

MORALITY AND THE PROTECTION OF DISSENT

James Gordley[†]

In his address on Law and Culture, Cardinal George maintains that “Oliver Wendell Holmes helped to set American law on the wrong path a century ago by separating law from morality.”¹ I agree.² If by morality, we mean a vision of how people should and should not live their lives, of what makes life better and worse, then how could law and morality really be separate? As Cardinal George points out, the state regulates working conditions.³ It combats racial discrimination. For that matter, it prohibits prostitution and the use of harmful drugs. It does so sometimes by making rules, sometimes by issuing warnings, and sometimes by campaigns designed to shape public opinion. In so doing, it necessarily and *ipso facto* endorses moral positions that are often controversial: whether greater safety for workers is worth the cost, whether it is good or bad to indulge racial hatred, to commercialize sex, or to get high at the cost of addiction. The state cannot take such moral positions without substantive beliefs about what in life is worthwhile and what is harmful. Indeed, as I have argued elsewhere, law and morality cannot be separated even in fields of private law such as contract, property, or tort.⁴ To decide whether a person can write a pound-of-flesh penalty clause into a contract, or when he is liable for making a stench on his property, or for striking a pedestrian while skate boarding, or for revealing some embarrassing fact about another’s past, the court or the jury must

[†] Shannon Cecil Turner Professor of Jurisprudence, University of California at Berkeley.

1. Francis Cardinal George, O.M.I., *Law and Culture*, 1 AVE MARIA L. REV. 1, 16 (2003).

2. James Gordley, *When Paths Diverge: A Response to Albert Alschuler on Oliver Wendell Holmes*, 49 U. FLA. L. REV. 441 (1997).

3. Cardinal George, *supra* note 1, at 12.

4. James Gordley, *The Moral Foundations of Private Law*, 47 AM. J. OF JURIS. 1 (2002); James Gordley, *Contract Law in the Aristotelian Tradition*, in THE THEORY OF CONTRACT LAW 265 (Peter Benson ed., 2001); James Gordley, *Immissionsschutz, Nuisance and Troubles de Voisinage in Comparative and Historical Perspective*, 6 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 13 (1998); James Gordley, *Tort Law in the Aristotelian Tradition*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 131 (David G. Owen ed., 1995).

weigh the value of the clause or activity in question against the harm that the person does or may do to others. It is not enough to say we must respect the other person's rights. The extent of our rights often depends on the value of what we are doing.

Some scholars believe that the state not only can act without substantive beliefs about what is good, but that it must do so. According to Bruce Ackerman, the state cannot take the position that any citizen's "conception of the good is better than that asserted by any of his fellow citizens."⁵ According to Ronald Dworkin, "political decisions must be, so far as possible, independent of any particular conception of the good life, or of what gives value to life."⁶ That is a defining characteristic of what he calls "liberalism."⁷

How, then, is the state to act at all? Scholars who take this approach try to squeeze answers out of such open concepts as "neutrality," "equality," or "freedom." For example, according to Dworkin, a liberal must approve of state efforts to combat racial prejudice to ensure both equality of opportunity and equality of result.⁸ In contrast, he claims, a liberal cannot approve of subsidizing the printing of books on the grounds that knowledge is worthwhile.⁹ A liberal cannot approve of creating a national park lest "a beautiful mountainside is spoiled by strip mining" on the ground that the mountainside is beautiful. His conclusions seem to defy common sense: the state may not promote knowledge or preserve beauty? So Dworkin finds an escape route: a liberal can approve of a national park if he holds a different, "more complex, belief," namely

that the conquest of unspoiled terrain by the consumer economy is self-fueling and irreversible, and that this process will make a way of life that has been desired and found satisfying in the past unavailable to future generations, and indeed to the future of those who now seem unaware of its appeal. He fears that this way of life will become unknown, so that the process is not neutral amongst competing ideas of the good life, but in fact destructive of the very possibility of some of these.¹⁰

5. BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 11 (1980).

6. RONALD DWORIN, *A MATTER OF PRINCIPLE* 191 (1985).

7. *See id.* at 191-92.

8. *See id.* at 201.

9. *See id.* at 195.

10. *Id.* at 202.

As others have shown at length, one problem with this approach is that concepts such as neutrality or equality are empty. They can be used to support any conclusion about what the state may do.¹¹ Racial prejudice was once defended by the slogan "separate but equal." In *Brown v. Board of Education*,¹² the Supreme Court rejected that defense, *inter alia*, on the grounds that separate education would not be equal. Suppose, however, that it could be equal, or that we are dealing with an ethnic group that can successfully form its own and equally attractive schools, law firms, businesses, and country clubs. Is racial discrimination, then, to be attacked because it prevents members of this group from associating with others, or to be defended because it permits racially prejudiced people to associate with whom they choose? There is no way to decide. What "liberalism" purportedly rules out, however, is for the state to condemn race prejudice, not because it deprives anyone of an equal share of something, but simply because hating people on account of their race is wrong.

If, indeed, one can appeal to Dworkin's "complex beliefs," then one can attack or defend almost anything. Not only could books be subsidized, but the works of Aristotle and Aquinas could be subsidized and their reading mandated on the grounds that otherwise a "way of life will become unknown," or "a way of life that has been desired and found satisfying in the past will become unavailable to future generations." On the same ground, monasteries could also be subsidized or job discrimination on the basis of sex. The one side would argue that new opportunities are being opened up and the other side that old ways are being forgotten.

In law, politics, or ethics, a good theory ought to make coherent what we already grasp on the basis of common sense. I do not think that theories like Dworkin's are either coherent or in accord with common sense. They are becoming popular for a quite different reason. Some people believe that if law cannot be separated from morality, liberty itself is in danger, at least, the liberty basic to our form of government.¹³ That is the claim this essay will examine.

The source of this fear is a long-standing confusion about how to reconcile two major traditions of political thought, or, in the language

11. See Steven D. Smith, *The Restoration of Tolerance*, 78 CAL. L. REV. 305 (1990).

12. 347 U.S. 483 (1954).

13. See JOSEPH RAZ, *Liberalism, Scepticism and Democracy*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 97, 98 (rev. ed. 1995).

of Isaiah Berlin, two concepts of liberty.¹⁴ According to one tradition, which stretches back at least to Locke, the duty of the state is to protect liberty. Liberty means that people can choose what to do without interference by others. In the other tradition, which stretches back to Socrates, Plato, and Aristotle, liberty is identified with human goodness and fulfillment: one who does not live a fulfilled life is not truly free. The state should enable people to live such a life. Berlin believed that a society must make room for both of these conceptions of liberty, although he was perplexed about how to do it. He saw them as incommensurable, irreconcilable, and antagonistic. The path toward one led away from the other.¹⁵

These two conceptions appear antagonistic to many of our contemporaries who want to separate law from morality. They see, correctly, that to enable people to live a better and more fulfilling life, the state must act on the basis of some substantive conception of what sort of life is better. It must act upon moral principles that describe what contributes to such a life and what detracts from it. They believe that once the state endorses such principles, it must regard anyone who dissents as a threat to himself and to others. Why, then, wouldn't the state silence the dissenter?

At first glance, Western history hardly reassures a person who has these concerns. For much of it, people accepted Christian ideals as to how life should be lived, as well as the principle of Greek political philosophy that the state should promote the best life for its citizens.¹⁶

14. Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118 (1969).

15. *See id.* at 167-72.

