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Hard-Hearted Liberals [Review of the book *Courting the Abyss: Free Speech and the Liberal Tradition* by J. Peters]

Disciplines

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HARD-HEARTED LIBERALS

John Durham Peters, **Courting the Abyss: Free Speech and the Liberal Tradition**, University of Chicago Press, 2005, 309 pp., \$25.00 (hardcover).

Book Review by
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John Peters' previous book, *Speaking Into the Air: A History of the Idea of Communication* memorably enriched the discussion of mass communication by giving it sweeping historical scope and a distinctive ethical philosophy. In *Courting the Abyss: Free Speech and the Liberal Tradition*, Peters once more sets out to place communication on a wide intellectual stage. This time he takes on the culture wars, broadly interpreted, to challenge *the* communicative practice at the heart of liberal self-identity. The problem he poses is whether liberal freedom of expression has any decent sense of restraint, and why it matters if it doesn't.

Peters is no dispassionate observer standing above the fray. He coins the term 'abyss-walking' to describe what he sees as a regrettable penchant of liberals to consort with the devil. The sort of thing he seems to have in mind is the infamous work of the Catholic, African-American, Puerto Rican New York artist Andres Serrano, whose photograph "Piss Christ" was a culture war emblem par excellence in the early '90s. Asked why he had made so offensive an image, Serrano's answer was roughly, God made urine, why should it offend? Peters doesn't discuss him, but Serrano seems to be an example of the abyss-walking breed Peters suspects of cynically provoking public outrage in order to preen, a motive Peters finds unworthy and damaging. But Serrano has always defended his art, and very articulately, as having a serious religious sensibility, and a group of religious thinkers for whom the difficult boundary between the sacred and the profane is no trivial question have taken him at his word.

Such interpretive complexity is little addressed in Peters' extended polemic against liberalism in which he treats offense to public taste as an I-know-it-when-I see-it category and not as an historically moving target. Nor is there much discussion of how to rearrange the legal goalposts to improve how free speech is done in the United States. That's an important omission, since the evolution of liberal freedom of expression during the last century in the U.S. has unfolded largely in the ethical arena of legal philosophy and reasoning.

Long before liberals had exasperated Peters, they were embarrassing those who once wore the label proudly. Progressive, the current term of art, is preferred by practitioners of what still amount to liberal values at base. Progressive sounds more intellectually independent and chicly radical than 'liberal' with its roots in those old-fashioned workhorses of classical liberal thought, Adam Smith and John Locke. Lately, the term has suffered an even more depressing fate, providing the root for 'neo-liberal,' a term that links the commercial roots of classical liberalism with the heartlessness of managerial global capitalism.

One more lament for a failed tradition might not be news. But Peters creates a liberal piñata to swing at, a fantasy civil libertarian heedless of the pain and scruples of decent folk while claiming a constitutional right to offend taste. In so doing, he misreads core elements of modern liberalism. And he barely credits the contributions of liberalism to civil rights, the women's movement, religious freedom, and dissent against misbegotten wars. Liberalism is a fractious work in progress, its constitutive values of liberty of conscience and expression, equality, security, and the right to property in constant and shifting tension. These days, the most relentless encroachments on liberty of expression come from the expanding claims of property and security. The first enlarges the public sphere to homogenize and stuff it with corporatized expression; the second shrinks it with escalating levels of surveillance and constraint that create disciplinary fear.

But this is not the thrust of Peters' concern. Most of *Courting the Abyss* tacks back and forth between two narratives. One is Peters' version of the history of liberalism, which tracks familiar pre-20th century theorists, assigns the 20th century mostly to Oliver Wendell Holmes Jr., and adds an unexpected figure, Paul, the evangelist, whom Peters championed as a philosopher of communication in *Speaking Into the Air*. The other is a running commentary on the excesses of free speech liberals. For Peters, these excesses are the logical outcome of liberals' uncritical embrace of Enlightenment rationality and Stoic indifference to pain. Inveighing against the speech he hates without naming the legal protections he would toss overboard, he eventually introduces an alternative liberalism he describes as a transcendental politics of bodily passivity. Included in it are a number of the arguments he has rejected for liberalism re-phrased in new language but not meaningfully changed.

