

State Responses to Incongruence: Toleration and Transformation

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Abstract

This chapter focuses on toleration in relation to ‘incongruent practices’, which are in tension with liberal egalitarian norms and principles. It identifies three responses to these practices, two of which deny that the liberal state should tolerate them (but for opposite reasons), but the third of which does claim to tolerate them. This third response can take the form of ‘transformative liberalism’, according to which the state should permit various incongruent practices but should also seek to transform them through the use of its expressive and non-coercive powers. The rest of the chapter explores the relationship between transformative liberalism and toleration in more detail, with the aim of learning about both of them: to see what looking at transformative liberalism through the lens of toleration tells us about that approach and also to see what this can teach us about the nature of toleration itself. It suggests that the forms of interference involved in some transformative liberal policies might be considered intolerant, even if less intolerant than outright prohibition. This might even be the case with respect to state speech, in the light of the particular meaning and force of state condemnation. In considering these issues, the chapter examines several recent debates concerning how toleration is best conceptualised.

I. Introduction

Liberalism is closely associated with the idea of toleration, and thus with debates about toleration's definition and proper scope. These debates are the root of various claimed paradoxes of toleration. Can (and should) we tolerate the intolerant? If we cannot tolerate everything, then does this mean that toleration always involves line-drawing that is itself intolerant (Forst 2013, pp. 24–25, 2021; Königs 2021a)? If the liberal state ought to be neutral concerning conceptions of the good, then does this mean that it is not tolerant after all, since toleration must involve the tolerator objecting to the thing that they are tolerating (Kühler 2021)?

Such questions can be approached both descriptively and normatively: both by seeking to develop a clear and coherent account of what toleration is and by offering an account of what ought and ought not be tolerated. Often these descriptive and normative elements are intertwined. If one believes toleration to be a good thing, a value or virtue, then one will want an account of toleration that produces attractive judgments concerning what does and does not count as an act of toleration. This presumably helps to explain the sense that there is something paradoxical about the idea of a 'tolerant racist' (Forst 2013, p. 19, 2021; Königs 2021a). More generally, the best descriptive account of toleration should help us to explain toleration's relevant moral features, including the fact that toleration is at least sometimes desirable and attractive. The account will thus be normatively informed. Importantly, this does not mean that the account will be fully moralised, such that all acts of toleration are justified and all intolerance is unjustified. The questions of whether X is tolerating Y and of whether X ought to tolerate Y should be distinct questions, such that there can be cases of unjustified toleration and of justified intolerance. But normative considerations will nonetheless properly shape the descriptive concept.

One of the foci of debates about the scope of toleration concerns groups whose practices appear to be in tension with liberal egalitarian norms and principles, but which do not clearly violate basic rights, by which I mean the set of basic rights familiar from liberal theory and practice. Think here of religious groups who believe that only men can hold certain positions of leadership or who refuse to admit members who do not endorse the group's views on sexual ethics. Such discriminatory leadership and membership policies deviate from liberal egalitarian norms, but do not violate the basic rights of those who are discriminated against, or at least not obviously or uncontroversially. This is also true with respect to associations that are organised in hierarchical, non-democratic ways, or that require their members to dress in ways that (arguably) reflect patriarchal norms. Such practices seem to be in tension with liberal egalitarian norms of equality and democracy, but again do not uncontroversially violate anyone's basic rights. They are examples of what we can call *incongruent practices*. (For further characterisation and discussion of incongruent practices, see Billingham 2019a.) How should the liberal egalitarian state respond to such practices, and the beliefs that motivate them? More specifically, should it tolerate them?

This question is particularly interesting due to the fact that these beliefs and practices seem to fall in a ‘grey zone’. They do not fall into the category of practices that are clearly intolerable and must be prohibited, but they also are not obviously innocuous (although this is not to say that they are necessarily wrongful). This makes them centrally relevant to the question of the scope of toleration.

The next section sketches three possible responses to the question of whether the liberal state should tolerate incongruent practices. The first two of these deny that it should, but for opposite reasons. The first holds that the state should not tolerate these practices because it should not disapprove of them, and thus its non-interference with them does not constitute toleration. The second holds that the state should not tolerate these practices because it should not permit them. In contrast to both of these, the third response does present itself as tolerating incongruence, because it involves both disapproval and permission. Some versions of this response add to this the claim that the state should express its disapproval, in various ways that fall short of prohibition. This view can be called ‘transformative liberalism’, since it seeks to tolerate yet also non-coercively transform incongruent practices.

Sections III and IV explore the relationship between transformative liberalism and toleration in more detail, with the aim of learning about both of them: to see what looking at transformative liberalism through the lens of toleration tells us about that approach and also to see what this can teach us about the nature of toleration itself.

II. Tolerating Incongruence? Three Responses

Standard accounts of toleration involve what Rainer Forst (2013, pp. 18–20), following Preston King (1976, pp. 44–51), calls the ‘objection component’: the tolerator disapproves of or dislikes the object of their toleration. This is what distinguishes toleration from indifference or affirmation. There is some debate about exactly what is involved in ‘objection’, for example whether one must have reasons for objection that are based on moral grounds, or at least meet some minimal moral standards. But what matters for our purposes here is simply that some kind of disapproval is involved. You tolerate me eating a beef burger if you disapprove of it, because you are a vegetarian, but do not interfere. But you do not tolerate me eating a vegetarian burger with my hands rather than cutlery when you don’t interfere with this, since you do not disapprove of my eating in this way (let’s assume).

