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Freedom of Association: It's Not What You Think

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Abstract—This article shows that associative freedom is not what we tend to think it is. Contrary to standard liberal thinking, it is neither a general moral permission to choose the society most acceptable to us nor a content-insensitive claim-right akin to the other personal freedoms with which it is usually lumped such as freedom of expression and freedom of religion. It is at most (i) a highly restricted moral permission to associate subject to constraints of consent, necessity and burdensomeness; (ii) a conditional moral permission not to associate provided our associative contributions are not required; and (iii) a highly constrained, content-sensitive moral claim-right that protects only those wrongful associations that honour other legitimate concerns such as consent, need, harm and respect. This article also shows that associative freedom is not as valuable as we tend to think it is. It is secondary to positive associative claim-rights that protect our fundamental social needs and are pre-conditions for any associative control worth the name.

Keywords: freedom of association, intimate association, social needs, social rights, freedom of expression, freedom of religion

1. *Introduction*

Freedom of intimate association with family members, friends and acquaintances is not what we tend to think it is. It is not, as John Stuart Mill thinks, 'the right to choose the society most acceptable to us'.¹ Nor is it, without significant qualifications, what the US Supreme Court describes as the

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¹ John Stuart Mill, *On Liberty* (first published 1859) ch IV.

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protection of our choices to enter into and maintain certain intimate human relationships as a fundamental element of personal liberty.² Nor does it entail in any general sense the right to exclude.³ Contrary to these standard liberal positions, intimate associative freedom is neither a general moral permission to associate or not as we wish nor a content-insensitive moral claim-right that protects us in behaving wrongly when we do so.⁴ Both as a permission and as a claim-right, associative freedom is highly constrained and content-sensitive. As such, it differs from the other personal freedoms with which it is usually lumped such as freedom of expression and freedom of religion, which are largely content-insensitive claim-rights that do protect us in behaving wrongly within their domains.

Associative freedom is also not as valuable as we tend in liberal societies to think it is. Although considerable associative control is necessary for self-respect, wellbeing and the cultivation of judgement, nevertheless it is not the most important associative right we have. Our fundamental associative interests ground more important positive claim-rights. These are, first, the right to have intimate associates (not necessarily of our choosing) during periods of abject dependency and risk of abject dependency and, second, the right to have minimally adequate opportunities to cultivate intimate associations when we are not abjectly dependent. These positive protections are necessary pre-conditions for any meaningful associative freedom worth the name. As such, they not only limit our moral permissions to associate or not as we please, but also trump our moral claim-rights to refuse to associate. Appropriate state institutions cannot fully guarantee these positive protections because, first, it is part of the nature of intimate associations that they tend to require more investment, care and persistence than state provisions can secure and, second, such institutions are hostage to people's willingness to perform their functions. But, of course, state institutions can go some way to filling basic associative gaps, and can do much to assist (or impede) people in carrying out their personal associative duties.

² This paraphrases Justice Brennan in *Roberts v United States Jaycees* 468 US 609, 618 (1984). 'Our decisions have referred to constitutionally protected "freedom of association" in two distinct senses. In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment - speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.'

³ Compare with Amy Gutmann's statement that 'The freedom to associate necessarily entails the freedom to exclude'. Amy Gutmann, 'Freedom of Association: An Introductory Essay' in Amy Gutmann (ed), *Freedom of Association* (Princeton University Press 1998) 11.

⁴ The distinction between intimate associations and collective or expressive associations is drawn by Justice Brennan in *Roberts* (n 2) 620. Justice Brennan characterizes the boundary between intimate associations and expressive associations in terms of the properties of intimate associations—their small size, selectivity and seclusion. Cited from Seana Valentine Shiffrin, 'What is Really Wrong with Compelled Association?' (2005) 99 *Northwestern L Rev* 839.

2. Intimate Associations

Intimate associations contrast with collective, expressive and political associations like unions and clubs, which necessarily have some further purpose as outlets for the expression of shared values or pursuit of shared goals, and whose members' freedom (or not) to be exclusive tends to dominate discussions of associative rights.⁵ Collective associative rights are undoubtedly important, but they're not the focus of the present analysis.⁶ Intimate associations need not exist for any further expressive, cultural, aesthetic or political purpose. They can exist for their own sake, and they are distinguished by their interactions, persistence and comprehensiveness. Let's take each feature in turn.

Interactions are a constituent element of, and necessary prerequisite for, intimate associations. People are a 'family' in name only if they never interact with each other.⁷

But, of course, interactions also occur outside of associations. We chat with the grocery store clerk when we pay for our milk, but we do not have an intimate association with her.

Moreover, the interactions of intimate associates tend to be of a particular kind marked by interest and investment, if not care, concern and love. People are a 'family' in little more than name if their interactions are principally hostile or brutal.

