

## ARTICLES

# What does it mean to be ‘illiberal’?\*

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## Introduction

‘Illiberal’ is an adjective that is commonly used within contemporary legal, political, and philosophical scholarship. For example, authors might speak of ‘illiberal cultures’,<sup>1</sup> ‘illiberal groups’,<sup>2</sup> ‘illiberal states’,<sup>3</sup> ‘illiberal democracies’,<sup>4</sup> ‘illiberal beliefs’,<sup>5</sup> and ‘illiberal practices’.<sup>6</sup> Yet despite its widespread usage, no in-depth discussions exist of exactly what it means for someone or something to be illiberal, or might mean. This article fills this lacuna by providing a conceptual analysis of the term ‘illiberal practices’, which I argue is basic in that other bearers of the property of being illiberal can be understood by reference to it. Specifically, I identify five ways in which a practice can be illiberal based on the different ways in which this term is employed within both scholarly and political discourses. The main value of this disaggregation lies in the fact that it helps to prevent confusions that arise when people use the adjective ‘illiberal’ in different ways, as is not uncommon.

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1 E.g., Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995).

2 E.g., Nahshon Perez, ‘Why Tolerating Illiberal Groups Is Often Incoherent’, *Social Theory and Practice* 36, no. 2 (2010): 291-314.

3 E.g., Andreas Follesdal, ‘The Standing of Illiberal States: Stability and Toleration in John Rawls’ “Law of Peoples”’, *Schriftenreihe-Wittgenstein Gesellschaft* 25 (1997): 165-174. It is worth noting that some politicians have openly championed the idea of an illiberal state. Most famously, Hungarian prime minister Victor Orban said in a 2014 speech that ‘we have to abandon liberal methods and principles of organising a society. The new state that we are building is an illiberal state’. See Ian Traynor, ‘Budapest Autumn: Hollowing out Democracy on the Edge of Europe’, *The Guardian*, 29 October 2014, sec. World news, <https://www.theguardian.com/world/2014/oct/29/budapest-viktor-orban-democracy-edge-hungary>.

4 E.g., Fareed Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad*, Revised edition (W. W. Norton & Company, 2007).

5 E.g., Corey Brettschneider, *When the State Speaks, What Should It Say?: How Democracies Can Protect Expression and Promote Equality* (Princeton, N.J.: Princeton University Press, 2012).

6 E.g., Liav Orgad, ‘Illiberal Liberalism Cultural Restrictions on Migration and Access to Citizenship in Europe’, *The American Journal of Comparative Law* 58, no. 1 (2010): 53-105.

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## Illiberal practices as the basic unit of analysis

Liberalism is a political philosophy that presents us with a particular vision of what a just or good society looks like. By and large, the vision is that of a society in which people enjoy a wide range of liberties – *e.g.*, rights to freedom of speech, conscience, speech, and property – and to (broadly) equal degrees. The corollary of this is that anyone or anything that is said to be *illiberal*, including ‘cultures’, ‘groups’, ‘states’, ‘democracies’, ‘beliefs’, and ‘practices’, must bear some kind of negative relationship towards this ideal or important aspects thereof. Since it is *illiberal practices* that ultimately frustrate the realisation of the liberal ideal understood as behaviours that purposefully prevent people from enjoying extensive and broadly equal freedoms (think, for instance, of female genital mutilation and bans on same-sex relationships), I believe we can fruitfully understand other bearers of the property of being illiberal by reference to such practices.

On this view, an ‘illiberal belief’ is a conviction according to which certain illiberal practices ought to be introduced or sustained. To be clear, the holders of such beliefs need not be aware of the fact that some of the practices that they support are illiberal, whether because they believe the relevant practices are not illiberal or, as is more likely, because they have never thought about their illiberal credentials. Suppose I believe that same-sex relationships ought to be legally proscribed. Even when I am unaware of the fact that such bans are illiberal, this does not alter the fact that my belief that such bans should be introduced or maintained is an illiberal one.