This observation generates a first possible response to whether the state ought to tolerate incongruent practices: no, it should not tolerate them, because it should not disapprove of them. Such practices fall within the realm of freedom of expression, religion, and association. They are part of citizens’ exercising their basic liberal rights to live out their conceptions of the good. As long as freedom of exit from groups that engage in incongruent practices is secured, the state should have no negative attitude toward them. Such practices should not be prohibited, but this lack of prohibition does not constitute toleration. Thus, when liberal states exempt religious groups from certain anti-discrimination

laws, they are not ‘tolerating’ the exempted practices, but reflecting an appropriate lack of opposition to them.

This is a version of the ‘neutrality objection’ to liberal toleration. Practices that violate others’ rights should be prohibited, while the state should be neutral toward those that do not. There is thus no space for toleration.

This argument crucially depends on viewing objection as an essential component of toleration. Most theorists do so. Indeed, Forst (2013, p. 18) takes it to be uncontroversial and “of primary importance for the concept.” Similarly, Peter Königs (2021b, p. 6) writes that “as a matter of conceptual necessity, you cannot tolerate what you do not consider wrong.” Edward Langerak (2011, p. 111) comments that “everyone in this debate agrees that toleration is to be sharply distinguished both from indifference toward diversity and from broadminded celebration of it.”

Langerak’s claim that there is universal consensus on this matter is no longer true, however (if it ever was). Peter Balint (2017, 2021) has recently defended a broad view of toleration whereby it simply involves not negatively interfering with something. For Balint, non-interference counts as toleration even when we are indifferent towards, or even positively appraise, the relevant action or practice. Cases where we disapprove of the practice fall into a subcategory of the concept of toleration, which Balint (2017, p. 28) calls ‘forbearance tolerance’. Adopting this view provides a reply to the neutrality objection: even when the liberal state is neutral toward a practice, and refrains from interfering with it for this reason, this lack of interference still counts as toleration (Balint 2017, pp. 32–33). This would thus be one route by which we might conclude that the state should tolerate incongruent practices, even accepting that the state should not disapprove of them.

Balint’s view has faced forceful objections, however. Several critics have argued that dropping the objection component deprives toleration of the feature that makes it a distinctive phenomenon. The specificity of relations of toleration is non-interference *despite* grounds for objection, and thus the tolerator having some reasons or desire to interfere (Ceva 2020). ‘Toleration’ carries with it the assumption that the object could well *not* be tolerated. This is why it seems odd to say that ‘Swedish society tolerates children born with a genetic disease’, to borrow an example from Élise Rouméas (2018). Further, the presence of objection is what marks toleration out from mere non-interference, and thus makes it a distinctive concept rather than “pretty much a synonym for freedom” (Horton 2020, p. 193) (or at least negative liberty), as it becomes on Balint’s broad account. It is also what makes toleration politically resonant: toleration matters when interference is a live possibility (Rouméas 2018). In sum, then, dropping the objection component from our conceptualisation of toleration is certainly one way to dissolve the neutrality objection, but it is one that comes at a high cost with respect to conceptual clarity, normative salience, and political resonance.

As an aside, we should note in passing that the neutrality objection is consistent with the idea that *citizens* within liberal democratic societies practice toleration toward one another, since they can still object to one another’s conduct,

including in relation to incongruent practices. This leads to a different puzzle, however, which is that citizens might not seem to have the *power* to interfere with those practices. Such power is generally seen as another necessary element in an act of toleration; otherwise interference is again not an option. The precise formulation of this condition is contested, for example whether actual power is necessary (Balint 2017, pp. 81–83) or it is enough that the agent believes that she has such power (Cohen 2004, pp. 93–94; Langerak 2011, p. 117). Forst (2013, pp. 25–26) endorses a counterfactual power condition, whereby agents who lack power (and know that they lack it) but are of the conviction that they would not interfere even if they did have power can in this way adopt an attitude of tolerance. Even if this is right, however, having this attitude is not the same as actually engaging in acts of toleration (Jones 2007, pp. 384–385). For this, power (or at least believed power, if we follow Cohen) is required.

However, citizens within democracies do have some modicum of political power, since they can seek to effect a change in the law, such that some practice that they object to is legally prohibited. They can do this in various ways, including through voting, lobbying, and protest. When they refrain from doing this, or indeed seek to enact laws that enforce non-interference, we could say that they are acting tolerantly (Jones 2018, p. 214), or at least acting in accordance with the ideal of toleration by seeking to establish rules that instantiate its demands (Jones 2012, p. 268). Further, the law never actually incapacitates; citizens retain the power to interfere with one another in ways that the law prohibits (Jones 2012, p. 269). This is especially the case since the law often “leaves gaps, is too difficult to apply in all but the most egregious cases, or the risk of being caught and severity of punishment is too low to properly constrain choices,” as Balint (2017, p. 92) puts it. Willingly following the law could also thus be seen as tolerant (Jones 2007, p. 388). In sum, there are several possible ways that citizens could be conceived as tolerant, although further argument would be needed to establish their ultimate plausibility.

In any case, the focus of this chapter is on toleration of incongruent practices by the state. A first response to this issue, as we have seen, is that the state should not tolerate such practices, because it should not disapprove of them, and thus its non-interference does not qualify as toleration.

