



## **Legal Studies Research Paper Series**

### **Liberalism, Liberal and Illiberal**

Research Paper No. 18-328  
2018

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# Liberalism, Liberal and Illiberal

MAIMON SCHWARZSCHILD\*

*“Modern times are indeed happy as few others have been, for we can think as we please, and speak as we think.”*<sup>1</sup>

– Cornelius Tacitus, *Histories* 1.1  
(praising the age of the Emperors  
Nerva and Trajan)

*“Herrer og Narre have frit Sprog.”*  
(“Lords and jesters have free speech.”)<sup>2</sup>

– Danish proverb

It might seem perverse to ask whether liberals can or should be tolerant. Liberalism is about liberty, surely, and liberty means freedom for people to say and do—more or less, to be sure—as they choose.<sup>3</sup> How can liberalism be liberal if it denies people that freedom: at least, if it denies that freedom more rather than less? Even the word “tolerance” seems weak, if not inapt, for this. Liberalism, you might think, positively prizes and champions freedom—that is, people saying and doing what they like—it doesn’t merely tolerate it, as it were grudgingly. There is an oddly off-key note,

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1. CORNELIUS TACITUS, *THE HISTORIES* 3 (Kenneth Wellesley III trans., Penguin Books, 1995).

2. HENRY G. BOHN, *A POLYGLOT OF FOREIGN PROVERBS* 374 (1867) (quoting a Danish proverb).

3. John Christman, *Liberalism and Individual Positive Thinking*, 101 *U. CHI. ETHICS* 343, 343 (1991).

duly mocked by South Park,<sup>4</sup> to such a thing as the Los Angeles Museum of Tolerance, with its faint echo of Hollywood personages giving each other Jean Hersholt Humanitarian Awards.<sup>5</sup>

Freedom of speech, in particular, might seem at the heart of liberalism. Together with freedom of religion, it is the first guarantee of the United States Bill of Rights.<sup>6</sup> The French Declaration of the Rights of Man and the Citizen proclaims that “[t]he free communication of thoughts and opinions is one of the most precious of the rights of man,” and the United Nations’ Universal Declaration of Human Rights affirms that “[e]veryone has the right to freedom of opinion and expression.”<sup>7</sup> Liberalism is associated with other important freedoms as well: economic freedom as well as free thought, free speech, freedom of association, and freedom of religion.<sup>8</sup> But liberalism is surely, if perhaps not first and foremost, associated with the idea of freedom of religious conscience, together with ideals of political freedom and self-government, which in turn pre-suppose freedom of speech and debate on public questions.

Liberty, accordingly, and especially freedom of conscience and of inquiry and expression, has been at the heart of the liberal tradition. Liberalism traces back to the Renaissance humanists and Pico della Mirandola, who drew in turn—selectively, of course—on ancient Greek and Roman sources;<sup>9</sup> to the French Enlightenment and the writings of Voltaire, Montesquieu, and the Encyclopaedists; to the Protestant Reformation and its doctrine of the Bible open to all believers—an equivocal forerunner to be sure, since the great Reformers themselves, more often than not, brooked little or no dissent;<sup>10</sup> to the widening, albeit contested, scope of free speech amidst

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4. *South Park: The Death Camp of Tolerance* (Comedy Central television broadcast May 1, 2015) <http://southpark.cc.com/clips/104220/museum-of-tolerance> [<https://perma.cc/2TTV-QNPA>].

5. See JOAN DIDION, *In Hollywood*, in *THE WHITE ALBUM* 153, 164 (1979).

6. DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN, art. 11 (Fr. 1789).

7. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 19 (Dec. 10, 1948).

8. Michael Walzer, *Liberalism and the Art of Separation*, 12 *POL. THEORY* 315, 315–16 (1984).

9. See generally GIOVANNI PICO DELLA MIRANDOLA, ORATION ON THE DIGNITY OF THE MAN (Gateway eds., Robert Capongi trans. 1956), [http://www.andallthat.co.uk/uploads/2/3/8/9/2389220/pico\\_-\\_oration\\_on\\_the\\_dignity\\_of\\_man.pdf](http://www.andallthat.co.uk/uploads/2/3/8/9/2389220/pico_-_oration_on_the_dignity_of_man.pdf) [<https://perma.cc/3Z4X-8GG5>]. Renaissance humanists drew inspiration from ancient Greek and Roman sources. See Plato, Gorgias, in *THE COLLECTED DIALOGUES OF PLATO* 461e (Edith Hamilton & Huntington Carins eds., W.D. Woodhead trans., Princeton University Press 1989) (1953) (“It would indeed be hard on you, my good friend, if on coming to Athens, the one spot in Greece where there is the utmost freedom of speech, you alone should be denied it.”).

10. See generally Eric Kayayan, *The Case of Michel Servetus*, 8 *MID-AM. J. THEOLOGY* 117 (1992) (recounting the case of Michael Servetus, the Renaissance polymath and non-trinitarian theologian who was burned at the stake in John Calvin’s Geneva).

the religious and political divisions in early Stuart England;<sup>11</sup> to Locke's *Letter Concerning Toleration*, against religious compulsion and hence in vindication of religious freedom;<sup>12</sup> to Mill's *On Liberty*, perhaps the most eloquent and influential expression of nineteenth and twentieth century liberalism.<sup>13</sup>

If anything, a standard objection to liberalism is that it is weak or empty: in the *bon mot* attributed to Robert Frost, a liberal is a man so broadminded that he won't take his own side in a quarrel. Yet liberal institutions, in practice, have sometimes been robust. In mid- to late-twentieth century America, for example, there was a wide, vigorous, and generally uninhibited diversity of opinion in public and private life: even the major news media and academia often provided a range of views.<sup>14</sup> When Soviet Communism dissolved in the late 1980s and early 1990s, it was actually suggested that the "end of history" had arrived: that human rights—freedoms of thought, expression, and religion—together with broadly free markets and the rule of law were now accepted everywhere and would thence-forward go essentially unchallenged.<sup>15</sup>

Yet in recent years there has clearly been a counter-trend, if not a wave, of opposition to free thought and free speech from constituencies and institutions usually accounted liberal. Universities and colleges—supposedly citadels of free inquiry—are an epicenter of this, "islands of repression," as they began to be described some decades ago, in what was then optimistically thought to be, and sure to remain, an off-campus "sea of freedom."<sup>16</sup> The jargon of campus intolerance has become familiar: micro-aggressions, safe spaces, trigger warnings, "no-platforming."<sup>17</sup> Speakers are shouted down at

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11. See generally DAVID COLCLOUGH, *FREEDOM OF SPEECH IN EARLY STUART ENGLAND* (2005).