Intimate associations also persist over time, and mere interactions do not. If mere interactions do persist, they tend to bleed into associations. Our relation with the grocery store clerk develops into an association once we've chatted with her week after week. Similarly, the relations between people who know each other very little, such as a group of strangers who become trapped

⁵ Seana Shiffrin offers some plausible reasons to question a sharp dichotomy between intimate associations and collective associations, notably, that both are sites in which members' thoughts and ideas are formed and the content of their expressions is generated and germinated rather than merely concentrated and exported. Shiffrin (n 4). Similarly, Larry Alexander argues that, although associations can be classified as intimate, political, expressive, creedal, hobby-based, recreational, commercial and so on, nevertheless many, if not most, associations fall into more than one category. For instance, social clubs are venues for close friendships, recreation and commerce. See Larry Alexander, 'What is Freedom of Association, and What is its Denial?' (2008) 2 Soc Phil & Pol 1. Finally, Rob Jubb has suggested in correspondence that it may be better to think of associations as lying along a continuum from more impersonal and instrumental associations to more intimate and affective associations. I grant that these views are credible, but even so, paradigmatically, intimate associations differ from collective associations in that, unlike the latter, they need not have some further purpose beyond associating to motivate their existence.

⁶ I put aside the question of whether my analysis of intimate associative rights can be extended to collective associations. Since intimate associations are fundamentally important to our lives as human beings in a basic way that is not obviously true of collective associations, it is unlikely that an analysis of the former would apply without modification to the latter.

⁷ Thomas Parr has suggested to me that people might be a family in more than name even if they never interact provided that they are always prepared to interact when a member needs assistance. In reply, I think this might make these people members of a *clan*, but not a *family* in its paradigmatic sense. A *clan* in this sense is not well characterised as an intimate association; it is at best an abstract association.

together in a mine for an extended period, morph into intimate associations as they come to depend on each other for continued survival.

Finally, intimate associations are comprehensive. They are often a core focus of our lives, marked by emotional and material commitment. Many of our fundamental moral roles are structured around intimate association. The roles of parent, grandparent, spouse, friend, partner, son, daughter, cousin, nephew, niece, uncle and aunt are all animated by the associative relationships that give them their distinctive moral responsibilities.⁸

People who lack intimate associations may give either mere interactions or collective associations the meaning that others give to their intimate associations. But, neither mere interactions nor collective associations are well suited to perform this function since mere interactions are momentary and often insignificant to the other participants, and collective associations aim to further whatever shared interests animate them, which can conflict with the interests of the people who imbue them with intimate meaning.⁹

Other distinguishing features of intimate associations, such as their small size, selectivity and seclusion, derive from their interactivity, comprehensiveness and persistence.¹⁰ Given the time and commitment required for intimate associations, they are necessarily few in number. Our positive decision to associate intimately with persons A–F entails that we not associate intimately with persons G–Z. And, given that typically we wish to invest our energies well, we tend to be selective about the people with whom we form intimate associations. But, of course, such selectivity is not always possible. We cannot select our biological relations, and yet those are often the closest associations we have.¹¹

Our associative activities come in two forms. The first are the positive acts of forming and maintaining associations. The second are the negative acts of refusing to form and refusing to maintain associations. Associative freedom encompasses both of these forms of activity. It encompasses whatever options

⁸ Emanuela Ceva has suggested to me that comprehensiveness does not apply to our acquaintances. This is true for, say, our passing nod to a colleague in the hall. But, that kind of connection is like our friendliness to the grocery store clerk. It is not an acquaintance in the sense meant here. Acquaintances fall short of friendships and loving family relationships, but are richer than incidental contacts. Think of Jane Bennett's statement about Mr Bingley in Jane Austen's *Pride and Prejudice* once Bingley goes to London and Miss Bingley leads Jane to believe he doesn't care about her. Jane says to Elizabeth: 'He may live in my memory as the most amiable man of my acquaintance, but that is all.' She has deep feelings for him, but both propriety and social constraints on their contact make it unfitting for her to think of him as a friend or as a romantic possibility without any sign that he will continue to pay addresses to her.

⁹ I do not mean to imply that intimate associations cannot conflict with members' interests. They can. But, it's not the case that the animating purpose of such associations is to pursue interests other than those of the member parties. I thank Rob Jubb for prompting me to clarify this point.

¹⁰ See n 4.

¹¹ This shows that it would be a mistake to think intimate associations are, by nature, voluntaristic and require that members be able to join and leave at will. A more credible view of intimate associations is akin to that underpinning Dworkin's account of associative or communal obligations, better known as role obligations, which are '... the special responsibilities social practice attaches to membership in some biological or social group, like the responsibilities of family or friends or neighbours'. Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 196. For the rest of this article, the term 'association' refers to intimate associations.

we have to come together or not with others to form bonds of mutual attachment as well as whatever options we have to maintain or dissolve those bonds once they are formed. The question is: how expansive are these options? And what kinds of rights are they?