Furthermore, whilst I have mentioned that the holders of illiberal beliefs must support specific illiberal practices, it is not necessary for them to support the relevant practices *because of* their illiberal properties. Suppose I support mass surveillance by the state as we find in countries such as China where people’s behaviour is closely monitored through the Internet and through numerous cameras and other forms of technology within public spaces. Even when I do not endorse such surveillance *because* it greatly reduces people’s privacy – I might simply be deeply concerned about terrorism, violence, and/or anti-social behaviour and believe that mass surveillance is necessary in order to address these evils – I am still supporting an illiberal practice and my belief that this practice ought to be introduced or maintained will still be an illiberal one.

In fact, those who hold illiberal beliefs might even do so *in spite of* the illiberal properties of the practices that they support. Consider a Catholic who regrets the gender inequality created by the Church’s ban on women’s ordination but who simultaneously believes that being faithful to Catholic traditions is more important than trying to reform this practice. These regrets notwithstanding, it remains plausible to characterise this person’s opposition to female priesthood as ‘illiberal’ given that by supporting this gendered practice, he or she still subordinates liberal commitments to non-discrimination and gender equality to other goods.

What about attributions of the property of being illiberal to agents, such as individuals, families, cultural and religious communities, and states (including demo-

cratic states)? Based on when such attributions are made by scholars and politicians, it looks like for these and other agents to merit the label 'illiberal', there must be a *sufficiently large discrepancy* between liberal norms of free and equal treatment on the one hand, and, on the other, the agents' beliefs and practices or dispositions to engage in certain practices, wherever this cut-off might lie exactly.<sup>7</sup> Just compare the United States with countries such as Iran and Saudi Arabia; whilst the US's weak privacy protections and its failure to address structural discrimination against Afro-Americans render it illiberal in important respects, it still provides its citizens with a much wider set of rights and liberties than do Iran and Saudi Arabia. Accordingly, what we find is that whereas the latter countries are commonly referred to as illiberal *simpliciter*, the US usually is not. Likewise, the threshold-view offers an insight into why orthodox religious minorities within contemporary liberal democracies are often classified as 'illiberal' but the majority cultures within these societies are not. Though these majority cultures retain illiberal practices – think of gendered housework and care-giving practices<sup>8</sup> and of how female promiscuity tends to be judged more harshly by their members than male promiscuity<sup>9</sup> – these practices are generally less restrictive and less discriminatory than those found within *e.g.*, Ultra-Orthodox Jewish, Salafist, and Amish communities. (Of course, one might question whether it is analytically and/or normatively useful to describe agents as illiberal *simpliciter* when doing so obscures their acceptance of various practices that are not illiberal and perhaps even positively supportive of liberal values and/or when doing so obscures how agents who are not usually referred to as illiberal *simpliciter* might have illiberal beliefs and (dispositions to) engage in illiberal practices nonetheless; I leave this for the reader to decide.)

### Disaggregating illiberal practices

So far, I have suggested that the notion of an 'illiberal practice' can be used to make sense of ascriptions of illiberalism to various other entities, including beliefs, individuals, cultural and religious communities, and states. The aim of this section is to examine different ways in which a practice can be illiberal based on how this term is used within both scholarly and political discourses. I believe that five different ways can be distinguished:

- 7 I will not attempt to settle this issue here, which would take us too far afield. However, it should be clear that there must be a cut-off *somewhere*.
- 8 See, for instance, Joukje Swinkels et al., 'Explaining the Gender Gap in the Caregiving Burden of Partner Caregivers', *Journals of Gerontology. Series B: Psychological Sciences and Social Sciences* 74, no. 2 (2019): 309–17, <https://doi.org/10.1093/geronb/gbx036>.
- 9 See, for instance, Rachel Allison and Barbara J. Risman, 'A Double Standard for "Hooking Up": How Far Have We Come toward Gender Equality?', *Social Science Research* 42, no. 5 (2013): 1191–1206, <https://doi.org/10.1016/j.ssresearch.2013.04.006>; Michael J. Marks and R. Chris Fraley, 'The Sexual Double Standard: Fact or Fiction?', *Sex Roles* 52, no. 3 (2005): 175–86, <https://doi.org/10.1007/s11199-005-1293-5>.