12. JOHN LOCKE, *A LETTER CONCERNING TOLERANCE AND OTHER WRITINGS* (1689).

13. JOHN STUART MILL, *ON LIBERTY* (Batoche Books eds. 2001).

14. See, e.g., *Carroll v. President & Comm'rs of Princess Anne Cty.*, 393 U.S. 175 (1968) (striking down a restraining order against a white supremacist rally, in an opinion by Justice Fortas, with a concurrence by Justice Douglas against all forms and types of censorship).

15. See generally FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

16. Chester E. Finn, Jr., *Campus: "An Island of Repression in a Sea of Freedom,"* COMMENTARY, Sept. 1989, at 17, 23 ("Meanwhile, in the realms of intellectual inquiry and expression, [campuses] permit less diversity, turning the campus (in the memorable phrase of civil rights scholar Abigail Thernstrom) into an 'island of repression in a sea of freedom.'").

17. *The Coddling of the American Mind*, ECONOMIST, June 4, 2016, at 58, 59–60.

campus forums or disinvited before they arrive.<sup>18</sup> Ideas, views, and facts that challenge or differ from conventional campus opinion, “liberal” opinion, are condemned as “hate speech.”<sup>19</sup> With left-of-center or leftist opinion now virtually unanimous among faculty in relevant fields and among administrators, campus activists increasingly target campus figures, or would-be speakers, who might have been thought safely on the left, yet who are deemed by their denouncers to have offended the orthodoxy.<sup>20</sup> There have been scenes of groveling apologies reminiscent of confessions at show trials, by accused faculty and staff, some of them subjected to “re-education” by their far-from-educated accusers.<sup>21</sup> As one liberal writer observes, these are not “just a bunch of weird, unfortunate events that somehow keep happening over and over,” nor “a series of one-off episodes. They are carrying out the ideals of a movement that regards the deligitimization of dissent as a first-order goal.”<sup>22</sup>

A similar spirit of intolerance, moreover, is evidently spreading in the “sea of freedom” beyond the precincts of academia. Religious freedom was largely uncontroversial in the United States until recently: the “Religious Freedom Restoration Act” for legal accommodations to conscience, for example, was enacted by nearly unanimous vote in Congress in 1993. But the *Hobby Lobby* decision in 2014 met with widespread liberal outrage, with calls to repeal the statute, or even to amend the Constitution.<sup>23</sup> In the political sphere, there are worrisome threats to non-conformists. The Internal Revenue Service evidently targeted conservative political contributors in the run-up to the 2012 election, a matter that remains unresolved to this day.<sup>24</sup> There were calls in Congress to amend the First Amendment in

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18. *Id.* at 59–60.

19. *Id.* at 59.

20. *Id.* at 60.

21. *Id.*

22. Jonathan Chait, *Can We Start Taking Political Correctness Seriously Now?*, N.Y. MAG. (Nov. 10, 2015, 9:01 AM), <http://nymag.com/daily/intelligencer/2015/11/can-we-take-political-correctness-seriously-now.html> [<https://perma.cc/8HQS-HEKX>]. See generally Stanley Kurtz, *Year of the Shout-Down: It Was Worse Than You Think*, ETHICS AND PUBLIC POLICY CENTER (May 31, 2017), <https://epcc.org/publications/year-of-the-shout-down-it-was-worse-than-you-think/> [<https://perma.cc/2KQH-PMSV>]; Paul R. Gregory, *Speaking Bolshevik*, DEFINING IDEAS (Oct. 5, 2017), <https://www.hoover.org/research/speaking-bolshevik> [<https://perma.cc/822N-89KD>]; Heather MacDonald, *Higher Ed’s Latest Taboo Is “Bourgeois Norms”*, WALL STREET JOURNAL (Sept. 18, 2017), <https://www.wsj.com/articles/higher-eds-latest-taboo-is-bourgeois-norms-1505774818> [<https://perma.cc/73YS-NAHJ>].

23. See Maimon Schwarzschild, *Do Religious Exemptions Save?*, 53 SAN DIEGO L. REV. 185, 193–94 (2016).

24. *The IRS Finally Reveals List of Tea Party Groups Targeted for Extra Scrutiny*, WASH. TIMES (June 5, 2016), <http://www.washingtontimes.com/news/2016/jun/5/irs-reveals-list-of-tea-party-groups-targeted-for-/> [<https://perma.cc/M7QB-6VUN>]. For a running

order to overturn the *Citizens United* decision that accorded free speech protection to a film critical of Hillary Clinton.<sup>25</sup> There have been threats by Democratic office-holders, as well as by activists, to prosecute or to punish skeptics about global warming.<sup>26</sup> There were sinister “paramilitary” police raids on the homes of political opponents in Wisconsin in 2013.<sup>27</sup> There are numerous other examples: it is plausible, at least, to think that these too are not “just a bunch of weird, unfortunate events that somehow keep happening over and over.”<sup>28</sup>

But perhaps all these are simply deviations from liberalism?