16. John Finnis claims that while Aristotle subscribed to this principle, Aquinas did not. JOHN FINNIS, *AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY* 219-54 (1998). According to Finnis, Aquinas believes that "[t]he proper function of the state's law and government . . . is not . . . to make people integrally good but only to maintain peace and justice in interpersonal relationships." John Finnis, *Abortion, Natural Law and Public Reason*, in *NATURAL LAW AND PUBLIC REASON* 75, 77 (Robert P. George & Christopher Wolfe eds., 2000). That is his interpretation of passages in which Aquinas says that human law prescribes, not "the acts of every virtue" but those acts "ordainable to the common good," (*SUMMA THEOLOGIAE*, Part I-II, Question 96, Article 3 (Biblioteca de autores cristianos, 3d ed., 1963)); that it directs the citizens "in the upholding of the common good of justice and peace" (*Id.*); that "the end of human law is the temporal tranquility of the state, which end law attains by restraining external actions insofar as those are evils which might disturb the peaceful condition of the state." *Id.* Part I-II, Question 98, Article 2; that human law is concerned with people "relating to one another" which "is a matter of justice." *Id.* Part I-II, Question 100, Article 2. Passages such as these show that human laws do not suffice to make people good and that not everything that makes them good is prescribed by human law. If it were otherwise, nothing would be left to be directed by one's own prudence (as Finnis notes, *supra*, at 225) or by divine law. Unlike human law, divine law can govern one's unexpressed intentions and with one's relation to God, as opposed to merely

That principle did limit the authority of the state in one respect: it prescribed the ends for which the state should use its power. By the sixteenth century, Catholic theologians had concluded that if the government became destructive of these ends, the people had the right to abolish it and to organize a new government that would serve them better, changing its form as they thought fit.¹⁷ In another respect, however, the state's power was not limited. The state was empowered to suppress dissent. Since the best life was believed to be one lived in accord with Christian principles, the state suppressed religious dissent in both Catholic and Protestant territories.

When John Locke argued that religious dissent should not be a crime, he also challenged the principle that the task of the state is to promote the best life for its citizens. The state, he claimed in *A Letter Concerning Toleration*, should merely promote their "civil interests." "Civil interests I call life, liberty, health, and indolency of the body; and the possession of outward things, such as money, lands, houses, furniture, and the like."¹⁸ In another work of his, *Two Treatises of Government*, he described the state as a compact entered into so that people can preserve what otherwise might be taken from them by force. The state does not exist so that people can live a more fulfilling or morally better life. There is no such thing. In his *Essay on Human Understanding*, Locke claimed that "the philosophers of old did in vain inquire, whether the *summum bonum* [the greatest good]

one's "external actions" and one's relation to other people, which are the distinctions Aquinas is drawing in the last two passages quoted. But Aquinas said that "legal justice" is a "general virtue" "so far as it directs the acts of all virtues to the common good" and "is in the sovereign principally and as a master craft. . . . [T]he name of legal justice can be given to every virtue insofar as every virtue is directed [by it] to the common good" and in that sense "legal justice is essentially the same as all virtue but differs from it logically." *SUMMA THEOLOGIAE*, Part II-II, Question 58, Article 6. Moreover, as Finnis notes, FINNIS, *supra*, at 232, there are "many texts, in many parts of Aquinas' work, which flatly say that law and state have amongst their essential purposes and characteristics the inculcation of virtue." I think the explanation is that Aquinas compared "individual . . . to the community as a part to the whole." *SUMMA THEOLOGIAE*, Part II-II, Question 61, Article 1. When he speaks about the state and virtue, I take him to mean that for the whole community to be in good moral order, the parts must be in good moral order, and so whoever directs the community must concern himself with the moral order of the parts.

17. James Gordley, *The Achievement of Baldus de Ubaldis (132?-1400)*, 4 *ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT* 820, 822 (2000). Quentin Skinner has traced the path by which their ideas were passed on through Huguenots and Puritans to the founders of the American republic. 2 *QUENTIN SKINNER, THE FOUNDATIONS OF MODERN POLITICAL THOUGHT* 135, 174 (1978).

18. JOHN LOCKE, *A Letter Concerning Toleration*, in *THE SECOND TREATISE OF GOVERNMENT AND A LETTER CONCERNING TOLERATION* 125, 128 (J.W. Gough ed., 3d ed. 1966) (1946).

consisted in riches, or bodily delights, or virtue or contemplation[.] And they might have as reasonably disputed, whether the best relish were to be found in apples, plums, or nuts."¹⁹ "[W]hat has an aptness to produce pleasure in us, is what we call *good*, and what is apt to produce pain in us, we call *evil*."²⁰ For one person, study might be good; for another, hawking; for another, "luxury and debauchery."²¹ "Happiness" is "utmost pleasure."²²

Isaiah Berlin's two conceptions of liberty seem, then, to have been born adversaries. Those who believed that the state should promote a genuinely good life suppressed dissent. Locke proclaimed freedom to dissent, but thought that "good" merely meant living as one pleased. But are Berlin's two concepts really hostile? At two key moments in history they were thought to be in harmony. One was at the foundation of the American republic. The other was at the Second Vatican Council.

In the early Republic, even thinkers who disagreed as profoundly as Thomas Jefferson and John Adams thought that virtue and liberty were each a precondition for the other.²³ Jefferson observed to Adams that they both agreed that those who govern should be those who possess the greatest "virtue and talents." "May we not even say that that form of government is the best which provides the most effectually for a pure selection of these natural aristoi into the offices of government?"²⁴ Jefferson also believed that "no government can continue good but under the controul of the people" which presupposes that they, too, are virtuous. By the end of the Roman Republic, the people were "so demoralized and depraved as to be incapable of exercising a wholesome controul." Consequently, the Republic would have been doomed even if the virtuous republicans Cicero, Brutus, and Cassius had led it. In the generations necessary

19. JOHN LOCKE, AN ESSAY ON HUMAN UNDERSTANDING 247 (Roger Woolhouse ed., 1997).

20. *Id.* at 239.

21. *Id.* at 246.

22. *Id.* at 239.

23. On Adams' and Jefferson's ideas of virtue, see generally JOHN R. HOWE, JR., THE CHANGING POLITICAL THOUGHT OF JOHN ADAMS 28-58 (1966); GARRY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 181-206 (1978). I am defending a narrower thesis than these authors, however. I am merely claiming that Adams and Jefferson believed that liberty and virtue fostered each other. I am not insisting here that they derived their ideas from the so-called Scots common-sense philosophers or that Locke's political ideas, as distinct from his moral philosophy, were not important to them.

24. Letter from Jefferson to Adams (Oct. 28, 1813), in THE ADAMS-JEFFERSON LETTERS 387, 388 (Lester J. Cappon ed., 1959) [hereinafter LETTERS].

for the people to be taught “what is right and what wrong, [and] to be encouraged in habits of virtue” there would be “many Neros and Commoduses, who would have quashed the whole process.”²⁵ Similarly, Adams thought that the virtue and liberty fostered each other. “[I]f there is a form of government whose principle and foundation is virtue, will not every wise man acknowledge it more likely to promote the general happiness than any other?”²⁶ This form of government is one based on “love of liberty” which arises from “a love of truth, and a veneration for virtue.”²⁷ “Liberty can no more exist without virtue and independence, than the body can live and move without a soul.”²⁸

Neither of them thought that virtue and morality were human inventions. Jefferson believed that they arise from “moral precepts, innate in man, and made part of his physical constitution, as necessary for a social being. . . .”²⁹ Hobbes was wrong, he said, to think “that justice is founded in contract solely, and does not result from the construction [i.e., the constitution] of man. I believe, on the contrary, that it is instinct, and innate, that the moral sense is as much a part of our constitution as that of feeling, seeing, or hearing. . . .”³⁰ According to Adams, we have “[a] faculty or a quality of distinguishing between moral good and evil,” which is “essential to morality.”³¹ Our capacity to feel guilt when we do evil belongs to “our unalterable moral constitution.”³² “Human nature itself is evermore an advocate for liberty” as “there is in human nature a resentment of injury and indignation against wrong; a love of truth, and a veneration for virtue.” Rooted in human nature, therefore, were the “revolution principles” that authority is placed in the hands of the government for the good of the people. Rather sweepingly,

25. Letter from Jefferson to Adams (Dec. 10, 1819), in *LETTERS* 548, 549-50.

26. Letter from John Adams to John Penn (Jan. 1776), in 4 *THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES* 203, 204 (Charles Francis Adams ed., 1856) [hereinafter *ADAMS, WORKS*]. Similarly, see *JOHN ADAMS, THOUGHTS ON GOVERNMENT* in 4 *ADAMS, WORKS* 189, 193.

27. *JOHN ADAMS, NOVANGLUS* in 4 *ADAMS, WORKS* 3, 14.

28. *Id.* 31.

