perspective and its reasoning may have been more informed. As a matter of historical record, one Justice in the majority, Justice Powell, admitted that it was his lack of empathy for homosexuals that caused him to uphold the statute criminalizing homosexual sodomy. JOHN C. JEFFERIES, JR., JUSTICE LEWIS F. POWELL, JR. (1994). Powell claimed during the consideration of *Bowers* that he did not know, much less have a close personal relationship with, anyone who was a homosexual. Ironically, *his law clerk was gay*. Years after *Bowers*, in part as a result of the revelation that he had known gay men, and in the case of at least one, worked closely with him, Powell admitted that his vote in *Bowers* was misguided. This is important because what changed his opinion was neither some new reflection on politics nor a change in the Constitution. Rather, it was a heightened *understanding*, a newfound empathy, for a group of individuals he first came to know. As John Jeffries, a former law clerk and biographer of Justice Powell, noted "Powell had never known a homosexual because he did not want to. In his world of accomplishment and merit, homosexuality did not fit, and Powell therefore did not see it." *Id.* at 529.

326. RICHARDS, TOLERATION, *supra* note 5, at 244.

As this passage suggests, in the context of loving relationships, autonomy and understanding, far from being mutually exclusive, are inextricably intertwined. From a Millian liberal perspective, the right to a homosexual lifestyle is a right that primarily affects the individual alone.[327] Although protections for gay rights may have some social side effects, like challenging certain traditional and religious conceptions of the family, the costs of these social side effects are outweighed by the paramount virtue of autonomy.[328] In other words, even though the majority may disapprove of such conduct, this disapproval does not outweigh the value derived from protecting individuals in their pursuit of the good. From the Kantian or Rawlsian liberal perspective, of which David Richards' quote above is a part, individuals should have the right to autonomously pursue relationships of their choosing, as this right is essential for individual self-definition.[329] One may take this Kantian proposition one step further in suggesting that this unfettered pursuit of meaningful relationships fosters the values underlying *tolerance as understanding.*

In the *Bowers* dissent, the positions of liberalism and *tolerance as understanding* are congruous.[330] According to the Millian harm principle,[331] a majority's disapproval of gay rights must be a secondary concern to the individual's right to pursue his or her own conception of the good.[332] But, where the liberal right to pursue one's own conception of the good comes in conflict with the liberal freedom of association, liberalism's position is far less clear.[333]

Boy Scouts of America v. Dale[334] illustrates this conflict. In *Boy Scouts*, the Supreme Court, in a 5-4 decision, held that New Jersey's public accommodations law cannot be applied so as to prohibit the Boy Scouts from revoking a Scoutmaster's membership

---

327. *See supra* notes 5, 22, 69, 76, 87-96 and accompanying text.

328. For Millian liberalism, autonomy is the paramount means for social progress. *See supra* notes 5, 22, 69, 76, 87-96 and accompanying text. To the extent there are social side effects of autonomy, like impinging on another's morality, they can only be regulated if they preclude the right of the other to act autonomously. The right to be gay may impinge on others' morality, but it does not preclude the others from acting autonomously and choosing traditional lives for themselves.

329. RICHARDS, TOLERATION, *supra* note 5, at 244.

330. 478 U.S. 186 (1986).

331. This principle states that an individual may do as he chooses so long as he causes no direct harm to others. *See supra* notes 5, 22, 69, 76, 87-96 and accompanying text.

332. *See supra* note 328.

333. Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

334. *Id.*

based on his advocacy of homosexuality.[335] According to the Court, because the Boy Scouts inculcate values contrary to homosexuality, the Boy Scouts had a First Amendment right to exclude the Scoutmaster from their organization.[336] The Court advanced the liberal First Amendment position that the government should not interfere with an individual's right to associate with whomever they choose and should not interfere with the right of a group of similar-thinking individuals to collectively espouse their views.[337]

The dissent in *Boy Scouts* also advanced a liberal argument, but one tempered by concerns about equality.[338] The dissent argued that the freedom of association is not a license to violate state anti-discrimination laws.[339] Because the freedom of association only attaches to unequivocal and uniform advocacy of positions, any organization invoking such a freedom must demonstrate that the person whom the organization seeks to exclude epitomizes the contrary position.[340] The dissent placed a higher burden on the organization to demonstrate that the interloper would have hampered organizational imperatives.[341] Nevertheless, like the majority opinion, the dissent upheld the right of a group to exclude members, regardless

---

335. The New Jersey public accommodations law provides:

> All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, familial status, or sex, subject only to conditions and limitation applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.