A second response to incongruence also rejects toleration, but in the opposite way: it holds that incongruent practices should be legally prohibited. This response reflects what we would more commonly understand by the claim that something should not be tolerated. We might mark this difference by saying that while the first response involves the state ‘not tolerating’ incongruent practices, this second response involves the state being *intolerant* toward them.

Prohibition is clearly the appropriate response to some practices, even ones that are based upon a conception of the good. For example, religious groups should not be permitted to engage in child sacrifice. The easy cases here are ones where basic rights are clearly violated, so that fall outside the definition of incongruent practices above. However, some theorists have defended prohibition for practices that do fall within that definition. For example, Sarah Conly (2016, pp. 34–35) has argued that the Catholic Church should be prosecuted for discrimination in employment on account of its male-only priesthood.

Conly's view remains a minority position. Much more common is the view that purveyors of goods and services should not be permitted to refuse to supply those goods when such supply would conflict with their conscience. This has been at issue in the infamous 'gay cake' cases in both the UK (*Lee v. Ashers Baking Company* [2018]) and the USA (*Masterpiece Cakeshop v. Colorado Civil Rights Commission* [2018]), as well as in two of the UK cases that were the subject of a prominent decision at the European Court of Human Rights (*Eweida and others v United Kingdom* [2013]; the relevant cases involved Nancy Eweida and Gary McFarlane). These cases differ in many important respects that are highly relevant to normative evaluation. Nonetheless, a fairly common view of all such cases is that incongruence can be permitted only when it stays within the bounds of civil society associations and only impacts upon a group's own members. It becomes intolerable when it enters the public, including economic, realm in ways that affect other citizens who do not adhere to the relevant comprehensive doctrine. This idea has recently been expressed within the literature on legal accommodations using the notion of 'third-party harms'. The presence of such harms is said to rule out accommodation, or at least make them much harder to justify (Sepinwall 2015; Tebbe 2017, pp. 49–70; for critique see Esbeck 2017). This leads to complex questions regarding what count as relevant harms. Debates over the public wearing of the burqa, for example, partly centre on whether this practice causes genuine third-party harms, as claimed by the French government in its argument that the burqa breaks the social tie and is incompatible with the principle of 'living together' (*S.A.S v. France* [2014]).

For my part, I think that the idea that incongruence must be prohibited as soon as it impacts non-members is too quick, and there might be scope for accommodations even in cases where we can plausibly identify certain third-party harms. I will not pursue that argument here, however. The key point for our purposes is simply that a second response to incongruence is intolerance. Few, if any, theorists would apply this response to all cases of incongruence, but there are active debates about the merits of its application to various incongruent practices.

Let's now turn to a third response to our question regarding toleration and incongruence. Even in cases where one decides that the second, prohibitionist, response is inappropriate—liberal freedoms make prohibition unjustified—one might feel that the first, neutralist, response is insufficient. Even if the state should not make an incongruent practice illegal, it might seem unsatisfactory for it to be indifferent toward that practice, as the first response assumed. Shouldn't the incongruence count for something? If the practice is in tension with the liberal egalitarian values of the state then does this not mean that the state should have an attitude other than indifference toward it?

This is where we might find space for toleration. The state might permit a practice but nonetheless disapprove of it. This response to the neutrality objection has recently been offered by Kühler (2021) and Balint (2017, pp. 34–35). In some cases liberal egalitarian values speak against a practice but other such values (or perhaps pragmatic considerations) speak against prohibiting it, with the balance of reasons rendering toleration—permission in the face of

disapproval—the appropriate response. Balint calls this the range of state ‘forbearance tolerance’—his term for non-interference in the face of objection.

To be clear, the claim here is a conceptual one concerning the space for toleration by the liberal state, rather than a normative one that the state should in fact disapprove of incongruent practices. There is a substantive debate to be had about when such disapproval is evident. My own view is that in many cases incongruence is not a sufficient reason for state disapproval; the state really should be neutral, i.e. indifferent, toward many incongruent practices. We should resist the ‘logic of congruence’: the claim that it is “imperative that the internal life and organization of associations mirror liberal democratic principles and practices” (Rosenblum 1998, p. 36; see also Billingham 2019a; Spinner-Halev 2008). Nonetheless, there might be a class of incongruent practices that the state should indeed disapprove of, but still should not prohibit, and thus can be said to be tolerating. The size of this class is a matter for normative debate.

If the state is tolerating an incongruent practice, then one might think that it should make its disapproval evident. It could do this in various ways. State officials could speak out against the practice; the state could refuse to employ individuals who engage in it and dismiss existing employees who do so; and groups that engage in it could be denied state subsidies or tax-exemptions, have existing tax-exemptions withdrawn, or even have additional taxes applied. According to advocates of such policies, they are ways that the state can display opposition to incongruent practices, and encourage their reform, while nonetheless respecting associational and religious freedom by not prohibiting the practices. Call this approach ‘transformative liberalism’. It is liberal due to its protection of familiar liberal freedoms, but supplements this with an ambition to transform incongruent beliefs and practices when these are deemed to be in sufficient conflict with liberal egalitarian values. (Again, this will likely not be the case for all incongruence, but for some subset of it.)

The idea that liberalism is, or should be, a transformative project, one that ultimately must reshape citizens’ attitudes and behaviours so that they conform to liberal values, has been emphasised by theorists such as Stephen Macedo. For him, liberalism protects the freedom “to resist full compliance with liberal and democratic values”, but it nonetheless “counts on shaping, to some degree, people’s extra-political associations and communities, including families and religious communities” (Macedo 2012, p. 165). Indeed, liberal constitutionalism “is a pervasively educative order” (Macedo 1998, p. 57). For Macedo, then, liberalism is always transformative. This claim is controversial in itself, since it suggests that liberalism interferes with citizens’ private lives and conceptions of the good more than is usually thought.