It must be said that liberalism has often been ambivalent or equivocal about how far its tolerance should extend: a kind of half-way covenant with tolerance, and with freedom of speech in particular. Locke’s *Letter Concerning Toleration* famously excluded Roman Catholics and atheists: “no opinions contrary to human society, or to those moral rules which are necessary to the preservation of civil society, are to be tolerated by the magistrate.”<sup>29</sup> The French Declaration of the Rights of Man and of the Citizen puts “[t]he free communication of thoughts and opinions” in Article 11—seemingly with less priority than in the American Bill of Rights—after providing for sovereignty and the general will, and after noting that the law has the right to forbid only actions harmful to society;<sup>30</sup> the Universal Declaration of Human Rights puts freedom of conscience and of expression in Articles 18 and 19, likewise only after providing for other

account of the IRS Scandal, see Paul Caron, *TaxProf Blog*, L. PROFESSOR BLOGS NETWORK, [http://taxprof.typepad.com/taxprof\\_blog/irs-scandal/](http://taxprof.typepad.com/taxprof_blog/irs-scandal/) [<https://perma.cc/ZL4K-PCWS>].

25. See 160 CONG. REC. S55, 43–44 (daily ed. Sept. 11, 2014) (explaining that the United States Senate voted on a party-line vote on September 11, 2014—54 Democrats in favor, 42 Republicans opposed—to advance a constitutional amendment to overturn the *Citizens United* decision).

26. See Kevin D. Williamson, *The Democrats’ Theme for 2016 Is Totalitarianism*, NAT’L REV. (Dec. 20, 2015, 2:00 AM), <http://www.nationalreview.com/article/428793/democrats-and-totalitarianism-2016> [<https://perma.cc/9HAY-5ER4>] (providing weblinks to the various incidents).

27. *State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85, ¶ 28, 363 Wis. 2d 1, 866 N.W.2d 165, *reconsideration denied sub nom.*; *State ex rel. Three Unnamed Petitioners v. Peterson*, 2015 WI 103, 365 Wis. 2d 351, 875 N.W.2d 49.

28. Chait, *supra* note 22.

29. LOCKE, *supra* note 12, at 17. By contrast, Spinoza, a few years earlier, proclaimed a more unqualified tolerance. Cf. BARUCH SPINOZA, TRACTATUS THEOLOGICO-POLITICUS 299 (Gebhardt ed., Samuel Shirley trans., E.J. Brill 1989) (1925) (“The right of the sovereign both in the religious and secular spheres should be restricted to men’s actions, with everyone being allowed to think what he wishes and say what he thinks.”).

30. DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN, *supra* note 6.

rights, especially a right against discrimination “and against any incitement to such discrimination.”<sup>31</sup> In practice too, there have been restrictive measures and moments, even in English-speaking countries which have surely been more liberal and freer in recent centuries than most others in history and around the world. There were the seditious libel prosecutions in England in the eighteenth century and later; the Alien and Sedition Acts in the post-revolutionary United States; the U.S. draft-obstruction and syndicalism prosecutions in the years during and after the First World War; it would not be difficult to cite other examples.<sup>32</sup>

Yet in most if not all of these British and American instances, there was vigorous liberal push-back and, at least after a time, a generally successful vindication of free speech. John Wilkes, prosecuted for seditious libel, became a popular hero and a symbol of political reform. The Alien and Sedition Acts and their sponsors were discredited and abandoned.<sup>33</sup> Oliver Wendell Holmes soon dissented, after first having upheld the Wilson-era draft-obstruction convictions, and the courts’ free speech decisions eventually seemed to vindicate his dissents.<sup>34</sup>

When putative liberals, or liberal societies, are intolerant of free conscience or expression, is this then a mere deviation from liberalism: a failure—momentary or otherwise—to live up to the better angels of liberal nature?

Two twentieth century thinkers and historians of ideas, Isaiah Berlin and Jacob Talmon, suggest darker or at least more complicated possibilities.

#### ISAIAH BERLIN AND TWO CONCEPTS OF LIBERTY

Isaiah Berlin’s famous essay, *Two Concepts of Liberty*, suggests, as the title implies, that there are two concepts of liberty, or perhaps that there are actually three: the two are “negative freedom” and “positive freedom.”<sup>35</sup> Negative liberty is the freedom to do or be what you are able to do or be, free of interference or coercion by other people.<sup>36</sup> This, says Berlin, is what classical liberal political philosophy meant by freedom or liberty.<sup>37</sup> Such liberty, liberal thinkers agreed, could not be unlimited, both because

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31. See Universal Declaration of Human Rights, *supra* note 7, art. 7.

32. See Walter Berns, *Freedom of the Press and the Alien and Sedition Laws: A Reappraisal*, 1970 SUP. CT. REV. 109, 111.

33. See Bernard Shientag, *From Seditious Libel to Freedom of the Press*, 11 BROOK. L. REV. 125, 134 (1942).

34. Compare *Abrams v. United States*, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting), with *Debs v. United States*, 249 U.S. 211, 217 (1919), and *Frohwerk v. United States*, 249 U.S. 204, 210 (1919), and *Schenck v. United States*, 249 U.S. 47, 53 (1919).

35. ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY*, 118, 121–22 (1969).

36. *Id.* at 121–23.

