The Treatment of Isolationist Minorities

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This Note examines what may be the most radical challenge posed by religious subcultures to the liberal politics of modern industrial nations—that of isolationist, nonliberal (or even illiberal) religious minorities. These subcultures do not seek to integrate with mainstream society or gain power within it, but to withdraw in order to maintain norms widely discrepant from those that are socially dominant. They often seek to place restrictions upon their own members' freedom or activities, in part to maintain the group's differences from the greater society. These cultures, characterized by features as distinctive as collective property ownership, pacificism, and the rejection of the separation of church and state,[1] pose a serious challenge to liberalism's self-understanding and the norms of liberal tolerance.

This Note will begin in Part One by introducing a distinction drawn by Will Kymlicka between two different types of social restrictions which an isolationist cultural minority might seek to impose on its members.[2] Kymlicka defends what he calls "external" restrictions as compatible with the principles of liberalism and critiques "internal" restrictions as inimical to a liberal society. I will, however, offer an argument for why at least some internal restrictions should be permitted and enforced by a liberal state. The argument will focus on the key concept of liberal tolerance[3] and the implications of this principle for society. Guided by this theoretical framework, I turn in Part Two to two legal cases involving paradigmatic isolationist religious minorities—the Hutterites of Canada and the Amish in the United States. In Part Three, I propose a legal test to differentiate between permissible and impermissible internal restrictions.

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1. ALVIN J. ESAU, THE COURTS AND THE COLONIES: THE LITIGATION OF HUTTERITE CHURCH DISPUTES 35 (2004).

2. WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A NEW THEORY OF MINORITY RIGHTS 34-37 (1995).

3. *See, e.g.*, RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY (2000).

I. THE MORAL UNIVERSE OF INTERNAL RESTRICTIONS

In a series of sophisticated works, Canadian philosopher Will Kymlicka, one of the world's premier scholars of multiculturalism, has advanced a defense of group rights and a conceptual framework for understanding a broad spectrum of multicultural issues.[4] Kymlicka advocates governmental interventions on behalf of multiculturalist goals, to enhance the power of minorities vis-à-vis majorities. He explicitly situates his defense of such interventions within a tradition of liberal philosophy characterized by its valorization of individual rights, freedom, and equality.[5] It is in the context of a liberal viewpoint that Kymlicka draws a fundamental distinction between what he calls "internal" and "external" restrictions. His aim is to reassure liberals that government policies that promote multiculturalism and protect group rights pose no threat to individual liberties because they are typically external in kind. Conversely, internal restrictions should not be and usually are not pursued by Western governments.[6]

The principal differences between the two kinds of restrictions are their target and their motivating rationale. External restrictions target members of the majority, seeking to restrain the majority's power or in some way empower the minority with respect to the dominant group. Internal restrictions target members of the minority culture itself, constraining the freedom of some of its members in order to empower the group as a whole. As Kymlicka puts it, both restrictions aim at protecting a community from destabilizing influence, but an internal restriction is "intended to protect the group from the destabilizing impact of *internal dissent* (e.g., the decision of individual members not to follow traditional practices or customs), whereas [an external restriction] is intended to protect the group from the impact of *external decisions* (e.g., the economic or political decisions of the larger society)."[7] Kymlicka also distinguishes between the two types of restrictions on the basis of how they mediate the minority's relationship with the majority. If the limitation is designed to protect group identity by resisting the larger society, then it is external, but if it aims to preserve group homogeneity, it is internal. Kymlicka places a heavy emphasis on this distinction, arguing that while liberals should advocate external restrictions as promoting fairness among groups, they should oppose internal restrictions, which limit individuals' capacity to destabilize and reform groups from within.[8]

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4. WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY (1990); WILL KYMLICKA, LIBERALISM, COMMUNITY AND CULTURE (1989); WILL KYMLICKA & BAOGANG HE, MULTICULTURALISM IN ASIA (2005).

5. JOHN GRAY, LIBERALISM (1995).

6. KYMLICKA, *supra* note 2, at 36.

7. *Id.*

8. *Id.*

The multicultural policies of Western nations provide a wealth of instances of both classes of restrictions, but a few examples should suffice to clarify the distinction. A paradigmatic external restriction would be a guaranteed seat for a minority in a national parliament or on the nation's constitutional court. This "special group representation right," as Kymlicka calls it, is designed to decrease the likelihood of the society's majority dominating the minority and ignoring its distinctive needs when creating national policies.[9] A classic example of an internal restriction is the Amish practice, held to be a constitutional right by the United States Supreme Court in *Wisconsin v. Yoder*, of withdrawing their children from school before it is legal for other parents to do so.[10] This special group right aims to preserve the cultural distinctiveness of the Amish.

Unlike Kymlicka, I believe that at least some internal restrictions that minority groups may seek to impose upon their members are defensible from inside liberalism, so to speak. After describing the concept of liberal tolerance, I will aim my argument at a society shaped by such tolerance. The arguments I will present are not designed to justify all internal restrictions—some, such as corporal punishment for heretics or female genital mutilation should clearly not be enforced or legitimized by the political apparatus of any state.[11] Rather, the arguments are intended to demonstrate the powerful moral case for permitting at least some "internal restrictions" and to establish a presumption in their favor, which should sometimes trump otherwise valid laws. Then, after exploring some legal and sociological particulars of how isolationist minorities have been treated in the United States and Canada, I will articulate a more detailed, operational legal test for distinguishing among permissible and impermissible internal limitations.

In sketching these arguments I also hope to expose the volatility of Kymlicka's distinction between internal and external restrictions by showing that most internal restrictions are really attempts at external restrictions—they endeavor to limit the influence of the dominant

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9. *Id.* at 37. Kymlicka differentiates among three different categories of group-differentiated rights (his term for rights created by governmental multiculturalist policies).

> Special group representation rights within the political institutions of the larger society make it less likely that a national or ethnic minority will be ignored on decisions that are made on a country-wide basis. Self-government rights devolve powers to smaller political units, so that a national minority cannot be outvoted or outbid by the majority on decisions that are of particular importance to their culture.... Polyethnic rights protect specific religious and cultural practices which might not be adequately supported through the market.... *Id.* at 37-38.