To flesh out the nature and parameters of associative freedom, let's locate these positive and negative options within the familiar Hohfeldian conceptual territory that we navigate in moral and legal philosophy to talk about rights.¹² What follows is, in the first instance, a discussion about moral permissions and moral claim-rights, including socially enforceable moral claim-rights that get their teeth from familial expectations, social norms and peer pressure. This discussion has implications for legally enforceable claim-rights, but that analysis lies beyond the scope of the present paper.¹³

3. Permissions

We might think that, if our associative freedom includes anything, it includes a Hohfeldian moral permission to act.¹⁴ Having such a moral permission means having no moral duty not to act. In terms of complete associative freedom, it would mean that it is both morally permissible for us to form and maintain associations with others as we please and morally permissible for us not to form or maintain associations with others as we please.

A complacent, unreflective liberal take on free association embraces both of these permissions. For instance, Mill can be read as endorsing both of them when he says that we are not bound to seek the society of any one of whom we have an unfavourable opinion and instead have a right to avoid it 'for we have', as quoted above, 'a right to choose the society most acceptable to us'.¹⁵

¹² In this discussion, I focus on the credentials of associative freedom as a Hohfeldian permission and a Hohfeldian claim-right. Associative freedom can also be cashed out as a power and an immunity. Hohfeldian powers track what is possible for us to do. A Hohfeldian power is the ability to create or remove Hohfeldian categories (ie claims, duties, permissions, no-claims, powers, immunities, disabilities and liabilities). Immunities track our protections from others' exercise of such powers. As a power, associative freedom is the power to create or remove our own or others' associative duties, claims, etc. As an immunity, it is the protection from such powers. The simplest exercise of the power is to create associative duties for ourselves and associative claims for others. In marrying someone, I exercise my associative powers to create new duties for myself and new claims for my spouse. Yet, my powers to do this are intertwined with my spouse's powers to do the same; neither of us has these powers (morally speaking) without the other's consent, but the other's consent doesn't necessarily secure these powers for us. Also, we each retain a power of sorts to remove some of the other's new associative claims—through divorce—but again that typically requires consent. Moreover, in divorcing, we cannot remove all of the other's newly acquired claims. One of us may have to pay alimony, and we will have to share custody of the children. We each have residual immunities from the other's power to remove our associative claims. As this case shows, our associative powers and immunities are constrained by context, others' associative interests, consent and burdensomeness.

¹³ The discussion of social needs and rights will tend to slide quickly into a discussion about how we regulate society because, unlike other needs such as material needs, social needs are necessarily intersubjective; they're about giving people access to social connections and social inclusion. That quickly leads to a discussion about how we set things up as a society so that people can more or less easily establish, sustain and further social connections.

¹⁴ To avoid confusion, I shall not use a 'liberty' to refer to a Hohfeldian privilege or permission.

¹⁵ Mill (n 1) ch IV.

In other words, we have no duty to associate with any person with whom we do not wish to associate and we have no duty not to associate with any person whom we favour and whose society is most acceptable to us.¹⁶

Mill's view is patently false. We do not have a permission to choose the society most acceptable to us for many reasons the simplest being that our own society may not be most acceptable to those whose society is most acceptable to us. A slightly less complacent, but still unreflective, liberal take on free association recognizes that whatever general moral permission we have to associate depends on our particular permissions to associate with particular people, and those particular permissions are hostage to various constraints including consent, the type of association, and its burdensomeness. This liberal take maintains, however, that our *negative* permissions to refuse to associate are fundamental, absolute and prior to any positive permission or claim to have associates. The standard thought is that the freedom to associate necessarily entails the freedom to exclude. But, our permissions not to associate are also hostage to numerous constraints such as necessity, the type of association, burdensomeness, pre-existing commitments and collective responsibility. Let's flesh out each of these constraints on our positive and negative options.