29. Letter from Jefferson to Adams (May 5, 1817), in *LETTERS* 512, 512.

30. Letter from Jefferson to Adams (Oct. 14, 1816), in *LETTERS* 490, 492. For similar reflections by Jefferson, see Letter from Jefferson to Adams (Oct. 28, 1813), in *LETTERS* 387, 388; Letter from Jefferson to Thomas Law (June 13, 1814), in *THOMAS JEFFERSON, WRITINGS* 1335, 1337 (Merrill D. Peterson ed., 1984).

31. Letters from John Adams to John Taylor, in 6 *ADAMS, WORKS* 443, 520.

32. *ADAMS, NOVANGLUS*, *supra* note 27, at 44.

Adams claimed that these “principles of nature and eternal reason” were also “the principles of Aristotle and Plato, of Livy and Cicero, and Sidney, Harrington, and Locke.”³³ He seems to have ignored what Locke said about the amorality of human nature. If he had considered this view, presumably, he would have rejected it, as Jefferson did that of Hobbes.

The second moment, and one that would have surprised Adams and Jefferson, was at the Second Vatican Council. The Council declared that “the human person has a right to religious freedom” against the “coercion . . . of any human power.”³⁴ Moreover, “within the limits of morality and the general welfare, a man [must] be free to search for the truth, voice his mind, and publicize it. . . . It is not the function of public authority to determine what the proper nature of forms of human culture should be.”³⁵ The Council also declared that religion, culture, and the state fulfill and perfect human life. People are bound “to order their whole lives in accord with the demands of truth,” especially religious truth.³⁶ Furthermore, “culture must be made to bear on the integral perfection of the human person.”³⁷ To form that culture, “[h]uman institutions, both private and public, must labor to minister to the dignity and purpose of man.”³⁸ Society is a moral order that “must be founded on truth, built on justice, and animated by love.”³⁹

According to John Courtney Murray, one of the great advocates of the Declaration on Religious Freedom, the difficulty for some at the Council was not the principle of freedom of speech and religion. The difficulty was that the Declaration seemed to contradict the teaching of three nineteenth century Popes: Gregory XVI, Pius IX, and Leo XIII. Murray believed that the Declaration represented what is technically known as a “development” of Catholic doctrine. “The notion of development, not the notion of religious freedom, was the real

33. *Id.* at 14.

34. Second Vatican Council, *Dignitatis Humanae* [Declaration on Religious Freedom] ¶ 2 (1965), reprinted in THE SIXTEEN DOCUMENTS OF VATICAN II 397, 398-99 (Nat'l Catholic Welfare Conference trans., St. Paul ed. 1967) [hereinafter *Dignitatis Humanae*].

35. Second Vatican Council, *Gaudium et Spes* [Pastoral Constitution on the Church in the Modern World] ¶ 59 (1965), reprinted in THE SIXTEEN DOCUMENTS OF VATICAN II, *supra* note 34, at 513, 575-76 [hereinafter *Gaudium et Spes*].

36. *Dignitatis Humanae*, *supra* note 34, ¶ 2.

37. *Gaudium et Spes*, *supra* note 35, ¶ 59.

38. *Id.* ¶ 29.

39. *Id.* ¶ 26.

sticking-point for many of those who opposed the Declaration. . . ."⁴⁰ The development of doctrine was described by John Henry Cardinal Newman in 1878 in his influential book, *An Essay on the Development of Christian Doctrine*. "An idea which represents an object or supposed object is commensurate with the sum total of its possible aspects," aspects "which may vary in the separate consciousness of individuals."⁴¹ Development is "[t]h[e] process, whether it be longer or shorter in point of time, by which the aspects of an idea are brought together in consistency and form."⁴²

According to Murray, the three nineteenth century popes spoke for their own time, not for all time, because they had seen only an aspect of the truth.⁴³ What they had seen was that in continental Europe, avowed enemies of the Catholic Church and its autonomy carried the banner of religious freedom. A few months after proclaiming the principle of religious liberty in 1789, the French government confiscated the property of the Catholic Church and, within a year, it prescribed how the Church should choose its bishops. Under the Jacobins, the government tried to destroy Christianity by terror and executions. In the late nineteenth century, rabidly anti-clerical parties in Catholic states wanted to use state power to destroy the Church. As late as 1902, and in the wake of the Dreyfus affair, the French government claimed the right to supervise Catholic religious orders and to dissolve the Jesuits.⁴⁴ The government of newly united Italy seized Church lands and tried to confiscate Catholic alms. The German government launched a *Kulturkampf*, a "culture war," against Catholicism. The United States was an exception, but we tend to forget (and perhaps we should) that for a long time, many Americans believed "this is a Protestant country, and the Catholics and Jews are here under suffrance."⁴⁵

40. John Courtney Murray, *Religious Freedom*, in THE DOCUMENTS OF VATICAN II 672, 673 (Walter M. Abbott ed., 1966).

41. JOHN HENRY CARDINAL NEWMAN, AN ESSAY ON THE DEVELOPMENT OF CHRISTIAN DOCTRINE 34 (Christian Classics Inc. 1968) (1845).

42. *Id.* at 38.

43. Conversation with John Courtney Murray reported by John Noonan in JOHN T. NOONAN, JR., THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM 29 (1998). See generally JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 67-68 (1960). On Murray's influence on the Council, see NOONAN, *supra*, at 331-53.

44. On religious liberty in France in the nineteenth century, or rather, on the lack of it, see *id.* at 265-84.

45. The words are Franklin Delano Roosevelt's. Presumably he meant them ironically since he was addressing Leo Crowley, a Catholic, and Henry Morgenthau, a Jew. But he surely

By the time of the Council, much had changed. It had become possible to envision religious tolerance in a state that is nevertheless committed to seeking the best life for its citizens, and in which all parties can be trusted not to suppress their opponents if they become able to do so.

Is there a contradiction in imagining such a state? I don't think so. If the state has the duty to seek a good life for its citizens, it must base its actions on some substantive idea of what constitutes a good life. But it does not follow that the state is empowered to suppress dissent, whether the dissent concerns religion or any other belief about what constitutes a good life.

The reason why many people see a contradiction was put succinctly by Holmes in his dissent in *Abrams v. United States*:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you . . . doubt either your power or your premises.⁴⁶

Notice how he posed the problem: someone—"you"—"want a certain result with all your heart" and "have no doubt of your premises or your power." According to Holmes, "naturally" you will "express your wishes in law and sweep away all opposition."

John Stuart Mill's starting point was similar in *On Liberty*, his classic defense of freedom of speech. Mill wrote as though he were trying to persuade someone with the power to do so not to suppress a view he believes to be objectively false. Mill argued that what seems false may actually be true, and that the dissemination of what is indeed false will make the truth more clear and vivid. That is so, he said, not occasionally, but so invariably that those in authority must act as though it were always so.⁴⁷ According to Mill, this weak

expected them to recognize the sentiment. HENRY MORGENTHAU, JR., DIARIES, Franklin D. Roosevelt Library, entry for Jan. 27, 1942, *quoted in* MICHAEL BESCHLOSS, THE CONQUERORS: ROOSEVELT, TRUMAN AND THE DESTRUCTION OF HITLER'S GERMANY, 1941-1945, 51 (2002).

46. 250 U.S. 616, 630 (1919).

47. JOHN STUART MILL, ON LIBERTY 77-96 (Gertrude Himmelfarb ed., 1974). Similarly, among contemporary scholars, Raz believes that freedom of speech should be protected although there are better and worse ways to live. See *Free Expression and Personal Identification*, in RAZ, *supra* note 13, at 146. His claim rests on a similar insistence that the gains of protecting it will outweigh the loss. See note 53, *infra*.

empirical claim was the reason for protecting freedom of expression.⁴⁸ The similarity in Holmes' and Mill's starting points may not be a coincidence. Holmes reread Mill's essay during the early months of 1919, the year of his *Abrams* dissent.⁴⁹

Once the problem is posed that way it does defy solution. Whether those in power can suppress dissent cannot depend on their doubts about what is true or their evaluation of the costs of suppressing it. If it did, the decision would be like any other the government makes: the government would decide what to do by balancing the good against evil consequences. For example, when considering whether to suppress racist cant, those in authority would consider how likely it is that such views are right or that their dissemination will enlighten us even if they are wrong. If this procedure were followed, freedom of speech and freedom of religion, as we have known them in our country, would cease to exist.