37. *Id.* at 123.

it would leave the strong free to suppress the liberties of the weak and because there are other values besides liberty—“happiness, or culture, or security, or varying degrees of equality”—on behalf of which one might be prepared to curtail liberty.<sup>38</sup> But liberal writers such as Locke and Mill in England, and Tocqueville and Benjamin Constant in France, agreed that without some inviolable degree of liberty in this sense, people would not be free to pursue or even to conceive “their own good in their own way.”<sup>39</sup> “The most eloquent of all defenders of freedom and privacy, Benjamin Constant, who had not forgotten the Jacobin dictatorship, declared that at the very least the liberty of religion, opinion, expression, property, must be guaranteed against arbitrary invasion.”<sup>40</sup> Without such negative liberty, wrote Mill, unless people are allowed to think and speak and live as they wish “in the path that merely concerns themselves,” civilization cannot advance; the truth will not, for want of a free market in ideas, come to light; and society will be crushed by “collective mediocrity.”<sup>41</sup> Liberty in this sense, says Berlin, means “liberty *from*”: absence of interference or coercion—either by public authority or even, says Mill, by social or institutional pressure.<sup>42</sup>

There is, however, another sense of liberty, not at first glance enormously different from negative liberty, which answers the question “Who governs me?” rather than “How far does government interfere with me?”<sup>43</sup> “The desire to be governed by myself,” says Berlin, “or at any rate to participate in the process by which my life is to be controlled, may be as deep a wish as that of a free area of action, and perhaps historically older. But it is not a desire for the same thing.”<sup>44</sup> This is “positive liberty”: the idea of self-government, of being one’s own master.<sup>45</sup>

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38. *Id.* at 123–24 (“Because [early liberal thinkers] perceived that human purposes and activities do not automatically harmonize with one another, and because (whatever their official doctrines) they put high value on other goals, such as justice, or happiness, or culture, or security, or varying degrees of equality, they were prepared to curtail freedom in the interests of other values and, indeed, of freedom itself.”).

39. Locke, Mill, Tocqueville, and Benjamin Constant believed people would not be free to pursue life and liberty without this freedom. *Cf.* John Rawls, *Justice as Fairness: Political not Metaphysical*, 14 *PHIL. & PUB. AFF.* 223, 250 (1985) (stipulating for “lexical priority” to liberties, including free speech).

40. BERLIN, *supra* note 35, at 126.

41. *Id.* at 127.

42. *Id.*

43. *Id.* at 130.

44. *Id.* at 131.

45. *Id.* at 131–32.



This idea of being one's own master, and on the other hand the idea of free choice or freedom from coercion—including freedom of conscience and speech—might seem very similar, mere “negative and positive ways of saying much the same thing.”<sup>46</sup> Yet, says Berlin, “the ‘positive’ and ‘negative’ notions of freedom historically developed in divergent directions not always by logically reputable steps, until in the end, they came into direct conflict with each other.”<sup>47</sup>

The idea of being one's own master, of autonomy, might elide firstly into the idea of being governed by one's “true self,” not by one's base passions or one's irrational impulses, but by one's higher nature, oneself at one's best, or as one ought to be.<sup>48</sup>

Presently the two selves may be represented as divided by an even larger gap; the real self may be conceived as something wider than the individual (as the term is normally understood), as a social ‘whole’ of which the individual is an element or aspect: a tribe, a race, a Church, a State, the great society of the living and the dead and the yet unborn. This entity is then identified as being the ‘true’ self which, by imposing its collective, or ‘organic,’ single will upon its recalcitrant ‘members,’ achieves its own, and therefore their, ‘higher’ freedom. The perils of using organic metaphors to justify the coercion of some men by others in order to raise them to a ‘higher’ level of freedom have often been pointed out. But what gives such plausibility as it has to this kind of language is that we recognise that it is possible, and at times justifiable, to coerce men in the name of some goal (let us say, justice or public health) which they would, if they were more enlightened, themselves pursue, but do not, because they are blind or ignorant or corrupt. This renders it easy for me to conceive of myself as coercing others for their own sake, in their, not my, interest. I am then claiming that I know what they truly need better than they know it themselves. What at most this entails is that they would not resist me if they were rational and as wise as I and understood their interests as I do. But I may go on to claim a good deal more than this. I may declare that they are actually aiming at what in their benighted state they consciously resist, because there exists within them an occult entity—their latent rational will, or their ‘true’ purpose—and that this entity, although it is belied by all that they overtly feel and do and say, is their ‘real’ self, of which the poor empirical self in space and time may know nothing or little; and that this inner spirit is the only self that deserves to have its wishes taken into account. Once I take this view, I am in a position to ignore the actual wishes of men or societies, to bully, oppress, torture them in the name, and on behalf, of their ‘real’ selves, in the secure knowledge that whatever is the true goal of man (happiness, performance of duty, wisdom, a just society, self-fulfillment) must be identical with his freedom—the free choice of his ‘true,’ albeit often submerged and inarticulate, self.<sup>49</sup>

In principle, negative freedom might itself have elided in the same way into the idea of non-coercion of your “true self,” rather than your actual, empirical self. “But the ‘positive’ conception of freedom as self-mastery”,

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46. *Id.*

47. *Id.* at 132.

48. *Id.* at 134, 142.

49. *Id.* at 132–33.

says Berlin, “has in fact, as a matter of history, of doctrine, and of practice, lent itself more easily to this splitting of personality into two”, and to justifying intolerance and coercion in the name of “true freedom.”<sup>50</sup>

The idea of positive liberty may elide further, says Berlin, to the idea that your true self necessarily wills what is rational. “Freedom is not freedom to do what is irrational, or stupid, or wrong. To force empirical selves into the right pattern is no tyranny, but liberation.”<sup>51</sup> But who is the best judge of what is rational? Surely the best educated, those with the best qualifications and the most knowledge. This implies considerable submission, at least, to the rule of experts: in practice, this tends to mean ever more power for administrative bureaucracies. Moreover, the idea of a rational way of life may imply, or at least may go along with, the idea that there is a single, correct rational way of life. After all, it is irrational to affirm both P and not-P. By a train of reasoning “not logically reputable” but still psychologically understandable, you might conclude that different ways of life, or choices in life, or opinions about life cannot all be rational, or equally rational, especially if they conflict or contradict one another. According to this way of thinking, “the ends of all rational beings must of necessity fit into a single, universal, harmonious pattern,”<sup>52</sup> which some people are especially qualified to discern, and to whose judgments all should submit: voluntarily or, in the case of the recalcitrant, by whatever coercion is necessary.<sup>53</sup>

Berlin noted that the idea of positive liberty might evolve in this way into something nearly the opposite of freedom from coercion, away from tolerance and liberty of thought and expression and in the direction of despotism.<sup>54</sup> “Not a few contemporary liberals,” says Berlin, “have gone through the same peculiar evolution.”<sup>55</sup>

Berlin’s *Two Concepts of Liberty* touches lightly on what may be a third concept of liberty, or perhaps a special type of positive liberty. This is based in the human desire for status and recognition, and it takes group form in the desire for emancipation and empowerment of one’s class, community, nation, or race.<sup>56</sup> It is sometimes called social freedom, says

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50. *Id.* at 134.