Starting with consent, if Eve wishes to be Adam's associate, but Adam does not wish it, then often Eve has no moral permission to form or maintain an association with him. Adam's consent matters even when his society is most acceptable to Eve.¹⁷

But, luckily for Eve, not all of our associations must have mutual consent to be permissible. Indeed, some associations lacking it are not just permissible but obligatory. Think of parents and young children. If Abel is a young child and Eve is his mother, she does nothing wrong *ceteris paribus* in having an intimate, mother-child relationship with him even though he is unable to consent to it. Indeed, she has a moral duty to maintain the association since without parental care Abel will fail to develop. So, here Eve not only has a moral permission to associate with Abel, but has no moral permission not to associate with him *ceteris paribus* even if his society is not most acceptable to her.¹⁸

¹⁶ There is an ambiguity in Mill's discussion. Mill can be read as endorsing both of these permissions or he can be read as rejecting the first permission *to form* associations as we please since he goes on to say that we may have a duty to caution others against associating with a person of whom we disapprove, 'if we think his example or conversation likely to have a pernicious effect on those with whom he associates', and, by implication, presumably, we too may have a duty not to associate with the unfavourable person for the same reason. This duty not to associate clashes with the idea that we have the right to choose the society most acceptable to us, which includes the society of those who may have a pernicious effect on us.

¹⁷ In fact, in such cases, it is not even possible for Eve to form an association since there is no *mutual* attachment but instead active detachment from Adam and, therefore, what she is trying to make cannot be created.

¹⁸ One argument against compelled association is that it will interfere with the emotionally expressive purposes of the association, that is, the expression of affection between the parties. This argument, while not trivial, is less forceful than the argument that people require at least minimal access to intimate association even when it lacks the emotional connections we would wish to have in such associations.

More interestingly, some associations are permissible, if not obligatory, even when neither party consents. Think of the associations among the 33 men in the 2010 Copiapó mining accident in Chile that trapped them underground for 69 days. Since they necessarily depended on each other for their collective survival, they had to form intimate associations regardless of whether they each favoured the others' society.

These examples show that necessity can constrain our negative permission not to associate by making an association obligatory. But, necessity does not always make non-consensual associations obligatory. For example, it is not obligatory (in any straightforward sense) for a girl, Lalit, to marry the man of her parents' choice, Ali, even when her tribe's survival depends on it. Suppose that unless Lalit marries Ali their tribe will die out, as there are no other people of childbearing age and no other accessible tribes that they can join. Even so, the type of association and its burdensomeness matter, and an under-age, forced marriage is overly burdensome and, of course, a gross violation of Lalit's rights to physical security, movement, marriage choice and so on. By contrast, it might be obligatory for Lalit to be friends or at least to be friendly with Ali when her tribe's survival depends on it since a friendly relation is not usually overly burdensome.

That said, when a non-consensual association lacks necessity, this doesn't always make the association optional for the non-consenting party (or impermissible for the consenting party). Think of a friendly little boy, Kevin, who follows his grumpy, retired neighbour, Mr Gustafson, around because his parents are always working. The relation is important, but not necessary to Kevin's health and survival since he does have a family and he could find other neighbours to follow. And yet, Mr Gustafson has some duty to associate with him given Kevin's vulnerability and need for a parental figure as well as his own proximity and awareness of Kevin's situation. Again, the reasons for the duty have to do with the type of relation and its burdensomeness. The relation is important to Kevin and not particularly onerous for Mr Gustafson.

But, of course, even *severe* burdensomeness doesn't always remove the duty to associate. It may be very burdensome for Eve to continue her relationship with her son Abel if he's psychologically unstable or wanted by the police. But, that doesn't in itself remove her duty to associate with him. The intimate bonds between parent and child generate special duties that override many other considerations, partly because the relation is so important for the child. Similarly, Mr Gustafson might still have a duty to associate with Kevin even if the relation becomes very burdensome, given his ability to avert the harm to Kevin that would come from neglect.

Now, although mutual consent is often a condition for permissibility, it's not a guarantee of permissibility. Some consensual associations are morally impermissible. The reasons relate once more to the type of association and its burdens.

The burdens of some consensual associations lie in the parties' positions relative to each other. For example, a boss has a moral duty not to have a sexual relation with an employee, and a teacher with a student, and a president with an intern because, even if the intimate association is voluntary, it has hierarchical contours. The subordinate party is not well placed to assess the relation, may be harmed by it, and is vulnerable to domination during it and afterward.¹⁹

The burdens of other types of associations lie in the parties' positions in relation to people outside the association. Think of Romeo and Juliet. Or, think of Robert Bolt's play *A Man for All Seasons*, which presents a friendship between Thomas More and the Duke of Norfolk. Once More is under suspicion for treason, he ends the friendship 'for friends' sake'. The Duke resists, but More persists. It would be impermissible for More to maintain an association that puts his friend in danger.

That said, it wouldn't be impermissible for the Duke to maintain the association. Indeed, it might be obligatory for him to do so despite More's objection, which shows that there can be an asymmetry in people's permission to associate with each other.

More's case also shows that there is a difference between intimate associations and the underlying commitments that tend to sustain them. In ending their friendship 'for friends' sake', More and the Duke do not alter their regard for each other, but only the practical expectations each may have of the other.