Peters' 'liberal' is an oddly floating, undifferentiated signifier. It is less a description for individuals with differing and specific views than a non-ideal type of a particularly disagreeable sort that is bereft of compassion, detests emotion, and enjoys goosing others for intellectual sport. This type is responsible for Supreme Court decisions such as *New York Times v. Sullivan*, which declined to punish non-intentional publication of false facts about a public official in a newspaper ad, and *Cohen v. the United States*, which allowed a profanely inscribed jacket to be freely worn in the public corridor of a court building; Damien Hirst cows; Robert Mapplethorpe whips; *Hustler* [Magazine's] incest caricature of Jerry Falwell; Foucault's unflinching description of the execution of Damians the Regicide in *Discipline and Punish*; the avant-garde artists funded by the National Endowment for the Arts in the late '80s and early '90s, and certain lesser known examples. Erotic vomit is one. In the face of this onslaught, Peters proposes simple decency as the proper boundary of speech, mental anguish and popular disgust as its natural limits.

In liberalism, anything goes, Peters says again and again. But from start to finish, this is a world view in which anything does not go. The thinkers who created the tradition we now call liberalism believed passionately in the rule of law as a necessary mechanism to restrain men's bad actions. Since law and the force it authorizes are majority creations in the liberal system, protecting the natural rights of minorities was understood to be a crucial concern. Classical liberals were never friends of harmful speech as they construed it, so it took several painful centuries to achieve speech protections for ordinary citizens. Over the course of the 20th century, protections for citizen speech against state and majoritarian reprisals were dramatically expanded in the U.S. in ways that not all citizens are comfortable with. Peters' views express

this unease. But by eliding the framework of unregulated expression and regulated action that is a pole star of liberal thinking, Peters' repeated charges that liberalism condones abominations ignores its essential grounding of expressive freedoms within strict norms of law and order.

Peters calls out liberals who defend contemporary violations of taste by invoking the framers of the Constitution, who would certainly find various imaginative exercises of contemporary speech bewildering. The framers saw themselves as channeling the most advanced political theory of the day, collectively embraced intellectual and political progress, and likely would not have begrudged it in their descendants. Peters himself locates the heart of modern liberalism in the early 20th century private correspondence of the misanthropic Oliver Wendell Holmes, Jr. lurking beneath the heroic Holmes shaped by his artful admirer, Zachariah Chaffee. It turns out not to please him. But liberalism did not stop with Holmes, and neither should our account of it.

Among 20th century folks whose contributions to liberal theories of expression Peters might fruitfully have explored in some depth are John Dewey, Harry P. Kalven, Isaiah Berlin, Thomas Emerson, John Rawls and C. Edwin Baker. Among jurists besides Holmes, he might have considered Learned Hand, Charles Evans Hughes, William O. Douglas, William P. Brennan, and Thurgood Marshall. With more attention to the Dewey branch of liberalism especially, he could have found more to like. But the evolution of modern liberalism is not confined to its philosophers, and this is a telling point for understanding the contributions of ordinary citizens to its history, which Peters does not systematically explore. In the last century, the liberal project of freedom of expression called forth armies of protesters, religious believers, artists, lawyers, judges, legislators, and ordinary folks to win speech rights that could be used and not just admired, and to make significant strides in government accountability and transparency. A not insignificant number of these folks suffered injury, imprisonment and the wrath of the community for their trouble. Even cops sometimes played roles (as they must in a liberal state) as midwives for new forms of protected expression.

Then what makes liberals so thoughtlessly and narcissistically cruel? It starts, says Peters, with the cockamamie conviction that truth emerges from a wrestling match with evil. John Milton, whom he treats at length, is the famous proponent of the argument that evil is a necessary training ground for virtue, and that in a created world, good will win. But it's a mystery to hear that this is what serious modern liberal thinkers believe. John Rawls, C. Edwin Baker and some others have driven a permanent stake through the strict constructionist strain of the so-called marketplace of ideas. But such skepticism is hardly recent. Madison already wasn't buying it in the Federalist papers. Even Milton conceded that "revolutions of ages do not oft recover the loss of a rejected truth, for the want of which whole nations fare the worse." John Stuart Mill was acutely conscious of the infinite deferral of truth and the incalculable damage done by bad ideas. He called the inevitable victory of truth a "pleasant falsehood." He believed that, across the centuries and carnage, rejected truth would sooner or later reassert itself for another try. But another try is not certainty.