Mill and Holmes defended freedom of speech by pointing to one benefit that it could bring: it could move us closer to the truth. There are, of course, other benefits as well. As Chief Justice Hughes observed, free speech provides the "opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic."⁵⁰ Justice Marshall said that freedom of speech is protected "[t]o permit the continued building of our politics and culture, and to assure self-fulfillment for each individual."⁵¹ Scholars have classified theories of free speech according to which of these three benefits they stress: the

48. By a similar argument, he took a step toward the separation of law from morality that Cardinal George has criticized. Cardinal George, *supra* note 1, at 5. Mill claimed that the law should not try to make people better but only to prevent them from doing "harm" to others. "Harm" did not include the damage done them by a negative moral example or a culture that encourages them to do what they should avoid. His argument was that the violation of society's moral code will promote the "individuality" which is the surest path to virtue, so sure a path that a society must act as though any effort to promote a morally better life for its citizens will invariably lead to a worse one. Mill concluded that the state could not prohibit the importation of opium in China or discourage drunkenness. MILL, UTILITARIANISM 165, 170-72 (Oskar Pietsch ed., Bobbs Merrill Co. 1957) (1861). He did not explain why the state could regulate factory safety (*id.* at 164-65) if, as he claimed, the state cannot watch over a person's "own health, whether bodily or mental and spiritual." *Id.* at 72.

49. Vincent Blasi, *Misleading Metaphor: Holmes and the Marketplace of Ideas* 45 n.128 at <http://www.law.berkeley.edu/cenpro/kadish/Blasi%20Holmes.pdf> (on file with the Ave Maria Law Review) (citing 1 HOLMES-LASKI LETTERS 187 (Mark De Wolfe Howe ed., 1953)).

50. *Stromberg v. California*, 283 U.S. 359, 369 (1931).

51. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972).

pursuit of truth, the flourishing of democratic government, or the self-realization of the individual.⁵² It is no doubt true that just as some speech brings us closer to the truth, some benefits democratic government, and some leaves the individual speaker more fulfilled. Nevertheless, if we regard these considerations as addressed to a person or group that has power to suppress dissent and is deciding whether to use it, then again, that person or group will make this decision in the same fashion as they would make any other decision. They will weigh the good and evil consequences, and protect speech only when they believe that the good of doing so outweighs the evil.

One response is to find some reason why the right to free speech is a trump card, a right that can be exercised even if society will be worse off. But what could the reason be? Some think that an individual is not autonomous or free unless he has such a right, and his freedom or autonomy must prevail over what those in authority think to be good for him or for society.⁵³ But as Robert Post has noted,

in First Amendment contexts, autonomy typically figures on both sides of an equation. Thus, if you intentionally subject me to

52. *E.g.*, Steven D. Smith, *Skepticism, Tolerance, and Truth in the Theory of Free Expression*, 60 S. CAL. L. REV. 651, 655-56 (1987); Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 136 (1981). *See generally* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 193 (1983).

53. Dworkin notes that usually arguments of this kind are made from the perspective of the speaker: he is being denied respect or his free development is hindered. Moreover, those who make these arguments believe that freedom of speech must be protected as a matter of principle, whereas those who are concerned to protect the audience's right to listen make an argument of policy and therefore must allow "competing dimensions of the public's interest to be balanced against its interest in information." DWORKIN, *supra* note 6, at 386-87. But an argument based on autonomy can be made from the perspective of the audience as well. According to Thomas Scanlon, for example, "[t]o regard himself as autonomous . . . a person must see himself as sovereign in deciding what to believe and in weighing competing reasons for action." Therefore, "[t]he harm of coming to have false beliefs is not one that an autonomous man could allow the state to protect him against through restrictions on expression." Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHILOSOPHY AND PUBLIC AFFAIRS 204, 215, 217 (1972). In addition, an argument based on autonomy can rest on policy, or a balancing of what is lost and gained, although then, to do the work required of it, the gains have to be regarded as invariably so large, and the losses so small, that the argument functions as a trump, and always cuts in favor of freedom of speech. Mill's argument in *On Liberty* is like that. So is Raz's argument that autonomy requires choice that requires in turn that different life styles be made public and so presented as viable options. Freedom of expression with respect to these life styles is therefore to be protected as a public good, not for the sake of the right holder. He then denies the state the right to suppress "false, worthless, degrading, depraved, etc., views and opinions" because bad speech can be part of a good way of life. RAZ, *supra* note 13, at 160-64. I do not think he successfully explains why that is true so often that the loss from suppressing bad speech nearly always exceeds the gain.

emotional distress, my autonomy interest in not being distressed must be weighed against your autonomy interest in saying what you wish, and for this reason autonomy tends to drop out of the equation altogether.⁵⁴

Another response is to retreat into skepticism. There is no true substantive conception of what is good or evil, or, at least, none which those in authority can be certain they have found. Therefore, they cannot suppress dissent in the name of such a conception. That might be one way to interpret the Supreme Court's remark that "[u]nder the First Amendment there is no such thing as a false idea."⁵⁵ But as Vincent Blasi⁵⁶ and Robert Post have noted, and as Steven Smith has shown in detail,⁵⁷ an attempt to justify freedom of speech is seriously mistaken if it is based on a claim that opinions are neither true nor false. If that were so, as Post observes, the discussion of ideas "could not serve a 'truth seeking function,' and the Court's whole constitutional rationale for protecting opinion would collapse."⁵⁸

As we will see later, Blasi and Post seek a half-way house between moral truth and moral relativism. Smith, in contrast, believes that there is moral truth, and that the state must act on the basis of it. He then tries to answer Holmes. Why isn't the suppression of dissent "perfectly logical" if "you have no doubt of your premises or your power?" He runs into trouble, I believe, because he accepts Holmes' formulation of the question to be answered.

Smith's first step is to revive an argument of John Locke that was also made by Thomas Aquinas against the forcible conversion of Muslims and Jews.⁵⁹ By threatening force, you can silence a person, but you can't make him believe the world is other than as he sees it.⁶⁰ That is a good argument, but it only goes so far. It shows that one motive for persecution is futile: to persecute because error is bad for the dissenter, and those in authority want to make him change his mind.

The problem, as Smith recognizes, is that this argument by itself does not explain why those in authority cannot silence a dissenter to

54. Robert C. Post, *Community and the First Amendment*, 29 ARIZ. ST. L.J. 473, 479 (1997).

55. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

56. Blasi, *supra* note 49, at 26-27.

57. See Smith, *supra* notes 11, 52. See also RAZ, *supra* note 13, at 98-109.

58. ROBERT C. POST, *CONSTITUTIONAL DOMAINS* 157 (1995).

59. *SUMMA THEOLOGIAE*, Part II-II, Question 10, Article 8.

60. Smith, *supra* note 52, at 703-04.

prevent his error from spreading. They cannot, according to Smith, because truth is valuable only if one's beliefs are held "voluntarily." Moreover, "a belief is voluntary in a maximal sense only if it was chosen by a believer who was aware of all plausible alternatives."⁶¹ Therefore, the state must allow free expression of what it believes to be plausible and harmful error.⁶² But this answer assumes too much. It assumes that it is more important to those in authority that citizens hold their beliefs after considering every plausible argument than that they hold true beliefs. Those in authority may be content if, for example, their citizens think it obvious that they should treat one another decently without regard for race. Certainly, if there were a shortage of plausible sounding racial bigots, the state wouldn't subsidize bigotry and the development of plausible arguments for it simply to ensure their citizens were exposed to them.

The problem, I believe, is that the question is unanswerable if we put it as Holmes and Mill did: "if you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition." Why, then, isn't it "perfectly logical" to suppress dissent?