51. *Id.* at 148.

52. *Id.* at 154.

53. *Id.*

54. *Id.* at 152.

55. *Id.*

56. *Id.* at 157.

Berlin. If people feel unfree in the sense of being members of an unrecognized or insufficiently respected group, they may prefer a regime of coercion by their group or by an elite within their group, as against negative or tolerant liberty presided over by others.<sup>57</sup>

Although I may not get 'negative' liberty at the hands of members of my own society, yet they are members of my own group; they understand me, as I understand them; and this understanding creates within me a sense of being somebody in the world . . . Unless this phenomenon is grasped, the ideals and behaviour of entire peoples who, in Mill's sense of the word, suffer deprivation of elementary human rights, and who, with every appearance of sincerity, speak of enjoying more freedom than when they possessed a wider measure of these rights, becomes an unintelligible paradox.<sup>58</sup>

This idea of group sovereignty, then, like the idea of positive freedom more generally, can lead to similarly illiberal conclusions, says Berlin. Believers in negative liberty—in tolerance and in limited government—“want to curb authority as such,” whereas “those who believe in liberty in the ‘positive’ self-directive sense . . . want it placed in their own hands.”<sup>59</sup> The ambiguity of the idea of liberty, in short, enables illiberal claimants to the idea to “prove to their own satisfaction that the road to one ideal also leads to its contrary.”<sup>60</sup>

#### JACOB TALMON AND TOTALITARIAN DEMOCRACY

Jacob Talmon's study of “The Origins of Totalitarian Democracy” argues that eighteenth century Enlightenment political thought, particularly in France, quickly bifurcated or at least developed diverging tendencies towards what Talmon calls liberal or empirical democracy on the one hand, and towards political messianism or totalitarian democracy on the other.<sup>61</sup> Both shared the conviction that Europe's heritage of Church and feudalism were unnatural, irrational, and stifling, and that liberty and the rights of man were the way to human happiness. The empirical school “finds the essence of freedom in spontaneity and the absence of coercion,” and it “assumes politics to be a matter of trial and error, and . . . recognizes a variety of levels of personal and collective endeavour, which are altogether outside the sphere of politics.”<sup>62</sup> The outlook of this school was substantially that of the founders of American independence, and its emphasis on

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57. *Id.*

58. *Id.* at 157–58.

59. *Id.* at 166.

60. *Id.* at 162.

61. J.L. TALMON, *THE ORIGINS OF TOTALITARIAN DEMOCRACY* 1 (1985).

62. *Id.* at 1–2.

limiting the reach and power of government was embodied in the American constitution.<sup>63</sup>

The messianic school, however, believed that there is in principle, and can and ought to be in fact, an emancipated and virtuous way of life, in which all will live in harmony, in which the supreme rational goals of liberty, equality, and fraternity will also coalesce in harmony.<sup>64</sup> This means a single way of life—for there can only be one way that is the most rational way—and an all-embracing way, in which all aspects of each person’s life should conduce to the good of all.<sup>65</sup> It was this messianic approach that to a considerable extent inspired the Jacobin wing of the French Revolution.

Jean-Jacques Rousseau, says Talmon, was perhaps the most influential of the thinkers that inspired Robespierre and the other Jacobin leaders.<sup>66</sup> Rousseau’s decisive idea was that of the “general will” which ought to be sovereign.<sup>67</sup> There is some ambiguity to the idea: it is meant to be the will of the people, and in that sense it is democratic. Yet Rousseau strongly suggests that the general will is not to be confused with the will of the majority at any given time, or even with the will of all.<sup>68</sup> Rather, there is the idea that the general will is the general good, that which is objectively right and virtuous. This is the “true” will of each person, and of the people as a whole, not what they might actually choose out of willfulness, ignorance, greed, or superstition.

For freedom is the capacity of ridding oneself of considerations, interests, preferences, and prejudices, whether personal or collective, which obscure the objectively true and good, which, if I am true to my true nature, I am bound to will. What applies to the individual applies equally to the people. Man and people have to be brought to choose freedom, and if necessary to be forced to be free.<sup>69</sup>

Accordingly, the Jacobins in power repressed all opposition: royalists to begin with, then any who would spare the lives of king or royalists, then fellow reformists or revolutionists whose views diverged or were suspected of diverging from the Jacobins’—Girondists, Dantonists, and Hébertists, among many others.<sup>70</sup> Opposition, in the view of the Jacobin leaders, was

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63. *Id.* at 1–3.

64. *Id.* at 1–2.

65. *Id.*

66. *Id.* at 84.

67. *Id.*

68. *Id.* at 42.