‘Transformative liberalism’ actively considers what policies the liberal state should adopt in order to achieve its transformative ends. Rather than transformation merely happening as a side-effect of the functioning of liberal institutions, the state “should intentionally seek to transform” (Brettschneider 2012, p. 99) some incongruent beliefs and practices. One way to do this is through ‘positive’ policies, such as civic education and various kinds of symbolic expression—public memorials, statues, street names, and so on that celebrate

events or individuals reflecting ideals and principles the state wishes to promulgate. These policies present the state's values without directly opposing alternatives. But the focus in this chapter is on 'negative' policies, which directly target incongruent practices: critical state speech, denial of state subsidies, and so on.

I have criticised transformative liberalism, and especially the version of the view developed by Corey Brettschneider (2012), at length elsewhere (Billingham 2019a, 2019b). The rest of this chapter examines the view further through the lens of toleration.

III. Are Transformative Liberal Interferences Intolerant?

The previous section introduced transformative liberalism as a view that involves the liberal state in toleration: in permitting incongruent practices that it nonetheless objects to. However, the transformative liberal state also *expresses* this objection in various ways, and uses those means to encourage reform. Does this mean that it is not tolerant of the relevant incongruent practices after all? Or that it is somehow tolerant and intolerant toward them at the same time? Exploring these questions might tell us something about both transformative liberalism and toleration itself.

Our questions here centre on what Forst (2013, pp. 20–23) (again following King 1976, pp. 51–54) calls the 'acceptance component' of toleration—the not interfering with, or allowing, or putting up with, the objected-to practice. What precisely is required in order for an agent to count as 'putting up with' something such that they can be said to tolerate it? Asking this the other way around, what kinds of 'not putting up with' count as intolerant? What counts as a relevant form of interference? Whether or not transformative liberalism qualifies as tolerant will turn on our answer to these questions.

One possible answer is that intolerance involves *preventing* a practice. Peter Jones (2007, 2018), for one, uses the language of prevention when defining toleration. If we take this literally, then it suggests that merely discouraging or disincentivising a practice does not count as intolerance. The transformative liberal state would thus be tolerant toward incongruent practices.

The truth in this thought is that one does not have to be silent about a practice in order to tolerate it. Communicating one's objection, or engaging in dialogue concerning the propriety of a practice, does not generally constitute intolerance (although we will consider this issue in greater detail in Section IV). However, there are various forms of interference that lie between prevention and dialogue. Issuing threats that impose extra costs upon an action or obstacles that make the action more burdensome both surely constitute intolerance, even though they do not necessarily prevent the action and certainly do not make it impossible (Balint 2017, p. 83). Indeed, even legal prohibitions do not make actions impossible or prevent them in a strict sense; they threaten punishment, imposing costs upon the action. It seems clear, then, that 'prevention' sets the bar for intolerance too high. Jones (2007, p. 395, fn 21) in fact acknowledges

this, noting that while prevention is the paradigm case, intolerance can also take the form of disincentives or disadvantages imposed on conduct.

Nonetheless, one might hold that these various kinds of interference all involve an *intention* to prevent the action, and this is why they are intolerant. Intolerance must involve the intention to prevent, even if the prevention is unsuccessful. Thus, Andrew Cohen (2004, p. 85) writes that toleration requires that there is “no action aimed at preventing the behavior in question.” Similarly, Jones (2015, p. 556) emphasises that it is “intentions rather than consequences that mark people out as tolerant or intolerant.”

It is not completely clear where transformative liberalism would stand on this view. There is certainly a sense in which transformative policies aim to prevent incongruent practices; the hope of transformative liberals is that their policies will ultimately lead to reforms that produce congruence. But some might find it odd to speak of the state intending to prevent a practice when it is refraining either from legally prohibiting it or from imposing conditions on it that make it practically impossible or completely unaffordable—acts that are within the state’s power. It might seem more natural to say that the state is deterring or discouraging the practice. Now, this could still count as ‘intending to prevent’, since the ultimate aim is that the practice ceases. But the term then risks becoming too broad. After all, even rational persuasion in some sense involves the intention to prevent the action that one objects to, via convincing the other party to cease engaging in it. The term ‘prevent’ would then no longer be doing the limiting work that was its original attraction.

It might thus seem better to think in terms of a range of possible forms of (negative) interference, all of which constitute intolerance except (usually) for mere expression of dislike and engagement in rational dialogue. (Again, this exception still requires further examination and justification, which we will turn to in Section IV.)

Balint (2017, pp. 83–84) endorses this view, defining toleration in terms of an absence of negative interference or hindrance. In this case, various transformative liberal policies would be intolerant, *qua* hindering. For example, take the state threatening to withdraw a group’s tax-exempt status, or to cease to allow it to provide state-funded services, unless it ceases to engage in some incongruent practice. This threat hinders the continuation of that practice by raising its costs. The same applies to excluding from public employment anyone who engages in an incongruent practice. Such policies can thus be seen as intolerant toward the practice, despite not prohibiting it.