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- i An agent A – who might be a single individual or a collective agent such as a state or a cultural or religious community – purposefully constrains the freedom of a person or group of people P whereby one or more of the following criteria are met:
  - a P's basic rights are violated (at least from a liberal perspective);
  - b P's lifestyle options are substantially and wrongfully reduced (at least from a liberal perspective).
- ii A fails to show equal moral concern to P in one of three ways:
  - a A denies certain goods (*e.g.*, liberties, material resources, symbolic recognition) to P based on properties of P that are irrelevant to the distribution of the relevant goods given A's commitments;
  - b Whilst denying the relevant goods to P is not at odds with A's commitments, A's commitments fail to show equal moral concern to P;
  - c Whilst denying the relevant goods to P satisfies neither (ii.a) or (ii.b), A denies them to P because *other agents* have commitments that fail to show equal moral concern to P.

### *Freedom*

Let me start by clarifying practices of type (i). In order for agents to purposefully constrain the freedom of some person or group of people P, they must be aware of the fact that they are imposing restrictions on P's liberty. Not all freedom-constraining behaviours are purposeful in this sense. For example, when I lock a room without knowing that you are still in it, this is not plausibly construed as an illiberal practice no matter how much your freedom is constrained (suppose you spent days in the room before being liberated).

As indicated, practices that fall under (i) can be illiberal in two (mutually compatible) ways. One is that they violate people's basic rights (i.a), which are rights that provide people with meaningful opportunities for living minimally decent and self-directed lives. Such rights are widely understood to include rights to *e.g.*, bodily integrity; private property; the means of subsistence; and freedoms of speech, conscience, and association.<sup>10</sup> Paradigmatic examples of practices that violate basic rights – at least on a liberal understanding of what these rights protect; I will say more about this later – can be found among North-Korea's practice of censoring any type of speech that is critical of the political establishment as well as among the persecution of homosexuals by the Iranian government. On a micro-level, one might think of cases where people subject their minor daughters to genital mutilation and ones where they engage in honour killings. (Whilst other political ideologies – *e.g.*, conservatism and socialism – also condemn at least some these practices, in order for practices to be illiberal, they do not need to be *exclusively* antithetical to liberal values and principles; all that seems necessary is that liberalism condemns them whether or not other ideologies do so as well.)

10 Compare John Rawls, *Political Liberalism* (Columbia University Press, 2005), 291.

For some legal and political theorists, practices that satisfy (i.a) are the only ones that are properly called 'illiberal'.<sup>11</sup> On this view, liberalism is an ideology that is exclusively concerned with the realisation and protection of basic rights, which means that as long as agents respect these rights, the practices in which they engage cannot be illiberal. For other theorists,<sup>12</sup> in contrast, the notion of an illiberal practice has broader scope. On this view, it also covers practices that substantially<sup>13</sup> and, at least from the perspective of a more comprehensive liberal morality, wrongfully<sup>14</sup> reduce people's lifestyle options *even when* no basic rights are being violated (i.b). For examples of such practices, one might think of how many conservative religious communities use criticism, shunning, and threats of excommunication to enforce stringent norms of conduct that leave their members with a narrow range of careers to choose from – think, for instance, of how Ultra-Orthodox Jews males are socially expected to devote their lives to studying the Torah and of how Ultra-Orthodox Jewish women are socially expected to spend theirs serving their husband and family.<sup>15</sup> Other cases where people's (*de facto*) lifestyle options are substantially reduced and, at least from the perspective of a more comprehensive liberal morality, wrongfully so include ones where during their childhood they are shielded from exposure to lifestyles that fall outside a narrow socially-approved range and/or ones where they are prevented from developing critical thinking skills and dispositions during this period.<sup>16</sup> Examples of such practices can be found among parents who withdraw their children from curriculum subjects that contradict the parents' religious beliefs as well as among Amish parents who completely pull their children out of school at the age of fourteen.<sup>17</sup>