N.J. STAT. ANN. § 10:5-5 (l) (West Supp. 2003). In the definition section of the statute, the term "public accommodation" is broadly defined and the New Jersey Supreme Court interpreted it so as to include accommodations utilized by the Boy Scouts.

336. *Boy Scouts*, 530 U.S. at 647-48 (citing Roberts v. United States Jaycees, 468 U.S. 609, 622-23 (1984)) ("Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express. Thus, '[f]reedom of association . . . plainly presupposes a freedom not to associate.'").

337. The Court stated:

> We are not, as we must not be, guided by our views of whether the Boys Scouts' teachings with respect to homosexual conduct are right or wrong; public or judicial disapproval of a tenet of an organization's expression does not justify the State's effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive message.

Id. at 661.

338. *Id.* at 678-80 (Stevens, J. dissenting).

339. *Id.* at 648-60.

340. *Id.* at 678-80.

341. *Id.*

of whether the exclusion is based on prejudice or unfounded hatred.[342] Thus, although the dissent was more sympathetic to the Scoutmaster's claims, it still took the liberal position that those who unequivocally advocate a position may be shielded from anti-discrimination laws.[343]

Under a theory of jurisprudence based on *tolerance as understanding*, this right of a group to exclude would be limited. The reasons for exclusion could not include reasons contrary to *tolerance as understanding* such as racism, homophobia, anti-Semitism, or misogyny.[344] As was suggested earlier, under a theory of tolerance based on understanding, the individual's right to noninterference is not necessarily as great as another individual's right to commune or associate with others.[345]

D. Rights of Religious Minorities

The degree to which a State should tolerate minority religious practices that run contrary to the State's interests is a troubling issue for both liberalism and theories based on *tolerance as understanding*. Generally, in cases raising this issue, the State argues that the minority's religious practice, and/or its refusal to abide by generally applicable laws, will greatly harm the secular purposes of the State.[346] For example, if a religion requires an individual to engage in a criminal activity, like taking illegal drugs, then the liberal legal system would have to balance two very powerful competing claims: the individual's right to autonomously pursue her own conception of the good and the State's right to enforce its laws in a neutral fashion.[347] As will be discussed below, for both liberalism and *tolerance as understanding*, it is difficult to discern a clear method for deciding whether the individual's religious convictions should take precedence over the need for social order and uniform laws.

Recent jurisprudential history demonstrates liberalism's uncertainty with respect to the rights of religious minorities. In just seven short years, from 1990-1997, the legal standards with respect to accommodating religious minorities vacillated back and forth numerous times. Beginning in the 1960's, the Supreme Court began to

342. *Boy Scouts*, 530 U.S. at 678-99.
343. *Id.*
344. *See supra* note 67.
345. *See supra* notes 96-97.
346. *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872 (1990).
347. *Id.*

interpret the Free Exercise Clause of the First Amendment in a manner that often favored the rights of religious minorities.[348] In *Sherbert v. Verner*, for example, the Supreme Court held that a State could not deny unemployment insurance to a Seventh Day Adventist who was fired from her job because she was a Saturday Sabbath observer.[349] The compelling state interest test established in *Verner* was the law until 1990, when it was rejected in *Employment Division v Smith*.[350] In *Smith*, the Court decided whether the Free Exercise Clause permitted Oregon to deny unemployment benefits to individuals who were fired from their jobs for using illegal drugs in religiously required ceremonies.[351] Writing for the *Smith* majority, Justice Scalia refused to apply the compelling state interest test and held that the First Amendment does not protect religious minorities from abiding by "neutral generally applicable laws," such as criminal laws.[352]

In 1993, in response to *Smith's* discarding of the pro-religious rights "compelling state interest test," Congress passed the Religious Freedom Restoration Act (RFRA),[353] which reinstated the compelling state interest test and overturned *Smith*.[354] However, Congress' reinstatement of the compelling state interest test was short-lived. In 1997, in *City of Boerne v. Flores*, the Supreme Court declared RFRA unconstitutional.[355] Relying on the landmark holding of *Marbury v. Madison*, which held that it is within the province of the judicial

348. *See* Sherbert v. Verner, 494 U.S. 872 (1963); Wis. v. Yoder, 406 U.S. 205 (1972).