Finally, the burdens of associations can fall not only on the participants, but also on non-participants. The president's affair with an intern affects not only the intern, but also the president's spouse, children, allies, political party, and constituents. The president's duty not to form that association rests not only on its hierarchical contours, but also on duties to other associates. Similarly, Eve has a duty to her son Abel not to adopt too many other children since she couldn't be a good mother to them all.

Together, these points show that, contra both Mill and the less unreflective liberal view, first, we have no general moral permission to choose the society most acceptable to us and, second, when we are in morally obligatory associations, we have no general moral permission *not* to associate. Therefore, our associative freedom, whatever it is, is not a Hohfeldian permission to associate or not as we please.

At this point, the defender of the less unreflective liberal view might observe that we still have a general moral permission to associate in the abstract sense that it is morally permissible, in principle, for us *to have associations*. This is correct, but it has little content. The general permission to have associations

¹⁹ Of course, the relation between parent and child is hierarchical and can pose distinctive risks to the child for that very reason. But, that non-egalitarian quality is inescapable for much of childhood and, typically, its risks are vastly outweighed by the benefits of the relation.

is meaningless without particular permissions to have particular associations with particular people. If a person's possible associations were all impermissible ones, then she would have no meaningful permission to associate.

The defender of the less unreflective liberal view might then focus on the option not to associate and argue that if we extricate ourselves from our obligatory associations by patiently waiting for our existing associations to end and judiciously refraining from forming new ones, then we are free of associative duties to choose permissibly not to associate with anyone. By discharging our pre-existing associative duties, we gain a general moral permission not to associate at all, and that permission follows from our moral permission not to associate with any particular person. In the words of Henry David Thoreau on a solitary life:

If you are ready to leave father and mother, and brother and sister, and wife and child and friends, and never see them again; if you have paid your debts, and made your will, and settled all your affairs, and are a free man; then you are ready for a walk.²⁰

However, this too is mistaken. Even when we carefully avoid forming associative bonds, we do not have a general moral permission not to associate. The reason for this is that each person has certain fundamental, positive associative claim-rights. Claim-rights generate duties for other people that are either negative duties not to interfere or positive duties to assist, or both. Where such rights-correlated duties exist, the duty bearers have no moral permission to act other than as the duties require.

The positive associative claim-rights that curtail our moral permissions not to associate include as noted at the outset, first, rights to have associates (not necessarily of our choosing) during periods of abject dependency or risk of abject dependency and, second, rights to have meaningful opportunities to form associations when we are not abjectly dependent. Let's start with abject dependency.

The most obvious period of abject dependency is childhood. For the newborn baby and the young child, it does not make sense to talk about associative freedom, but it does make sense to talk about acute associative need. Children have positive claim-rights to the comprehensive, persistent, interactive (and caring) relations that make intimate associations, first, because they have special claims to an 'open future'.²¹ Without intimate associations, their prospects for a decent or flourishing life radically diminish.²² Second, children also have claims of dignity and respect as developing autonomous beings. Much of the meaning in our choices comes from our relations with others and, therefore, respect for our autonomy entails respect for our essentially social nature as human beings.

²⁰ Henry David Thoreau, 'Walking' (first published 1861, Project Gutenberg EBook #1022 2010).

²¹ See Joel Feinberg, *Freedom and Fulfilment* (Princeton University Press 1994) 82.

²² See, for example, SM Liao, 'The Right of Children to be Loved' (2006) 14 J Pol Phil 420.

The other obvious periods of abject dependency in our lives are those of acute incapacitation such as old age and severe impairment. We have positive claim-rights to have intimate associates (not necessarily of our choosing) during these periods on the same grounds of respect for our dignity, sociality, autonomy, and future prospects however modest they may be. We may also have such rights on grounds of desert, based on our past associative contributions.

When we are not abjectly dependent or at imminent risk of abject dependency, we have no positive right to *have* intimate associates just as we have no positive right to *have* a child.²³ But, we do have positive rights to have minimally adequate opportunities to cultivate associations as well as negative rights not to be rendered abjectly dependent through, for example, coercive or incidental social deprivation.²⁴ Without the protection of meaningful opportunities to associate, there can be no meaningful notion of *associative freedom*. Protection of such opportunities secures our fundamental associative interests.