Two comments on condition (i.b) are in order. The first is that even when a practice makes it difficult and/or costly to pursue a large number of lifestyle options, it will not be illiberal insofar as it simultaneously makes a comparable if not greater number of lifestyle options (more readily) available, whether now or in the future. Consider the practice of marrying someone. Married couples tend to be under strong

- 11 Whilst I am not aware of anyone who has argued this in print, I have encountered this view in private conversations with legal and political theorists.
- 12 E.g., Clare Chambers, ed., 'All Must Have Prizes: The Liberal Case for Interference in Cultural Practices', in *Multiculturalism Reconsidered: 'Culture and Equality' and Its Critics*, (Cambridge; Malden, MA: Polity, 2002); Susan Okin, 'Multiculturalism and Feminism: No Simple Question, No Simple Answers', in *Minorities within Minorities: Equality, Rights and Diversity*, ed. Avigail Eisenberg and Jeff Spinner-Halev (Cambridge: Cambridge University Press, 2005), 67-89; Orgad, 'Illiberal Liberalism Cultural Restrictions on Migration and Access to Citizenship in Europe'; Perez, 'Why Tolerating Illiberal Groups Is Often Incoherent'.
- 13 I take it that there can be reasonable disagreements about exactly how far-reaching these restrictions must be. Rather than trying to identify a precise cut-off, which is beyond this article's scope, I simply focus here on cases where it is clear that this requirement is fulfilled.
- 14 I say more about this later in this section.
- 15 Lynn Davidman and Arthur L. Greil, 'Characters in Search of a Script: The Exit Narratives of Formerly Ultra-Orthodox Jews', *Journal for the Scientific Study of Religion* 46, no. 2 (2007): 201-216.
- 16 Compare Emile Lester, 'The Right to Reasonable Exit and a Religious Education for Moderate Autonomy', *The Review of Politics* 68, no. 4 (2006): 612-35; Steven V. Mazie, 'Consenting Adults? Amish Rumspringa and the Quandary of Exit in Liberalism', *Perspectives on Politics* 3, no. 04 (2005): 745-59, <https://doi.org/10.1017/S1537592705050425>.
- 17 See *Wisconsin v. Yoder* (1972).

social pressure to refrain from starting intimate relationships with third parties and insofar as one partner is much wealthier than the other, he or she might be unable to end the marriage without losing a large proportion of his or her wealth. Yet whilst these restrictions are significant, it looks like they are *off-set* in many cases by the rights and opportunities that become (more readily) available once people are married, which helps to explain why marriage is not typically seen as an illiberal practice. Not only do married couples enjoy special legal entitlements in most countries, such as family rates on health and liability insurance and the right to inherit the property of one's spouse, they will ordinarily find it easier to pursue various lifestyle options because of the relationship stability that marriage provides, including the option of having and raising children.<sup>18</sup> What such cases suggest is that in order for a practice to be illiberal in virtue of its freedom-diminishing properties under (i.b), it must impose *net* restrictions upon a person's lifestyle options as determined by a weighing of its freedom-diminishing and freedom-enhancing properties.

To be more precise still, and this brings us to the second comment, it ought to impose *substantial* net restrictions upon a person's lifestyle options. Not all practices that constrain a person's lifestyle options all-things-considered satisfy this criterion. Consider a ban on the consumption of alcoholic beverages in public. Even if we assume *arguendo* that such bans are not justified, perhaps because they fail to prevent disorderly behaviours by intoxicated individuals whilst simultaneously denying people who wish to peacefully enjoy drinks in parks and other public venues the opportunity to do so, the restrictions that they impose upon people's freedom do not appear to be far-reaching enough to classify them as 'illiberal' (subsuming them under this header would stretch the meaning of an 'illiberal practice' well beyond its ordinary usage).