10. Wisconsin v. Yoder, 406 U.S. 205 (1972). Indeed, the examples chosen in this paper were chosen because they are analyzed by Will Kymlicka himself, sharpening the contrast between the conclusions he and I come to regarding them.

11. *See generally Rebecca J. Cook, Bernard M. Dicken & Mahmoud F. Fathalla*, REPRODUCTIVE HEALTH AND HUMAN RIGHTS: INTEGRATING MEDICINE, ETHICS, AND LAW 262 (2003); Bettina Shell-Duncan, *The Medicalization of Female "Circumcision": Harm Reduction or Promotion of a Dangerous Practice?*, 52 SOC. SCI. & MED. 1013–1028 (2001).

society's decisions and norms on the group, albeit by restricting the members of the group itself. However, as I hope to make clear, the intra-group character of these restrictions is foisted upon minorities by the nature of liberal tolerance.

The liberal philosophical tradition is now several centuries old and is characterized by the work of too many significant thinkers to be reducible to a simple creed.[12] However, modern liberal philosophers articulating theories of political morality have emphasized certain discernible themes.[13] The most significant element for present purposes could be characterized as neutrality-focused liberalism. Such liberalism advocates that the government remain neutral with respect to particular moral issues. The consistency of this theme across the work of many otherwise very different liberal philosophers is striking. In the work of Jürgen Habermas, neutrality is the upshot of his central distinction between "morality" and "ethics."[14] In John Rawls, a commitment to neutrality stems from his advocacy of a political conception of justice and his distinction between public reason and more "comprehensive" doctrines.[15] For Bruce Ackerman, an extreme version of liberal tolerance is foundational to his basic argument.[16]

Ronald Dworkin, who I take to be representative of this tradition, offers a particularly clear statement of "liberal tolerance," which is his term for a kind of state neutrality with respect to the values and life-plans of particular citizens.[17] Dworkin acknowledges that the requirement of neutrality is "for many people, the most problematic feature of liberal equality."[18] As Dworkin puts it, the idea of neutrality is that as a "principle of political morality . . . government must not punish or discriminate against people because it disapproves of their ethical convictions."[19] When specifically applied to the law, liberal tolerance mandates that individuals "must not use the law, even when they are in the

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12. *See, e.g.*, IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (Mary Gregor ed., Cambridge Univ. Press 1998) (1785); JOHN LOCKE, TWO TREATISES ON GOVERNMENT (Peter Laslett ed., Cambridge Univ Press 1960) (1689); JOHN STUART MILL, ON LIBERTY (David Bromwich & George Kateb eds., 2003) (1869).

13. BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980); JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999); JOSEPH RAZ, THE MORALITY OF FREEDOM (1986).

14. Jürgen Habermas, *Reply to Symposium Participants*, 17 CARDOZO L. REV. 1477 (1996); *see also* JÜRGEN HABERMAS, JUSTIFICATION AND APPLICATION 154 (Ciaran P. Cronin trans., MIT Press 1993) (1990).

15. JOHN RAWLS, POLITICAL LIBERALISM 59-60 (1993). The validity of these claims has been subjected to trenchant criticism by opponents of political liberalism, *see, e.g.*, Robert P. George & Christopher Wolfe, *Natural Law and Liberal Public Reason*, 42 AM. J. JURIS. 31 (1997), but liberalism remains the dominant Anglo-American political philosophy.

16. ACKERMAN, *supra* note 13.

17. DWORKIN, *supra* note 3, at 211; *see, e.g.*, MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); John Finnis, *On 'Public Reason'* (Oxford Legal Stud. Res. Paper No. 1, 2007), *available at* http://ssrn.com/abstract=955815.

18. DWORKIN, *supra* note 3, at 281.

19. *Id.*

majority, to forbid anyone to lead the life he wants, or punish him for doing so, just on the ground that his ethical convictions are, as they believe, profoundly wrong."[20] Liberal tolerance denies that an action may be criminalized *solely* because of its moral wrongfulness; the moral rightness or wrongness of some behavior is not a valid reason for state action.

I am not interested here in defending liberal tolerance in general, nor any specific justification or interpretation of the principle, other than assuming a broadly Dworkinian understanding of it.[21] Rather, I will attempt to demonstrate how internal restrictions can be justified even within a framework of liberal tolerance—the very framework under which objections to internal restrictions are typically raised.

The place to begin is with some implications of the principle of liberal tolerance. Liberal tolerance eschews the criminalization of any activity solely because of its immorality, but not because of a skepticism concerning the truth of ethical propositions; liberal tolerance, after all, claims to be a true principle of justice. Rather, proponents of liberal tolerance are able to admit the wrongfulness of the very conduct they refuse to intervene against. It is part of the self-understanding of liberal tolerance that it permits wrongs to occur, which the majority may know to be immoral, but which it must, for the sake of justice, refrain from suppressing, and this has a profound impact on the social environment of a polity.

Indeed, a society committed to liberal tolerance knowingly permits an imperfect moral environment to exist. Human beings exist in society, and every society, and each subculture and group within it, is characterized by a certain social ethos. Other people's beliefs, ideas, actions, and activities produce the social environment within which we live, and that environment inevitably affects and influences our own behavior. Dworkin makes this point with particular force:

> How others treat me—and my own sense of identity and self-respect—are determined in part by the mix of social conventions, opinions, tastes, convictions, prejudices, life styles, and cultures that flourish in the community in which I live. Liberals are sometimes accused of thinking that what people say or [] think in private has no impact on anyone except themselves, and that is plainly wrong. Someone to whom religion is of fundamental importance, for example, will obviously lead a very different and perhaps more satisfying life in a community in which most other people share his convictions than in a dominantly secular society of atheists for whom his beliefs are laughable superstitions.

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20. *Id.* at 283.

21. Under some interpretations of liberal tolerance, the importance of social environment is so understood that it creates a valid reason for the state to intervene. *See* Finnis, *supra* note 17.