To see the force of positive associative claim-rights, all we need to do is ask: 'What if everyone chose not to associate with this person?'²⁵ In the case of a baby, child or other abjectly dependent person, the impact of isolation is immediate and extreme. In the case of a non-dependent person, the impact is less extreme in the short term, but sets up conditions for an extreme impact, if not abject dependency, since the empirical evidence indicates that we deteriorate mentally, emotionally and physically when we are chronically acutely lonely and socially isolated, in the same way that we deteriorate when we are chronically hungry, fearful or in pain. Like hunger, fear and pain, chronic loneliness causes an anxiety-inducing physiological threat response known as the 'fight or flight' response. It is associated with numerous health risks including obesity, Alzheimer's disease, high-blood pressure, reduced immunity, reduced capacity for independent living, alcoholism, depression, suicide and mortality in older adults.²⁶

Bracketing for now the proposal that people's basic associative needs be met through state institutions (see Section 4), we may conclude that positive associative claim-rights generate associative duties for us, collectively, to ensure that everyone's basic associative needs are met. This limits our moral permissions both to not associate at all and to not associate with certain persons when our associative contributions are required. This does not mean

²³ At most, we have a positive right to try to have a child and to be provided some assistance in that effort.

²⁴ Kimberley Brownlee, 'A Human Right against Social Deprivation' (2013) 63 Phil Q 199.

²⁵ In a related paper, I explore a number of each-we dilemmas of sociability, starting with the question 'What if everyone chose not to associate with a person?', which bring into sharp relief the tension between individual associative control and acute associate need. Kimberley Brownlee, 'Ethical Dilemmas of Sociability' (in progress).

²⁶ John T Cacioppo and William Patrick, *Loneliness: Human Nature and the Need for Social Connection* (Norton 2008); and J Decety and John T Cacioppo, *Handbook of Social Neuroscience* (OUP 2011).

we have a duty to associate with any particular person. Rather, it means that if a person with associative needs either has special claims on us, such as our own dependent, or her fundamental needs cannot be met by others, then we have a duty to associate with *her*. By contrast, we have no such duty if a person who has no special associative claims on us simply wishes to associate with us rather than with someone else who is available.

Consequently, at most, we have a conditional permission not to associate that depends on, first, other people honouring each other's positive associative claim-rights and, second, our own dissociation neither undermining our capacity to offer associative contributions in future nor rendering us abjectly dependent on others' associative contributions.

Moreover, even when our associative contributions are not required, we have persisting associative duties, first, to concern ourselves with whether others' associative needs are being met and, second, to contribute our associative resources to the common pool as required to ensure that others' associative needs are met.

Now, even though we have no general moral *permission* not to associate, we may have a moral *claim-right* not to associate that protects us when we act wrongly by refusing to honour these associative duties. Such a claim-right is intuitively compelling since, as David Miller notes, 'we have a deep interest in not being forced into association with others against our wishes',²⁷ even if we're wrong to avoid the association. Let's see, therefore, how well associative freedom can be cashed out as a Hohfeldian claim-right.

4. *Claim-Rights of Conduct*

A claim-right of conduct secures a protected sphere of autonomy of action with which interference by others is justifiably restricted and of which positive protection by others may justifiably be expected.²⁸ That protected sphere secures a space for us to act unencumbered in ways that may be morally objectionable. This is one reason why moral *rights of conduct* are not moral *permissions*: what they protect may be morally impermissible.

But, despite the protection they afford, rights of conduct do not immunise us from criticism when we exercise them to act wrongly. For instance, although our freedom of expression defeasibly protects us from interference when we make highly offensive racist jokes, it does not immunise us from criticism for doing so.

Now, if associative freedom is a claim-right of conduct, what is the protected sphere of action that it secures? Just as there is an expansive, mistaken, liberal account of associative permissions, so too there is an expansive,

²⁷ David Miller, *National Responsibility and Global Justice* (OUP 2008) 210–11, cited in Sarah Fine, 'Freedom of Association is not the Answer' (2010) 210 *Ethics* 338, 343.

²⁸ See Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986).

mistaken, liberal account of associative claim-rights. One iteration of it can be found in human rights documents such as Article 20 of the Universal Declaration of Human Rights, which states that: (1) Everyone has the right to freedom of peaceful assembly and association; and (2) No one may be compelled to belong to an association.²⁹ What goes unnoticed is that these two sections of the Article conflict with each other. If (2) is true, then (1) can be at most the freedom *to try* to form peaceful assemblies and associations. We can have no right to succeed in associating with others if no one may be compelled to associate with us. And, if (1) is true—that we have rights actually to associate (and not merely to try to associate)—then (2) is false since (1) requires that it be permissible, in principle, to compel others sometimes to associate with us.

It turns out that both (1) and (2) are false. As we saw in the previous section, it is sometimes permissible to compel association, and therefore (2) is false. And, as we will see in what follows, in a general, content-insensitive form, (1) is also false since it is a mistake to align associative freedom with other claim-rights of conduct, such as freedom of expression and freedom of religion, which do provide a largely content-insensitive protection of our personal choices.

Freedom of expression gives us defeasible, content-insensitive moral protection to say, write, draw, film and display things that are objectionable. Some argue that freedom of expression does not extend to defamation or hate speech, but a true blue liberal like Mill holds that freedom of expression *is* content-insensitive (excepting incitement to violence), and is in good standing even when our expression is harmful.