Peter Königs has recently defended a narrower view, however. He argues that intolerance must involve “particularly vile or ruthless means of interference” (Königs 2021b, p. 8), offering coercion (including state coercion), hate campaigns, and public demonisation as paradigm cases. “Not to tolerate a practice or worldview is to intervene with it in a particularly cruel and ruthless manner” (Königs 2021b, p. 10), whereas interference that exhibits “a certain degree of civility, human decency and benevolence” (p. 8) does not count as intolerant. Transformative liberalism would thus presumably not be intolerant.

One problem with Königs view is that it does not seem right to see all forms of coercion as ‘cruel and ruthless’. If the state prohibits driving above the speed limit and penalises transgressors with a moderate fine then this is clearly coercive, and makes the state intolerant of speeding. But this interference doesn’t seem “vicious” (Königs 2021b, p. 10). Indeed, we might well believe that the liberal state’s coercion should never be cruel, vicious, or ruthless. The limits placed on state action by liberal values and norms are meant to ensure this. Königs view thus seems to imply that the liberal state is never (or at least very rarely) intolerant, which does not seem right.

One might wonder if this is simply to quibble over words. Königs could perhaps reformulate his view using some other less severe adjectives that do capture state coercion. This might create other problems for his argument, however, since his account is offered as a way to show why toleration has value, and indeed has value that is obvious, or “readily intelligible” (Königs 2021b, p. 9) (thus defusing the ‘paradox of moral toleration’, which questions how it can be morally right or valuable to tolerate what is morally wrong or bad [Forst 2013, pp. 21–22, 2021]). Königs’s argument here depends on the fact that it is clearly valuable to avoid interference with others that is cruel, vicious, inhumane, and so on. But if those terms are in fact too strong to properly capture the nature of toleration-relevant interference then this argument loses its force. And without this normative motivation for adopting Königs narrow view, the broader non-hindrance view seems more plausible.

Even if one adopts this broader view, Königs’s argument highlights that some forms of intolerance are more severe than others. This suggests that we need to make distinctions regarding degrees of toleration. More vicious forms of interference do seem more intolerant. More generally, making an action more costly and completely preventing it might both count as intolerance, but they are intolerant to different degrees. The transformative liberal state is surely more tolerant of an incongruent practice than a state that prohibits that practice, even if the former state is still somewhat intolerant toward it.

While rarely discussed in detail, the idea that toleration can come in degrees seems to be fairly widely endorsed (for example, see King 1976, p. 53; Horton 1996, p. 28; Jones 2007, p. 395, fn. 21). Cohen (2004 pp. 88–89, fn. 21) rejects it, however, arguing that one either tolerates an object or one does not. Cases where we might be tempted to talk about degrees of toleration should instead be conceptualised in terms of scope. More or fewer objects are being tolerated, but for any particular object one is either interfering or not, and thus tolerating or not.

An example using an arguably incongruent practice might help here. No liberal state completely prohibits the wearing of the Islamic veil (the niqab or burqa). But various European countries have banned the wearing of a full-face veil in public places (BBC 2018). Another possible arrangement is to limit a ban to certain settings, such as courts and schools, or to individuals in certain roles, such as judges and teachers. Other states, including the United Kingdom and United States, have imposed no ban at all.

These policies might be seen as involving different degrees of toleration: states tolerate the wearing of the veil to different degrees. Cohen's point is that it is better to see it as a matter of scope: different veil-wearing activities are tolerated or not tolerated in different states. With respect to any particular activity (e.g. 'wearing the veil on public transport', 'wearing the veil when doing one's job as a teacher', etc.) the veil is either tolerated or not tolerated. The differences between states concern the scope of veil-wearing activities that are or are not tolerated.

There can be cases, however, where one can engage in different levels of interference with the same act or object. One state might prohibit male-only priesthoods, while another permits them but withdraws tax-exempt status (which would otherwise have been available) from religions that practice it. The latter, transformative liberal, policy is intolerant of the practice, but to a lesser degree than the former, prohibitionist, policy. To give a more abstract example, I might interfere with your ϕ -ing by wrestling you to the ground, throwing rocks at you from a distance, or threatening to harm your pet dog. These different forms of interference hinder your action to a greater or lesser degree. Even if we cannot precisely measure the different levels of hindrance, it seems to make sense to see them as different degrees of toleration.

In other words, we might want to talk about the scope of toleration when the same form of interference is being imposed on different actions (even if those actions are all manifestations of the same general practice, such as veil-wearing), but the degree of toleration when different levels of interference are imposed on the same action.

Some cases involve a combination of these things. Take sin taxes, for example, which are taxes imposed on specific goods based on the judgment that they are harmful to their consumers. Compare a state that prohibits smoking with one that imposes a sin tax on tobacco. There is a difference in scope here, in that certain actions are interfered with in the former state but not the latter, for example producing and selling cigarettes. But there is also a difference in degree, with respect to the same act: buying cigarettes. In the former state, this act is illegal, while in the latter it has a cost imposed upon it on the grounds of the state's disapproval.

It is possible to collapse this distinction and only recognise differences in scope, by more finely individuating the objects of toleration. Wrestling you to the ground means not tolerating your ϕ -ing. Throwing rocks at you tolerates you ϕ -ing, but does not tolerate you ' ϕ -ing without risk of harm'. Threatening to harm your dog tolerates both of those things, but does not tolerate you ' ϕ -ing while protecting your dog from harm'. If we precisely individuate acts in this kind of way then we can always say that different acts are being tolerated rather than the same act being tolerated to different degrees. Such an individuation (in this context at least) seems highly artificial, however. It seems much more natural to distinguish degrees of interference with, and thus toleration of, the same act.