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> Exactly because the moral environment in which we all live is in good part created by others, however, the question of who shall have the power to help shape that environment, and how, is of fundamental importance, though it is often neglected in political theory.[22]

Dworkin seems just right here. Our lives and our ability to construct certain visions of what constitutes a good life are profoundly shaped by the environment within which we find ourselves—a morally shaping environment that is constituted in part by the actions, choices, and examples of other individuals. By permitting moral wrongdoing, not because it is impossible to prevent it, but because justice will not permit its suppression, liberal tolerance allows for the contamination of the moral environment in which individuals develop and act. As a result, the moral ecology[23] within which citizens of a liberally tolerant polity live is profoundly imperfect. If pornography, obscene materials, and neo-Nazi hatefulness, just to use Dworkin's examples,[24] are allowed to subsist within a society, they produce an unsound milieu for human development.

The refusal of liberal tolerance to employ the state as a forum for evaluating conceptions of the good life should give us pause for two important, but very different reasons. First, one significant motivation for liberal tolerance is a commitment to allowing individuals to freely construct their own vision of the good life.[25] What I want to underline is that internal restrictions are an important tool with which persons pursue this liberal project of individual self-creation. For although this project is viewed as a solitary achievement, it is one that many individuals (if not everyone) will seek to involve the help of others in pursuing. Cooperative aid in the project of shaping one's life will take many forms. Emotional and intellectual support, the establishment of models for living, and the creation of a sense of community can all be important in sustaining one's desired vision of the good life. One of the primary benefits of such cooperation will be assistance in self-binding—in preventing oneself from acting contrary to long-term preferences at specific moments of weakness, vacillation, or temptation.[26] Communities here act analogously to Odysseus' crew-members binding him to the mast. Internal restrictions will often operate as such a form of strategic cooperation, such as self-binding—as a way in which individuals assist each other in persevering in

22. Ronald Dworkin, *Women and Pornography*, N.Y. REV. BOOKS, Oct. 21, 1993, at 36, *available at* http://www.nybooks.com/articles/13790.

23. ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY (1993).

24. Dworkin, *supra* note 22.

25. *See, e.g.*, GARY GUTTING, PRAGMATIC LIBERALISM AND THE CRITIQUE OF MODERNITY 60 (198); RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY xv (1989).

26. *See* Joseph Heath, *The Benefits of Cooperation*, 34 PHIL. & PUB. AFFAIRS 313 (2006).

their difficult projects. If an individual definitively rejects his initial project, of course, the existence of these self-binding strategies will become a grave nuisance. Nonetheless, a liberal state motivated by a desire to facilitate individual self-creation, which forbade internal restrictions, would be partially self-defeating. For collective assistance in self-binding or in defense against contaminatory influences will often be crucial to *individuals'* success in achieving their constructive projects, and liberalism bars the use of the state itself as a medium for organizing such cooperation.

The second rationale for permitting internal restrictions given liberalism's relationship to moral environment abstracts from individual projects and looks at social flourishing in a more universal light. The full flourishing of human persons, and particularly children, requires a certain kind of moral environment; namely, one conducive to moral virtue. Without such an environment, it will be more difficult for persons to build themselves up, with and through their communities, as fully virtuous moral individuals. In a degraded moral ecology, there will be marked external impediments to the capacity of persons to acquire virtue. People thus have a legitimate claim in justice to develop within and pursue the creation of a certain kind of moral environment—one that would be fully conducive to their moral well-being.

Yet, because liberal tolerance is (we are assuming) a peremptory norm of political justice, the government cannot permit the populace, and persons cannot permit themselves, to seek an ideal moral environment through the suppression of degrading voices via the coercive legal machinery of the state. Of course a moral environment, like an economic system, is not the product of individual human choice, but of collectively engaged individuals. A characteristic way in which individuals collectively pursue common ends on a large scale is the state, "the public managing structure of the political community."[27] But under the principle of liberal tolerance, that path is closed off. The upshot of liberal tolerance, then, is that the state is under a weighty obligation to enable collectivities to non-politically create their own moral environments.

The greater the extent to which a polity consciously blocks efforts by the state to ensure a sound moral environment, the greater the importance of allowing discrete groups to create and protect distinct moral ecologies. The important question then is whether internal restrictions serve a necessary role in the construction of a distinctive moral environment. The significance of such restrictions is not difficult to see. In order to preserve a particular moral ecology, a group must filter out certain external influences, lest its members be subsumed into the dominant society. After

27. John Finnis, *Is Natural Law Theory Compatible with Limited Government?*, *in* NATURAL LAW, LIBERALISM, AND MORALITY: CONTEMPORARY ESSAYS 1, 6-7 (Robert P. George ed., 1996).

all, the point of a social ecology, like a natural ecology, is the influence that it has on individuals, who as of yet, have no fixed set of beliefs or at least are subject to change. Tolerant liberal societies permit a broad range of objectionable influences, which create a particular kind of moral environment. A primary way for a non-political group to preserve and protect an alternative moral environment is to pressure group members themselves to censor outside influences. As we will see in the cases of the Hutterites and the Amish, this filtering function is the rationale for many of the internal restrictions sought by minority subcultures. Internal restrictions designed to guard group members from morally corrosive influences thus appear as a form of social self-defense against the sort of imperfect dominant culture that liberalism—because of its commitment to liberal tolerance—produces.

If Dworkinian liberalism is sound or even if it is merely the motivating rationale for our dominant social and legal arrangements, then it is crucial that we permit distinct moral ecologies to exist. If as a matter of political morality, certain social or moral pathologies must inevitably be permitted by the state, then individuals deserve the ability to construct protective mechanisms around themselves, their families, and their communities. To refuse them this opportunity is to render these individuals defenseless against a corrosive, non-ideal moral environment. Nor can a liberally tolerant state judge amongst internal restrictions on the basis of their ability to conduce to a superior or inferior moral environment. Liberal tolerance precludes state action solely on the basis of an act or practice's moral merit; it forbids adjudicating among restrictions on the basis of their intrinsic compatibility with the good life.