69. *Id.*

70. *Id.* at 112–14, 117.

not an exercise of liberty: it was treason, for once liberty is established, the general will “expresses itself as an entity,” and opposition—or even indifference or lack of enthusiasm—is a betrayal of the rights of man.<sup>71</sup>

In this context, Talmon finds one aspect of French revolutionary policy intriguing, and in a way paradoxical. While the Jacobin regime—increasingly as time went on—created a “messianic climate” of stringent control of public and private life, based on the principle that all should be unanimous and permanently mobilized for the public good, nonetheless Jacobin economic policy for the most part proclaimed respect for property rights, rather than for public ownership or a nationalized economy.<sup>72</sup> The persistence of private property and a degree of economic freedom, says Talmon, meant that the Jacobin regime did not have—or even claim—complete power over every aspect of everyone’s life, and hence that the material basis for some measure of human independence or even dissidence would not be dissolved. A few French revolutionary figures and small groups, marginal ones, however, did call for a fully collective planned economy, in which economic equality would be enforced and private ownership abolished. The pamphleteer François-Noël Babeuf—executed as a political conspirator after Thermidor—and “Les Égaux” (“The Equals”) advanced this view.<sup>73</sup> It was Babouvist social doctrine, says Talmon, added on to Jacobinism, which was later taken up by the nineteenth century romantic revolutionaries and then by Marxist “scientific socialism.”<sup>74</sup>

Talmon goes on to note a “psychological peculiarity” of Robespierre, and of others among the Jacobins, which might have echoes in more recent times. This was “Robespierre’s habit of declaring himself a victim of persecution, of embarking upon a dirge of self-pity . . . every time he was opposed.”<sup>75</sup> “It is the psychology of the neurotic egoist, who must impose his will—rationalized into divine truth—or wallow in an ecstasy of self-pity.”<sup>76</sup> Robespierre’s colleague Louis de Saint-Just had a “similar mentality,” and would declaim that:

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71. *Id.* at 111–18.

72. *Id.* at 150, 160.

73. *Id.* at 180.

74. *Id.* at 192, 237.

75. *Id.* at 81.

76. *Id.*

[T]he Republic is never to be safe as long as a single opponent is left alive, and the sword is to be brandished against not only the opponents, but also the ‘indifferents.’ But this does not prevent Saint-Just from . . . appealing to Frenchmen to love and respect each other, and from imploring the Government to let everyone find his own happiness.

This is a self-righteous mentality which is quite incapable of self-criticism, divides reality into watertight compartments and adopts contradictory attitudes to the same thing, making judgment wholly dependent on whether it is ‘me’, by definition representing truth and right, or the opponent who is associated with it.<sup>77</sup>

#### LIBERAL DEMOCRACY’S FOES: THEN AND NOW

Both Berlin and Talmon, writing in the mid-twentieth century, were surely preoccupied, at least in part, with possible sources and forerunners of Communist doctrine and practice: the ideology and policy of dictatorships dominating much of the world, regimes which had sympathizers, “fellow-travellers,” and apologists in the democracies as well.<sup>78</sup> Talmon, in particular, distinguished totalitarian democracy, or totalitarianism of the left, from right-wing totalitarianism. “The Left proclaims the essential goodness and perfectibility of human nature”—the Right does not:

Both may preach the necessity of coercion. The Right teaches the necessity of force as a permanent way of maintaining order among poor and unruly creatures, and training them to act in a manner alien to their mediocre nature. Totalitarianism of the Left, when resorting to force, does so in the conviction that force is used only in order to quicken the pace of man’s progress to perfection and social harmony. It is thus legitimate to use the term democracy in reference to totalitarianism of the Left. The term could not be applied to totalitarianism of the Right.<sup>79</sup>

Moreover, the Left, in a spirit of optimism, tended to see itself as a universal creed, and hence professed internationalism; whereas the Right was particularist, nationalist, or racist. The Left, rather than nationalist, was avowedly rationalist. Belief in reason as a unifying force for humanity dovetailed with the Left’s internationalist stance. The rationalism of the Left, moreover, meant a commitment to science. The Right, by contrast, tended to exalt emotion or even boasted of overt irrationalism; and it was ambivalent or hostile to science, technology, and modernity.<sup>80</sup>

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77. *Id.* at 81–83.

78. *Id.* at 220; BERLIN, *supra* note 35, at 144, 158.

79. TALMON, *supra* note 61, at 7.

80. *Id.* at 6–7.

To what extent do Berlin's exposition of positive liberty and Talmon's of political messianism help to account for today's intolerance of free conscience and free expression, which emanates from putatively liberal or democratically-minded people and institutions?

To the extent that Berlin's and Talmon's accounts were shaped by concern for how the trends of thought in question contributed to twentieth century Communism, it might seem that their perspective is less relevant after the dissolution of the USSR and most of its satellite regimes. But the past, as Faulkner said, is not even past.<sup>81</sup> There is probably no way to settle how much or how little the tendency in Western liberalism to sympathize with, or at least to apologize for, the Communist regimes—as opposed to the vigorously anti-totalitarian stream of Western liberalism—today influences liberal or progressive sensibilities.<sup>82</sup> Still, the very phrase “politically correct” is an expression that originates in Communist Party circles. It was sometimes used mockingly or self-deprecatingly, even by Party-minded people, when I was growing up in the 1950s and 60s. But it was no joke in the People's Republic of China at the time, and elsewhere in the Communist world. Some of the recent campus scenes of “confession” by those accused of ideological sins, and the talk of “re-education,” and for that matter the threats to the employment and livelihoods of those targeted, on-campus and off, are eerily reminiscent of Stalinist and Maoist practices.<sup>83</sup>

Perhaps paradoxically, the disappearance of the Soviet Union may have given a new lease on life to intolerant dogma and to conduct reminiscent of Communist politics. It is difficult or impossible, for example, to imagine the leadership of Britain's Labour Party falling to a Trotskyist sectarian under conditions that prevailed before the fall of the Berlin Wall. In a sense, it is a moot question whether Communist ways continue to influence some, perhaps numerous, liberal-minded people, or whether the attractions or snares of positive liberty and political messianism are latent in liberal aspirations,

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81. WILLIAM FAULKNER, *REQUIEM FOR A NUN* 92 (1951).