Now as we have seen already, both condition (i.a) and condition (i.b) contain normative terms. Condition (i.a) is concerned with cases where people's basic rights are *violated*, which involve unjustified interferences with rights as opposed to justified interferences which are commonly referred to as 'infringements of rights'.<sup>19</sup> Likewise, condition (i.b) is concerned with cases where people's lifestyle options are not just constrained but *wrongfully* constrained. What this means is that *even when* people's basic rights are interfered with and *even when* their lifestyle options are substantially reduced by others, those affected need not be treated in illiberal ways. Consider in this context the imprisonment of murder-convicts. As most liberals and non-liberals alike believe that, in most cases, (temporarily) incarcerating these individuals is justified on grounds of retribution, deterrence, and/or incapacitation, this practice it is not commonly regarded as illiberal in spite of the fact that those who are incarcerated suffer far-reaching restrictions on their basic rights (in-

18 Compare Stephen Macedo, *Just Married: Same-Sex Couples, Monogamy, and the Future of Marriage* (Princeton University Press, 2015), 99-118.

19 Cf. Judith Jarvis Thomson, *The Realm of Rights*, (Cambridge, Mass: Harvard University Press, 1992).

cluding ones on their rights to freedom of movement and freedom association) as well as substantial restrictions on their lifestyle options.

To be sure, what counts as an (un)justified restriction of someone's liberty from a liberal perspective or the perspective of a particular version of liberalism such as political liberalism or perfectionist liberalism<sup>20</sup> may or may not be (un)justified morally speaking. To give a possible example of a case where there is divergence, Kimberley Brownlee has argued that our moral rights to refuse to associate with others and to choose our associates are less extensive than liberals ordinarily accept.<sup>21</sup> In her view, our interests in human companionship, which she sees as both an intrinsic good and a good that is essential to (most) people's psychological and physical health, are so weighty that there are various contexts where we have moral duties to offer our society to specific individuals in order to protect them from chronic loneliness. To the extent that she is right about this, then even when it is illiberal to, say, legally require adult children to visit their elderly parents from time to time as the Chinese government currently does,<sup>22</sup> doing so might be justifiable nonetheless insofar as such visits are necessary for protecting the latter from chronic loneliness.

### *Equality*

Practices that satisfy condition (ii) contravene liberalism's other core commitment, namely that of showing equal moral concern to individuals. To reiterate, this occurs when

- a An agent A denies certain goods (e.g., liberties, material resources, symbolic recognition) to a person or group of people P based on properties of P that are irrelevant to the distribution of the relevant goods given A's commitments;
- b Whilst denying the relevant goods to P is not at odds with A's commitments, A's commitments fail to show equal moral concern to P;
- c Whilst denying the relevant goods to P satisfies neither (ii.a) or (ii.b), A denies them to P because *other agents* have commitments that fail to show equal moral concern to P.

As these conditions suggest, denying some good to a person or group of people that is granted to other individuals need not be illiberal. Consider the special political competences that parliamentarians hold within representative democracies. Whilst these competences allow them to decide matters that ordinary citizens are not authorised to decide, at least not directly, the fact that the latter are denied said prerogatives does not show them less than equal concern insofar as they had fair opportunities to run for a seat in parliament (which helps to explain why representative democracies are not normally seen as illiberal institutions). Instead, a

20 See Jonathan Quong, 'Public Reason', in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Summer 2013, 2013, <http://plato.stanford.edu/archives/sum2013/entries/public-reason/>.

21 Kimberley Brownlee, 'Freedom of Association: It's Not What You Think', *Oxford Journal of Legal Studies* 35, no. 2 (2015): 267–82, <https://doi.org/10.1093/ojls/gqu018>.

22 See Tao Liu and Li Sun, 'An Apocalyptic Vision of Ageing in China: Old Age Care for the Largest Elderly Population in the World', *Zeitschrift Fur Gerontologie Und Geriatrie* 48, no. 4 (2015): 354–64, <https://doi.org/10.1007/s00391-014-0816-5>.

specific good must be refused to a subset of people based on criteria that *fail* to show equal moral concern to the individuals involved.

One way in which this may occur is that P is denied a good on the basis of features of P that are irrelevant to the distribution of the relevant good *given A's commitments* (ii.a). Consider a sports club that has adopted a zero-tolerance policy towards discrimination on grounds of sexual orientation. Despite this commitment, it might still happen that, say, an admissions officer ends up denying membership to a person based on his suspected homosexuality. Similarly, a police force that has set itself the goal of treating different racial or racialised groups fairly might have some officers who fail to live up to this commitment by engaging in racial profiling.