II: THE LEGAL TREATMENT OF ISOLATIONIST GROUPS

A: The Hutterites in Canada

In North America today, there are religious minorities that withdraw from the dominant society and seek to create radically different ways of life. Many of these isolationist religious communities are the descendants of the Radical Reformation of the sixteenth century.[28] Among the most extreme of these religious reformers were the Anabaptists, of which the Hutterites, Amish, and Mennonites are descendants. The Anabaptists were persecuted for their insistence on doctrinal purity and for the extent to which they sought to realize that purity in their way of life.[29] Fleeing

28. Paul Peachey, *The Radical Reformation, Political Pluralism, and the Corpus Christianum*, *in* THE ORIGINS AND CHARACTERISTICS OF ANABAPTISM 10, 14 (Marc Lienhard ed., 1977); Kenneth R. Davis, *The Origins of Anabaptism: Ascetic and Charismatic Elements Exemplifying Continuity and Discontinuity*, *in* THE ORIGINS AND CHARACTERISTICS OF ANABAPTISM 27 (Marc Lienhard ed., 1977).

29. ESAU, *supra* note 1, at 3-5.

political suppression, several Anabaptist groups immigrated to North America, eventually settling in various sites across the United States and Canada.[30]

The Hutterites are among the largest, best-documented, and most distinctive of these Anabaptist groups. Before considering legal cases in which they have been involved, it is worthwhile to highlight the cultural and philosophical uniqueness of the Hutterites, which is essential to understanding the complex dynamics that characterize their interaction with industrial society.

The Hutterites have certain core beliefs that ensure their distinctiveness. They engage only in adult voluntary baptism, practice nonviolence (the refusal to violently resist aggressors, including during war),[31] live in agricultural colonies, and have a collective ownership scheme in which no individual possesses any private property.[32] It is difficult to underestimate the extent to which the latter two practices isolate the Hutterites from mainstream Western society and guarantee a certain amount of uneasiness in their interaction with the state.

Communal property, which emerges as a source of considerable controversy in Hutterite litigation, is vital to the Hutterian way of life:

> The concept of communal property . . . means that all property within the group is church property. We can think of a Hutterite colony, including all the land . . . as being a church, an "ark of salvation" set down in a "fallen" world. Hutterites live *in* a church, as compared with the modern secular-sacred division of life, where we go *to* church occasionally.[33]
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> For the Hutterite, the colony may be thought of as a communal ark . . . that leads to eternal life in heaven, while the rest of the world is drowning in the flood of temporary selfish pride and pleasure leading to death.[34]

The significance of communal property is also clear within the constitution of the Hutterian Brethren Church.[35] The purposes of the

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30. *Id.* at 5-7.

31. *Id.* at 35.

32. *Id.* at 1-2.

33. *Id.* at 3.

34. *Id.* at x. Creating a social ethos conducive to a virtuous life for an individual is an instance of what has been called a "collective freedom." Such freedoms involve capacities to achieve some desideratum that are impossible to exercise as an individual. One person alone cannot create a social ethos; only the collective pursuit of it renders the goal attainable. PETER SINGER, MARX: A VERY SHORT INTRODUCTION (2001) (discussing the capacity for changing the basic structure of the economy as a collective freedom).

35. Hofer v. Hofer, [1992] 3 S.C.R. (Can.) 165, at ¶ 14 "This document is in the form of articles of association, and was executed by the representatives of 60 Hutterite colonies across Canada on

church are defined in Article 2, including that "the members achieve one entire spiritual unit in complete community of goods . . . in perfect unity in mutual relationships . . ."[36] This communal property scheme enables and requires a form of life very different from the kind of individualism that thrives in contemporary Western society.

The Hutterites' collectivistic distribution of goods is explicitly viewed as integral to the moral environment sought by the community. It is not merely an expression of their view of the world, but an instrument to its success and a sign of that success. As John Hostetler puts it, Hutterites believe that the "natural, or carnal, desires of the individual . . . are considered so strong that the help of the community is essential if life is to be lived according to the divine order."[37] Mark Caldwell notes that the Hutterites have long "espoused an insular ecclesiology whereby the intrinsically demonic world was rendered incapable of destroying Christian discipleship" and in which the traditional Christian idea of *extra ecclesiam nulla salus* ("there is no salvation outside (or without) the Church") is "applied not to a hierarchical or salvation dispensing church but to the brotherhood itself."[38]

The Hutterites also diverge from the dominant understanding of the separation of church and state.[39] Modern society has seen the relative privatization of religion as it passed from a source of moral norms for political society to a voluntary arrangement engaged in at a largely non-political level.[40] In contrast, the Hutterites reject the separation of the sacred and the secular:

> The inside law of the church is comprehensive and applies to the whole life of the disciple. What you have is . . . the church community, which is supposed to live all of life according to the law and love of Christ . . . and you have the "world" community, which is not yet redeemed. . . . [this requires] integration for church members of all of their life into the jurisdiction of the church, and therefore the radical totalistic sovereign jurisdiction of the church . . . .[41]

Consequently, while most minorities seek some form of engagement with mainstream society, if only in order to transform it, the stance struck by the Hutterites is one of withdrawal, separation, and isolation.

Alongside their philosophical and social distinctiveness, the Hutterites

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August 1, 1950." (*Hofer* II).

36. *Id.* (quoting Article 2).

37. JOHN A. HOSTETLER, HUTTERITE SOCIETY 190 (1974).

38. Mark S. Caldwell, *Dissertation Abstract*, 39 CHURCH HISTORY 571, 571 (1970).

39. Chris Eberle & Terence Cuneo, *Religion and Political Theory*, The Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., Winter 2009 Edition), *available at* http://plato.stanford.edu/entries/religion-politics/.