82. Even when it comes to symbols, there has been no shortage of valentines from currently-prominent “progressives” to past and present Communist dictatorships and their American enthusiasts: honeymoons in the USSR or Cuba on the part of prominent office-holders and candidates; films like “Trumbo” emanating from Hollywood; the choice of Pete Seeger to perform at President Obama's inauguration. Leonid Bershidsky, *How Bernie Sanders Spent His Soviet 'Honeymoon,'* BLOOMBERG VIEW (Feb. 11, 2016, 4:54 PM), <https://www.bloomberg.com/view/articles/2016-02-11/how-bernie-sanders-spent-his-soviet-honeymoon> [<https://perma.cc/2Q8U-78XZ>]; Jon Pareles, *Pete Seeger, Champion of Folk Music and Social Change, Dies at 94*, N.Y. TIMES (Jan. 28, 2014), <http://nyti.ms/1cokw4L> [<https://perma.cc/MPP5-LFXL>]; *TRUMBO* (Filbert Steps Productions 2007).

83. *The Coddling of the American Mind*, *supra* note 17, at 60.

and hence are liable to appear—with or without Communist influence—among believers in a liberal or “progressive” credo.

In some important ways, however, it seems to me that the ideas and attitudes associated with liberal intolerance today are different from what they might have been in the mid-twentieth century, in Berlin’s and Talmon’s time.

Talmon cites “progressive” universalism and internationalism, for example, by contrast with the particularism, nationalism, or racialism of the Right. This was a prominent theme in the nineteenth and twentieth centuries: leftist groupings declared themselves as Internationals—the socialist “Second International,” the Communist “Third International,” the Trotskyist “Fourth International.” “Workers of the world, unite!” was a perennial slogan; the socialist and then Communist hymn was the Internationale.<sup>84</sup> Today, this theme has all but disappeared and has been replaced by “identity politics”: the particularism of racial, ethnic, gender, sexuality-defined, and other groups deemed to be victimized, substituting in a sense for the world proletariat as the focus for the Left’s millennial aspirations to power.

Both Berlin and Talmon also emphasized the importance of rationalism to the despotic politics of positive liberty or totalitarian democracy: the idea that coercion is justified in the name of reason, and of what people would—or “truly do”—want, were it not that their reason is clouded or overborne. Reason was indeed a prominent theme, tracing back to the eighteenth century Enlightenment, contrasting with what was said to be the irrationalism of church, crown, and “reaction.” Radical Jacobins transformed churches throughout France into “Temples of Reason.”<sup>85</sup> Marxists insisted that their socialism was “scientific.”<sup>86</sup> Twentieth century radicals invoked

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84. When the Internationale was ceremonially played at the 2011 congress of the Communist Party of China, the delegates stood silently, perhaps puzzled or unmoved by the hymn-tune of late 19th century European socialism; at any rate, none sang along. Tranbylamber, *Internationale Chinese 2011*, YOUTUBE (Nov. 7, 2011), <https://www.youtube.com/watch?v=Xnt8Y8kzUlk> [<https://perma.cc/7JUH-Q6KA>]. Contrast this to the 2008 Party Congress where all the delegates enthusiastically sang along to the Chinese national anthem; this however was followed by the Internationale, again heard in silence. Sasalove2a1, *中国国歌 国际歌 Chinese National Anthem and Internationale*, YOUTUBE (Dec. 21, 2008), <https://www.youtube.com/watch?v=OyJC279w4GM> [<https://perma.cc/Ry79-SXBS>]. Curiously, there is a truly international aspect to the Chinese national anthem. Its orchestration and harmonization, standard in the People’s Republic, is by Aaron Avshalomov, a Jewish composer from Russian Central Asia who settled in China in the 1930s.

85. JOHN R. HALL, *APOCALYPSE FROM ANTIQUITY TO THE EMPIRE OF MODERNITY* 114 (2009).

86. *Id.* at 134.



modernity and identified themselves—to a characteristically extreme degree in the USSR, with its gargantuan power stations and “tractor operas” —with science, technology, and development. Today this theme too is muted or disappeared. Campus radicals and feminists denounce patriarchal rationalism. Progressive environmentalism is suspicious or hostile towards development and technology. Assertions that “the science is settled” are perhaps equivocal: they might seem an affirmation of science and the scientific method; or alternately, they might seem the reverse.

There is an element of continuity between then and now, or so it might appear, in the progressive claim for coercion—in Talmon’s words—only “to quicken the pace of man’s progress to perfection and social harmony.”<sup>87</sup> When disagreement is denounced as hate speech, the implication is surely that it undermines inter-racial or -cultural harmony. Students who support “speech codes” often seem genuinely to believe that they are advancing social tolerance and harmony. A degree of utopianism, therefore, and of optimism about a progressive future, may persist at least among some supporters of putatively-liberal despotism. But it seems to me that this faith is increasingly attenuated: like nostalgia, it is not what it used to be.

Within living memory, belief in socialism—or in Communism; or, at least, in greatly increased and benevolent state provision—was deep, genuine, and widespread. There was real faith that these ideas would bring forth a more prosperous as well as a more humane future. It is questionable today, after the dissolution of “real existing socialism” and with what seems, at best, the stasis of social democracy in many countries around the world, whether these ideas really inspire the same conviction or enthusiasm. An American journalist in Leonid Brezhnev’s USSR enumerated the ideological tenets of Soviet Communism and observed: “The curious thing about these formulas . . . is that almost no one takes them literally, yet no one within the system would dream of challenging any of them. Orthodoxy reigns in the absence of faith.”<sup>88</sup> The same may be true, at least in some “progressive” quarters today.

The idea that power should be ceded to experts is perhaps the strongest common thread in illiberal liberalism then and now. Even about this though, perhaps the spirit is somewhat different. There was a time when technocracy, a planned economy, and what Engels called “the replacement of the government of men by the administration of things,” appealed to many people as a promising ideal for a better tomorrow: among other things, as an antidote to corrupt politics and politicians.<sup>89</sup> It is questionable how

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87. TALMON, *supra* note 61, at 7.