But even when denying certain goods to P based on P's sexual orientation or (attributed) race *is* consistent with A's commitments and therefore not a failure to show P equal moral concern under (ii.a), it still constitutes such a failure for the simple reason that acting in homophobic or racist ways is *itself* a failure to show equal moral concern to others (ii.b). Unless this is so, for homosexuals to be refused membership of a sports club that is officially opposed to the admission of homosexuals would not show these individuals less concern than heterosexual people receive. Neither would police forces that officially espoused white supremacist ideologies be showing black people less than equal concern by subjecting them to racial profiling. But this is plainly absurd.

Finally, even when A's behaviour satisfies neither (ii.a) or (ii.b), it will fail to show equal moral concern to P nonetheless when it denies certain goods to P because *other agents* have commitments that show P less than equal moral concern (ii.c). Consider a restaurant owner who hires only Caucasian staff because her racist clientele would stop frequenting her venue if she employed any black workers. In this case, treating black people worse than white people need not be part of the restaurant owner's personal commitments or goals – rather than seeking to uphold racist norms, she might simply refuse to hire black people in order to protect her profits. Still, the fact that this decision denies black people a valuable good (that of employment) along with the fact that the restaurant owner would not have taken it *unless* other people regarded and treated black people as morally inferior seems enough to render the relevant decision incompatible liberalism's egalitarian commitments.

Having identified different ways in which a practice can be illiberal by virtue of failing to show equal moral concern to people, I want to conclude with two comments. The first is that just as some might argue that liberals assign either too much weight or too little weight to various specific freedoms and/or to freedom in general,<sup>23</sup> so some may argue that they are mistaken in thinking that all people are due equal moral concern. To the extent that this tenet of liberalism cannot be sustained, perhaps because those with superior cognitive capacities are due (some-

23 For a defence of the moral importance of freedom in a quantitative sense, see Ian Carter, *A Measure of Freedom* (Oxford: Oxford University Press, 2003).

what) greater concern,<sup>24</sup> there might be practices that are illiberal by virtue of showing unequal moral concern to people that are morally justified nonetheless.

The second comment is that whilst many illiberal practices satisfy both (i) and (ii) – think, for instance, of the persecution of homosexuals based on their sexual orientation and of the oppression of Muslims based on their religious beliefs – some illiberal practices satisfy *only one* of these criteria. Suppose that a state refuses to recognise same-sex marriage but does recognise civil unions for same-sex couples that provide them with all the same rights as married couples have, including the right to visit one's partner in the hospital, the right to inherit his or her property, and the right to receive family rates on health and liability insurance. In this case, being refused the right to marry a person of the same sex does not look illiberal in terms of its impact upon people's liberties. Still, there is a plausible argument to be made<sup>25</sup> that by denying same-sex couples a symbolic good to which many homosexuals and lesbians attach great weight, these individuals are shown less than equal moral concern by the state. Conversely, some practices impose illiberal restrictions on people's freedom without showing them unequal moral concern. Suppose that a state conducts mass surveillance in order to fight crime and that this cannot be justified from a liberal perspective – as is plausible given the harm that such surveillance does to people's privacy, one of liberalism's core values. Whilst substantially and, at least from a liberal perspective, wrongfully constraining people's freedom, to the extent that the affected individuals are monitored *irrespective* of their race, gender, religion, and so on, this practice does not show them unequal moral concern in any obvious sense.

24 For further discussion of this topic, see *e.g.*, Andrea Sangiovanni, *Humanity without Dignity* (Harvard University Press, 2017); Ian Carter, 'Respect and the Basis of Equality', *Ethics* 121, no. 3 (2011): 538–71, <https://doi.org/10.1086/658897>.

25 As some authors have done. See, for instance, Macedo, *Just Married* and Richard D. Mohr, *The Long Arc of Justice: Lesbian and Gay Marriage, Equality, and Rights* (Columbia University Press, 2005), <https://doi.org/10.7312/mohr13520>.