349. The State, according to the Court, could not withhold the insurance based on the fact that the Seventh Day Adventist refused to take jobs that required her to work on her Sabbath. *Sherbert*, 374 U.S. 398. For the State to impose such a substantial burden on a religious minority, the State had to demonstrate a *compelling governmental interest* and had to demonstrate that the means for achieving this interest were narrowly tailored. In other words, if the State could achieve this compelling state interest by a method that was less burdensome on the religious interest, then the State was constitutionally required to do so. *Id.*

350. 494 U.S. 872 (1990).

351. In *Smith*, the terminated employee was a member of the Native American Church, which had a religious ritual involving the consumption of peyote, an illegal hallucinogenic. *Id.* The employee was fired for taking peyote and denied unemployment benefits because he was discharged for misconduct. *Id.*

352. *Id.*

353. 42 U.S.C. §§ 2000bb *et seq.* (2003).

354. RFRA stated in relevant part:

> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, [unless] it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest and (2) is the least restrictive means of furthering that compelling governmental interest.

RFRA §§ 2000bb-1.

355. City of Boerne v. Flores, 521 U.S. 507 (1997).

branch to determine what the Constitution says, the *Flores* Court said Congress lacked the authority to overturn *Smith*'s constitutional holding concerning the meaning of the First Amendment's Free Exercise Clause.[356]

This seesawing between the "compelling state interest test" and the "neutral laws of general applicability test" reflects the ambivalence of liberalism towards State accommodation of religious practices that interfere with neutral State laws. This ambivalence mirrors the difficulty in determining the outer-limits of autonomy under Mill's harm principle. According to Millian liberal theory, the individual has a strong right to autonomy so long as he does not cause harm to others.[357] In religious accommodation cases, the two central issues are how much social harm results from making exceptions to laws of general applicability, and should the State or the majority have to incur the costs associated with the social harm?[358] Liberalism fails to provide clear guidelines for evaluating these competing claims because of the normative and empirical ambiguities associated with determining whether the right to autonomy has infringed upon the Millian obligation not to cause harm to others.[359] For similar reasons, as will be discussed below, a theory of jurisprudence based on *tolerance as understanding* has little more ability to provide clear guidelines. These difficulties will be elaborated upon in the context of the Supreme Court case, *Wisconsin v. Yoder*.[360] *Yoder*, along with *Sherbert v. Verner*,[361] helped to establish the compelling state interest test.[362]

In *Wisconsin v. Yoder*, the Supreme Court held that Wisconsin's compulsory school attendance law, which required children to attend school until age sixteen, violated Amish parents' constitutional right to freely exercise their religion.[363] The Amish parents in *Yoder* were fined for refusing to send their fourteen and fifteen-year-old children to school beyond the eighth grade, even though the parents maintained that attendance of school past this age

356. *Id.* (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).

357. MILL, ON LIBERTY, *supra* note 2, at 12 ("That 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.").

358. *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872 (1990).

359. *See supra* notes 5, 22, 69.

360. 406 U.S. 205 (1972).

361. 494 U.S. 872 (1963).

362. *Id.*; 406 U.S. 205.

363. *Yoder*, 406 U.S. at 234.

conflicted with the religious and communal tenets of the Old Order Amish communities.[364] In deciding *Yoder*, the Supreme Court balanced the State's paramount responsibility for educating its citizens with the right to exercise one's religious convictions.[365] The State of Wisconsin put forth two reasons in defense of its compulsory school attendance law.[366] First, it argued that an educated citizenry is essential for a participatory political system to operate effectively.[367] Second, it argued that an education allows for individuals to be self-reliant.[368] The Court rejected the State's claims by arguing that an eighth grade education, in addition to the real world education of the Amish beyond the eighth grade, allowed the Amish to be self-reliant citizens capable of participating in the political system.[369] The Court concluded that Wisconsin's interests in requiring education until the age of sixteen was neither a compelling government interest nor sufficiently tailored to achieve this interest.[370]

In concurrence, Justices White, Brennan and Stewart questioned the Court's favorable treatment of the Amish's free exercise claim.[371] Justice White wrote, "This would be a very different case for me if [the Amish's] claim[s] were that their religion forbade their children from attending any school at any time and from complying in any way with the educational standards set by the

---

364. As the Court noted :
> Formal high school education beyond the eighth grade is contrary to Amish beliefs, not only because it places Amish children in an environment hostile to Amish beliefs with increasing emphasis on competition in class work and sports and with pressure to conform to the styles, manners, and the ways of the peer group, but also because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life. During this period, the children must acquire Amish attitudes favoring manual work and self-reliance and the specific skills needed to perform the adult role of an Amish farmer or housewife.