Indeed, if anything, it might be better to collapse the distinction between degree and scope in the other direction and make all the differences about degree, even if this involves identifying the objects of toleration slightly more loosely. For

example, as an example of different degrees of toleration, Jones (2007, p. 395, fn. 21) writes that a society that imposes sin taxes on tobacco is more tolerant “of smoking” than one that prohibits smoking. Similarly, it seems natural to say that states that ban the veil only in certain public buildings are more tolerant ‘of veil-wearing’ than those who ban it in all public places.

A different objection with this talk of degrees of toleration, which might be motivating Cohen, holds that while there can be various forms of interference, the most normatively salient fact is that they all constitute intolerance. I am interfering with you ϕ -ing, and thus intolerant of it, and there is nothing to be gained by distinguishing degrees of intolerance. Saying that I am more tolerant of your ϕ -ing when I throw rocks than when I wrestle, or (even worse) that in the former case I am both tolerant and intolerant of you ϕ -ing (since I interfere, but to a lesser degree than I could), is misleading. What matters is that I interfere with you, and so am not tolerant of your ϕ -ing. There might be distinctions to be drawn here with respect to interference, freedom, and justification; but it is all simply intolerance.

There is some attraction to this view. If you accuse me of being intolerant and I respond by saying that I am being more tolerant than I could have been then this does seem to somewhat miss the point. Nonetheless, there also does seem to be something important about being able to recognise that the transformative liberal state is more tolerant than the prohibitionist state. Many transformative liberal policies hinder incongruent practices, and are thus acts of intolerance. The transformative liberal state is not fully tolerant toward those incongruent practices; we can rightly call it intolerant of them. But we also want to recognise that it is less intolerant than the prohibitionist state. Speaking of degrees of toleration is a helpful way to do this.

Further, when we turn to the normative question of what we *ought* to tolerate, this approach allows us to ask this question both in terms of scope (which practices ought the state interfere with?) and degree (what degree of interference is warranted with any particular practice?). This is an important advantage.

The more basic idea that we have explored in this section, however, is that the transformative liberal state might plausibly be said to display some intolerance through its negative interference with intolerant practices, even though that interference falls short of prohibition.

IV. State Speech and Toleration

As noted above, the mere expression of disapproval, or engagement in rational persuasion, is not usually taken to constitute intolerance (for example, see Cohen 2004, pp. 85–86). Mark Webb (1997, p. 416) writes that one “certainly” may tolerate another’s religion even while trying to convert her. Forst (2008, p. 289) goes so far as to claim that mutual toleration “presuppose[s] that one knows the other’s point of view and argues against it.”

Some transformative liberal policies take this kind of form. State officials such as judges and executive office-holders express disapproval of some belief or

practice and explain why (they believe) it is incompatible with the liberal egalitarian values endorsed by the state. Brettschneider (2012, pp. 156–157) gives the example of New York’s Mayor Bloomberg rebuking opponents of plans to build an Islamic centre near the former site of the World Trade Center for displaying anti-Muslim animus. Do the claims in the previous paragraph show that such speech is undoubtedly tolerant? Or is there more to say about it from the perspective of toleration? Might this kind of expression constitute intolerance when it comes from the ‘mouth’ of the state?

Balint (2017, p. 117) suggests that ‘speaking back’ against practices that one disapproves of can be a form of intolerance, since it is intended to hinder the performance of the criticised acts. This would certainly apply to speech-based transformative liberal policies. Balint’s claim here risks being too broad, however, since it seems to apply to all forms of critical speech, including all cases of rational dialogue. Rational dialogue seeks to persuade the other party to change their beliefs and behaviour, and is in that sense intended to hinder their performance of the objected-to act. Balint’s argument would thus seem to categorise all such speech as intolerant, in contrast to the standard view.

Perhaps this simply shows that the standard view is mistaken, and we should categorise all oppositional speech as intolerant after all, viewing its usual exclusion from the category of toleration-relevant interference as arbitrary. Ben Cross (2019) has recently defended this claim, at least in relation to ‘unwilling hearers’, who wish to avoid exposure to the arguments. Unwilling hearers have their choices and options limited against their will, by being made to hear arguments against their beliefs and practices that they wish to avoid. This diminishes their freedom (Cross 2019, p. 333) and autonomy (p. 346). We can generally assume that those who engage in incongruent practices do not want to hear those practices being criticised or argued against by state officials. So if Cross is right then speech-based transformative liberal policies would be intolerant, along with large swathes of argument-expression, including most proselytism.

Cross’s argument faces two significant objections, however. First, even with respect to unwilling hearers, argument expression does not usually constrain agency in a way that makes an accusation of intolerance plausible. Hearers of arguments can generally exercise their own reason and judgment in determining what to believe and how to act. The arguments might affect that process, but do not constrain or undermine it. Cross is right that presenting arguments to unwilling hearers limits their choices, in the sense that it removes the option not to be exposed to those arguments. But this is not enough to say that their agency is curtailed. After all, all actions that others dislike limit their choices in this sense: the option for those actions not to occur is removed. But, as Jones (2007, pp. 394–396, 2018, pp. 210–211) emphasises, merely acting in a way that another person dislikes does not make one intolerant.