40. ESAU, *supra* note 1, at 31.

41. *Id.* at 31-33.

have also marked out a unique place in Canadian society through a curious stream of litigation that has flowed from their colonies. The cases I will consider involve disputes over the Hutterites' collectivistic property scheme. The first is *Hofer v. Hofer*, [1970] S.C.R. 958 (Can.) (*Hofer I*). *Hofer I* involved a number of adult Hutterites, the Hofers, who lived in the Interlake Colony of Hutterian Brethren. The Hofers converted to the Radio Church of God, a religion at odds with Hutterianism and stopped participating in the religious life of the colony.[42] After declaring their fealty to the Radio Church of God, the Hofers were expelled from their colony. They then brought the case that reached the Canadian Supreme Court and became *Hofer I*, seeking to invalidate their expulsion and to recover their share of the colony's assets.[43]

The contentions of the Hofers were many. They claimed that "the contract embodied in the articles of association . . . [was] contrary to public policy and therefore void, being destructive of the freedom of religion and reducing the appellants to the condition of serfdom."[44] They also claimed in the alternative that "the articles of association purport to give ministers of the Church . . . unlimited power and control over the life and property of the plaintiffs and that the agreement is therefore contrary to public policy."[45]

The Canadian Supreme Court began by noting some basic facts about the Hutterites, including the essential role played by communal property in the Hutterian way of life.[46] The Court also noted that as adults the Hofers had signed the colony's articles of association, in which all assets were declared colony property for communal use.[47] The colony was not an ordinary commercial enterprise, but a component of a church whose fundamental aim was the realization of a particular conception of Christianity.[48] Accordingly, it would be improper to equate the colony with a business partnership and apply the governing precedents of business law.[49]

The Court then upheld the validity of the Hofers' expulsion. The Hofers, after converting to the Radio Church of God, had denied the propriety of many Hutterian religious festivals, changed the date upon

42. Hofer v. Hofer, [1970] S.C.R. 958 (Can.), at ¶ 34 (*Hofer* I).

43. *Id.* at ¶ 18.

44. *Id.* at ¶ 10.

45. *Id.* at ¶ 20.

46. *Id.* at ¶ 26. The Court adopted the eloquent language of the trial judge in the case, stating "To a Hutterian the whole life is the Church. The colony is a congregation of people in spiritual brotherhood. . . . They are not farming just to be farming—it is the type of livelihood that allows the greatest assurance of independence from the surrounding world." *Id.* at ¶ 27.

47. *Id.* at ¶ 10, 31.

48. *Id.* at ¶ 28; *see also* Barickman Hutterian Mutual Corp. v. Nault, Lafrenieere and Zastre, [1939] S.C.R. (Can.) 223, *reversing* [1938] 1 W.W.R. 777.

49. *Id.* at ¶ 28.

which they celebrated the Sabbath, and ceased to eat pork.[50] The colony made several efforts to reincorporate the Hofers, including lengthy discussions with ministers and the imposition of a penalty that the Hofers refused to recognize. Ultimately, the colony expelled the Hofers in a meeting the Court decided was not "contrary to natural justice or otherwise invalid."[51] The point of the colony was to be exclusively Hutterian and the church thus possessed basic authority over membership.[52]

The Court also dismissed the other public policy contentions made by the Hofers.[53] Chief Justice Cartwright responded to the claim that the Hutterites' expulsion of members without property violated freedom of religion. He declared "[t]he principle of freedom of religion is not violated by an individual who agrees that if he abandons membership in a specified Church he shall give up any claim to certain assets."[54] He also emphasized the necessity of the current practice for the survival of the Hutterites as a distinctive moral community:

> [O]ne of the liberties chiefly prized by a normal man is the liberty to bind himself. Unless the members are free to enter into contracts of the sort set out in the articles of association, it is difficult to see how the Hutterian Brethren could carry on the form of religious life which they believe to be the right one. The appellants . . . remain free to change their religion but they have contracted that if they do so and leave the Colony, voluntarily or by expulsion, they will not demand any of its assets.[55]

Hofer I is a demonstration of the Canadian Supreme Court's nuanced understanding of how a Hutterite colony actually operates. It is also a decision that underlined how essential the colony's internal restrictions were to the Hutterites' survival as a unique entity. The internal restrictions here were conceptualized as a tool used to sustain the Hutterite way of life, rather than as a hammer against dissenters.

Hofer v. Hofer, [1992] 3 S.C.R. 165 (*Hofer II*) offered the Canadian Supreme Court a second chance to examine Hutterite colony practices. Unlike *Hofer I* however, which had dealt with the substantive permissibility of an internal restriction, *Hofer II* dealt with how an internal restriction may be imposed. Again, as in *Hofer I*, the case dealt with members of a Hutterite colony who had been expelled for apostasy and were challenging the validity of their expulsion. The Court set itself the task of determining whether the expulsion had occurred pursuant to "the

50. *Id.* at ¶ 34.
51. *Id.* at ¶ 40.
52. *Id.* at ¶ 41.
53. *Id.*
54. *Id.* at ¶ 9.
55. *Id.* at ¶ 12.

applicable rules . . . the principles of natural justice, and without mala fides."[56]

The institutional framework constituting the Hutterites' internal rules is complex, encompassing the Church constitution, the colony's articles of association, the statutory act that first incorporated the Hutterian Brethren Church, and Hutterite informal customs and practices.[57] In a lengthy opinion, the Court carefully scrutinized the interactions among these various sources of norms, the requirements for a valid expulsion, and the byzantine process through which the Hofers were actually expelled.[58] The Court also held that the expulsion must satisfy "the most basic requirements" of natural justice, which were "notice, opportunity to make representations, and an unbiased tribunal."[59]

While the Court found that many of the Hutterites' requirements for valid expulsion had been fulfilled, the basic requirement of sufficient notice had not been satisfied.[60] The Court declared that "natural justice requires procedural fairness no matter how obvious the decision to be made may be" and that the failure to warn the Hofers that their expulsion would be considered at an upcoming colony meeting invalidated their expulsion.[61]

While perhaps less dramatic, *Hofer II*–no less than *Hofer I*–represents a successful application of the Canadian Supreme Court's subtle approach to Hutterite disputes. The Court carefully analyzes the relevant norms and facts and places basic liberal limits on the *manner* in which internal restrictions may be imposed. This is a salutary example of the proper way in which courts can preclude the imposition of internal restrictions. The restriction is being conceptualized as a tool which the community uses for self-preservation, but which must be used in a fair manner. An internal restriction imposed in bad faith, for purposes unrelated to the community's moral ecology, contrary to its own rules, or in a procedurally defective manner, will not properly contribute to the normative goals I sketched earlier.