Id. at 211.

365. *Id.* at 221. The Court stated:
> By preserving doctrinal flexibility and recognizing the need for a sensible and realistic application of the Religion Clauses 'we have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion. This is a tight rope and one we have successfully traversed.'

Id.

366. *Id.*
367. *Id.*
368. *Id.*
369. *Yoder*, 406 U.S. at 222-36.
370. *Id.*
371. *Id.* at 238 (White, J., concurring).

State."[372] Justice White strongly emphasized the importance of compulsory education laws for a democratic society as well as uniform educational standards.[373] Justice White further argued that even if the parents object, the State has an obligation to the child to provide the tools for them to live, including the tools necessary to live outside the community, in the event the child chose to do so.[374]

Justice Douglas took this State obligation argument one step further in his partial dissent from the opinion.[375] Justice Douglas argued that the decision whether to attend school cannot rest in the parents' hands alone, as the child will be the one who has to deal with the consequences of that decision for his or her entire life.[376] Justice Douglas worried that by denying an Amish child an education beyond the eighth grade, that child might be denied the opportunity of becoming whoever that child wants to be.[377] Justice Douglas argued that the State had a legitimate role in protecting the child's interests in being educated beyond the eighth grade.[378] Both the concurrence and partial dissent were particularly concerned with the claim that the State has the obligation to protect the children.[379] Although this claim may be viewed as a liberal one, meaning the State must ensure that the child has the right to pursue his own good, the conception of the State as *parens patriae* has been traditionally considered non-liberal and highly paternalistic.[380]

---

372. *Id.*
373. *Id.* at 238-41.
374. *Id.*
375. *Yoder*, 406 U.S. at 241-49 (Douglas, J., dissenting in part, concurring in part).
376. *Id.*
377. *Id.* at 243-47.
378. *Id.*
379. *Id.*
380. As the majority opinion argues, "if the State is empowered, as parens patriae, to 'save' a child from himself or his Amish parents by requiring an additional two years of compulsory formal high school education, the State will in large measure influence, if not determine, the religious future of the child." *Id.* at 232. Surprisingly, Justice Douglas, one of the Court's greatest liberals, seemed to have taken a non-liberal position. As James Gordon writes:

> Yoder also involved an apparent role-reversal. Chief Justice Burger, the opinion's author, was in Yoder the great champion of First Amendment rights. Ironically, the sole dissenter was Justice Douglas. Burger wrote, in language that easily could have been penned by Douglas, "There can be no assumption that today's majority is 'right' and the Amish and others like them are 'wrong.' A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different." Douglas, rising to the challenge, assumed that the Amish were indeed "wrong" and condemned them harshly: "If [a child] is

This ambivalence and lack of clear guidelines in liberalism is also present in theories of jurisprudence based on *tolerance as understanding*. A legal theory based on norms of understanding would similarly have to balance the religious convictions of minorities versus the State's interest in having an educated citizenry. Such a theory would also have to consider the ability of children to survive outside of the Amish community. In balancing these various interests, it is important to consider the empirical evidence on how the lives of children within insulated communities are impacted by their insulation. As a general proposition, it seems that a theory based on norms of understanding, which necessarily would emphasize the virtue of mutual empathy and universal concern for all, might be somewhat skeptical of religious claims necessitating insulation from others.[381]

As has been suggested above in the *Boy Scouts* case,[382] the right of autonomy -- whether in the form of freedom of association, as in the *Boy Scouts* case, or freedom of religion, as in the *Yoder* case -- does not extend to cases clearly antithetical to the practices of understanding.[383] Thus, liberal freedoms could not be used to legitimize or excuse racist, homophobic or anti-Semitic speech or actions. Unlike liberal theories, which require the government to remain neutral with respect to different religions and apply general principles toward all religious claims, *tolerance as understanding* would not protect the individual's right to believe as he chooses where this right trespasses on the norms associated with understanding. Rather than remaining neutral with respect to the validity of an individual's conscience or a group's religious practices, *tolerance as understanding* would examine whether communities are practicing values not directly antithetical to norms of understanding. With respect to *Yoder*,[384] the central issue would be whether exempting children from minimal educational requirements, such as years of

---

harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed."

James Gordon, *Wisconsin v. Yoder and Religious Liberty*, 74 TEX. L. REV. 1237, 1238-39 (internal citation omitted).