Holmes's younger contemporary Dewey, with his practical, grounded, active-neighbor call to civic duty, represents a sturdier strain of modern liberal thought in which the meaning of social action and inquiry is always uncertain, and truth is never fixed. What a community takes to be true evolves

pluralistically and provisionally from the plenitude of human experience and intelligence for Dewey, who in good liberal fashion counted the journey for more than the outcome. (Holmes didn't quite.) He entertained no illusions that ideas defend themselves and no certainty that things come out well in the end. Not truth as a self-propelling engine, but democratically-engaged citizens committed to working out their lives together opened up the possibility, but did not guarantee the outcome of good.

The Nazis in Skokie are one of Peters' object lessons in liberal arrogance. In 1978, a ragtag band of these folks took the city to court for refusing to let them stage a public rally. The courts ultimately ruled for the Nazis and against the city's hastily cobbled-together ordinances requiring demonstrators to purchase insurance, forbidding them to wear military-style uniforms or incite hatred. Though the ACLU's agonized decision to represent them cost it a third of its membership, Peters attributes to defenders of the Skokie Nazis the *reductio ad absurdum* (no person involved actually delivers this sentiment in his text) that truth will triumph either because or in spite of Nazis marching. But he is vague about a preferred outcome. Would he codify majoritarian sentiments as Skokie tried to do in order to remove disfavored views from public display? Arrange to prevent protesters unable to obtain insurance from publicly assembling to express their views? Require demonstrators to obtain city permission to protest?

He does not say, and seems unable to imagine a citizenry competent to mount a powerful response to Nazi speech, or any other troubling politics. That democracy is hard work is not just a Holmesian doctrine of perverse suffering, but a fact. Dewey believes the citizenry can do this work and does not soft pedal its responsibility. But Peters castigates the defense of difficult speakers as 'performance art,' making use of a familiar stereotype of art as frivolous and flighty expression, and damning liberal motivation as so much trafficking in knowing irony by elites with no real stake in the matter except a self-congratulatory sense of moral superiority. Liberals pretend, monstrously, that shocking speech is restorative for the body politic. Enough already, says Peters. The citizens don't get it, and they're right. This explanation makes childish villains of both those who offer unpopular views and those who aid them, and shifts the argument away from critical questions about how multiplicities of 'truth' are negotiated in any community and the shifting, complex relations of power and powerlessness.

We can pivot Peters' description of hard-hearted liberals in a different direction by saying that the strength of liberalism is its hard-headed recognition that power usually wins in this world because it can. The genius of tolerance, if it has one, is to make space for weak minorities to triumph *some* of the time against power. Does space for the weak extend to nascent Nazis as well as the good guys? Of course. And this is why automaticity is no refuge from eternal vigilance. Thus, it seems the faith of modern liberalism is less a Miltonian conviction that right will surely win and more the Eliadean certainty that the world must always be made new again.

Since Peters seems to regard all public indignation toward unruly expression as proof of liberal callousness, what must he make of the long history of community-outraging speech by liberal speakers and their defenders in the labor, civil rights, and anti-war movements? One could hardly say that Eugene Debs, sentenced to jail for 10 years for violating the 1917 Espionage Act, his conviction upheld by the Supreme Court (and Holmes) for saying to a public gathering, "You need to know that you are fit for more than slavery and cannon fodder," lacked compassion or simply enjoyed flaunting his own outrageousness.

He also makes the curious claim that Martin Luther King, Jr. was no liberal because his principles were Christian and Gandhian. This is strange. The Judeo-Christian and Greek belief that every soul is of incomparable worth handily survived the religious skepticism of the Enlightenment, which infused it with a secular commitment to equality and natural rights, testimony to the truism that all revolutions take parts of rejected doctrines with them into their new lives. Though Peters invokes Gandhi's influence on King as proof of extra-liberal influence, divesting the civil rights movement of its liberal DNA is not so easy. Gandhi was not only a devoted follower of Hinduism but a jurist trained in the very Anglo liberal tradition whose strengths and weaknesses he made good use of. In America, the Pennsylvania Quaker settlement from which the young Bayard Rustin imbibed the non-violent philosophy he passed on to Martin Luther King, Jr. could celebrate its colonial origins in liberal religious tolerance.