To put the question that way is misleading, as we can see if we ask who is "you" and what is "power." One answer is that "you" refers to someone who is constitutionally entitled to make laws and "power" to a constitutionally conferred power to make them. If that is so, then the question assumes that power has been constitutionally conferred on legislators to "sweep away all opposition" to any result that they want with all their heart. The other possibility is that "you" may be anybody at all, and that "power" is that person's ability to express his wishes in law by any means whatever, even by voting in defiance of the constitution if he is a legislator, or by bribing a sufficient number of legislators if he is a private person.

This distinction between legitimate and illegitimate exercises of power is not one with which either Holmes or a child of utilitarianism, such as Mill, could be entirely comfortable. Holmes thought that law is whatever will influence a bad man who is concerned only in the unpleasant consequences he will face if he acts

61. *Id.* at 710.

62. *See id.* The state should allow free expression of implausible error because its expression communicates a "biographical truth," namely, that the speaker in fact holds the belief he does. The communication of this truth is of value, and not dangerous since the belief communicated is by hypothesis implausible. *See id.* at 712-15.

illegally.⁶³ If we imagine that a person who can influence legislation is himself a bad man, nothing but lack of power can stand between him and any result he wants with all his heart. Indeed, sometimes Holmes seems to say that law is whatever those with power happen to want.⁶⁴ Moreover, utilitarians perennially have trouble explaining why a person should not act beneficently when it is illegal to do so. Why shouldn't I break a rule if by doing so I can promote the greatest good of the greatest number?

Here, however, the distinction between a legitimate and illegitimate exercise of power matters very much. If we are speaking of a constitutionally conferred power that entitles a legislator to "sweep away all opposition" to any result he "wants with all his heart," we are supposing that such a power has been conferred on him. Why should it have been? If it should not have been conferred, Holmes' question about how it should be used if it were, is not very interesting. It is a question about why a person might restrain himself in exercising a power he should never have been given. If, however, the question is why a person should not overstep his constitutional authority to obtain a result he wants with all his heart, even if it is a good result such as the betterment of society, then the question is very interesting, but it has nothing in particular to do with freedom of expression. It is the question of why one should not break the law to benefit society. This question is the same whether the law is protecting freedom of speech or prohibiting a person from committing a murder in order to go to medical school and thereby save lives.

The question to ask instead is whether a constitutional power to suppress dissent should be conferred on legislators in the first place. In answering that question, I will now consider three special situations. One is the suppression of dissenters who may come to power and then silence their opponents. Intolerance of these dissenters may be self-defense. That is not to say they should be silenced when there is no real chance that they will come to power. There is no chance the American Nazi Party will come to power, and

63. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459-62 (1897). Reprinted in 110 HARV. L. REV. 991 (1997).

64. Oliver Wendell Holmes, *Law in Science and Science in Law*, in COLLECTED LEGAL PAPERS 210, 225 (1920) (law serves "social end[s] which the governing power of the community has made up its mind that it wants."); Oliver Wendell Holmes, *Summary of Events: The Gas-Stokers' Strike*, 7 AM. L. REV. 582, 583 (1873) (unsigned essay reprinted in 44 AM. L. REV. 795 (1931) ("[the more] powerful interests must be more or less reflected in legislation.")).

so the United States Supreme Court may be right not to stop them from marching in Skokie.⁶⁵ I am not sure however that the result should have been the same in Weimar, Germany. Given the tragedy of World War II, it is not surprising that Germany today takes a different approach to the Nazi movement than the United States. While German law recognizes a constitutionally protected right of free speech,⁶⁶ it criminalizes propaganda on behalf of parties that have been declared illegal because they are “against the constitutional order.”⁶⁷

A second special situation is when the views that are expressed harm others by defaming them, insulting them, or revealing embarrassing facts about their lives. In principle, the victims of these harms should be protected. Nevertheless, that protection may have to be limited. In matters of public concern, expressing such views may be of public benefit. If the person expressing these views is held liable, the cost of doing so falls on him, and he will not be compensated for bearing it. He may refrain from expressing them even though the value to society outweighs the harm they do. Therefore, as the Supreme Court recognized in *New York Times Co. v. Sullivan*,⁶⁸ there should be a privilege to speak even when someone is hurt. Moreover, it may be difficult or dangerous to let the extent of this privilege turn, as it would in a negligence case, on a judge’s or jury’s assessment of the value of the speech or the extent of the harm. The Supreme Court said that it could not distinguish in principle between a Thomas Nast cartoon ridiculing the Tweed Ring and a parody in *Hustler Magazine* pretending that the Reverend Jerry Falwell had sex with his mother in an outhouse.⁶⁹ To distinguish them by saying that the latter is worthless, the Court would have had to make a direct judgment about their value.⁷⁰ In *Florida Star v.*

65. *Nat’l Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43 (1977).

66. GRUNDGESETZ (federal constitution) art. 5 (F.R.G.).

67. Strafgesetzbuch (Penal Code) § 86(1) (F.R.G.).

68. 376 U.S. 254 (1964).

69. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 54-55 (1988).

70. Thus I interpret *Falwell* differently than Robert Post, who believes that “an ‘outrageousness’ standard is unacceptable not because it ‘has an inherent subjectiveness about it,’ but rather because it would enable a single community to use the authority of the state to confine speech within its own notions of propriety.” Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 603, 632 (1990). That presupposes that those who are uncivil wish to change community standards of civility rather than merely to insult someone by saying something that is uncivil by current standards. The difference is important because, for Post, the

B.J.F.,⁷¹ the Court refused to weigh the value to the public of learning the name of a rape victim while her assailant was still at large against the harm to the victim. It held that publication of the information was constitutionally protected. One can protect freedom of speech and still be willing to make such a comparison. In France, a columnist was held liable for calling a Jewish television journalist a "tart kosher pork butcher."⁷² In Germany, a court found a journalist liable for publishing true information about talk of a divorce in the Hohenzollern family in 1970.⁷³ In any event, the problem here is a special one: the extent to which free expression should be curtailed in order to protect the person harmed.

In a third special situation, the dissent is not honest. Suppose that a religious leader pretends to have had an experience, for example, a personal interview with a saint in heaven, that he never had. Can he be prosecuted for fraud if, on the basis of that claim, he raises money from his followers? Even in the United States, albeit on a single occasion, the Supreme Court held that he could be, although it maintained that the only issue for the jury was his own sincerity, not the truth or falsity of his beliefs.⁷⁴ Justice Jackson, dissenting, questioned whether one could settle the one issue without asking about the other, and he noted that prejudice could easily shape the jury's judgment about sincerity.⁷⁵ Those are, indeed, dangers, and they may be serious enough to warrant immunizing fraud from prosecution. Our question here, however, is why even honest dissent should be protected.

If we leave these special situations aside, and consider the remaining motives that those in authority might have for suppressing dissent, we can see that giving them power to do so would be futile, wrong, or dangerous. One motive might be to benefit the dissenter. The error harms him. But to suppress dissent for this reason would be futile. As Aquinas, Locke, and Smith said, there is no way to convert him by force.

Another motive might be to silence the dissenter and so prevent the error from spreading. Silencing a dissenter will not convert him

result in *Falwell* shows that the First Amendment is not merely concerned with the search for truth: in *Falwell* what mattered was the manner of expression. Post, *supra* note 54, at 479-80.

71. 491 U.S. 524 (1989).

72. CA Paris, 1 ch., Feb. 15, 1988, J.C.P. 1988, II, 21115.

73. OLG Hamburg, *Neue Juristische Wochenschrift*, 30 (1970), 1325.

74. *United States v. Ballard*, 322 U.S. 78 (1944).

75. *Id.* at 92-93, 95.

but it may prevent him from converting others. One reason that those in authority might want to stop dissent from spreading is that, if it does, the dissenters will someday be in the majority. Then, if the constitution provides that legislators are chosen by majority vote, the state will act on the dissenters' ideas of how life should be lived.

This reason for preventing the spread of dissent is improper just because the constitution provides for majority rule. To suppress dissent in order to keep the current majority in power is like rigging the next election or passing a law that is supposed to bind future legislators. If the constitution gives the legislators authority only because they commanded a majority of the votes at the time they were elected, it would be inconsistent to give them power to subvert that system by depriving their citizens of the free choice of whom to elect in the future.