B. The Amish in the United States

The Amish are the subject of a vast literature that I will not attempt to survey here. Instead, I will supply some brief historical and cultural context before considering one of the most significant cases dealing with Amish internal restrictions. Like the Hutterites, Amish Christianity was

56. *Hofer v. Hofer*, [1992] 3 S.C.R. 165 (Can.), at ¶ 10 (*Hofer II*).
57. *Id.* at ¶ 12-66.
58. *Id.* at ¶ 66-79, 87-145.
59. *Id.* at ¶ 80.
60. *Id.* at ¶ 158.
61. *Id.* at ¶ 164, 174.

born of radical elements in the sixteenth century Protestant Reformation.[62] Subject to severe persecution from the beginning, the Anabaptist ancestors of the Amish came in waves to North America.[63] Also, like the Hutterites, "Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence."[64] Donald Kraybill summarizes the clash between the Amish and the industrial state: "These duels are essentially face-offs between the Goliath of modernity and shepherds from traditional pastures. These conflicts of conviction . . . mark a collision of cultures . . . . Negotiating with Caesar is, in essence, negotiating with modernity."[65]

The confrontation between two Amish groups, the Old Order Amish and Conservative Amish Mennonite Church, and the government of Wisconsin is detailed in *Wisconsin v. Yoder.*[66] The Amish had refused to send their children to school after the eighth grade, violating Wisconsin's compulsory education laws mandating formal schooling until age sixteen. The government fined the Amish, who then brought a suit that eventually reached the U.S. Supreme Court. The Court engaged in a survey of Amish history and tradition and concluded that formal schooling and Amish religious beliefs were genuinely incompatible, and that as a result, the First Amendment entitled the Amish to an exemption from otherwise legally required schooling insofar as the law conflicted with the Amish faith.[67]

The Amish objection to high school holds that it exposes their children to a culture that is antithetical to the Amish way of life. Indeed, it is undeniable that any high school in principle and certainly contemporary U.S. high schools in practice contain a particularized culture in which students are submersed. American high schools emphasize "self-distinction, competitiveness, [and] worldly success," all of which are inimical to Amish views of good community, which emphasize "wisdom, rather than technical knowledge; community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society."[68] High school would also remove Amish youth from the community during years crucial to their religious and vocational development. The Court noted the rather dramatic judgment of one expert who testified that "compulsory high school attendance

62. Donald B. Kraybill, *Negotiating with Caesar*, *in* THE AMISH AND THE STATE 5 (Donald B. Kraybill ed., 1993).

63. *Id.* at 6.

64. Wisconsin v. Yoder, 406 U.S. 205, 210 (1972).

65. Kraybill, *supra* note 62, at 17.

66. 406 U.S. 205 (1972).

67. 406 U.S. at 210.

68. *Id.* at 211.

could . . . ultimately result in the destruction of the Old Order Amish church community as it exists in the United States today."[69]

The Court also considered the purposes of Wisconsin's compulsory school-attendance law and announced that it was engaged in balancing the religious freedom and parental rights of the Amish against state interests.[70] The Court scrutinized whether the Amish rejection of high schooling was "a matter of personal preference," or as the Amish maintained, essential to the preservation of their religious community.[71] Ultimately, the Court found that the Amish religion determined its members' lifestyle comprehensively.[72] The Court thus accepted both that the Amish religion required removing Amish children from school early and that Amish communities would be gravely damaged if precluded from doing so. The Court declared, "[T]he Amish mode of life and education is inseparable from and a part of the basic tenets of their religion."[73] Finally, the Court rebutted the government's contention that if the Amish were exempt from compulsory school attendance laws, any Amish individuals who later chose to leave the community would be without useful skills, and so condemned to dismal lives as burdens on society.[74] The Court deferred to expert testimony that the Amish continued to educate their youth after elementary school, albeit in agricultural vocations, and were as successful at imparting useful skills as the state educational system.[75]

Yoder seems yet another instance of a sensible judicial conceptualization of internal restrictions. If we, like the Court, credit the experts' contentions, then removing children from the formal education system before high school is essential to the preservation of the distinctive moral environment that characterizes Amish community. Thus, like *Hofer I*, *Yoder* is an example of how internal restrictions can be recognized as community self-help and treated accordingly.

As a matter of legal doctrine however, the existence of *Yoder* as more than an unprincipled anomaly is suspect. In an extensive line of cases from *Sherbert v. Verner*[76] to *Frazee v. Illinois Department of Employment Security*,[77] including *Yoder*, the Court delineated and applied a religious liberty jurisprudence in which there was a presumption in favor of exempting religiously motivated practices from otherwise valid laws.[78] In

69. *Id.* at 212.
70. *Id.* at 214.
71. *Id.* at 216.
72. *Id.*
73. *Id.* at 219.
74. *Id.* at 224.
75. *Id.* at 223-24.
76. 374 U.S. 398, 399-401 (1963).
77. 489 U.S. 829 (1989).
78. *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); United States v. Lee, 455 U.S. 252, 255 (1982); Thomas v. Review Bd. of the Indiana Employment Sec. Div., 450 U.S.

1990 though, the Court radically changed course in *Employment Division v. Smith*, 494 U.S. 872 (1990). In *Smith*, the Court declared that religiously motivated conduct would not be presumptively exempted from neutral, generally applicable laws.[79]

In a post-*Smith* jurisprudence, *Yoder* is no longer a secure result. Nonetheless, there are reasons to view the decision as justified, even after *Smith*. First, apart from general considerations of religious freedom, the argument of this Note has hopefully shown how certain secular, normatively desirable goals are served by the religious practices of *Yoder*. Second, *Yoder* may be supported by a broader constitutional right to associate or to freely shape the expressive associations to which one belongs.[80]

C. Internal and External Restrictions: A Distinction Without a Difference?

Before considering a doctrinal test, it is worth taking a second look at the internal-external distinction itself. As we have seen, Kymlicka places substantial emphasis on the difference between external and internal restrictions. While the former target dominant society, seek to constrain it, and are typically compatible with liberalism, the latter target minority group members, seek to constrain them, and are commonly supposed to be illiberal. However, I think there is less of a difference here than might be thought, and that many if not most internal restrictions are in fact best conceptualized as external restrictions being pursued in the only way possible (given liberal tolerance).