Similarly, freedom of religion gives us defeasible moral protection to engage in objectionable practices, though the scope of that freedom is not wholly content-insensitive. As John Rawls argues, religious protection does not extend to human sacrifice: 'If a religion is denied its full expression, it is presumably because it is in violation of the equal liberties of others.'³⁰ Nevertheless, the scope for religious freedom granted in many places is more expansive than the protection of everyone's equal liberties would allow. In the UK, for example, despite the harm it causes, parents can refuse on religious grounds to let their newborn baby be given a blood transfusion. In many US states, religious parents are exempt from child abuse and child neglect laws when they

²⁹ The conjunction of 'association' with 'assembly' suggests that this Article applies in the first instance to non-intimate, collective associations. (Commentaries on the drafting of the UDHR confirm that political associations, such as trade unions, were uppermost in the drafters' minds.) But, I take it that this unspecified notion of *associative freedom* should be extended, broadly unaltered, to intimate associations since no other Article in the UDHR protects non-familial, intimate connections such as friendships. In subsequent agreements, such as the International Covenant on Civil and Political Rights, freedom of assembly and freedom of association are enumerated under different Articles, and one explanation given for this is that freedom of association includes private informal contacts. See Martin Scheinin 'Article 20' in Guðmundur Alfredsson and Asbjørn Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martinus Nijhoff 1999).

³⁰ John Rawls, *A Theory of Justice* (Harvard University Press 1971) 205–8, 370.

deny their child standard medical care, and they are equally exempt from the requirement that their children receive public education or its equivalent.

Some libertarian thinkers not only toss associative freedom into the same pot as freedom of expression and freedom of religion, but view the latter freedoms as examples of the former, and indeed as examples that demonstrate the priority of the negative option to dissociate over the positive option to associate. Concerning expression, Loren Lomasky argues that the realisation of free speech incorporates some form of semantic association, and that prior to a liberty to speak one's mind there must be 'a permission to desist from echoing the words that issue from the commanding heights of pulpit or palace'.

That is, freedom of speech is no less fundamentally a freedom not to give utterance to objectionable phrases than it is to give declaration to one's own beliefs and attitudes. Speech rights are, then, associational and, in the first instance, negative.³¹

And, on religion, Lomasky argues that, insofar as freedom of religion is understood as 'the struggle of individuals to secure adequate scope to practice their faith alongside others who espouse similar convictions, this is a mode of positive freedom of association'.

However, these confessional congregations cannot begin to get underway until there is acknowledged a negative freedom to dissociate from the established church... To follow a preferred path to salvation was to eschew incompatible routes. Thus, freedom of religion is, in the first instance, a negative entitlement [to dissociate].³²

Lomasky is mistaken about the priority of negative freedoms of expression and religion over positive freedoms of expression and religion. For the negative option to dissociate from Religion A to exist, there must be a pre-existing positive option to be a member of Religion A. We cannot leave associations of which we were never allowed to be members. Similarly, for the negative option not to parrot the words of others to exist there must first be the positive option to learn the language, concepts and expressions that make both imitative and original expression possible. We cannot speak at all without having access to the tools of speech. Hence, the positive protection of access is necessarily prior to whatever negative options we have to turn away from it.

This does imply that freedom of expression and freedom of religion have associative aspects, but it does not imply that they are associative *freedoms*. It is a mistake to list off associative freedom in the same breath as the freedoms of expression and religion because, unlike the latter two freedoms, associative freedom does not give us a largely content-insensitive, defeasible protection to act in morally objectionable ways. We can see this by reviewing the different

³¹ Loren Lomasky, 'The Paradox of Association' (2008) 25 Soc Phil & Pol 182, 183.

³² *ibid.*

impermissible associations discussed in Section 3. We have claim-rights to form a few of these associations, but not most of them.

First, our associative claim-rights do not protect us in forming friendships with non-dependent people who have no wish to associate with us. As noted in the case of Adam and Eve, Adam's consent matters when Eve wants to be his friend. Her associative claim-rights of conduct do not protect her in hounding him with the aim of being his friend. The same is true in the case of Lalit, who refuses to be Ali's friend even though it could save her family. She may well have a duty to be his friend, but Ali has no claim-right that she do so. He has no right of conduct to force his company on her. The associative duties that Adam, Lalit and we have correlative to everyone's positive associative claim-rights do not translate, absent special claims, into duties to associate with particular people.