Peters also argues that by putting bodies on the line for belief, non-violence is at odds with a [John] Lockean consent to the state's monopoly on legitimate violence that defines liberal democracies. This leaves out too much. For John Locke, the body is the citizen's original and most valuable property. Putting it on the line for belief *is* liberalism. Thus, the signers of the Declaration pledged their lives, their fortunes, and their sacred honor. Bodies have always been a weapon of the weak in struggles for social justice. Nor is there anything anti-liberal in the proud tradition of civil disobedience in which citizens accept the penalties of breaking the law in order to show their commitment to changing it. It is true that the liberal state may use state-sponsored force to punish the transgressor, in Lockean language, as an option of last resort. The armed force of a liberal constitutional state admitted black schoolchildren to white schools in the face of angry mobs and protected civil rights marchers from Southern sheriffs while waiting for public opinion to catch up. State force may be wrongly chosen, badly timed or abusively administered — it often is. But it has an indispensable role to play.

Peters points to the "spectacular" political success of non-violence. But such campaigns have been most powerful in states with liberal traditions in which some kind of independent press exists to get the word out and the state has some pangs about using violence against citizens armed only with their moral sensibilities. (The Orange Revolution may be an exception, but this is a close call. Non-violence was not strongly tested, and it could generously be said that post-Soviet Ukraine had some formal democratic institutions and commitments before the 2004 presidential election.) In regimes that lack respect for conscience or philosophical commitment to free expression, non-violent protesters are simply carted away and tortured or executed out of sight.

Peters admires the non-violent politics of Aung San Suu Kyi, the Burmese prisoner of conscience, but fails to note that her landslide election victory, years in detention and Nobel prize have achieved no democratic progress for her people. Brutally beaten and executed for their own protests last year, the monks of Myanmar have done no better. Having ruthlessly dispatched its opposition, the regime swiftly gagged the domestic press and caused the story to disappear abroad. Nor should we forget that non-violent campaigns often feature canny generals as prepared as any battlefield commander to sacrifice their troops and blame the other side for its aggression. The bodily investment that gives non-violence its moral authority is not an exception to liberal logic, but one of its profoundest expressions.

Is Peters right, nonetheless, in charging that liberals are too ready to accept fatuousness, too foolish in their tolerance for evil? In his view, liberals are worse than naive (truth will win) and deluded (evil produces good). They're dishonest. They allow vulnerable others to suffer the pain and bear the brunt of noxious doctrines they themselves reject. Though Peters locates this presumed indifference to human pain in liberalism's Stoic roots, Stoicism is also charity toward the stranger, a virtue recently praised by Martha Nussbaum as an antidote to nationalism. Modern liberalism is no enemy of indignation, compassion, or pity. No liberal doctrine forbids folks to respond feelingly to injury, insult, or wrong. Free speech liberals aren't against emotion, which modern thinkers treat as essential to ethical valuation, but injustice. One recalls Robert F. Kennedy's speech to an angry African-American crowd in the wake of Martin Luther King, Jr.'s assassination, a courageous and perfect melding of reason and emotion, a compassionate, deliberate, liberally grounded counsel against retribution.

We return to fundamental arguments for extending tolerance to noxious speech. Peters brings forward Lee Bollinger's claim that tolerance bolsters our commitment to self-restraint toward the thought we hate. Affirming ideational over physical conflict is surely laudable, but reminding ourselves doesn't seem to be the main point. Nor is it guaranteeing that our own cry will be heard when we are in distress, the argument advanced by Aryeh Neier, the ACLU national director during the Skokie case, though this comes closer. The chief boon of liberal tolerance, rather, is that hearing views radically unlike our own makes it possible to transform ourselves. The thought we hate may not be evil; it may even be right. And even if we finally decide it is evil, it may still teach us something unexpected we desperately need to know. This is what speech limiters fear, recognizing a real risk and the point. The hope that our opponents might be transformed in turn by tolerating our views need not be self-serving arrogance, unless we illiberally imagine that only folks besides ourselves need changing. By this measure, there seems little support for Peters' claim that ordinary folks do not 'get' the taste-spanking irony of abyss-walking. They get it, and decide for themselves.