To see why, let us imagine a gender-egalitarian family that is attempting to instill their favored egalitarian mores in their children in the midst of a pervasively patriarchal society. The family perhaps belongs to a cultural community that greatly values gender egalitarianism and would like to nourish lives centered on gender equality. So the group pursues external restrictions. They attempt to gain control of the governmental communications commission to censor media (the media in this state is the main source of patriarchal norms), or to win political power to prescribe what programming is allowed, or even to pass a referendum giving them power over censorship legislation. However, this group will almost certainly fail in achieving its goals—a result in which neutrality-oriented liberals might well rejoice, since in principle a liberally tolerant society is committed to permitting these patriarchal influences. In other words, liberal tolerance forbids external restrictions that aim to shape the

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707 (1981).

79. 494 U.S. at 879-885 (1990).

80. *See* Boy Scouts of America v. Dale, 530 U.S 640 (2000). Eisgruber and Sager attempt to exploit *Dale* as part of a broader attempt to explain widespread intuitions about religious liberty without conceding a unique value to religion under the Constitution. *See* CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 63-67 (2007).

mainstream moral environment by suppressing negative influences.

Thus, to pursue its egalitarian ethos, our family's community founds a colony in which individuals are not permitted to own televisions or radios, on the theory that without some form of restriction, the group's pursuit of egalitarian gender norms will be far less successful.[81] Restrictions on community members' access to media are of course "internal restrictions," but their point is to constrain the power of the majority culture in undermining the distinctiveness of the minority. The community might prefer an external restriction. After all, its goal is to limit the pressures exerted on it by mainstream society, and not—as Kymlicka has it—to stifle dissent.[82] But, given the constraints imposed by liberal tolerance, the only way by which to achieve this goal is through internal restrictions. Here, the rationale and ultimate target of the restriction is external, but its immediate object becomes internal. Such internal restrictions, like external restrictions, are a form of community self-help against the majority. There seems little of moral moment separating such a practice from external restrictions, and certainly nothing that can bear the weight that Kymlicka places upon it.

III. THE COURTS AND INTERNAL RESTRICTIONS: OPERATIONALIZING THE PRESUMPTION FOR INTERNAL RESTRICTIONS

The normative argument of this paper, if successful, suggests the need for some guidance in determining which internal restrictions should be permitted and even enforced by modern liberal states. Surely a group claiming that it should be able to physically confine or torment its members should be prevented from doing so, even if it could plausibly show the indispensability of this practice to the preservation of its preferred "moral environment." My argument does not purport to legitimate "internal restrictions" in all cases, but merely to establish a presumption in their favor. So, I will now try to outline an operational legal test to differentiate permissible from impermissible internal restrictions.

The test has three parts. Any restriction that satisfies all three prongs should be permitted, given the moral presumption in favor of internal

81. Of course, a wise community may not want to reduce to zero its children's exposure to objectionable messages from the outside world. There is substantial evidence that exposing children to some pernicious influences and subjecting those influences to criticism strengthens children's ultimate resistance to these influences. *See, e.g.*, M. Pfau, *The Inoculation Model of Resistance to Influence*, *in* 13 PROGRESS IN COMMUNICATION SCIENCES 133 (F.J. Boster & G. Barnett eds., 1997) (discussing theory that exposure to weak critical messages and their refutation inoculates individuals against persuasion by later more powerful critical messages); W.J. McGuire, *The Effectiveness of Supportive and Refutational Defenses in Immunizing Defenses*, 24 SOCIOMETRY 184 (1961); W.J. McGuire & D. Papageorgis, *The Relative Efficacy of Various Types of Prior Belief-Defense in Producing Immunity Against Persuasion*, 26 PUB. OPINION Q. 24 (1961).

82. KYMLICKA, *supra* note 2, at 36.

restrictions. First, no restriction is permitted that violates basic liberal rights (e.g., bodily security), which I take to be the rights guaranteed by a nation's bill of rights or constitutional rights tradition. Second, a restriction cannot deny a legal entitlement essential to well-being. While a secondary school education may or may not be a basic right, some education is essential to well-being and thus may not be denied. Third, a restriction must be plausibly related to and necessary for the preservation of a moral environment, and there cannot be an equally effective but unrestrictive way in which to sustain that environment. Finally, while presenting no substantive criteria for validating an internal restriction imposed by a group, *Hofer II* is useful as a reminder that the process by which an internal restriction is applied must also be judicially scrutinized.[83] In this sphere, the Canadian Supreme Court seems right in demanding that the enforcement of an internal restriction satisfy basic norms of justice as well as whatever rules a community itself might adopt.

Liberal tolerance's forbearance from imposing one vision of the good life does not amount to a purgation of all considerations of justice from the law. The first requirement, like the second, reminds us that it is a defeasible presumption that was argued for, which can be outweighed by important considerations of justice and human well-being. The third requirement ensures that internal restrictions bear the proper relationship to the goals of community protection for which I argued.

This test may seem difficult to satisfy, but it does not render the presumption in favor of internal restrictions a nullity. The test I have proposed is not so permissive as to allow the violation of basic liberal norms, but is sufficiently accommodating of isolationist minorities that a good many internal restrictions that would be struck down in other contexts, such as housing[84] cooperatives, would be sustained here. A single example should suffice to illustrate the test's real-world workability and the extent to which it generates results distinct from those implied by Kymlicka's defense of multicultural rights.