Second, our claim-rights do not protect us in having associations that are otherwise very burdensome on either our would-be associates or third parties. For instance, our associative claim-rights do not protect us in forming unequal and harmful associations such as an adult's sexual relation with a child or a father's sexual relation with his daughter or a spouse's relation with their partner in a forced marriage. Associative claim-rights may protect a teacher in forming a sexual relation with her student or the president with an intern, but not without a lot of explanation that will undoubtedly refer to consent. Consent matters not only for permissibility when it does make associations permissible, but also for the proper parameters of our claim-rights to act wrongly.

Consent also does the moral work in other types of impermissible intimate associations, such as More's friendship with the Duke. Given the morally uncomplicated, admirable nature of friendship, the interests we have in friendships, and the mutual commitment that More and the Duke have to their friendship, associative rights of conduct are well designed to protect More if he wishes to continue the friendship despite its risk to the Duke.

The risk to the Duke is similar to the risk that a highly contagious mother poses to her baby when she wants to continue to be his primary carer. Yet, in the mother's case, consent cannot do the moral work since the baby is unable to consent to the harm. Consequently, conflicting intuitions arise about the mother's rights. On the one hand, we might think she has no moral right to sustain the association since the baby cannot consent. On the other hand, we might think that, given the morally uncomplicated, admirable nature of mothering and the inestimable value of the baby being loved, the mother has a moral right to sustain the association despite the risks to her baby.

Equally morally ambiguous cases include our claim-rights to have associations that are burdensome for non-participants. Suppose the president's affair with someone is morally impermissible only because of its burdens for non-participants such as the president's spouse and children whose home life

is damaged by the association. Presumably, the president's claim-rights do protect that association. By contrast, suppose More's friendship with the Duke is a threat not only to the Duke's life, but to his children's lives. In that case, More's (and the Duke's) claim-rights do not protect the association. The difference in the two cases lies in the severity of the burdens.

Together, these cases show that our claim-rights protect some wrongful associations, but not many, since the nature of our relations matter greatly, which is why the positive claim-right to associate is much more limited than the other personal freedoms with which it is usually aligned.

By contrast, there are no such restrictions on the negative claim-right *not* to associate. In its negative form, our associative right of conduct *is* like our freedoms of expression and religion. It gives broadly content-insensitive protection of our decisions not to associate when we have a moral duty to associate. For example, it protects Eve in refusing to associate with her son Abel, Mr Gustafson in refusing to associate with Kevin and Lalit in refusing to be friendly with Ali. It also protects More in refusing to remain friends with the Duke (though that act is more right than wrong, and hence doesn't need a claim-right to protect it).

That said, such negative claim-rights are defeasible. They can be overridden by the duties with which they conflict. Given the fundamental importance of the associative claim-rights discussed above—to have associates when we are abjectly dependent and to have opportunities to form associations when we are not abjectly dependent—the negative claim-right to refuse association is overridden when those competing positive claim-rights cannot reasonably be met through other means.

A critic might object that our fundamental associative interests can always be met through other means, namely, by setting up appropriate state institutions, which then leave intact individuals' claim-rights to decide to associate or not as they wish.³³

In reply, state institutions cannot fully satisfy our fundamental associative needs for several reasons. First, as noted in Section 1, intimate associations are marked by persistence, comprehensiveness and emotionally invested interactivity, all of which are more demanding than what state provisions can typically secure. So, even though, in principle, paid employees can provide the emotional connection and caring support of intimate association, the practical realities of institutional operations make it unlikely that employees could sustain the persistent, proximate and comprehensive interactivity that makes for an intimate association.

Second, to the extent that state institutions can meet some of our basic associative needs, they can do so only insecurely because their continued operation is contingent on people's willingness to assume their offices. If no

³³ I thank Thomas Parr for highlighting this objection.

one is willing to assume the office of caregiver, nurse or community supporter for an isolated person, then that person's associative needs go unmet. This is analogous to the abortion stalemate in the USA, where women have a moral and legal right to reproductive control, but seemingly fewer and fewer doctors are willing to perform abortion procedures. That stalemate shows that we shouldn't complacently assume that someone's rights will be satisfied when we establish appropriate institutions. Hence, the moral burden of meeting people's basic associative needs remains with us as individuals.

5. *Conclusion*

This article has shown that, contrary to standard liberal thinking, intimate associative freedom is neither a general moral permission to associate or not as we please nor a content-insensitive moral claim-right akin to the other personal freedoms with which it is usually listed. It is at most (i) a limited permission to associate subject to constraints of consent, necessity and burdensomeness; (ii) a conditional permission not to associate provided our associative contributions are not needed; and (iii) a highly constrained, content-sensitive claim-right that protects only those wrongful associations that honour other legitimate concerns such as consent, need and basic respect. This article has also shown that associative freedom is not as fundamental as it is presumptively taken to be. It is secondary to positive associative claim-rights that both protect our fundamental social needs and are pre-conditions for any associative control worth the name.