Second, we want a concept of toleration where it is possible, and not unreasonably demanding, to tolerate. We want toleration to be an attainable ideal. Cross (2019, pp. 335–336) acknowledges that it might often be unreasonable to insist that people do not express their disapproval, but holds that this simply means that we should often permit this form of intolerance;

when we call for toleration we should instead be understood to be objecting to certain kinds of intolerance (such as threats, intimidation, and harassment). But while this is a conceptually viable move, it means that the concept of toleration loses its distinctive use, applicability, and normative appeal. It seems better to recognise considerations concerning reasonable expectations as playing a role in shaping our conceptualisation of toleration itself.

This also relates to an argument that Königs (2021b, pp. 11–12) makes concerning the political resonance of toleration. Toleration has positive valence, and the charge of intolerance is a serious one. This normative consideration should constrain the kinds of negative interferences that we label intolerant. While this argument is not sufficient to justify Königs's narrow definition of intolerance, discussed above, it does give further reason not to see all argument expression aimed at unwilling hearers as intolerant. This is an example of the way that normative considerations properly shape the descriptive concept of toleration, such that disputes over conceptualisation are not merely terminological.

In sum, Cross's view would see speech-based transformative liberal policies as intolerant, but that view faces some important challenges. Those who reject it will hold the conventional view holds that expressing opposition to a belief and practice, and seeking to persuade practitioners to change their views, is generally compatible with toleration. But this does not mean that speech can never be intolerant (Jones 2018). The question for us is whether condemnatory state speech might be.

There does seem to be something distinctive about opposition to a belief or practice being expressed in the name of the state, as opposed to by a private citizen. Consider the controversy over the racist comments made by Donald Sterling, the owner of the LA Clippers basketball franchise, in April 2014. Many people rightly condemned these comments, but there was arguably something distinct about the condemnation delivered by President Barack Obama. He could be understood as speaking on behalf of the state, of 'we the people', when expressing the fact that Sterling's comments were unacceptable, even if they were constitutionally protected free speech. Obama stated that the comments were "incredibly offensive" and ignorant, and that "we just have to be clear and steady in denouncing" such racism. He also noted that the fact these statements stood out so much was in itself a reason for hope, since it showed that "there has been this shift in how we view ourselves" (Chappel 2014). The difference between Obama's speech and that of others is not simply that he was a high-profile figure or particularly influential; many prominent people, such as former players, spoke out against the comments. The difference is that Obama's speech communicates that the comments are ones that 'we around here', the collective of citizens, consider unacceptable, incompatible with "how we view ourselves", even if we have reasons to stop short of legally prosecuting them. The condemnatory speech of other individuals, in contrast, even if those others are rich, famous, and/or powerful, can only communicate that they, or perhaps a group that they represent, disapprove. (Although the NBA authorities did also display intolerance toward Sterling's comments: they forced him to sell the Clippers and banned him from the NBA for life.)

The example of Obama's response to Sterling might suggest that the state is able to communicate something in its speech that private citizens cannot: the censure of the community as a whole. Of course, this censure will likely be contested within the community, not least by those who endorse the condemned belief or practice. Nonetheless, when the state expresses condemnation of incongruence it is claiming that a belief or practice is incompatible with the values on which society is based and ought to be viewed as beyond the pale by society at large. The practice is officially declared to be incompatible with good citizenship. This distinctive kind of communication could plausibly be said to make such speech intolerant, even accepting the conventional view that not all oppositional speech is intolerant. The transformative liberal state tolerates the condemned practice in terms of refraining from prohibiting it, but the communication of society's official opposition to it can plausibly be construed as itself a form of intolerance.

Jones (2018, p. 214) notes, drawing on Mill, that there is a kind of social disapproval that can be an instrument of intolerance, due to the pressure it places upon its targets. Such disapproval can sometimes interfere with agency in a way that normal kinds of expressions of opposition or persuasive argument do not. Arguably, state speech could constitute this kind of intolerant social disapproval, precisely due to the way that it involves speaking in the name of the people.

One way to capture this idea would be to say that condemnatory state speech is coercive, in a way that private persuasion usually is not. Cohen (2004, p. 86) and Jones (2018, p. 214) both suggest that condemnation that has a force amounting to coercion should count as intolerant and Webb (1997, p. 416) notes that significant power differences between parties can give speech such force. This could well apply to state speech.

Brettschneider (2012, p. 152) denies that state speech is coercive, as long as its voice is one among many. Others have suggested that this underestimates the distinctiveness of state speech. Jacob Rowbottom (2017, p. 45) writes that "treating certain views as officially disfavored and subject to government-sponsored opposition in the field of political debate is a significant step and should not be underestimated." Such government speech "is itself a vertical intervention into the horizontal competition of ideas among citizens, which openly treats some ideas as officially having lower status and necessitating official opposition." This does not in itself mean that oppositional state speech is coercive, of course. There might be other reasons not to appeal to that concept. For example, if coercion must involve threats or the use of sanctions to foreclose some options then perhaps oppositional state speech does not count as coercive. For our purposes, the key point is that state speech imposes an important kind of pressure on its targets, through the distinctive message that it can send, such that the label of 'intolerance' does seem appropriate, whatever verdict we reach regarding 'coercion'.