Another reason for preventing the spread of dissent is that those in authority may believe the error is harmful to the dissenters themselves. Nevertheless, whatever their reasons, those in authority also may err. To the extent that they can successfully suppress dissent, for that very reason, their error is more dangerous than the error of a dissenter. They can more effectively shield error against truth. In religious matters, the rule in Europe once was *cuius regio eius religio*: the religion of the region is that of its prince. Neither Catholics nor Protestants think that the rule prevented error. It concentrated error in blocks circumscribed by the boundaries of states and entrenched it within these boundaries against opposition.

Depending on how strong one believes this consideration to be, one can draw one weak conclusion or some stronger ones. The weak conclusion is that it is quite sensible for the constitution to deny those in authority the power to suppress dissent for fear that it might be misused. If this power is denied to those in authority, then, quite simply, they do not have it. There is no point in asking, as Holmes does, why those in authority should refrain from using it if they did. To draw the weak conclusion, one does not have to regard the First Amendment as enshrining a universal principle. One can believe it is like establishing a bicameral legislature or requiring a jury trial. These are not essential features of any democratic constitution, but sensible precautions against the misuse of power. That does not make them any less a part of our constitution. Catholics who draw this weak conclusion can still agree with the Second Vatican Council that, as a universal principle, Christians should not coerce dissenters. The

Council noted the contradiction between doing so and the example of Christ and the apostles.⁷⁶

A second and stronger conclusion is that constitution makers should never grant those in authority such a power, at least, under any circumstances we can readily imagine. That is so whether the constitution makers are those who draft and approve a written constitution, as in the United States, or those whose understanding of the proper limits of public power forms an unwritten constitution, as in Britain. Leaving aside the special situations mentioned earlier, the exercise of such a power by those in authority would be futile, wrong, or more dangerous than permitting dissent. If that is so, the power to suppress dissent is like the power to execute people without trial whenever the government believes it to be in the public interest. It is hard to imagine circumstances in which any government should be given that power.

Whether the protection of freedom of speech and religion should then be regarded as a universal principle depends on what one means by "universal." It is not universal in the same way as a theoretical proposition about the necessary features of representative government: for example, that it be responsive to the views of the people. If someone said that representative government should not be responsive to the people, he would not understand what representative government means. That freedom of religion and expression should be protected is a practical proposition about which powers are too dangerous to entrust to a government. This proposition is universal if it holds under all circumstances. It approaches universality if it holds under all circumstances we can readily imagine. Such a proposition is like a law that a legislator makes to cover all the circumstances that he envisions. It may be that under sufficiently exotic circumstances an exception is warranted to the principle or to the law.⁷⁷ If, however, we cannot readily imagine any circumstances under which the government should have the power to suppress dissent, there is little point in worrying about whether the principle that it cannot do so is universal or merely approaches universality.

A still stronger conclusion is that those who make the constitution may not exercise such a power themselves. Suppose that those

76. *Dignitatis Humanae*, *supra* note 34, ¶ 11.

77. This is what Aquinas, following Aristotle, meant by *epikeia* or "equity." *SUMMA THEOLOGIAE*, Part II-II, Question 120, Articles 1, 2.

making the constitution are nearly all Catholics, or Calvinists, or theists, or atheists. The stronger conclusion is that they cannot legitimately make a constitution which establishes one church and proscribes all others, or which proscribes every form of worship. By "legitimately," I mean that neither they nor anyone else should regard them as possessed of such a power. If they possessed it, they, as constitution makers, could exercise power that, if our second conclusion is correct, should not be entrusted to legislators. Yet such a power would be even more dangerous in their hands. Constitutions are harder to change than laws. The danger of entrenching error is correspondingly greater. Suppose, as most people would, that it would be too dangerous to confer on any government the power to execute or incarcerate people without trial whenever it is deemed in the public interest. It would be odd to think so and to believe that the constitution makers themselves have such a power. To be consistent, one would have to believe that such a power is either more necessary or less likely to be abused by the constitution makers.

To put this argument another way, whoever the constitution makers may be, they must give some reason why they have the power to suppress a certain view (or to incarcerate or execute whom they please) other than that they think it will be in the best interest of society. Private people do not have the right to do something simply because they think it is in the best interest of society. As Locke pointed out,

no private person has any right . . . to prejudice another person . . . because he is of another church or religion. . . . [S]uppose two churches, the one of Armenians, the other of Calvinists, residing in the city of Constantinople. Will anyone say that either of these churches has a right to deprive the members of the other of their estates and liberty?⁷⁸

The question, then, is why constitution makers should regard themselves, or be regarded by others, as having such a right. The answer cannot be that they are correct and that the dissenters are wrong since a private person can say the same. Neither can the reason be that they have authority and are charged with looking after the best interests of society. Legislators have authority and are charged with looking after the best interests of society but, if our

78. LOCKE, *supra* note 18, at 134-35.

second conclusion is correct, they should not have the power to suppress dissent.

This argument has a John Rawls flavor about it which may be off-putting to those who disagree with Rawls. He believes that ideally everyone should have an equal share of resources because people would agree on this principle if we imagine them deciding how to distribute resources without knowing the role they will occupy in society or the particular purposes they will choose to pursue.⁷⁹ My argument here may sound similar: it considers whether those in authority should have power to suppress dissent without considering what sort of dissent they will suppress. Actually, the arguments are quite different. Rawls is conducting a thought experiment, which is interesting only if he can explain why those who must agree on how resources should be distributed should be kept ignorant of how people will actually use them. Elsewhere, I have argued there can be no such reason. They could not agree on how to distribute resources without having some criterion for why the distribution matters, whether it be to enable each person to do what he believes is worthwhile, or merely to enable each person to satisfy his preferences. I have argued that if they had such a criterion, it would not make sense to keep them ignorant of the goals that the people who receive resources will actually pursue. The resources that each one should have will depend on this goal, even if in principle one simply wants to treat each of them equally.⁸⁰ My argument here, however, is that for a person or group of persons to have a legitimate power to suppress a dissenting opinion, two circumstances must coincide: the belief that to do so would be in the best interests of society, and the legitimate power to do so. The belief cannot be the source of the power. Neither can the source of the power be the authority to advance the interests of society if the power is too dangerous to entrust to those with this authority.

It is hardly novel to suggest that freedom of religion and expression should be protected for fear that the government may perpetuate its own errors by suppressing dissent. That suggestion sounds like common sense. Nevertheless, the problem with it, according to some constitutional law scholars, is that there are many actions the government is permitted to take despite the risk of error.

79. JOHN RAWLS, *A THEORY OF JUSTICE* 11-13, 18-19, 136-37 (1971).

80. See Gordley, *Contract Law in the Aristotelian Tradition*, *supra* note 4, at 296-97.

Robert Post points out that some of them concern the regulation of speech: the idea

that the First Amendment expresses a generic distrust of government when it comes to the regulation of speech. . . . is too evidently weak to explain the pattern of First Amendment law, for we surely trust the Federal Trade Commission to regulate trade, including the making of contracts, and we surely trust the Consumer Products Safety Commission to regulate products, including their warnings and instructions.⁸¹

But his objection merely shows that we trust the government to regulate some kinds of speech. It does not show that we trust the government to regulate all kinds of speech, and in particular, that we trust it to suppress dissent. Regulating what contracts people make or what warnings about products they give has nothing to do with suppressing dissent. Such regulations do not entail the same risk of entrenching error.

Steven Smith has objected that other actions the government may take entail a risk of making an error that will be hard to correct:

adoption of a particular policy—whether it be reapportionment of representation, adoption of a Social Security program, a retaliatory attack on a foreign nation, or suppression of expression—involves a risk of error, and once made, error may in practice be difficult or impossible to correct. . . . The question in each case is whether the risk is worth taking.⁸²

This objection merely shows that sometimes, a power is constitutionally conferred on those in authority despite the risk of such an error. It does not show that a power cannot be withheld from them because of such a risk. It is dangerous to confer the power to declare war but one can rightly believe it would be more dangerous to withhold it. It is not inconsistent to confer the power to declare war and withhold the power to suppress dissent.