Peters observes that the "rich and educated consistently support free expression rights most vigorously." If they do, we can be sure this is a temporary circumstance, historically speaking. Still, it seems to count against them in Peters' eyes. If educated and secure folks believe in evolution and favor gay marriage, is their privilege grounds to reject these views? Or can tolerance on the part of any citizen be understood as having some element of generosity toward those with different beliefs, what Jose Ortega y Gasset, no liberal, called the willingness to live in common with others. In part, Peters is channeling the arguments of critical legal scholars that hate speech injuries are inequitably borne. True enough. What working principles, then, could lighten or remove these burdens without simply redistributing them to other vulnerable citizens, the stumbling block of a number of such efforts to date. This is one of the toughest problems for any free speech regime, and it would have been useful to hear more from Peters about how to navigate it.

Consider this example. To call attention to cost-free contemplation of distant suffering, Peters mentions that Adolf Eichmann was horrified by personal cruelty but "willing to countenance terrible things at a distance." Roughly, this critique informed the explosive "little Eichmanns" metaphor deployed by University of Colorado professor Ward Churchill to condemn Americans, including those murdered on 9/11 (this part caused the trouble), for averting our gaze to the worst effects of our vast footprint in the world.

Facing a furious state legislature, the university figured out a plausible way to withdraw Churchill's tenure and fire him, insisting his controversial speech was not the reason. Here is a test for pain-attentive liberalism. In acknowledging anguish, should we defend abyss-walkers given to majority-paining condemnations of ourselves, or majoritarian punishments expediently fashioned to mollify public outrage? And guided by what principles? When it comes to definitive judgments that assign legally binding responsibilities, such binaries are the form free speech controversies often take.

Peters leans heavily on the virtues of civility which, like outrage, he treats ahistorically. He might have recalled the view of J.S. Mill that politeness always involves a political concession. Uncivil is not the term we would now apply to workers who endured beatings in the 1930s in their efforts to secure labor rights. In far from the finest hour of American jurisprudence, respect for private property as the premier expression of civility was legally mobilized to prevent union folks from organizing inside factories. Authority also swept pickets from public streets in accord with the polite view that this was not the place where respectable people settle their differences.

Contemporary campaigns for civility, these days re-cast as 'quality of life' concerns, now criminalize the homeless, folks lacking legal rights to be anywhere except on public streets or in shelters that offer their own assaults on human dignity. Without legal access to private spaces, the homeless do what we all must — sleep, sit, eat, go to the bathroom, ask for help — but are punished for doing it publicly. Once more, the demand for civility is rolled out to defend private property. As Don Mitchell points out, the greatest outrage visited on us by the homeless is that they challenge our idea of *ourselves* as civil. The point is not that Peters wants bad treatment for the homeless or workers. The point is that public outrage in response to speech that is classified as uncivil because it is unfamiliar, unpleasant or non-conforming is not itself a measure of the meaning or moral worth of that expression.

Peters' account of the legal landscape is occasionally debatable. He asserts that the "main agenda" of speech cases since the 1920s has not been the question of the state's power to suppress or compel speech but squabbles among private actors (p. 155). A short list of Supreme Court cases suggests otherwise, including: *Whitney v. California* (1927) (seditious libel); *Near v. Minnesota* (1931) (First Amendment applies to states); *DeJonge v. Oregon* (1937) (right to assemble without a permit) *Hague v. CIO* (1939) (public forum doctrine); *Chaplinsky v. New Hampshire* (1942) (fighting words); *West Virginia Board of Education v. Barnette* (1943) (compelled Pledge of Allegiance); *Terminiello v. City of Chicago* (1949) (heckler's veto); *New York Times v. Sullivan* (1964) (standard for libel of public figures); *United States v. O'Brien* (1968) (burning draft cards); *Brandenburg v. Ohio* (1969) (incitement standard); *Tinker v. Des Moines* (1969) (speech rights of minors in school settings); *Red Lion v. FCC* (1969) (Fairness Doctrine); *New York Times Co. v. United States* (1971) (prior restraint of the Pentagon Papers); *Miami Herald v. Tornillo* (1976) (state regulation of newspaper content); *Buckley v. Valeo* (1976) (federal limits on campaign contributions and expenditures); *FCC v. Pacifica* (1978) (regulation of broadcast content); *Texas v. Johnson* (1989) (flagburning); *Madsden v. Women's Health Center* (1994) (buffer zones in a public forum); *Reno v. ACLU* (1997) (Internet Decency Act). And so on.