Another way to approach this is to revisit what toleration is centrally about: being willing to live with differences that we object to (Kühler 2021, p. 26; Horton 2020, p. 191). The expression of official state censure toward a practice communicates a clear desire that as a society we would not have to live with this difference. This seems different to merely holding that this practice would not

exist in an ideally just or moral society; it involves actively seeking to move toward a society free of this practice, by pressuring its adherents to abandon it. One might say that the same is true of all forms of rational persuasion and dialogue. These too seek to change the difference that they are targeted at, rather than simply to live with it. But, again, the use of the state's capacities seems to make a difference to the character of the expression here. Seeking to change people's minds through persuasion does not impose the same pressure upon the practice's adherents as that practice being officially held up as incompatible with society's values. Preferring a world where everyone agreed with me and seeking to bring about that world through the force of my arguments is not the same as declaring that world to be required by the core principles of society, while speaking on behalf of society as a whole. The latter arguably involves a kind of intolerance lacking from the former.

If this is right, then it means that while transformative liberalism tolerates incongruent practices in the sense of permitting them, it also acts intolerantly toward them through the various means that it employs to express state censure, from literal speech to educational practices to the use of the state's spending power. Importantly, the argument in this section applies to all of these policies, since all of them express state opposition to the targeted beliefs and practices. Thus, even if one is unconvinced by the suggestion in the previous section that policies such as withdrawing (or threatening to withdraw) tax-exempt status are intolerant qua hindering, one might still accept that they are intolerant through the way that they express state censure, on the basis of the discussion in this section. Even if transformative liberal policies are non-coercive, or at least less coercive than prohibition, they exert significant pressure upon their targets through their intolerance. The state's expressive and spending capacities are powerful tools. This is part of what makes them attractive to transformative liberals, but it is also a reason for caution.

V. Conclusion

This chapter has considered transformative liberalism through the lens of toleration in order to learn about both of them: both to examine whether transformative liberalism should be categorised as tolerant or intolerant and to consider interesting questions that this raises concerning the conceptualisation of toleration. In particular, it has explored the way in which toleration might come in degrees and whether speech can count as intolerant.

What normative implications, if any, follow from this discussion? Certainly we cannot simply infer from the fact that transformative liberalism is not maximally tolerant that it is normatively unattractive or objectionable. Even if our concept of toleration is normatively informed, such that normative considerations affect the choices that we make within our conceptualisation, this does not mean that toleration is always a good thing. For example, some of the arguments considered in this chapter relied on the idea that our conceptualisation should capture the fact that toleration generally has positive valence. But this is consistent with holding that some things should not be tolerated; there can be justified intolerance. We thus still face the central normative question of what

we (including the state) ought and ought not be intolerant toward, and in what ways that intolerance ought to be manifested. As Jones (2018, p. 219) puts it, “the ideal of toleration requires more than the idea of toleration.”

Nonetheless, as Jones also emphasises, our ideal of toleration will certainly be influenced by the concept: we need to know what counts as tolerant and intolerant in order to identify what ought and ought not be tolerated, and those normative judgments will themselves be informed and clarified by our understanding of the concept.

Further, if transformative liberalism is intolerant then this does highlight a reason that liberals might be hesitant of it (Spinner-Halev 2008). I have argued elsewhere that the use of transformative liberal policies should be much more limited than their advocates tend to claim (Billingham 2019a, 2019b). There are several reasons for this: the tendency toward defining the liberal democratic values on which these policies are based in increasingly expansive ways, the difficulties of interpreting the meaning of associations’ practices and evaluating them against liberal values, the need to maintain limits on the state’s authority over civic society, troubling implications for associational freedom, and the risk of alienating good-willed citizens who should be allies of liberal democracy. Many of these concerns can be captured by highlighting, or framed as pointing toward, the intolerance of transformative liberalism. Future debates concerning the justifiability of transformative liberal policies might thus be partly framed in terms of toleration.

The discussion in this chapter also points to more general lessons regarding our theorising about toleration, which suggest avenues for further research. One lesson is we should think about both the degree and scope of toleration. Different actions can be tolerated, and each action can be tolerated to different degrees. If this is right, then we might want to think more about how to conceptualise these different degrees and to measure the level of intolerance of different forms of interference, including different kinds of transformative liberal policy. One possibility is that the degree of intolerance is defined by the extent of the restriction on freedom; but perhaps this relationship is not so straightforward. We might also consider to what extent, if at all, the degree of intolerance is determined by the subjective perceptions of its targets, as compared to how hindering the interference is in more objective terms.

Beyond these conceptual questions, normative arguments for toleration or intolerance should also speak to the questions of both scope and degree. Some disputes will be about what precise actions or practices should (not) be tolerated (scope), while others will be about what kinds of interference are appropriate (degree). This will certainly be true with respect to debates about the state’s response to incongruent practices, given both the diversity of such practices and the range of different policies available—whether permissive, prohibitionist or transformative—and their different degrees of intolerance.

A second lesson is that we can hold to the idea that not all oppositional speech is intolerant while also recognising that some can be, and in particular that state speech might be in this category. Future work might further distinguish different kinds of state speech and the way that they relate to toleration. Differences might

arise based both on precisely who the speaker is and the content of their speech. We might also consider further whether non-state speech can sometimes be intolerant, and the conditions under which this could be the case. Again, there are also normative questions to ask here, such as what intolerant speech is justified, and indeed whether intolerant speech is generally easier to justify than intolerant action. This might be true, for example, if we think that speech involves a lesser degree of hindrance, or in the light of the central importance of freedom of speech within liberal societies.

More broadly, this chapter has shown how considering the example of the state's response to incongruence raises interesting questions about both the theory and practice of toleration. No doubt there are many other such examples that raise similarly important questions.

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Transformative liberalism; incongruent practices; religion; conceptual analysis; degrees of toleration; state speech; toleration and speech; neutrality objection; objection component; acceptance component

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