381. One might argue that where religious claims demanding insularity come in direct conflict with the more universal aspirations requiring empathy and compassion for all, that these religious claims be closely scrutinized. On the other hand, so long as no direct harm is being done by these insulated minorities -- that is they are not promoting values directly antithetical to norms of understanding -- it would seem that there would be an obligation to tolerate the insulation.

382. Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

383. *See supra* notes 60-67, 137-82 and accompanying text.

384. Wis. v. Yoder, 406 U.S. 205 (1972).

schooling or uniform requirements, would impermissibly interfere with the children's ability to engage in the mutual obligations associated with understanding.[385] Put differently, would the refusal of the Amish parents' to send their children to school greatly diminish the children's ability to practice empathy and compassion either within or outside the Amish community?[386]

In short, one of the most important distinctions discussed throughout these four issues is the willingness of theories based on norms of understanding to question legal norms, which protect the individual's right to conscience and autonomy.[387] Central to this discussion of hate speech, gay rights, and minority religious freedoms is that *tolerance as understanding* subjected First Amendment protections of political and religious expression to scrutiny where they impinged upon the mutual obligation not to hate.

CONCLUSION

In conclusion, it is important to stress a central overarching theme that has been suggested throughout, namely, a theory of jurisprudence based on norms of understanding would be more likely to de-emphasize the role of *interests* in constitutional disputes than a liberal-based theory. A theory based on understanding would re-conceptualize the standard liberal legal conceptions of constitutional dispute resolution. Liberal dispute resolution generally consists of three components: (1) a formalistic and purportedly neutral process; (2) an identification and crystallization of competing interests; and (3) a resolution of these interests based on a balancing between norms of autonomy and collective interest.[388] Liberal disputes are generally

385. *Id.*

386. Although no clear standards would flow from *tolerance as understanding* or liberalism to assist in answering this question, there is an important distinction between the two which has been addressed throughout the discussion of minority rights, as well as the discussion of the death penalty, hate speech and gay rights. It would be far more in keeping with a jurisprudence based on *tolerance as understanding* than one based on liberalism to analyze each case on a pragmatic case-by-case basis. Whereas liberal norms of abstract rights, formalism, and most importantly neutrality, would caution against such a case-specific approach, *tolerance as understanding* would evaluate the fit between its norms of empathy, compassion and humility and the specific narratives and evidence of the religious practice in question.

387. *See supra* notes 60-67, 137-82 and accompanying text.

388. *See generally* ELY, DEMOCRACY AND DISTRUST, *supra* note 244; Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, *supra* note 131. *See also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962); MILL, ON LIBERTY, *supra* note 2.

framed in adversarial terms.[389] As a result of the system's desire to concretize interests and highlight adversarial positions, mutually shared interests are often devalued.

This dispute system of identifying and highlighting interests in a neutral process is an outgrowth of the liberal norms of autonomy. For normative reasons, like the importance of autonomy and conscience, and empirical reasons, such as the "fact" of individuality, constitutional disputes under a liberal legal system are generally decided by balancing discrete interests in a purportedly neutral process.[390] Political process theory, which reflects these liberal norms, holds that disputes over distinct interests in society should be resolved in a neutral political process based on liberal norms, such as free speech and due process.[391] This interest-based theory is an integral component of liberal adjudication.[392]

Political process theory gained particular prominence in the sixties, and is still one of the dominant paradigms in constitutional dispute resolution.[393] The Supreme Court's most famous endorsement of political process theory comes from Justice Stone's "footnote 4" in *United States v. Carolene Products*.[394] There, the Justice set forth what is now a bedrock principle of constitutional jurisprudence: that the judiciary's function is to "neutrally" police the political process to ensure that various interests are given a fair opportunity to participate in that process.[395]

But a theory based on understanding would conceive of social disagreements in a different way. The most important objective of such a legal system would not be the "neutral" definition and

---

389. The adversaries present self-interested arguments about the merits of their position. *Cf.* ELY, DEMOCRACY AND DISTRUST, *supra* note 244.

390. *See generally* sources cited *supra* note 388.

391. There is a vast literature concerning process-based theory, beginning with Madison's Federalist # 10. THE FEDERALIST No. 10 (James Madison). *See* ELY, DEMOCRACY AND DISTRUST, *supra* note 244. *See also* political science literature on process politics, DAVID TRUMAN, THE GOVERNMENTAL PROCESS (1951).

392. THE FEDERALIST No. 10 (James Madison). *See also* ELY, DEMOCRACY AND DISTRUST, *supra* note 244; DAVID TRUMAN, THE GOVERNMENTAL PROCESS (1951); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962); MILL, ON LIBERTY, *supra* note 2.