There is no contradiction, then, between believing in freedom of speech and religion and believing that there are genuinely good ways to live, which the state should promote, and genuinely bad ones, which it should combat. Indeed, if this distinction were not genuine

81. Post, *supra* note 54, at 479.

82. Smith, *supra* note 52, at 695.

and important, error would not matter. It is because error does matter that we should choose the lesser of two evils and risk the spread of falsehood among individuals by persuasion rather than risk the suppression of truth by force. As Blasi and Post have observed, if there were no truth to seek, one could not understand why the First Amendment protects the search for it.

Blasi and Post, however, try to steer a middle course between affirming that there is a truth that one can find and denying that there is any truth at all. That effort not only sets them the difficult task of explaining how something can be true and not quite true both at once. It also provides a weaker defense of freedom of speech than if they simply affirmed that some beliefs are simply true and others false.

Blasi believes that what he calls "the scientific method" is an alternative to "moral absolutes" on the one hand and skepticism on the other.⁸³ He identifies this position with "fallibilism" which means that

all propositions are subject to testing. And that process of testing, whether it takes the form of systematic observation, controlled experiment, logical derivation, or a probing of the intuitions toward the end of reflective equilibrium, must always hold out at least the possibility that prior understandings will be displaced. In short, we might be wrong.⁸⁴

According to Blasi, this was the view of Holmes and Mill, and it grew out of English empiricism.⁸⁵ It explains Holmes' answer in *Abrams* to the question why a person with the power to do so would not suppress dissent:

when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas.⁸⁶

One problem with this defense of freedom of speech is that it requires us to believe more than the simple proposition that those in authority may err, even as to matters of which they feel sure, and that

83. Blasi, *supra* note 49, at 49-50.

84. *Id.* at 45.

85. *Id.*

86. 250 U.S. at 630.

it is therefore dangerous to give them power to suppress dissent. It requires us to believe that any opinion anyone may hold is subject to correction: for example, the opinion that absent exceptional circumstances it is wrong to steal or to kill, or that I am now sitting at my desk writing an article. The defense it affords for freedom of expression is only as strong as this dubious philosophical proposition.

Even then, Holmes' answer requires more than a philosophical commitment to "fallibilism." Those in authority must "believe even more than they believe in the foundations of their own conduct" that free discussion will arrive at truth. They must not only think that they might be wrong, but that the possibility is great enough that truth is more likely to emerge from open discussion. But they presumably have great trust in the "foundations" on which they have built their lives, more trust, much of the time, than they have in free discussion.

Blasi himself does not trust "the marketplace of ideas" which, he acknowledges, "does not offer the prospect of wisdom through mass deliberation."⁸⁷ Instead, according to Blasi, "[w]hat the marketplace of ideas does offer is a much needed counterweight, both conceptual and rhetorical, to certain illiberal attitudes about truth, change, and authority on which the censorial mentality thrives."⁸⁸ To be fair to Blasi, this claim comes at the end of an article devoted to a detailed discussion of Holmes. I am not sure how Blasi would develop this idea. Nevertheless it offers a very unsafe ground for protecting freedom of expression. The purpose of protection is to inhibit the spread of opinions about truth, change, and authority that are "illiberal." This comes close to saying that the reason for permitting free expression is that certain ideas ought to be suppressed: namely, any convictions that are not held tentatively and subject to correction, which are not thought to be testable by "the scientific method," in short, the beliefs of almost anyone who disagrees with "fallibilism." Presumably, Blasi does not think the government should enact laws prohibiting the expression of "illiberal" views. But if the point of the First Amendment is to prevent the spread of these views, then why not? If Blasi believes it paradoxical that a believer in "moral absolutes" will not suppress dissent, why is it not equally paradoxical for an opponent of "illiberal" views to refuse to do so?

87. Blasi, *supra* note 49, at 50.

88. *Id.*

Post steers a different middle course, one rooted not in English empiricism, but in nineteenth-century German philosophy. Commenting on the Supreme Court's remark that "there are no false opinions," he reformulates the distinction between fact and opinion in the following way:

Statements of fact make claims about an independent world, the validity of which are in theory determinable without reference to the standards of any given community, and about which we therefore have a right to expect ultimate convergence or consensus. Statements of opinion, on the other hand, make claims about an independent world, the validity of which depends upon the standards or conventions of a particular community, and about which we therefore cannot expect convergence under conditions of cultural heterogeneity.⁸⁹

For Post, statements of opinion must make claims about an independent world, otherwise free expression could not serve a "truth seeking function." He believes, however, that these opinions can only be validated, and hence can only be true, in the context of a given culture. "[E]thical thought . . . is ultimately 'a matter of belonging to a certain culture.' . . . If I were to argue, for example, that eating pork or marrying the widow of one's brother is morally wrong, I would ultimately have to appeal to the norms already accepted within my culture or community."⁹⁰ We cannot expect opinions to converge when there is a "diversity of groups and cultures."⁹¹ The norms of these different cultures "are not merely subjective; they are instead 'intersubjective.'"⁹²

The antecedents of this approach go back through Jürgen Habermas to nineteenth-century German philosophers who were looking for an alternative, on the one hand, to the traditional belief in natural law, and, on the other, to the skepticism of Enlightenment philosophers such as David Hume. Fichte, I believe, was the first to use the term *Weltanschauung* or "world view" to describe a set of beliefs that are not purely subjective and arbitrary but which could only be validated in terms of each other. Since then, this idea has

89. POST, *supra* note 58, at 162.

90. *Id.* at 160 (quoting Bernard Williams, *The Scientific and the Ethical*, in OBJECTIVITY AND CULTURAL DIVERGENCE 209, 220 (S.C. Brown ed., 1984)).

91. *Id.*

92. Post, *supra* note 54, at 475.

taken various forms. Some have spoken of a *Zeitgeist* or spirit of the times, others of a *Volksgeist* or spirit of a race, others of "class consciousness," and others of "culture." If all that is meant is that there is no single way that life should be lived, that some peoples in some places have valued more what others have valued less, and that what they value is shaped by their historical experience, or by their economic interests, then who could disagree? Certainly, not a person who takes the traditional approach to natural law. Freedom, according to Thomas Aquinas, means not only that one can decide between doing good and doing evil; it means that there are moral decisions that have no one right answer.⁹³ There may be no single right answer to the question whom to marry or what sort of work to do. That does not make these decisions unimportant but rather undetermined. Aquinas said the same of God's freedom to create the world as He did. There was no "best of all possible worlds," but rather many good ones, any one of which He could have chosen.⁹⁴ The decisions I make as to which good life to live are free decisions in this sense, and they make me the kind of person I am. So, too, are the decisions that give nations and groups within nations their distinctive character. In this sense one can speak of culture.

What has often been meant, however, is that there is no good or evil, and no truth, except as judged by the standards of a particular culture; there are no standards that transcend this culture by which its own standards can be judged. I have trouble imagining how that could be so, and if it were, how one could possibly understand people of another culture, or even understand that they are people in the same sense as ourselves. To make his point, Post chooses examples of the sort of rules that those who believe in natural law traditionally ascribe to positive law, divine or human, rather than natural law: eating pork or marrying one's brother's widow. Post does not say, and I find it hard to believe, that the heroism of Achilles or Musachi, the humanity of Confucius or Schweitzer, the self-abnegation of Buddha or Marcus Aurelius, the love of knowledge of Socrates or Mencius, the compassion of St. Francis or Gandhi, the righteous indignation of John Brown or Karl Marx, or the intolerance of either, are understandable only within their particular cultures. For my part, I would admit that in different cultures, these virtues and vices have taken distinct forms.

93. SUMMA THEOLOGIAE, Part I-II, Question 10, Article 2; Question 13, Article 6.

94. *Id.* Part I, Question 19, Articles 3, 10.