Let us return to the Hutterite property disputes, on which Kymlicka has written. The restriction in question is the prohibition on private ownership of any colony assets, which implies the forfeiture of all property claims by individuals expelled from the Hutterite community. We will assume that the restriction has been applied in a procedurally fair manner. This internal restriction is certainly related to and necessary for the preservation of the distinctive Hutterian moral environment. Both our brief overview of the Hutterites' worldview and *Hofer I* made clear how essential collective property is to the Hutterite's communal way of life, which makes the

83. Hofer v. Hofer, [1992] 3 S.C.R. (Can.) 165.

84. Nahrstedt v. Lakeside Village Condo. Ass'n, 878 P.2d 1275 (Cal. 1994) (discussing reasonableness standard for sustaining restrictions in cooperatives).

prohibition on private ownership indispensable for them—both necessary and irreplaceable.

The restriction also does not seem to violate any basic liberal right. There is no physical coercion against individuals who choose to exit the community. One might object that liberalism affirms a basic right to privately own goods and to be secure in that ownership against public expropriation. Both of these claims are plausible, although not obviously true. In any case, these rights are not foreclosed by the Hutterites. Every Hutterite always retains the right to exit and join a world in which private property can be owned, and property owned by an individual is never forcibly taken (without compensation). If one freely joins the colony, one freely gives up one's goods; if one grows up in the colony, one never owns goods and so cannot have any property expropriated. To make a property-based criticism stick, what must be maintained is that individuals have a (possibly inalienable) right to grow up in a system with private property, which the Hutterite scheme would violate. This claim is both foreign to many strands of modern liberalism and facially implausible.

There is also the possible claim that a community devoted to the extirpation of private property ownership denies its members some entitlement necessary for individual well-being. This objection, too, is implausible. First, the typical individual in an Amish colony reports themselves to be happy, representing living refutation of this objection.[85] Second, that individuals opt into the colony as adults indicates that at least some responsible persons view a communal property regime as in their best interest (at the time); a strident paternalism or a complex false consciousness view would be necessary to justify foreclosing that option.

Kymlicka seems to reach the opposite conclusion, however. In *Multicultural Citizenship*, Kymlicka discusses *Hofer I* and approvingly notes Justice Pigeon's dissent in the case, claiming that it is more consistent with Rawlsian liberalism.[86] Justice Pigeon notes correctly that a liberal vision of freedom of religion includes an individual right to change religion at will and that religious groups should accordingly not be allowed to eliminate this freedom.[87] While there was no direct denial of a right to exit from the Hutterite community in *Hofer I* (indeed, such a denial would require coercive violence, which both the Amish and Hutterites reject), Justice Pigeon maintained that the Hutterite policy of refusing individuals any property when they left functionally effected a deprivation of their right to exit.[88]

This argument maintains that the internal restrictions of *Hofer I*

85. *See, e.g.*, BILL MCKIBBEN, DEEP ECONOMY: THE WEALTH OF COMMUNITIES AND THE DURABLE FUTURE 42 (2007).

86. KYMLICKA, *supra* note 2, at 161.

87. *Id.*

88. *Id.*

contravene the first prong of my proposed test by violating freedom of religion. This argument fails, however. As a factual matter, it is doubtful that the deprivation of private property renders the average person incapable of departing. It provides a robust incentive to remain, but that is all. Many persons leave their family situation, their relationships, or their occupations, which offer them financial security, in order to begin a new life. Both the Hutterites and Amish impart valuable vocational skills to their members, which are transferable to jobs in the outside world, even if not the most lucrative ones. Certainly, at the moment of joining the colony in early adulthood it would be relatively easy to depart. After decades more in the colony it is more difficult to leave, but one's transferable skills and the presence of an external social safety net mean that exit is far from impossible.

At this point, however, I should add a couple caveats, if only to make clear that I recognize significant difficulties with permitting internal restrictions. The most important objection may be the most obvious. This objection accuses my argument for internal restrictions of subordinating individuals to the good of the group. This objection echoes the Kantian prohibition on the instrumentalization of persons.[89] The objection's immediate appeal stems from the fact that individuals' behavior is being shaped by a group for collective ends, which looks a lot like instrumentalization. That appearance, however, is mistaken.

First, restrictions on individuals' liberty for the sake of collective ends are legitimate when the purpose of the restriction is to secure justice. The criminal law, to take the most obvious example, proscribes acts and thereby limits individual freedom, for the sake of justice. Second, internal restrictions do not instrumentalize because they are imposed for the sake of every individual her or himself. The internal restrictions that would pass the test above must be related to the creation of (what at least the group believes is) a sound moral environment. The activity that the restriction is designed to prevent is presumed to be injurious to individuals and their communities. While those making this judgment may be incorrect, they cannot be accused of using the individual as a mere means—as something less than a person.

Now it could also be objected that the inability of a liberal society to investigate the moral merit of internal restrictions—or the merit of the moral environment those restrictions aim to preserve—means that individuals may be subjected to misconceived, futile, and possibly counterproductive interventions. It is certainly plausible—perhaps obvious—that some religious minorities will pursue social environments worse than the default that would exist in the absence of their interventions. There are several reasons to believe this will not generally

89. KANT, *supra* note 12.

be the case, however. First, religious subcultures are consciously adopting and pursuing a strategy for creating a particular social environment because they believe that it is conducive to human flourishing. The default social environment of a pluralistic, liberally tolerant society is not a product of conscious effort. It is the side-effect of countless individual decisions, many of which are driven, not by considerations of human well-being, but by self-interested economic factors. Religious minorities are reflexively and critically (if in a blinkered fashion) seeking a better moral environment.

Second, this argument was situated in the context of religious subcultures whose existence will often depend on the preservation of a specific social environment. Indeed, the test, sketched above, ensured that internal restrictions must be necessary elements of a subculture's strategy for creating a particular environment. As with the Amish's need to instill their youth with agrarian skills and a sense of community values, or the Hutterites' need for a collective property scheme, religious subcultures will often be seriously undermined by the loss of internal restrictions. The unappealing prospect of the state consciously undercutting these groups militates in favor of my argument. Of course, the possibility of internal restrictions aimed at creating prejudicial religious subcultures remains a disconcerting one, but it is in my view one of those bitter pills that a liberal society must swallow. Indeed, the willingness to allow such futility may be part of what makes a society tolerant at all.[90]

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90. Rainer Forst, *Toleration*, The Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., Winter 2009 Edition), *available at* http://plato.stanford.edu/entries/toleration/.