88. ROBERT G. KAISER, *RUSSIA: THE PEOPLE AND THE POWER* 132 (1976).

89. FRIEDRICH ENGELS, *ANTI-DÜHRING* 307 (C.P. Dutt ed., Emile Burns trans., Int’l Publishers Co., Inc. 1976) (1877).

much this remains anyone's optimistic ideal, and how much "more power to the credentialed!" represents a palpably less idealistic ambition that certain elites should enjoy more power, more prestige, and—perhaps—more graft.

In many ways, then, the differences that Berlin and Talmon were at pains to stipulate between despotic liberalism or progressivism on the one hand and reactionary authoritarianism, on the other, appear to have narrowed. The politics of racial or group identity; irrationalism or at least suspicion of reasoned argument; skepticism or hostility to science, technology, and modernity: these are no longer unique to authoritarianism of the Right. Perhaps the differences were never as great as Berlin and Talmon believed or felt obliged to suggest; but in any event, the distinctions seem less prominent today, if not entirely vanished.

Intolerance, coercion, and despotism are latent, or overt, in many political ideas, to be sure: in various expressions of religion and of atheism, of tribalism and of empire, of hierarchy and of egalitarianism. Few societies or cultures in human history have afforded much tolerance to free thought, free expression, free conscience, or for that matter to very much economic freedom or to anything one would recognize as the impartial rule of law. Isaiah Berlin and Jacob Talmon show how intolerance or despotism may be latent in liberalism as well, or can develop or exfoliate out of liberalism, whether or not "by logically reputable steps."<sup>90</sup>

Even for a liberalism committed to liberty, there are genuine questions about whether there are limits to liberty, and if so, where the line should be drawn. Freedom of speech and parliamentary democracy can be used as weapons against liberty and democracy. Sometimes, one hopes usually, "the cure for evil speech is more speech."<sup>91</sup> But sometimes the "remedy" might fail. When the Nazis put up candidates for election in the 1920s and early 30s in Weimar Germany, Goebbels wrote:

We are an anti-parliamentarian party that for good reasons rejects the Weimar constitution and its republican institutions. We oppose a fake democracy that treats the intelligent and the foolish, the industrious and the lazy, in the same way.

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90. BERLIN, *supra* note 35, at 132.

91. Justice Brandeis actually put this thought in a more qualified or nuanced way: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

We see in the present system of majorities and organized irresponsibility the main cause of our steadily increasing miseries. So why do we want to be in the Reichstag?

We enter the Reichstag to arm ourselves with democracy's weapons. If democracy is foolish enough to give us free railway passes and salaries, that is its problem. It does not concern us. Any way of bringing about the revolution is fine by us.

We are coming neither as friends or neutrals. We come as enemies! As the wolf attacks the sheep, so come we.<sup>92</sup>

Was it right for the Weimar republic to extend free speech and parliamentary rights to the Nazis? What about Communists and crypto-Communists in America and other democratic countries confronted by Communist tyrannies? The socialist philosopher Sidney Hook answered “Heresy, Yes – But Conspiracy No!”:<sup>93</sup> that Communist advocacy should be tolerated, but Communist “infiltration and deceit”—which were the operating principles of the Communist movement—should not be.<sup>94</sup> It may not always be easy to know where the one ends and the other begins.

Yet liberal societies, in the United States and elsewhere, have shown that a very substantial degree of freedom and tolerance is possible. American Supreme Court decisions on freedom of expression, especially since the 1950s, have been strongly civil-libertarian.<sup>95</sup> American freedom and tolerance have attracted people from around the world: immigrants seeking religious or political liberty; writers like George Orwell, who saw in Mark Twain's America a land where “human beings felt free, indeed were free, as they had never been before and may not be again for centuries.”<sup>96</sup> In the second half of the twentieth century, that freedom and tolerance may have been broader than in any other society in human history, while post-war Western European societies—under American military protection—enjoyed something almost comparable.

“Empirical democracy” along these lines also proved consistent, at least, with considerable economic freedom and standards of living unequalled in history. It might be thought a more attractive model altogether than what was wrought by the Jacobins, or than the messianist tyrannies of the twentieth

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92. JOSEPH GOEBBELS, WHY DO WE WANT TO JOIN THE REICHSTAG?, DER ANGRIF—GERMAN PROPAGANDA ARCHIVE (1998) (Apr. 30, 1928), <http://research.calvin.edu/german-propaganda-archive/angrif06.htm> [<https://perma.cc/MK5J-4RV6>].

93. Sidney Hook, *Heresy, Yes — Conspiracy No!*, N.Y. TIMES MAG., July 9, 1950, [https://www.dissentmagazine.org/wp-content/files\\_mf/1390433798d15Hook.pdf](https://www.dissentmagazine.org/wp-content/files_mf/1390433798d15Hook.pdf) [<https://perma.cc/K536-DVVZ>].

94. *Id.*

95. *See, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Bond v. Floyd*, 385 U.S. 116 (1966); *Yates v. United States*, 354 U.S. 298 (1957).

96. George Orwell, *Mark Twain: The Licensed Jester*, in THE MARK TWAIN ANTHOLOGY: GREAT WRITERS ON HIS LIFE AND WORK 205, 206 (Shelley Fisher Fishkin ed., 2010) (1943).

century, or for that matter than the bullying one-party sanctimony now growing on campus and seemingly spreading beyond the campus. But empirical democracy, and the freedom and tolerance associated with negative liberty, have been very much the exception, not the rule, in world history. There is reason to think they may be more fragile than they might seem to people who take them for granted. Hence the story, possibly apocryphal, of Benjamin Franklin leaving the Constitutional Convention and being approached outside by a citizen asking what kind of government the delegates had produced: Franklin is said to have replied, a little chillingly, “A republic, if you can keep it.”<sup>97</sup>

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97. James McHenry, *Anecdotes*, in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 85 (Max Farrand ed., Yale Univ. Press 1937).