Here, however, the question is whether this view is less threatening to freedom of religion and expression than the belief that there are standards of moral truth that transcend one's culture. I think it is more threatening. One who believes in transcendent standards may be too ready to think that his own beliefs are correct or to blame anyone who has not arrived at a truth that is supposed to be accessible to all. He may be tempted, if he can, to enlist the power of the state in what he regards as the cause of truth. Nevertheless, history may teach him how great the propensity is for both individuals and states to err even when they try not to err. It may teach him that to call on the state to set matters right is to make the same mistake as an Italian renaissance city-state that trusts in a mercenary army. In contrast, it is considerably more dangerous to identify moral truth with the ways of one's own group, be it one's race or class or culture, and to claim that there is no higher truth by which its ways can be judged. If it were so, in the final analysis, what use could one have for the ways of any other group? And then why should the other group's viewpoint be protected? In the early nineteenth century, Hegel invoked the *Geist* of his culture to defend the proposition that all persons are free. Savigny did so to defend the heritage of Roman law. Their mistake was to put culture above freedom and law. Once that is done, good and evil and the value of freedom and law are whatever the *Geist* says they are, or rather, whatever those who claim to speak for the *Geist* say that they are. The historical results have been frightening.

Of course, Post is not endorsing what he regards as a threat to democracy. He believes in "democratic self-governance" or "democratic legitimacy" which requires:

(1) that the public should have a warranted belief that the decisions and actions of the state are responsive to public opinion and (2) that all citizens must have the opportunity freely to participate in the formation of public opinion. Public opinion is thus conceived as mediating between the particular wills of individual citizens and the general will of the state. It performs this function by including all citizens in an open invitation to participate in an ongoing process of rational deliberation.⁹⁵

If, however, there are no standards higher than those of a particular culture to prescribe the proper ends of a state or the legitimate means

95. Post, *supra* note 54, at 480-81.

of achieving them, why should one believe in democratic self-governance unless it happens to be one of the norms of one's culture? Moreover, unless one's culture assigned this norm a supreme value, why would not the right to participate in forming public opinion be circumscribed by other norms so important to that culture that questioning them would itself violate culture norms? Indeed, according to Post, "[a] society characterized by the norms of only one community will lack the impetus to liberate its public discourse from the regulation of those norms." Therefore, to protect free public discourse, "a society must include a plurality of cultures and traditions."⁹⁶

If there is a plurality of cultures, what is to ensure that they are able to communicate? Why is there one society and a public discourse rather than merely discourse within separate communities, each of which regards its own norms as an ultimate standard, and each of which limits even that discourse by other norms concerning what may and may not be questioned? As I understand Post, he believes that public discourse is possible, but only if certain conditions happen to be met. One is that the cultural norms of the society in question, and presumably those of the communities that compose it, place a value on cultural heterogeneity. "[E]ven a culturally heterogeneous society cannot sustain public discourse unless the society values and wishes to preserve that heterogeneity."⁹⁷ Another condition is that

persons must have a reason to enter into the realm of public discourse to communicate with those beyond their own communities. . . . With respect to "the arena of public discussion" established by the first amendment, the common motivation must be understood as that of democratic self-governance and a shared political destiny.⁹⁸

Yet another condition is that their cultural norms are not too far apart:

communication requires not merely common information, but also commonly accepted standards of meaning and evaluation, so that the significance of that information can be assessed. The necessity for these standards suggests that the emergence of public discourse rests

96. Post, *supra* note 70, at 634.

97. *Id.*

98. *Id.* at 635.

upon a delicate balance: if persons in public discourse share too much, if they are simply members of the same community, the diversity requisite for the emergence of public discourse will not be present. But if, on the other hand, such persons share too little, if they have absolutely no common standards for the evaluation and assessment of meaning, public discourse cannot be sustained.⁹⁹

Freedom of religion and expression will be respected, then, if a society is composed of a plurality of cultures that value not only their own cultural norms but also the heterogeneity of the larger society and its democratic self-governance. In addition, the cultural norms of such a society need to be sufficiently close to provide "common standards for the evaluation and assessment of meaning." In this society, freedom of expression will be valued because it gives every citizen "the opportunity freely to participate in the formation of public opinion."¹⁰⁰

Post gives a lucid account of the conditions required, by his approach, if free expression is to be protected. My difficulty is that I do not see how that approach will protect the freedom of expression, which I have been taught to respect both as an American and as a Catholic attentive to the teachings of the Second Vatican Council.

First, we ought to protect even a heterogeneity that we do not value, indeed, even one that we wish did not exist. As a Catholic, I believe the Calvinist and the atheist are wrong, just as they, to hold the positions they do, must believe that I am wrong. My insistence, and, I hope theirs as well, that we all be allowed to practice our own religion or to express our own views should not depend on whether we value the resulting heterogeneity.

Second, if Post is right, one's ability to speak meaningfully to others in the larger society depends on the accident of how much one's own culture has in common with theirs. Every citizen may be given "an open invitation to participate in an ongoing process of rational deliberation,"¹⁰¹ but, depending on what they believe, it may be as meaningful as inviting a Catholic, a Hindu, an Orthodox Jew, a Moslem, and a vegetarian to a dinner of sausages made of beef and pork on a Friday in Lent. If a group's "standards for the evaluation and assessment of meaning"¹⁰² are sufficiently different, its members

99. *Id.* at 636.

100. Post, *supra* note 54, at 481.

101. *Id.*

102. Post, *supra* note 70, at 636.

can contribute nothing to the discussion. To the extent its standards are different, or the group is numerically small, it contributes less than others. The reason is not that its members' arguments are weak or that others are obstinate in the face of strong arguments. It is that their arguments are based on cultural premises that need not be shared, or fully shared, and that groups are represented, not according to their number, but according to the number of their members. Nevertheless, a system inherently weighted in favor of the cultural norms of more groups or of larger groups is said to have "democratic legitimacy," and each citizen is expected to agree that it does.

Third, if Post is right, freedom of religion and expression are appropriate only to societies that find themselves in the special circumstances that Post describes. If I am right, they should be protected more widely: wherever it is reasonable to fear errors by authority more than that of dissenters. There is a strong case that they should be protected everywhere.

Those who believe that some norms are transcendent and not merely cultural may be tempted to allow the state to defend these values by suppressing dissent. They may also see, however, that the state should not have the power to do so even if they dislike the resulting heterogeneity. Because they believe that some values are transcendent, they will believe that people even of diverse cultures must have some values in common. Therefore they will believe in the possibility of dialogue. They will believe freedom of religion and expression should be protected, not under rather particular cultural conditions, but wherever the state is to be feared. I do not see how one who believes values are merely cultural can take these positions.

We have seen one way in which Isaiah Berlin's two concepts of freedom are not antagonistic. Because we value the second kind of freedom, the freedom that comes with living a genuinely good life, we should fear error as to what kind of life that is. Because we fear error, and fear it more when it is made by the state, we should protect dissent.

We should also recognize that there is a second way in which his two concepts depend upon each other. Much of what the state can do to promote a genuinely good life for its citizens is to secure for them freedom of the first kind: freedom against interference by the state, and not merely when they dissent. For the state to act at all to promote the welfare of its citizens, it must have a substantive idea of what constitutes their welfare, that is to say, a moral vision of what it

means to live well. Sometimes that moral vision requires condemnation or prohibition of conduct destructive of a good life. But as noted earlier, to have such a substantive idea does not imply that there is only one right way to live a good life, although it does mean that there are many wrong ways. Aquinas thought that human freedom consists of choosing which right way to live. This freedom to choose is itself a basic constituent of a good life. It is so basic to a good life that even if the state could make a better choice for its citizens, that fact alone would not justify restricting this freedom.¹⁰³ Freedom of this sort should be protected because it belongs, substantively, to the concept of the good life, which the state should promote.¹⁰⁴ In contrast, freedom to dissent should be protected even when it conflicts with this conception and even when the state believes that it potentially makes everyone's life worse. To put it another way, not only are Isaiah Berlin's two concepts of liberty not in conflict, but we need three concepts instead of two: there is freedom to live a good life, there is freedom to choose for oneself among different good lives, and there is freedom to dissent over what constitutes a good life. The second is a constituent part of the first. The third must be protected, paradoxically, to avoid error as to the first, because error backed by force stretches further and endures longer than error unarmed. Nevertheless, if error were not bad, there would be no reason to fear it.

103. See Gordley, *Contract Law in the Aristotelian Tradition*, *supra* note 4, at 280-82.

104. A similar position is taken by RAZ, *supra* note 13, at 117-22.