393. *See* sources cited *supra* note 392.

394. 304 U.S. 104 (1938) (Stone, J., concurring).

395. A good example of the Court applying this theory is *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966). There, the Court struck down the poll tax, but did not address any of the real substantive inequalities relating to race and elections. The Court emphasized the importance of keeping the process of politics, as opposed to the substantive outcomes, fair. *Id.*

development of discrete interests, followed by resolution; rather the system would attempt to ameliorate social cleavages and focus on mutuality, connectedness and transcendence. In other words, a heightened demonstration of understanding between the parties, mutual empathy, compassion, sacrifice, forgiveness, and humility, would trump the values of championing individual interests.[396] The following stylized utilitarian calculus reflects this difference:

$$U(\text{resolution}) = p(B) - p(C) < U(\text{transcendence/communion}) = p(B) - p(C)$$[397]

This equation reflects the notion that within controversial moral disputes there is a great deal of uncertainty in ascertaining empirical facts and choosing norms for weighing these uncertain facts. In contrast, there is far greater certainty with respect to the values that may be derived from the transcendence of the dispute and the communion between the disputants.[398] This simple utilitarian calculus can provide fertile ground for advancing theories of tolerance based on understanding.[399] This equation, and the ideas underlying it, deserve far more attention than can be given to it in this conclusion. But it is important to recognize that there are theoretically viable arguments, such as those advanced in this article, for challenging liberalism's

396. *See supra* notes 47-130 and accompanying text.

397. In this standard utility equation, *U* stands for utility, *p* stands for probability, *B* stands for benefits and *C* stands for costs. Thus, the utility derived from "resolving" a case based on "individual interests" is outweighed by the utility of transcendence and communion.

398. The suggestion here is that when an issue is controversial, like certain aspects of abortion, there is great difficulty in reaching a consensus about how to weigh competing moral claims and the empirical evidence supporting those claims. But whereas the uncertainty surrounding the controversial moral claims is usually high, the uncertainty about the benefits of fostering communion (for example, empathy and compassion) is usually low. This is based on the idea that mutual empathy and compassion should be the paramount moral goals of human interaction, which includes human disputes. *See supra* notes 60-67, 137-82.

399. Although it is difficult to locate an example of a political institution employing the utility calculus set forth above, in *Planned Parenthood of Southeastern Pa. v. Casey*, 510 U.S. 1309 (1994), the Supreme Court did approach the issue of abortion with an analogous form of reasoning. In that case, three moderate conservatives on the Court upheld *Roe v. Wade* based on concerns of social harmony, rather than the substantive issue in the case, *whether the Constitution protects a woman's right to choose*. Even though these moderate conservatives probably did not support the substantive outcome of *Roe,* they upheld it based on the expectations women had developed during these twenty years of a *Roe* regime and the political turmoil that might result if *Roe* were upset. These three conservative Reagan/Bush-appointed Justices, however, did not argue, and likely did not believe, that *Roe*'s substantive holding that the Constitution protected a woman's right to choose was constitutionally tenable. Rather, they placed values such as social harmony above substantive resolution. *Id.*

focus on resolving competing individual interests, rather than attempting to harmonize interests by devaluing individuality.

In sum, this article has raised a number of questions about liberalism and its relationship to tolerance. Tolerance has become needlessly intertwined with liberalism, so much so that it is very rare for scholars to think about tolerance in anything but liberal terms. But, liberal tolerance is only one brand of tolerance. There are non-liberal brands of tolerance, such as *tolerance as understanding*.[400] Instead of treating tolerance as a means to foster autonomy and individual character as liberal theories do, *tolerance as understanding* treats tolerance as an end in itself.[401] Tolerance, according to this perspective, is reconceived as a paramount moral obligation requiring individuals to practice empathy, compassion and humility.

Tolerance as understanding and other non-liberal conceptions of tolerance have a great deal to offer liberalism. Even if one disagrees with the basic tenets underlying *tolerance as understanding*, or believes that it cannot be a pragmatic guidepost for moral behavior, it still offers a theoretical vehicle for critically analyzing the shortcomings of liberal tolerance. As has been suggested throughout, liberal tolerance, and the liberal legal and political institutions supporting it, would benefit from engaging in a theoretical dialogue with conceptions of tolerance not exclusively based on autonomy and individuality.

400. *See supra* notes 60-67, 137-82 and accompanying text.
401. *See supra* pp. 35-37.