And he can be hasty about important details. To show that liberalism has gone off the rails, he chastises Justice Scalia for relying on an "abstractly chaste" First Amendment in *R.A.V. v. St. Paul* (1992).

He accuses Scalia of protecting racist cross-burning that Scalia acknowledges to be abhorrent in his majority opinion. We are meant to conclude that even Scalia, no liberal mushmouth, is hostage to the indecent principle that anguish is no restraint to speech. But this is not a fair account. Scalia and his colleagues did not protect cross-burning, but unanimously struck down an ordinance too constitutionally flawed to serve as a First Amendment test of anything; the justices practically begged for a better case. They got three, consolidated them as *Virginia v. Black* (2003) and split the difference, carefully tailoring protection and regulation of cross-burning to circumstance, and finding that cross-burning is indeed proscribable in specific contexts of threat.

In a late and somewhat inconclusive chapter, Peter lays out a transcendental politics of passivity and bodily commitment as an alternative to liberalism. Though sacrifice in search of justice is firmly rooted in liberal logic, it is slightly surprising to see Peters embrace this position, though in fairness, he insists such sacrifice is proper only to those who are unarmed, cognizant and willing. Having divided speech into the publicly supportable and decent, and the liberally ironic and outrageous, he now admires the “sly humor and subversion” of transcendental passivity against the absurd and unjust. He even discovers that popular outrage has its uses, noting with approval that Martin Luther King, Jr. understood the hostility he elicited as a mechanism for getting racist rage out where it could be acknowledged and turned into something else. Peters also argues that if German citizens had only stood against the murder of their Jewish neighbors with nationwide strikes and protests, it “would have forced the Nazis into the open much sooner, and the Allies would never have been able to say they too did not know.” John Dewey could not have said it better. We can bet the Nazis would have framed such protests as outrageous and uncivil, a point Peters passes over. In the end, the serious-purposed, light-hearted transcendental cynicism Peters favors, he says, is absurd hope, a wonderful phrase that sounds a lot like liberal hope, replacing the certainty that truth will out in time to avoid tragedy.

Courting the Abyss tries a bold end run around the refusal of interpretive closure that structures contemporary tolerance. The pinched liberal straw man that emerges disappoints in its portrayal of what might more plausibly be seen as the imperfect but muscular 20th century philosophy that fought to achieve protections that have proved their importance and are more necessary than ever in a coercive atmosphere of disciplinary fear. Tolerance is a moral disposition. Its redemptive power lies in its prophetic character and transformative opportunities. But its effective reality exists only within a legal arrangement that protects objectionable speakers from majoritarian retaliation and keeps noxious speakers within a larger framework of law and order. With no clear indication that he wants to shift the legal boundaries of that structure or explore the gains and losses of a differently organized regime of expressive responsibilities and rights, Peters’ views seem to have less to do with identifying and reforming the flawed foundations of free speech liberalism than with his aversion to a particular set of community-challenging expressions that liberalism makes it possible to debate — a rather different matter.

As always, Peters is intellectually provocative. His unfailingly dense and engaging discourse is never dull, and more interesting here for being filtered through an unapologetic and unflinchingly polemic rhetoric. But what aims to be a subtle and searching argument is hampered by the fact that the two most visible actors in his drama, outrage and civility, have not been historicized, and by a lack of attention to the implications of populist contributions to the evolution of liberal free speech. His determination to call

liberals on the carpet for taking human dignity lightly lacks traction in the absence of a serious effort to confront multiplicities of truth, interpretive ambiguity, and the unavoidable discomforts of social transformation that are manifest in the mechanisms of unruly speech. Were he take up these issues, the results could be very interesting.

Editor's note: *Courting the Abyss* Author John Durham Peters responds to this review in this journal at:
<http://ijoc.org/ojs/index.php/ijoc/article/view/363/184>